DISTRICT COURT OF ADAMS COUNTY, STATE OF COLORADO 1100 Judicial Center Drive Brighton, CO 80601	
Plaintiffs: **Edie Apke** *et al, derivatively* on behalf of **Todd Creek Farms Homeowner's Association**, a Colorado nonprofit corporation**;** v. *Defendants*: **TODD CREEK FARMS HOMEOWNERS' ASSOCIATION,** a Colorado nonprofit corporation**; Jason Pardikes**, in their official capacity as Director of Todd Creek Farms Homeowner's Association; **Wendi Setchfield**, in their official capacity as Director of Todd Creek Farms Homeowner's Association; **Maryjo Montoya**, in their official capacity as Director of Todd Creek Farms Homeowner's Association; **Ben Cooper**, in their official capacity as Director of Todd Creek Farms Homeowner's Association; **Sean Holdren**, in their official capacity as Director of Todd Creek Farms Homeowner's Association.	▲COURT USE ONLY▲ Case Number: 2023CV30537 Division: C
ROBINSON & HENRY, P.C. Peter L. Towsky, #55556 Boyd A. Rolfson, #40035 1805 Shea Center Drive, #180 Highlands Ranch, CO 80129 P: 303-688-0944 peter@robinsonandhenry.com F: 303-284-2942 boyd@robinsonandhenry.com *Attorneys for Plaintiffs*	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT TODD CREEK FARMS HOMEOWNERS' ASSOCIATION'S MOTION TO DISMISS

COMES NOW Plaintiffs ("Members" or "Plaintiffs"), derivatively on behalf of Todd Creek Farms Homeowners Association, a Colorado nonprofit corporation, by and though their attorneys, Robinson & Henry, P.C. and for their Response in Opposition to Defendant Todd Creek Farms Homeowner's Association's Motion to Dismiss, hereby state as follows:

PRELIMINARY NOTE

1. Under Colorado Rules of Civil Procedure ("C.R.C.P.") a motion to dismiss based on Rule 12(b)(5) is to be determined by "the four corners" of the complaint. "In determining a motion to

dismiss for failure to state a claim under Colo. R. Civ. P. 12(b)(5), a court may consider only matters within the four corners of the pleading and must accept the allegations as true." *Schwindt v. Hershey Foods Corp*., 81 P.3d 1144, 1146 (Colo. App. 2003).

2. Here, Defendant Todd Creek Farms Homeowner's Association ("TCF HOA" or "Defendant HOA") filed, along with their Motion to Dismiss, multiple exhibits presumably to persuade the Court. This is improper and Defendant TCF HOA's exhibits bear no relevance to the determination of a C.R.C.P. 12(b)(5) motion. Plaintiff respectfully request that these exhibits and any arguments pertaining thereto be stricken from the record entirely – or at insofar as to the determination of the instant motion.

3. If this Court so chooses to treat Defendant HOA's "12(b)(5) motion in disguise" as a motion for summary judgment because matters outside the pleading have been presented to and will not be excluded by the court then, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56." To this end, the Colorado Court of Appeals in *Prospect Develop. v. Holland & Knight*, 433 P.3d 146, 149 (Colo. App. 2018) states, "Colorado courts have held that documents attached to or referred to in the complaint are not 'matters outside the pleading' for purposes of C.R.C.P. 12(b). *See*, e.g., *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). *Robinson v. Swalling*, 2020 Colo. Dist. LEXIS 825, *15-16.

4. C.R.C.P. 56(f) provides that a court may deny summary judgment or order a continuance to permit discovery if it appears that the opposing party cannot, for reasons stated, present by affidavit facts essential to justify its opposition to summary judgment. *Waskel v. Guar. Nat'l Corp*., 23 P.3d 1214, 1222 (Colo. App. 2000). *City of Aurora v. 1405 Hotel, LLC*, 2016 COA 52, ¶ 22, 371 P.3d 794, 801.

5. Plaintiff respectfully submits that the Court should not allow Defendant HOA to convert their motion to one under C.R.C.P. 56 given that Plaintiff has had no opportunity to conduct discovery, nor would they have been allowed to do so; given the posture of the matter (*See generally* C.R.C.P. 16 and 16.1 regarding when discovery may commence) and since given the

amount of evidence compiled without the benefit of discovery, it stands to reason that Plaintiffs could only uncover *more* evidence to support their claims. To so convert would be prejudicial to Plaintiffs and serve to placate the HOA's continued and ongoing impunity regarding the mishandling of HOA action and documentation.

6. In the alternative, Plaintiffs request additional time to compile evidence not contained herein to counter the "evidence" presented by Defendant HOA, though it is the Plaintiffs position that there is a genuine dispute of material fact for each and every claim TCF HOA professes to overcome with its conclusory statements made by affidavit.

7. Secondly, Defendant TCF HOA barely, if at all, made a good faith attempt at conferral for this Motion. An email was received by the undersigned from counsel for TCF HOA at 12:10pm on May 10, 2023, with a very terse explanation of TCF HOA's theory and a final comment that, "If we do not hear back we will presume that you oppose on all fronts."

8. The undersigned responded at 1:45pm the same day objecting and suggesting that counsels have a productive conversation making better use of the HOA's resources than such a superfluous motion. Counsel for TCF did not respond, but merely filed the instant motion at 5:36pm. It is Plaintiff's contention that this is *not* the "good faith conferral" as contemplated by the Rules.

> The Court expects that parties adhere to the rules and confer in good faith prior to the filing of a motion. *See* C.R.C.P 121 Section 1-15(8). An attempted phone call and follow-up email on the afternoon preceding the filing of a motion do not operate as a good faith conferral. Counsel for Defendant Navarro states that in almost 32 years, he has never had a party dismiss a claim following conferral for a motion such as the one at issue here. The subjective belief that conferral would be futile does not relieve Counsel from the duty to confer. Counsel for Defendant Navarro has failed to confer in good faith. Any further failures to confer will result in the Court striking the pleadings so filed and additional sanctions as the Court deems necessary.

Campbell v. Burke Builders, 2019 Colo. Dist. LEXIS 3755, *7

9. On the basis of the lack of *good faith* conferral, Plaintiffs request that Defendant TCF HOA's Motion to Dismiss be denied and stricken from the record.

INTRODUCTION AND PROCEDURAL HISTORY

10. On April 14, 2023 Plaintiffs filed their complaint derivatively on behalf of the TCF HOA against the TCF HOA and four current as well as one former board member in their official capacities for various acts and omissions in violation of duties including contractual, fiduciary (statutory) and other violations of the Colorado Corporate Non-Profit Act ("CNPA" or "Title 7") and the Colorado Common Interest Ownership Act ("CCOIA").

11. On May 10, 2023 Counsel For Defendant TCF HOA filed the instant Motion to Dismiss based on C.R.S. 12(b)(1) and 12(b)(5).

PLEADING STANDARDS

12. At the motion to dismiss stage, courts generally cannot consider evidence outside of the pleadings. *See*, e.g., *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("Generally, the sufficiency of a complaint must rest on its contents alone."). *Genesis Capital Ventures, LLC v. Restore With Apex, Inc*., 282 F. Supp. 3d 1225, 1230-31 (D. Colo. 2017). A court may not consider matters outside the allegations in the complaint when ruling on a motion to dismiss for failure to state a claim. *McDonald v. Lakewood Country Club*, 170 Colo. 355, 360, 461 P.2d 437, 440 (1969); *Dunlap v. Colorado Springs Cablevision, Inc*., 829 P.2d 1286, 1290 (Colo. 1992). When reviewing a motion to dismiss the claims, the Court may only consider matters stated within the claims themselves and may not consider information outside of the confines of Plaintiffs' pleading. *Rosenthal v. Dean Witter Reynolds, Inc*., 908 P.2d 1095, 1099 (Colo.1995); *see also*, *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 385-86 (Colo. 2001).

13. "[The] function when reviewing a C.R.C.P. 12(b)(5) motion is to assess whether the complaint is legally sufficient to state a claim for which relief may be granted. *Jacobsen v. Deseret Book Co*., 287 F.3d 936, 941 (10th Cir. 2002). We confine our review to the four corners of the complaint and any exhibits attached thereto, accepting as true all material facts alleged by the plaintiff and drawing all inferences in the plaintiff's favor. *Kreft v. Adolph*

Coors Co., 170 P.3d 854, 857 (Colo. App. 2007); see also C.R.C.P. 10(c); Stauffer v. Stegemann, 165 P.3d 713, 716 (Colo. App. 2006) (an exhibit to a pleading is a part thereof for all purposes)."
Kearl v. Portage Envtl., Inc., 205 P.3d 496, 498 (Colo. App. 2008).

14. "A complaint need not express all facts that support the claim; it need only serve notice of the claim asserted. C.R.C.P. 8(a); *Adams v. Corr. Corp*., 187 P.3d 1190, 1198 (Colo. App. 2008)." *Id.*

15. "A C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted tests the formal sufficiency of a plaintiff's complaint. *Pub. Serv. Co. of Colo. v. Van Wyk,* 27 P.3d 377, 385 (Colo.2001). C.R.C.P. 12(b)(5) motions to dismiss are looked upon with disfavor, and a complaint should not be dismissed unless it appears beyond a doubt that a plaintiff can prove 'no set of facts in support of her claim which would entitle her to relief.' *Id.* at 385–86. When reviewing a motion to dismiss under C.R.C.P. 12(b)(5), a court must accept all averments of material fact as true and view all allegations in the light most favorable to the plaintiff." *Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011).

16. The standard for determining whether a claim meets the pleading requirements is governed by the case of *Warne v. Hall*, 373 P.3d 588 (Colo. 2016), which adopted a "plausibility" standard for assessing C.R.C.P. 12(b)(5) motions. Under this standard, to survive a motion to dismiss for failure to state a claim, a plaintiff must allege a plausible claim for relief. *Warne*, 373 P.3d at 591. The plausibility standard was defined in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) as follows: "Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.' '[D]etailed factual allegations' are not required, but the Rule does call for sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'… A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged… When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,

663-664 (internal citations omitted).

17. Pursuant to C.R.C.P. 8(e)(1), "[w]hen a pleader is without direct knowledge, allegations may be made upon information and belief. No technical forms of pleading or motions are required. Pleadings otherwise meeting the requirements of these rules shall not be considered objectionable for failure to state ultimate facts as distinguished from conclusions of law."

18. As explained by the Court in *Warne*:

> Hall refers to language in subsection (e)(1) of the rule, which finds no analog in the federal rule. Compare C.R.C.P. 8(e)(1), with Fed. R. Civ. P. 8(d)(1). That subsection indicates, in relevant part, that when a pleader is without direct knowledge, allegations may be made upon information and belief, and that pleadings otherwise meeting the requirements of the rules shall not be considered objectionable "for failure to state ultimate facts as distinguished from conclusions of law." C.R.C.P. 8(e)(1).
>
> Even without express authorization in the language of Federal Rule 8, federal courts had long understood it to permit pleading based on information and belief, and they continue to do so following Twombly and Iqbal . *See* generally 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1224 & nn.1–1.75 (3d ed. 2002 & 2015 Supp.) (titled, "Statement of the Claim—Pleading on Information and Belief") (gathering cases and characterizing allegations on information and belief as a "practical necessity"). Far from its conflicting with the plausibility standard, federal courts have observed that pleading based on information and belief may, in fact, be useful where the facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible. See, e.g., *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir.2010) ; see also 5 Wright & Miller, supra , § 1224 & n.7 ("Pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff but he has sufficient data to justify interposing an allegation on the subject.").

Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016).

19. The party moving for summary judgment bears the burden of establishing that no issue of material fact precludes summary judgment. *Mehaffy, Rider, Windholz & Wilson v. Central Bank of Denver*, 892 P.2d230, 235 (Colo. 1995).

ARGUMENT

A. First Claim for Relief

20. Defendant TCF HOA's contention that Plaintiff cannot both plead a claim for Breach of Fiduciary Duty *and* a claim for Breach of Contract in the same complaint is not correct, nor is it based in law. First, pleading in the alternative is explicitly defined and allowed.

> Rule 8(a) expressly allows inconsistent claims to be pleaded in the alternative. See also *Montgomery Ward & Co., Inc. v. Andrews*, 736 P.2d 40, 47 (Colo. App. 1987) ("Parties can state as many separate claims as they wish, regardless of their consistency. It is the evidence at trial that determines what relief will be granted."). Defendant essentially asks that Plaintiff be forced to argue against himself at the pleading stage. The Court will not require him to do so.

V. Defendants, 2020 Colo. Dist. LEXIS 781, *9.

21. It is clear that even if the two claims were inconsistent, which Plaintiff does not concede they are, a C.R.C.P. 12(b)(5) Motion is not the correct procedural mechanism to defeat them. This issue would become a matter of evidence and jury instruction if the case were to go to trial, not a motion to dismiss at the pleading stage.

22. Second, a claim for Breach of Fiduciary is not necessarily required to be subsumed, nor disallowed to stand independently with a claim for Breach of Contract. In numerous instances of Colorado jurisprudence, in a variety of circumstances, both have been allowed to stand.

> Prior to trial the HOA and CPMG were joined as defendants, and plaintiffs alleged both tort and contract claims against them. As pertinent here, the HOA acknowledged that a contract between it and the lot owners existed that obligated the HOA to enforce the restrictive covenants, subject to certain defenses. However, the tort claim for breach of fiduciary duty was dismissed by summary judgment… Colorado Homes contends that the trial court erred in granting a partial summary judgment dismissing its tort claim for breach of fiduciary duty against HOA and CPMG. According to Colorado Homes, these defendants owed a fiduciary duty to it as a lot owner to act in good faith in enforcing the restrictive covenants. As a result, Colorado Homes argues, the trial court erred in concluding that the economic loss rule set forth in *Town of Alma v. Azco Construction, Inc*., 10 P.3d 1256 (Colo. 2000), barred this claim. We agree that *Town of Alma* does not bar this claim.

Colorado Homes v. Loerch-Wilson, 43 P.3d 718, 721 (Colo. App. 2002).

23. In *Badis* the Court distinguished between the types of claims based on the elements required to prove them.

> We next address plaintiffs' claims for breach of contract and breach of fiduciary duty. As to these claims, we conclude that § 13-20-602 does not apply. A claim to recover damages for negligence is different than a claim for negligent breach of contract or a claim for breach of fiduciary duty. See 1 R. Mallen J. Smith Legal Malpractice §§ 8.4, 8.7, 11.1 (3rd ed. 1989); *Coon v. Ginsberg*, 32 Colo. App. 206, 509 P.2d 1293 (1973). The elements to be proven differ as well as the measure of recovery."

Badis v. Martinez, 819 P.2d 551 (Colo. App. 1991).

24. The duties and obligations imposed on the directors codified in C.R.S. §§ 38-33.113, 33-33.3-303 under CCIOA and C.R.S. § 7-128-401 under the CCNPA *are independent of and in addition to* the contractual duties created by the HOA governing documents. To that end, the Colorado Supreme Court has said:

> In these situations where we have recognized the existence of a duty independent of any contractual obligations, the economic loss rule has no application and does not bar a plaintiff's tort claim because the claim is based on a recognized independent duty of care and thus does not fall within the scope of the rule.

Town of Alma v. AZCO Constr., Inc., 10 P.3d 1256, 1263 (Colo. 2000).

25. *Michaelson* highlights that a claim for breach of fiduciary duty may stand on its own. " In Colorado, shareholders may recover damages for such a breach of fiduciary duty. See *Hudson v. American Founders Life Ins. Co*., 151 Colo. 54, 61-62, 377 P.2d 391, 395 (1962); *River Management Corp*., 829 P.2d at 404." *Michaelson v. Michaelson*, 939 P.2d 835, 842 (Colo. 1997).

26. In a scenario where two claims were duplicative, one could be dismissed, however this was not argued by Defendant TCF HOA. In the instant matter though, regardless, the claims are not duplicative. The duties are different, and the elements to prove each claim are different as are the legal bases for each. In *Boyd v. Garvert*, the court rejected the defendant's argument that the plaintiff's negligence and breach of fiduciary duty claims were duplicative, finding that the duties and facts supporting the two claims were not the same. "Specifically, she argues that the trial court erred in allowing both the negligence claim and the breach of fiduciary duty claim to go to the jury because the claims were duplicative." The court found that the plaintiff's negligence and breach of fiduciary duty claims were not duplicative because the duties and facts supporting the two claims were not the same. *Boyd v. Garvert*, 9 P.3d 1161 (Colo. App. 2000). For that same

reason, the Breach of Fiduciary Duty claim is not subsumed by the Breach of Contract claim nor is it duplicative thereof.

27. Defendant TCF HOA cherry-picked the quote of its own citation which actually reads, "In typical commercial contracts, a breach of the duty merely results in damages for breach of contract, not independent tort liability. *Wheeler v. Reese*, 835 P.2d 572, 578 (Colo.App. 1992)." *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003). The opinion then goes on to say how *insurance contracts* are not typical commercial contracts. How there can be a special duty imposed and "an insurer's breach of this duty gives rise to a separate cause of action sounding in tort." *Id*. The words appear persuasive on their face, but they don't accurately represent what the Defendant claims them to mean.

28. In accordance with Plaintiff's First Amended Verified Shareholders Derivative Complaint And Jury Demand ("First Amended Complaint"), the basis for each claim is different and the elements to prove each claim is different. The claim for Breach of Contract is based on the TCF HOA's governing documents. The Breach of Fiduciary Duty is based on various statutory duties under CCIOA and the CNPA.

29. Most importantly perhaps, is that Defendant TCF HOA never argues that *either* claim is implausible nor that no set of facts could support these claims that would entitle Plaintiffs relief. Given that this is the standard by which such a motion must be judged, both claims must survive this motion and be allowed to proceed.

B. Second Claim for Relief

I. Vacancies and Term Limits

30. Plaintiff's First Amended Complaint has clarified a number of points which, if the initial Complaint had been unclear or deficient in any way, there is no longer any insufficiency to which the HOA can point that does not meet the requisite pleading standards including C.R.C.P. 8, nor a lack of material fact in dispute.

31. Two main issues belie Defendant TCF HOA's argument. First, while certain provisions of the Bylaws do allow a Board to make appointments under certain circumstances, the way in which this was accomplished on November 15, 2022, clearly violates multiple other requirements of the governing documents; and second the "swap" violates the implied duty of good faith and fair dealing that comes with the contractual obligations Directors are held to in regard to the governing documents.

32. Some of the various explicit violations of governing documents are detailed below.

33. Specifically, the "2006 Resolution Of The Todd Creek Farms Homeowners' Association Adopting Policies And Procedures Regarding Board Member Conflicts Of Interest" Section 1. General Duties states that: "All Directors shall exercise their power and duties in good faith and in the best interest of, and with utmost loyalty to the Association. All Directors shall comply with all lawful provisions of the Declaration and the Association's Articles, Bylaws, and Rules and Regulations." *See* Plaintiff's Amended Compl, Exhibit 13.

34. The Defendants violated this provision by participating in the November 15, 2022, "swap".

35. Defendants also violated (as clearly evidenced by the January 23, 2023 Hearing testimony) the Todd Creek Farms Homeowners' Association Voluntary Director Code Of Conduct And Ethics, which details "shoulds" and "should nots" of the directors, a document which Pardikes himself signed. "Should" Number 7 specifically states, "conduct open, fair, and well-publicized elections." See Exhibit 2.

36. TCF HOA Bylaws, Section 5.3 Term of Office for Directors states that, "The term of office of directors shall be three years or until a successor is elected. The terms of the directors shall be staggered.

37. These term limits pertain to the individual director, not the position itself.

38. In fabricating vacancies, Defendants effectively extended Defendant Pardikes' term in violation of Section 5.3 of the Bylaws through 2024. *See* P.Compl. Exhibit 4 - January 23, 2023 hearing transcript.

39. It is only acceptable to extend the term of a director beyond three years, "until a successor is elected." But there never was an election for Pardikes despite the multi-year extension of his term.

40. Defendants Pardikes, Stetchfield, Montoya, Cooper and Holdren, however circumvented the procedures of the Bylaws, intentionally, and in a manner that was wanton and willful and with utter disregard to the rights of the Plaintiffs and the shareholder members of the HOA.

41. While TCF HOA may argue that there is no issue of material fact here, it is clear that when applying the testimony of what happened regarding the November 15, 2022 "swap" to the Bylaws and other relevant governing documents mentioned herein, there is clear evidence that there was at least one a violation and creates a genuine issue of material fact.

42. Whether considered from a C.R.C.P. 12(b)(5) or 56 standard of judgment, TCF HOA's motion fails on its face.

II. Plaintiffs Standing

43. Defendant TCF HOA claims that Plaintiffs lack standing due to the fact they failed to exhaust every possible remedy prior to filing suit. Presumably this would apply to both Plaintiff's Second and Third claims, however it was only raised by Defendant TCF HOA as to the Second. Nevertheless, the argument fails for both.

44. Defendant TCF HOA is correct in that before proceeding with a derivative suit, shareholders typically need to make a demand to the corporation's board of directors to correct the alleged wrong. This is known as the "demand requirement." *See* C.R.C.P. Rule 23.1. However, in certain circumstances, this requirement can be bypassed if such a demand would be futile.

45. The principle of "futility" essentially means that there's no point in making a demand on the directors because it's unlikely to result in the desired action. This could be due to a number of reasons. For example, as is here, the directors themselves are the ones accused of wrongdoing.

46. "And, where directors and controlling shareholders are antagonistic, a demand upon them is *presumptively futile and no demand need be made*. *Cathedral Estates v. Taft Realty Corp.*, 228 F.2d 85 (2d Cir. 1955)." *Van Schaack v. Phipps*, 38 Colo. App. 140, 144, 558 P.2d 581, 585 (1976) [emphasis added].

47. "Demands for desired action need not be made by shareholder plaintiffs upon directors allegedly involved as wrongdoers. *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971); *Hirsch v. Jones Intercable, Inc.,* 984 P.2d 629 (Colo. 1999).

48. Allegations that the board of directors breached a duty of care owed to the corporation and its shareholders was sufficient to establish reason for plaintiff's failure to make further demands. *Greenfield v. Hamilton Oil Corp.,* 760 P.2d 664 (Colo. App. 1988).

49. Here, despite this presumptive futility, Plaintiffs did make such demands. One regarding the "swap" and the other a Request for Records, which forms the basis for the Third cause of action in this matter. While both demands exceeded the statutory minimum of ten business days for a response by allowing 11 business days, neither the Demand nor the Request was acknowledged let alone addressed by Defendant TCF HOA. Given that four out of five of the directors who participated in the "swap" (against the interest of the HOA itself) remain on the TCF HOA board today, it's clear that even the Demand letter and Request for Records which Plaintiffs signed and served were done in futility.

50. Similarly, if a majority of the board is interested or lacks independence in the transaction at issue, a demand may also be considered futile. In such situations, courts have allowed shareholders to file a derivative lawsuit directly, bypassing the demand requirement. This is to prevent unnecessary delay and waste of resources in situations where the demand is unlikely to bring about the desired action. However, the allegation of futility needs to be pleaded with

particularity under Rule 23.1, demonstrating why the demand would have been pointless. Here, it has been.

51. "Hence, the record before the trial court at the time of the hearing raises a genuine issue of fact, i.e., whether the controlling shareholders were sufficiently adverse to plaintiff Henry as to render futile [**586] a demand upon them for satisfaction prior to suit. Where the fact of the [*145] futility of a shareholder demand is placed in issue by the depositions and exhibits in the court file, it is error to grant summary judgment on the ground that plaintiff's complaint fails to allege the demand for shareholder relief required by C.R.C.P. 23.1. As stated in *McKinley v. Dozier*, 175 Colo. 397, 487 P.2d 1335." *Id*. at 144-45, 585-86.

52. Defendant TCF HOA suggests that the Plaintiffs should have sought a special meeting under the Bylaws, however this mechanism would do nothing to release the required records (which only the Board has access to) nor accomplish the desired accountability related to the November 15, 2022 "swap." Even calling a special meeting would require the participation of the Board Secretary or take months to accomplish without. Given the extreme mismanagement of by the TCF HOA board, it is clear that 1) these actions would have only been stonewalled further and were therefore futile and 2) more immediate redress and accountability is required.

53. Here it is clear that the director Defendants are sufficiently adverse and at any rate, the Complaint pleading is more than sufficient to survive a motion to dismiss or summary judgment as the Demand, Request and their futility have been more than sufficiently alleged.

C. Third and Fourth Claims for Relief

54. A mere denial is meant for an Answer to a Complaint, not a Motion to Dismiss under C.R.C.P. 12(b)(5).

55. Defendant TCF HOA in its Motion states, "Plaintiffs do not allege that the Association has withheld documentation nor that Plaintiffs do not have access to the requested documentation."

56. While it's the Plaintiff's position that the initial Complaint plainly and sufficiently laid out the requisite allegations in ¶¶ 122-126 stating that Defendant TCF HOA had failed to comply with the Request made and properly served, Plaintiff is sympathetic to Defendant TCF HOA's deficiencies and so added a excruciating detail in the Amended Complaint plainly stating, "To this day, TCF HOA has withheld documentation and the Plaintiffs do not have access to the requested *and required* documentation under the TCF HOA governing documents and/or CCIOA" and specified some of the missing documents.

57. Additionally, C.R.S. § 38-33.3-317(2)(a) states in relevant part that:

> [A]ll records maintained by the association must be available for examination and copying by a unit owner or the owner's authorized agent. The association may require unit owners to submit a written request, describing with reasonable particularity the records sought, at least ten days prior to inspection or production of the documents and may limit examination and copying times to normal business hours or the next regularly scheduled executive board meeting if the meeting occurs within thirty days after the request. Notwithstanding any provision of the declaration, bylaws, articles, or rules and regulations of the association to the contrary, the association may not condition the production of records upon the statement of a proper purpose.

The plain language used in the statute of "copying," "inspecting" and the limitation of normal business hours for those purposes clearly indicate the intention of the legislature to *require physical production of and/or access to* said records.

58. Regardless, Defendant TCF HOA neither provided the requisite documents electronically *or* physically.

59. Defendant TCF HOA's feeble allegations that the "Association, as a matter of course, makes records available to all homeowners…" whether online or in physical form is patently false. Once again, merely denying allegations made in Plaintiff's Complaint is fodder for *an Answer, not a motion to dismiss under (12)(b)(5)*. Nothing in Defendant's motion indicates that this is implausible or that no set of circumstances where the allegations taken as true could not merit relief.

60. It is clear that from long-time practitioners such as counsel for Defendant TCF HOA who "specialize" in representing HOA's and whose practice significantly involves CCIOA, they should know better. Blanket denials and extrinsic evidence in a Rule 12(b)(5) motion are not persuasive, they are frivolous and vexatious.

61. To the extent that this Court considers TCF HOA's Motion to be a summary judgment motion, it is the Plaintiff's contention that given its inability to request discovery at this phase of the case under C.R.C.P. 16 or 16.1, Plaintiffs respectfully request to either be given the opportunity to compile further evidence or be allowed to proceed with the allegations considered in the light most favorable to the Plaintiffs.

62. Plaintiffs contend that there is in fact a genuine dispute of material fact given the specificity with which the Amended Complaint details undisclosed and required documents.

D. Fifth Claim for Relief

63. Nothing Defendant TCF HOA argues serves to prove or persuade that the allegations in Plaintiff's fifth claim do not meet a plausibility standard, or that under no set of circumstances could the Plaintiff prevail. Defendant TCF HOA merely refutes the allegations made in the Complaint.

64. A motion to dismiss under (12)(b)(5) is not a time to provide evidence in a misguided, procedurally improper attempt to dismiss various claims. Nevertheless, Defendant TCF HOA does this incessantly throughout their motion.

65. Even if the Court were to consider Defendant TCF HOA's evidence, Plaintiff's assert that Defendant TCF HOA's allegations are untrue and when considered in light of the sufficient allegations made out in Plaintiff's Complaint or Amended Complaint (which should be considered true under the legal standards of the instant motion), there would *at best* be a genuine issue of material fact and still could not serve as a basis for dismissal under C.R.C.P. 12(b)(5) or 56.

66. Given that Defendant TCF HOA's "evidence," meaning the four exhibits submitted with their Motion should be stricken from the record and not considered by the Court, there is nothing countering the sufficiency of Plaintiff's Amended Complaint to justify granting Defendant TCF HOA's motion. There is certainly nothing contradictory or that does not meet the plausibility standard in the Amended Complaint – all of the allegations are laid out, they are plausible and often backed by various exhibits underscoring the allegation.

67. Even if such exhibits are considered, a mere affidavit contending that all relevant directors received the requisite education, that is not a substitute for *actual proof* of fulfilling the education requirement under the Bylaws such as a certificate of completion of some type of educational course.

68. Again to the extent that this Court considers TCF HOA's Motion to be a summary judgment motion, it is the Plaintiff's contention that given its inability to request discovery at this phase of the case under C.R.C.P. 16 or 16.1, Plaintiffs respectfully request to either be given the opportunity to compile further evidence or be allowed to proceed with the allegations considered in the light most favorable to the Plaintiffs or plainly considered true.

69. Plaintiffs contend that there is in fact a genuine dispute of material fact given the specificity with which the Amended Complaint details undisclosed and required documents.

E. Sixth, Seventh and Eighth Claims for Relief

70. Plaintiff's Complaint and Amended Complaint both more than reach the plausibility standard if *Iqbal*.

71. Laid out, with supporting facts and evidence, Plaintiffs support the allegations that there are heretofore undisclosed connections between Leuthner and Pardikes and alleged conflicted interest transactions. *See* Plaintiff's Amended Compl, Exhibits 9, 10, 11a, 11b and 12.

72. Plaintiffs furthermore reach the standard of plausibility in regard to the allegations that Pardikes received payment, without explanation, from the HOA given the level of specificity of

those payments including the amounts and dates of said payments and the evidence supporting those allegations. *See* Plaintiff's Amended Compl, Exhibit 10, Page 2, highlighted lines re: payments to Pardikes.

73. There is also clearly a genuine dispute of material fact that arise from these claims for relief given the evidence provided.

74. Defendant TCF HOA's conclusory denials and claims that any improprieties are a, "[C]oncocted a conspiracy theory…through a cohort of connected owners seeking to influence…" the HOA are not persuasive and hold no merit.

75. None of the alleged conflicted interest transactions have been disproven in any meaningful way.

76. At best, TCF HOA has made clear that there are genuine disputed issues of material fact and under either standard of judgment, their Motion must be denied.

77. To the extent that this Court considers TCF HOA's Motion to be a summary judgment motion and believes Plaintiffs' evidence is deficient, it is the Plaintiff's contention that given its inability to request discovery at this phase of the case under C.R.C.P. 16 or 16.1, Plaintiffs respectfully request to either be given the opportunity to compile further evidence or be allowed to proceed with the allegations considered in the light most favorable to the Plaintiffs or plainly considered true.

CONCLUSION

For the reasons set forth above, the Court should deny Defendant TCF HOA's Motion to Dismiss on all claims, and find that Plaintiffs are entitled to an award of their attorneys' fees and costs incurred in defending this Motion.

WHEREFORE, the Plaintiffs request that the Court Deny the Motion to Dismiss in its entirety and for such other relief as the Court deems just and proper.

Dated: June 20, 2023.

Respectfully Submitted,

ROBINSON & HENRY, P.C.

By: _____
Peter L. Towsy, #55556
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on June 20, 2023, a copy of the **PLAINTIFF'S RESPONSE IN OPPOSITON TO DEFENDANT TODD CREEK FARMS HOMEOWNER'S ASSOCIATION'S MOTION TO DISMISS** was filed with the Court via Colorado Court E-Filing System, and served to the following parties:

ORTEN CAVANAGH HOLMES & HUNT LLC
Jonah G. Hunt, #34379
Marcus T. Wile, #49471
1445 Market Street, Suite 350
Denver, CO 80202
JHunt@ochhoalaw.com
MWile@ochoalaw.com

JACHIMIAK PETERSON KUMMER LLC
Joseph R. Kummer, No. 39984
Chrysovalantou G. Hoppe, No. 44218
Taylor A. Clapp, No. 52800
860 Tabor Street, Suite 200
Lakewood, Colorado, 80401
jkummer@jpk.law
choppe@jpk.law
taclapp@jpk.law

ROBINSON & HENRY, P.C.

By: */s/ Megan J. Adams*
Megan J. Adams, Paralegal

Pursuant to C.R.C.P. 121 a true and correct copy of the foregoing with original or scanned signatures is maintained at the offices of Robinson & Henry, P.C. and will be made available for inspection or review upon request.