

|  |  |
|--|--|
| DISTRICT COURT OF ADAMS COUNTY,<br>STATE OF COLORADO<br>1100 Judicial Center Drive<br>Brighton, CO 80601   | <p style="text-align: center;">▲ COURT USE ONLY ▲</p>  |
| <p><i>Plaintiffs:</i> <b>Edie Apke et al</b>, derivatively on behalf of <b>Todd Creek Farms Homeowner’s Association</b>, a Colorado nonprofit corporation;</p> <p>v.</p> <p><i>Defendants:</i> <b>TODD CREEK FARMS HOMEOWNERS’ ASSOCIATION</b>, a Colorado nonprofit corporation; <b>Jason Pardikes</b>, in their official capacity as Director of Todd Creek Farms Homeowner’s Association; <b>Wendi Setchfield</b>, in their official capacity as Director of Todd Creek Farms Homeowner’s Association; <b>Maryjo Montoya</b>, in their official capacity as Director of Todd Creek Farms Homeowner’s Association; <b>Ben Cooper</b>, in their official capacity as Director of Todd Creek Farms Homeowner’s Association; <b>Sean Holdren</b>, in their official capacity as Director of Todd Creek Farms Homeowner’s Association.</p> |  |
| ROBINSON & HENRY, P.C.<br>Peter L. Towsky, #55556<br>Boyd A. Rolfson, #40035<br>1805 Shea Center Drive, #180<br>Highlands Ranch, CO 80129<br>P: 303-688-0944                      peter@robinsonandhenry.com<br>F: 303-284-2942                      boyd@robinsonandhenry.com<br><i>Attorneys for Plaintiffs</i>  | <p style="text-align: center;"><b>PLAINTIFF’S RESPONSE IN OPPOSITON TO DEFENDANTS JASON PARDIKES, WENDI SETCHFIELD, MARYJO MONTOYA, BEN COOPER, AND SEAN HOLDREN’S MOTION TO DISMISS INDIVIDUALLY NAMED DEFENDANTS PURSUANT TO C.R.C.P. 12(b)(5)</b></p> |

COMES NOW Plaintiffs (“Members” or “Plaintiffs”), derivatively on behalf of Todd Creek Farms Homeowners Association, a Colorado nonprofit corporation, by and through their attorneys, Robinson & Henry, P.C. and for their Response in Opposition to Defendants Jason Pardikes, Wendi Setchfield, Maryjo Montoya, Ben Cooper, And Sean Holdren’s (“Defendant Directors”) Motion to Dismiss Individually Named Defendants Pursuant To C.R.C.P. 12(b)(5), 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 Directors make reference to exhibits filed along with Defendant TCF HOA’s (“TCF HOA”) Motion to Dismiss, 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, be it that of the Directors’ or the HOA. These exhibits and any arguments pertaining thereto should therefore be stricken from the record entirely – or at the very least not be considered in the determination of this motion.

### **INTRODUCTION AND PROCEDURAL HISTORY**

3. 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”).

4. On May 13, 2023 Counsel For Defendant TCF HOA filed the instant Motion to Dismiss based on C.R.S. 12(b)(1) and 12(b)(5).

5. On May 31, 2023 Counsel For Defendant TCF Directors filed the instant Motion to Dismiss based on C.R.S. 12(b)(5).

### **PLEADING STANDARDS**

6. 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).

7. “[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)

8. “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.*

9. “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).

10. 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).

11. 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.”

12. 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).

## ARGUMENT

### A. Director Immunity

13. Plaintiffs concede Defendant Directors’ contention that C.R.S. § 12-21-115.7 generally shields unpaid, or volunteer directors from civil liability in the absence of wanton and willful misconduct.

14. Plaintiffs do not concede however that Plaintiffs have not adequately alleged such conduct, nor that Defendant Directors did not in fact act in such a way that precludes them from being immune from civil liability based on the actions alleged in Plaintiff’s First Amended Verified Shareholders Derivative Complaint And Jury Demand (“First Amended Complaint”).

15. In accordance with Plaintiff’s First Amended Complaint, the basis for each claim against each Director adequately alleges wanton and willful conduct, which was done with heedless and reckless disregard to both the rights of the HOA shareholder members and the consequences thereof. *Messler v. Phillips*, 867 P.2d 128, 134 (Colo. App. 1993).

16. None of the acts allegedly taken by the Defendant Directors were taken within the exercise of honest business judgment. *Rywalt v. Writer Corp.*, 526 P.2d 316, 317 (Colo. App. 1974).

17. In their Motion, Defendant Directors attempt to raise the standard by which Plaintiffs must plead and by which the sufficiency of the Complaint must be judged:

Even supposing Plaintiffs can somehow show the individual Board of Directors improperly filed an empty board set, Plaintiffs have not shown they [directors] acted recklessly in disregarding certain harm to its members.

*See* Defendant Director’s Mtn to Dismiss; Page 4, line 2.

18. The case law is clear that in judging a C.R.C.P. 12(b)(5) motion, the Court in fact must suppose the Plaintiff’s allegations are true, and “certain harm” is mentioned nowhere in the case law regarding the risk of harm or consequences to the Plaintiff(s) because “certain harm” is an overstated burden and not relevant for the Court’s consideration.

19. The claims which pertain to the individual directors are as follows:

- a. Claim 1: asserts breach of fiduciary duty for all Director Defendants and the HOA as a defendant.
- b. Claim 2: does the same, but on a breach of contract theory.
- c. Claims 6, 7 and 8: pertain to Defendant Pardikes and the HOA as defendants under various theories of law.

20. Defendant Directors argue that Defendants Montoya Cooper and Holdren, “only appear in the caption of the Case, the introduction paragraph, and under the heading of ‘Parties, Jurisdiction and Venue...’” The mere fact that their names do not appear, does not mean nor prove that no allegations are made against them. In Claims 1 and 2 of the Complaint and First Amended Complaint, it is clear that these three, and Defendants Pardikes and Setchfield clearly comprise the actors alleged of wrongdoing.

21. *All five board members at the time participated in the “swap.”* There is no room for ambiguity and the plausibility of such allegations has never been challenged.

22. The factual allegations plead are that the five Defendant Directors got together and while two quit, the remaining three “swapped” their positions and reappointed them in violation of every conceivable standard by which they may be judged – be it C.R.S. Title 7, fiduciary duties, or the HOA governing documents.

23. It is then alleged that these acts were wanton and willful, done with reckless disregard for the rights of the shareholder members, and done outside of the exercise of any honest business judgment.

24. Willful and wanton behavior is defined as "a mental state of the actor consonant with purpose, intent, and voluntary choice." *Safehouse Progressive Alliance for Nonviolence, Inc. v. Qwest Corp.*, 174 P.3d 821, 829 (Colo. App. 2007). It is conduct which is "wholly disregarding of the rights, feelings and safety of others . . . at times even imply[ing] an element of evil." *Pettingell v. Moede*, 129 Colo. 484, 271 P.2d 1038, 1042 (Colo. 1954).

25. The allegations in the Amended Complaint, when taken as true, leave no room for interpretation in regard to the purpose, intent and voluntary choice of the Defendant Director's actions.

26. Furthermore, "Whether conduct is 'willful and wanton must generally be determined at trial." See *Carothers v. Archuleta County Sheriff*, 159 P.3d 647 (Colo. App. 2006). This is a factual issue which cannot be resolved in a motion to dismiss, or a motion for summary judgment.

27. Finally, Defendant Directors never argue that *any* claim is implausible nor that no set of facts could support these claims entitling Plaintiffs relief. Given that this is the standard by which such a motion must be judged, all of Plaintiffs' claims must survive.

28. Defendant Director's motion fails to meet the standards by which they could succeed and therefore it must be dismissed.

29. The 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 defendants can point to that does not meet the requisite pleading standards including C.R.C.P. 8.

30. To the extent that the Court may choose to consider viewing the Defendant Directors' Motion under C.R.C.P. 56 given their reference to Defendant Todd Creek Farms HOA's motion and accompanying exhibits, it is the Plaintiff's position that there are sufficient evidence and

allegations in the First Amended Complaint to create genuine issues of material fact that rise to the level by which Plaintiffs would overcome a motion for summary judgment. In the alternative 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**

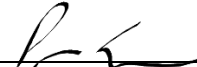
For the reasons set forth above, the Court should deny Defendant Directors' Motion to Dismiss on all claims given the sufficiency of Plaintiffs' allegations in the First Amended Complaint.

**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.*