DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202, (720) 865-8301	DATE FILED: June 20, 2018 5:00 PM FILING ID: 42422787D60B3 CASE NUMBER: 2018CV31475
Plaintiff: EVERGREEN ALLIANCE GOLF LIMITED, L.P., d/b/a ARCIS GOLF; v. Defendant: CLAYTON EARLY LEARNING, AS TRUSTEE OF THE GEORGE W. CLAYTON TRUST, a Colorado Trust.	**COURT USE ONLY**
Attorneys for Plaintiff: Frank W. Visciano, #7274 Charles E. Fuller, #43923 Devin N. Visciano, #45216 Senn Visciano Canges P.C. 1700 Lincoln Street, Suite 4300 Denver, CO 80203 Telephone: (303) 298-1122 FVisciano@sennlaw.com; CFuller@sennlaw.com; DVisciano@sennlaw.com	Case Number: 2018CV031475 Division/Courtroom: 275

PLAINTIFF'S OPPOSITION TO C.R.C.P. 12(b)(5) MOTION TO DISMISS

Plaintiff ("**Arcis Golf**") submits this response[1] in opposition to Defendant's May 16, 2018 Motion to Dismiss pursuant to C.R.C.P. 12(b)(5) ("**Motion**").

1. Introduction

Defendant ("**Clayton**" or "**Trust**") owns the Park Hill Golf Course, and entered into the Original Lease[2] with the original tenant in 1998. Since December 2008 Arcis Golf has been the tenant and Golf Course operator under the Lease (as amended). Over the past ten years Arcis Golf's investments in the Lease and Golf Course have been substantial.

[1] Arcis Golf also will be filing its Motion to Amend the Complaint, and a proposed Amended Complaint.
[2] Capitalized terms are as defined in the Complaint or as defined herein.

Article 24 of the Lease grants Arcis Golf, as tenant, a valuable right of first refusal ("**ROFR**") to purchase the Golf Course, providing (emphasis added):

> 24. RIGHT OF FIRST REFUSAL. If Lessor solicits or receives a "bona fide offer" (as defined below) to purchase Lessor's fee interest in the Leased Premises from a third party, before accepting such offer, Lessor shall notify Lessee of the terms and conditions of such offer and shall identify the proposed purchaser. An offer is considered a "bona fide offer," for purposes of this Article 24, if the offer complies with the following minimum requirements: (a) the offer must be in writing and must be an offer to purchase the entire Leased Premises, and, if accepted by Lessor, must constitute a legal, valid and binding obligation of the purchaser; (b) the offer must be by a party who is unaffiliated with Lessor (i.e., is not controlled by, under common control with, or does not control any individual or entity constituting Lessor); and (c) the offer must provide for a minimum of $50,00 in cash to be deposited into escrow upon the acceptance of the offer by Lessor, which deposit may be refundable pursuant to the terms of the offer. Thereafter, Lessee (or an affiliate of Lessee, including, without limitation, National Golf Properties, Inc., a Delaware corporation ("NGP") and any partnership in which NGP is a partner) shall have a period of thirty (30) days from receipt of Lessor's written notice within which to agree to purchase Lessor's fee interest in the Leased Premises on the terms and conditions set forth in such offer. …. During the term of this Lease, Lessor may not accept an offer which is not a bona fide offer.

In 2017 Clayton received a substantial offer from the City of Denver ("City") to purchase the Golf Course property. The accepted offer evolved into what the City publicly announced as an "agreement", memorialized in a detailed written purchase and sale agreement ("**PSA**") in September 2017, which was reviewed by certain members of the Denver City Council ("**Council**") at a meeting on October 3, 2017. Clayton now argues that the Court should dismiss the Complaint, asserting that no bona fide offer had been made because the City abandoned its process of seeking Council approval when it learned that Arcis Golf might exercise the ROFR.

2. Complaint Allegations

The following were among the facts alleged in the Complaint:

- "The City announced publicly in September 2017 that it had reached agreement to purchase the Park Hill Golf Course from [Clayton]." (Cmplt., ¶10);
- "[Clayton] and the City drafted an Agreement Concerning Park Hill Land, a purchase and sale agreement for the Park Hill Golf Course (the 'PSA'). On information and belief, the PSA was drafted before the City made its public announcement in September 2017 that it had reached agreement to purchase the Park Hill Golf Course." (Cmplt., ¶11);
- "Under the PSA, the City agreed to purchase the Park Hill Golf Course for $20.5 million ($10 million purchase price plus $10.5 million over a 30-year lease), though [Clayton] could earn up to $24 million in total from the City depending on additional considerations." (Cmplt., ¶12);
- "Shortly after announcing the sale, counsel for the Trust contacted Arcis Golf to request if Arcis Golf voluntarily would agree to give up its right to extend the term of the Lease before the end of October of 2017, instead of waiting until the July 1, 2018 deadline in the Lease to exercise its option extend the term of the Lease… Additionally, the Trust stated that if Arcis Golf failed to agree to waive its right to extend early, then the City would instigate condemnation proceedings to take a portion of the land comprising the Park Hill Golf Course to construct a 25-acre detention pond, and that construction of the detention pond would necessitate the closing of the golf course for an undetermined amount of time during the Lease term." (Cmplt., ¶13);
- "On November 28, 2017, Arcis Golf delivered to [Clayton] a letter demanding that [it] comply with Article 24 of the Lease, deliver to Arcis Golf written notice of the terms and conditions of the City's offer, and provide to Arcis Golf the thirty-day period to agree to purchase the Park Hill Golf Course in accordance with the City's offer." (Cmplt., ¶14);
- "… [T]he Trust shared the November 28, 2017 letter with the City." (Cmplt., ¶15);

- "… [T]he City then suspended its plans to purchase the Park Hill Golf Course because the City became aware of Arcis Golf's stated intention to exercise its right of first refusal to purchase the Park Hill Golf Course under Article 24 of the Lease." (Cmplt., ¶16);
- "The Trust responded to the November 28 letter on December 14, 2017, denying that Arcis Golf's right of first refusal under Article 24 of the Lease had been triggered… [T]he Trust is taking the position that – despite the PSA, the City's public announcement that it had agreed to purchase the Park Hill Golf Course, and the extensive and public course of conduct between the Trust and the City – a "bona fide offer" was never made under Article 24 of the Lease." (Cmplt., ¶17); and
- "However, the City had clearly and unequivocally manifested its willingness in writing to be bound to purchase the Park Hill Golf Course, and therefore Arcis Golf had a right of first refusal under Article 24 of the Lease. The Trust also clearly and unequivocally manifested its willingness in writing to be bound to sell the Park Hill Golf Course to the City." (Cmplt., ¶17).

When Clayton refused to honor Arcis Golf's ROFR – or even give notice of the offer - Arcis Golf asserted two claims - for breach of the Lease (*id.*, ¶¶22-26), and for declaratory judgment (recognizing that Arcis Golf has the ROFR) (*id.*, ¶¶28-30). The Complaint alleges specific facts going beyond a mere bona fide offer that me the Article 24 requirements: it alleges that Clayton and the City reached an agreement to purchase the Golf Course, publicly announced it as an agreement, and negotiated and finalized a draft agreement - the PSA, a copy is **Exhibit 1** hereto [3]. As discussed below, throughout this process two dozen City officials and

[3] Arcis Golf agrees with Clayton (see authority cited in Mot., 5) that the Court may consider materials referenced in the Complaint and documents subject to judicial notice (including matters of public record).

representatives, including the Denver Deputy Mayor, Chief Financial Officer, Deputy Chief of Staff, Chief Projects Officer, and the Director of Real Estate Division, were involved in the internal City communications and plans to complete the purchase by the PSA's closing date of January 2, 2019 – a transaction described by a Denver City attorney on August 3, 2017 as a "significant accomplishment for both teams", and a "milestone moment."

3. Clayton's Motion

Clayton (Mot. 3, 6-9) wants the Court to determine, as a matter of law, that there was no bona fide offer under Article 24 because, under the Denver City Charter ("Charter"), its Council "must first approve the offer through ordinance or resolution." Clayton in effect argues that, under Article 24, for the City to make a bona fide offer to Clayton that would trigger Arcis Golf's ROFR, Clayton and the City would have had to negotiate, then enter into the agreement, satisfy all conditions stated in the agreement, and then have Council pass an approving ordinance – all before Clayton even had to give Arcis Golf the ROFR notice. That is not what Article 24 or applicable contract law requires - and not what happens in the business world when first refusal rights are considered.

The City's announcement that it not just offered, but had agreed, to purchase the Golf Course (see Complt., ¶¶ 10-12) reflected its intent to be bound to purchase the Golf Course, subject to Council approval. The PSA evidences a purchase offer that (as specified in PSA §10.11) was to "take effect" when approved by Council. The City's announcement that the agreement had been reached, and the PSA terms, are proof that a bona fide offer under Article 24 had been made. The manner in which Clayton and the City proceeded in 2017 substantiates the fact that, not only had a bona fide offer been made and accepted, they were proceeding to a

closing. (Complt., ¶¶ 14-17). The Council approval requirement impacted the PSA's effective date, providing a possible future basis for the City to not proceed with the agreement. Denver City officials were involved in the agreement negotiations and the City's plans to approve the transaction. The City stopped short of having a Council vote on the transaction when it learned there was a problem due to Arcis Golf's right to the extend the Lease and the ROFR. It would be inconsistent with the facts as known at this stage to conclude that City approval for the transaction had not (or would not have) been obtained.

Clayton's reliance on the Charter is misplaced: Clayton conflates a binding offer with a binding, unconditional contract. Under Article 24 the ROFR is triggered by a bona fide offer, not by a contract. The Charter grants Council authority to approve a contract, not an offer. If a contract were not approved by Council, it would, under PSA §10.11[4], not "take effect". Until such a theoretical failure to approve occurred, the accepted offer and written agreement would remain binding, *e.g.*, obligating the City to seek Council approval. The Charter procedure pre-supposes the contract has been finalized subject to final approval. The Charter does not justify Clayton's failure to give Arcis Golf its ROFR notice; the offer was bona fide.

Article 24 states that a bona fide offer is one that "if accepted by Lessor [Clayton], must constitute a legal, valid and binding obligation of the purchaser." (Emphasis added). Based on the Complaint's allegations and supporting evidence explained below, Clayton cannot argue it

[4] Article VI. §10.11 of the PSA provides: "Subject to Council Approval. This Agreement is subject to the approval of the City Council in accordance with the provisions of the City Charter, and this Agreement shall not take effect until its final approval by the City Council, and until signed by all appropriate City officials, including the Mayor, the Clerk and Recorder, the Manager of Finance and the Auditor. Notwithstanding the foregoing upon satisfaction of the foregoing requirements, this Agreement shall be effective as of the Effective Date." (Emphasis added).

did not accept the offer. Since an offer is not a contract, the term used in Article 24 of the Lease – "if accepted" – makes clear that, at the time Clayton received the purchase offer, it need not have been a contract, or even have been accepted. That Clayton accepted the City offer and then drafted the comprehensive PSA itself was a breach by Clayton of Article 24 of the Lease, which required that "before accepting such offer, [Clayton] shall notify [Arcis Golf] of the terms and conditions of such offer …." (Emphasis added). Clayton did not provide the notice. Moreover, under Article 24 a "legal, valid and binding obligation of the purchaser," refers to the City's obligation to attempt to get Council approval. ROFR provisions requiring an offer to be "bona fide" are meant for the protection of the holder of a ROFR, here Arcis, and are waivable by Arcis. Under contract law, an offer may be "bona fide" even if it is conditional, provided the purchaser intends to be bound to attempt to satisfy the condition.

The facts alleged in the Complaint must be taken as true in a Rule 12(b)(5) motion, and support the conclusion that the requested offer had been made and triggered Arcis Golf's ROFR. Clayton's Rule 12(b)(5) Motion is without merit.

4. Standard of Review

Motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5) are viewed with disfavor. *Bly v. Story*, 241 P.3d 529 (Colo. 2010). A trial court may not dismiss a complaint that states a plausible claim for relief - *Warne v. Hall*, 2016 CO 50, ¶9, 373 P.3d 588, 591. Where the factual allegations are "enough to raise a right to relief 'above the speculative level' …." *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Courts must accept a plaintiff's averments of fact as true in determining, as an initial matter, whether the claims pleaded are plausible, and view them in the light most favorable to plaintiff, *See id.*, ¶¶*9, 27-28; Campaign*

Integrity Watchdog LLC v. Colo. Republican Party Indep. Expenditure Comm., 2017 COA 32, ¶9, 395 P.3d 1192, 1195.

Where (as here) unresolved questions of fact bear on the proper interpretation of a contract (or a defense), discovery must be allowed and a motion to dismiss under C.R.C.P. 12(b)(5) should be denied. *See Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911-12 (Colo. 1996). C.R.C.P. 12(b) provides in pertinent part (emphasis added):

> If, on a motion…to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in C.R.C.P. 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56.

Rule 56(f) states that the Court may "order a continuance to permit … discovery to be had or may make such other order as is just." Where a trial court is inclined to consider documents outside the pleadings, it should convert the motion to dismiss to a motion for summary judgment. *Bristol Bay Productions, LLC v. Lampack*, 2013 CO 60, ¶¶46-48, 312 P.3d 1155, 1165.

While a Rule 12(b)(5) tests whether the plaintiff failed to state a claim properly, it is appropriate "to go beyond the question of the complaint's formal sufficiency and to introduce affidavits and other matters in conjunction with the Rule 12(b)([5]) motion to ascertain whether there is any merit to the claim." Charles Alan Wright et al., 5C Fed. Prac. & Proc. Civ. § 1366 (3d ed.). In fact, Rule 12(b)(6) of the Federal Rules of Civil Procedure, the analogue to C.R.C.P. 12(b)(5), was amended to "sanction[ ] the growing practice of accepting matters outside the pleading", particularly because courts began to recognize that it would be improper to resolve the dispute "when there is a material issue of fact that justifies a trial on the merits." *Id.*

The Complaint contains specific allegations that show a bona fide purchase offer was received by Clayton, and that a purchase agreement was negotiated. The Motion is premised on a lack of City approval, yet Arcis Golf has had no opportunity to conduct discovery as to what the City said and did when it made the accepted offer. Such evidence would impact the Court's consideration of Arcis Golf's first refusal right claims under Article 24. There is no basis to dismiss the Complaint at this early stage under Rule 12(b)(5).

5. <u>CORA Evidence Supporting Arcis Golf's Claim</u>

Arcis Golf, through separate (condemnation) counsel[5], made a CORA request to the City. Documents received to date substantiate the Complaint allegations that the transaction went well beyond a mere bona fide offer and triggered, under Article 24, Arcis Golf's first refusal right. Clayton's Motion effectively seeks to cut off this Court's consideration of evidence supporting Arcis Golf's allegations and claims; such evidence would undermine Clayton's argument (Mot., 3) that City approval "never happened", and that the Lease "forbids" Clayton from accepting the City's offer. Clayton's interpretation of Article 24 of the Lease is incorrect, and its conclusion that an Article 24 bona fide offer "never happened" is contrary to the Complaint allegations and evidence. The documents obtained to date through CORA show that the City for months was "on board" with this purchase:

- Discussions between the City and Clayton for the sale of the Golf Course started as early as June 2017, if not sooner. See, *e.g.*, **<u>Exhibit 3</u>** hereto. The negotiations continued during the summer and fall of 2017. See, *e.g.*, **<u>Exhibits 7 and 8</u>** hereto.

[5] See, Complaint at ¶13 (Clayton told Arcis Golf that the City would condemn a portion of the Golf Course if Arcis Golf failed to waive its right to extend the Lease).

- Two dozen of representatives of the City and the Denver Mayor's Office were involved in those negotiations and/or internal City documents relative to the purchase. See **Exhibit 2** hereto, a list and information as to 24 Denver City officials and employees who (as reflected in emails) were involved in the City's internal communications regarding the agreement and transaction before and after the PSA was finalized.

- In a June 20, 2017 email, the City's Director of Real Estate, Department of Finance, wrote to the Chief Projects Officer of the Mayor's Office, and Bruce James, counsel for Clayton, to discuss the Golf Course property values. **Exhibit 3**.

- In an August 2, 2017 email, John McGrath, Assistant Denver City Attorney involved in the negotiation and drafting of the PSA, forwarded to Clayton's counsel (James) the latest draft of the PSA, telling Mr. James that: "As an indication of our [City's] optimism, we are also attaching a clean version [of the PSA] with the 'draft' watermark removed." See **Exhibit 4** hereto.

- In an August 3, 2017 email, Mr. McGrath forwarded to Mr. James the PSA in final form, stating:

> Attached is what we understand to be the "agreement in principle" reached earlier today. The Word version shows the final change (in Section 8.1 on Page 9) and the PDF is the clean version. We understand that internal approval processes prior to final execution are required on both sides …. I also note that we will need to finalize the various exhibits to the agreement which we should probably turn to quickly (although we believe those to be pro forma closing documents). Clearly, this is a significant accomplishment for both teams and we appreciate your hard work and commitment to reaching this milestone moment.
>
> We look forward to working with you and the Clayton team on the next stages of this process."

See **Exhibit 5** hereto (emphasis added).

- On September 22, 2017, the Deputy Communications Director of Mayor Hancock's office compiled in an email a number of links to articles about the announced purchase, including a Denver Post article titled, "Denver locks $20.5 million deal to buy Park Hill Golf Club…". **Exhibit** 6 hereto. It was in this time period that the City publicly announced the deal. See Complaint ¶ 10.

- On September 22, 2017, Assistant City Attorney McGrath wrote an email to several City officials from the Mayor's Office, Department of Finance, Manager of Community Planning, and Public Works, titled "Clayton - Golf Course Lease Issue". See **Exhibit 7** hereto. The City, aware of Arcis Golf's first refusal right, was positioning to deal with it. Mr. McGrath states the City's position that "the lingering issues relating to Clayton's lease with Arcis" are "entirely Clayton's responsibility"; that the City might require a "full waiver and release of the renewal options and ROFR [right of first refusal] from Arcis"; and that if Clayton "is not able to resolve the matter with Arcis now", the City will require a "right to terminate the agreement at any point until Clayton delivers", and an "acknowledgement and agreement from Clayton that if the City terminates the global agreement and initiates a condemnation action, Clayton will consent to immediate possession." (Emphasis added.) Representatives of the Mayor's Office signed off on this position statement. The email supports the fact that the parties had, not just an offer, but a "global agreement".

- In a September 28, 2018 email, Mr. Dreyer sent out conference call instructions to a personnel from the Mayor's Office, City Attorney's Office, Public Works, Manager of Community Planning and Development, Department of Finance, Manager of Department of

Parks and Recreation, Division of Real Estate, Community Planning and Development, and Office of the CFO, to discuss the Golf Course including "Status of Arcis ROFR/renewal issue". See **Exhibit 8** hereto.

- On September 29, 2017, Council Member Albus Brooks published a news announcement on the denvergov.org website titled, "A letter from Clayton Early Learning to their neighbors", stating: "Last week the City and County of Denver and Clayton Early Learning announced a proposal for the City and County of Denver to purchase the Park Hill Golf Course." See **Exhibit 9** hereto.

- On October 3, 2017, Mr. Dreyer and other City staff and Clayton representatives met with Council's Budget & Governance Committee ("Committee") to approve a bill for the purchase of the Golf Course. Circulated to Committee members (all Council members), and discussed at the meeting, were: (1) an Ordinance/Resolution Request form (filled in by the City seeking that Committee members' approval of a bill approving the PSA); (2) the final version of the PSA negotiated and approved by the City Attorneys' Office; and (3) a PowerPoint presentation used to explain the PSA terms. See **Exhibit 10** hereto. Mr. Dreyer stated[6] that the City had decided not to request action by the Committee to approve a bill at that time, and the Committee agreed to postpone taking a vote on the proposed bill until a subsequent hearing. Mr. Dreyer presented to the Committee the terms of the PSA, and Committee members asked questions regarding it, and indicated their general approval of the sale of the Golf Course.

[6] A video recording of the October 3, 2017 Committee hearing is available at (starting at minute 22): http://denver.granicus.com/MediaPlayer.php?view_id=180&clip_id=10682

6. Clayton Misconstrues Article 24 of the Lease; Final Council Approval Was Not Required for Arcis Golf to be Entitled to Exercise the ROFR.

Based on the Charter, Clayton argues that for an offer to constitute "legal, binding and valid obligation" on the City, it must first be approved by Council. (Mot., 7-9). Neither the Charter, nor the PSA terms, support Clayton's position. The Charter sections recognize that, once the City enters into a contract for the purchase of property for more than $500,000, Council has the authority to approve the contract. Yet Council's authority under the Charter does not extend to approval of an offer which is what triggered the first refusal right here. City agencies and staff may make and negotiate offers without needing approval from Council. Because the Charter sections cited to by Clayton apply to "contracts" and not "offers", they do not bar Arcis Golf's claims.

The phrase "legal, binding and valid obligation" is not defined in the Lease. Clayton without basis assumes that a "legal, binding and valid obligation" means a fully executed contract with no unsatisfied conditions. Had the parties to the Lease intended for Arcis to be able to trigger its first refusal rights only after Clayton had entered into a fully executed contract with no unsatisfied conditions, they could have said that in Article 24 (they did not).[7] Arcis submits that the City's offer, with the condition, was still a "legal, binding and obligation" on the purchaser; based on the offer made, the City was obligated to seek City approval. If for an offer to be a "legal, binding and valid obligation" meant an executed agreement with no unsatisfied conditions, the purchaser's rights in the property (the City) would be fully vested and superior to

[7] Article 24 does not state that the purchase offer, if accepted by Clayton, must constitute a binding contract. Instead, it says that the accepted "offer" must constitute a "binding obligation of the purchaser" (emphasis added). Notably, Article 24 also does not state that the "offer must be a binding obligation to close the transaction; it merely states that it is to be a "binding obligation of the purchaser".

those of the holder of first refusal rights (Arcis). That would be a result contrary to Colorado law, which recognizes that a party with first refusal rights does not have to wait to assert such rights until after the property is already under contract with a third-party. *See Peters v. Smuggler-Durant Min. Corp.*, 910 P.2d 34, 38 (Colo. App. 1995) (explaining, "when a right of first refusal is involved, once the owners evidence an intent to sell the property, the right of first refusal is activated and converted into an irrevocable option to purchase", and further stating: "when a right of first refusal is ignored and the property held subject to it is sold to a third party … the holder of the right is entitled to relief."). Article 24 deals with "offers" triggering first refusal rights, not contracts. This issue alone – the proper interpretation of what the parties' intended by an offer being a "legal, binding and valid obligation" – raises an issue for which resolution under Rule 12(b)(5) would be improper. *See Dorman*, 914 P.2d at 911-12.

The need for Council approval of a contract did not make the City's offer not binding in determining whether the ROFR was triggered by the offer. Arcis Golf is not claiming the PSA is a contract specifically enforceable by it against the City; Arcis Golf is asserting no claim against the City, but instead argues that its ROFR was not invalidated under Article 24 by the Council approval condition. As reflected by the PSA, the City's offer, containing the council approval condition, was made to and accepted by Clayton, which then had the obligation, under Article 24, to provide notice and allow Arcis Golf to purchase the property under the same terms. Had Clayton done so, the Council approval would have had no role in Arcis Golf's purchase decision: if it accepted the offer there would be no need for Council to approve anything. Moreover and significantly, Article 24 states that: "[a]ny attempt to accept an offer which is not a bona fide offer shall be a breach of Lessor's obligations hereunder …." Given this provision, Clayton's

acceptance of the City's offer was, itself, evidence the offer was considered by Clayton to be "bona fide".

The reason for requiring that a "bona fide offer" be binding, if accepted, upon a proposed third-party purchaser is to protect the holder of the right of first refusal - here, Arcis. *See Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*, 805 N.E.2d 957, 963-64 (Mass. Super. Ct. 2004) ("The requirement that triggering offers be bona fide serves to disable property owners from extinguishing a right of first refusal by simply relaying vague offers that may include indefinite terms from unidentified third parties", and stating further that a "third-party offer is bona fide if it was made honestly and with serious intent, that is, if the offeror genuinely intends to bind itself to pay the offered price."); *ABCDW LLC v. Banning*, 388 P.3d 821, 832-33 (Ariz. App. Ct. 2016). The rationale is that a third-party purchaser could, in bad faith, offer to purchase the property above market value to induce the holder to purchase for that price or risk waiving the right. *See Uno Restaurants*, 805 N.E.2d at 963-64.

The facts alleged in the Complaint, and herein, suggest that the City had every intention to purchase the Golf Course but for Arcis' right to extend the Lease and ROFR. Clayton's argument takes a provision in the Lease meant for Arcis's protection and attempts to use it to deny Arcis's right. Because the requirement of a "bona fide offer" is for Arcis's benefit, Arcis is free to waive the condition.[8] *See Tarco, Inc. v. Conifer Metro. Dist.*, 2013 COA 60, ¶33, 316

[8] Clayton's reliance on municipal case authority (Mot. at pp. 8-9) is misplaced. The Lease was negotiated between two private parties, and the Court is being asked to interpret their intent with regard to Article 24. Even if the Court were to agree that the PSA was conditioned on final Council approval, that does not end the inquiry or mean there was no intent by the City to be bound to purchase the Golf Course during the time when the City was negotiating and finalizing the PSA and seeking all necessary approvals. Generally and in the context of a right of first refusal, whether an offer is "bona fide" is a question of fact. *Mucci*,

P.3d 82, 89; *Lehman v. Williamson*, 533 P.2d 63, 65-66 (Colo. App. 1975); *see also Shutte v. Thompson*, 82 U.S. 151, 161 (1872) (stating general rule that "a party may waive any conditions that are intended for his sole benefit").

Even a bona fide offer that is conditional will trigger a first refusal right. *Mucci v. Brockston Bocce Club, Inc.*, 472 N.E.2d 966, 968-69 (Mass. Ct. App. 1985); *Uno Restaurants*, 805 N.E. 2d at 963. *Mucci* is particularly instructive on this point:

> Mucci's contention that the offer was not bona fide is based in part upon the conditions in the agreement, that the buyers obtain financing and licenses. Mucci asserts that it would be unfair for him to be forced to match the $190,000 price since Carvalho and Middleton could avoid the purchase by simply not meeting the conditions. The 1964 deed, drafted by Mucci's attorney, however, does not specify that an offer, to trigger the right of first refusal, must be unconditional. Conditions of this type are certainly not uncommon in agreements for the sale of commercial real estate. Their presence, apart from anything else, does not prevent a finding that the agreements were entered into honestly and with serious intent. …. [T]here was evidence to support the finding that the offer, even if conditional, was bona fide notwithstanding the conditions in the purchase and sale agreement.

Id. at 968-69 (internal citations omitted). Similarly, in *Uno Restaurants*, the Court determined that even though the third-party offer was conditioned upon the purchase of multiple condo units, the offer was bona fide because there was "no evidence that [the third-party purchaser] did not intend to be bound by its offers." 805 N.E.2d at 963 (emphasis added).

Clayton's argument (Mot., 6-8) assumes that because City contracts are conditional, requiring Council approval, the offer was not "bona fide". Yet *Mucci* and *Uno Restaurants* clarify the point that even a conditional offer may still be bona fide and create a corresponding

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472 N.E.2d at 968; *Allright New York Parking, Inc. v. Shumway*, 463 N.Y.S.2d 968, 970 (N.Y. App. Div. 1983). Further, whether the City intended to be bound, or considered that it was bound, to purchase the Golf Course, notwithstanding the lack of final Council approval and during the time when such approval was being sought, is also a question of fact.

legal obligation to attempt to fulfill the condition(s). A party's obligation to use reasonable efforts and to act in good faith to satisfy conditions to contract formation or performance is well-recognized in 15 Williston on Contracts § 38:1 (4th ed.), Restatement (Second) of Contracts §§ 225(3) and 245 (1981) ("Section 225(3)" and Section 245"), and case law in Colorado and other jurisdictions. "When conditions exist, either to the formation of a contract or to performance under it, the parties must make reasonable efforts and accept reasonable terms in order to satisfy those conditions." 15 Williston on Contracts § 38:1 (4th ed.). *See also Atteberry v. Maumelle Co.*, 60 F.3d 415, 420 (8th Cir. 1995) (same). Section 225(3) states:

> Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.
>
> Comment d … The same term may, however, be interpreted not only to make an event a condition of the obligor's duty, but also to impose a duty on the obligee that it occur. And even where no term of the agreement imposes a duty that a condition occur, the court may supply such a term.

(Emphasis added). Section § 245 states:

> Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.
>
> Comment a. Excuse of non-occurrence of condition. Where a duty of one party is subject to the occurrence of a condition, the additional duty of good faith and fair dealing imposed on him … may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence.
>
> Illustration 4. A contracts to sell and B to buy A's rights as one of three lessees under a mining lease in Indian lands. The contract states that it is "subject only to approval by the Secretary of the Interior," which is required by statute. B files a request for approval but A fails to support B's request by giving necessary cooperation. Approval is denied and A cannot convey his rights. B has a claim against A for total breach of contract. A's breach of his duty of good faith and fair dealing contributed materially to the non-occurrence of the condition, approval by the Secretary of the Interior, excusing it.

(Emphasis added). *See also In re President Casinos, Inc.*, 419 B.R. 381, 390 (E.D. Mo. 2009) ("Courts in other jurisdictions that have confronted analogous circumstances have concluded that when a party withdraws its application to a board or agency before a final determination can be made on that application, it has acted in a way that hinders the condition precedent requiring approval of that board or agency. Thus, the defendants in those cases were not permitted to rely on the failure of the condition as a basis to terminate their contracts.").

Colorado has adopted Section 245 and recognizes the duty of good faith in performing conditions to contract formation or performance, including not to interfere with the occurrence of a condition. *See Dupre v. Allstate Insurance Co.*, 62 P.3d 1024, 1029 (Colo. App. 2002) (citing Section 245 and recognizing that the duty of good faith and fair dealing under Colorado law "requires that [a party] not act to prevent the occurrence of conditions to [contract] performance."); *Navajo Freight Lines, Inc. v. Moore*, 463 P.2d 460, 462 (Colo. 1970)("[I]t is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of that failure"). Other jurisdictions similarly recognize the principle that when a contract has a stated condition subject to formation or performance, the parties are "required to reasonably and in good faith attempt to fulfill that condition." *Baxter v. Aunders Outdoor Advertising, Inc.*, 171 P.3d 469, 472 (Utah Ct. App. 2007) (explaining that because one of the parties "had the burden of obtaining the permit" as a condition of the contract, that party was "obligated to proceed in good faith to cooperate in performing the contract in accordance with its expressed intent", including obtaining the permit); *In re Bicostal Corp.*, 202 B.R. 998, 1004 (M.D. Fla. 1996) (holding that the bankruptcy court erred in failing to consider "conditions in the contract that the

parties to the contract were required in good faith to attempt to fulfill"); *USGI, Inc. v. Michele Ltd. P'Ship*, No. B-88-229, 1991 WL 152445, at *2 (D. Conn. Jan. 26, 1991) ("Connecticut law imposes upon plaintiff a duty of good faith and fair dealing in an attempt to fulfill the conditions in the contract in good faith", and stating further that the failure "by plaintiff to find a purchaser for the mortgage, if not done in good faith, would be a breach of this duty."). *Highland Inns Corp. v. A.M. Landmark Co.*, 650 S.W.2d 667, 673-74 (Mo. Ct. App. 1983), is also instructive. There a purchase and sale agreement for real estate stated: "If buyer has not obtained and delivered to seller long term mortgage commitment in the amount of $1,300,00 on or before August 19, 1978, this contract is null and void". *Id.* at 673 (emphasis added). Notwithstanding such language, the Court held the buyer was obligated to attempt to make the condition occur; because the buyer failed to do so, the seller was entitled to recoup damages for breach of the agreement. *See id.* at 673-74.

Here, the City under the PSA was to seek Council approval; its offer was binding to that extent at the very least. The fact it elected to withdraw the request for formal Council approval, in order to defeat Arcis's first refusal rights, excuses the condition under Article 24, in any event cannot be a basis to defect Arcis's first refusal right. The "legal, valid and binding obligation" on the City included the obligation to seek Council approval; hence the offer, even with this condition, triggered Clayton's obligation to give Arcis Golf notice.

Arcis Golf alleges in the Complaint facts that go beyond showing that a bona fide offer was made that would be binding on the City. Those non-conclusory allegations are to be accepted as true and for purposes of the Motion and are reason alone to deny it. The fact that the City publicly announced its agreement to purchase the Golf Course, and then agreed to the

purchase price and a myriad of other terms in the PSA, is evidence of its intention to be bound to the offer – to be unbound only if Council disapproved. If there had not been a bona fide offer, why was there a fully negotiated PSA with public announcements that an "agreement" had been reached? The Complaint allegations sufficiently state a plausible claim for relief.

7. <u>The Motion Should Be Denied Because of Outstanding Issues Related to the City's Offer</u>

Rule 12(b) allows a Court to consider "matters outside the pleadings" and treat a Rule 12(b)(5) motion as one for summary judgment, with all parties being given "reasonable opportunity to present all material made pertinent to such a motion by C.R.C.P. 56". This case calls for such treatment. Clayton's contract construction argument is dependent on a fact issues that must be explored in discovery and properly briefed before the Motion can be resolved. The Court must consider matters outside of the pleadings where such evidence establishes the extent to which Clayton and the City acted as if a bona fide offer had been made.

Arcis Golf lacks important factual information relevant to the Motion – *e.g.*, whether the parties considered the accepted offer to be approved and binding at the time, what pre-approvals or pre-authorizations were obtained by the City prior to and after making the offer, and what representations were made regarding obtaining final City approval. Such issues (among others) must be considered before the Court determines whether dismissal would be appropriate. *See Dorman*, 914 P.2d at 911-12. In accordance with C.R.C.P. 56(f), Arcis should be allowed to conduct discovery; it is hard to imagine the City would proceed as far as it did without high-level communications and preliminary approval of the PSA purchase terms.

WHEREFORE, Plaintiff Arcis Golf requests that the Motion be denied, or alternatively should be treated as one for summary judgment and determined after discovery has occurred.

SENN VISCIANO CANGES P.C.

/s Frank W. Visciano [Orig. Sign. on File]
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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, a true and correct copy of the above and foregoing was served via Colorado Courts E-Filing on the following:

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