

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202 (720) 865-8301	DATE FILED: June 20, 2018 5:13 PM FILING ID: DFBF2057D317C 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 Facsimile: (303) 296-9101 FVisciano@sennlaw.com ; CFuller@sennlaw.com ; DVisciano@sennlaw.com	Case Number: Division/Courtroom:
AMENDED COMPLAINT	

Plaintiff Evergreen Alliance Golf Limited, L.P., d/b/a Arcis Golf ("Arcis Golf"), for its Amended Complaint against Defendant Clayton Early Learning, as Trustee of the George W. Clayton Trust, alleges the following:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Arcis Golf is Delaware Limited Partnership with its principal office address at 4851 LBJ Freeway, Ste 600, Dallas, TX 75244.

2. Clayton Early Learning is a Colorado nonprofit corporation with its principal office street address at 3801 Martin Luther King Blvd, Denver, CO 80205. The George W. Clayton Trust is a Colorado Trust whose Trustee is Clayton Early Learning. Clayton Early Learning and the George W. Clayton Trust shall be referred to together as the "Trust".



3. This Court has personal jurisdiction over the Trust pursuant to C.R.S. § 13-1-124 because it transacts business in Colorado and owns real property situated in Colorado.

4. Venue is proper pursuant to C.R.C.P. 98(a) because this action involves Arcis Golf's right of first refusal to purchase the land and improvements, situated in Denver, Colorado, that are the subject of the "Lease", described below, commonly known (and referred to herein) as the "Park Hill Golf Course".

GENERAL ALLEGATIONS

5. The Clayton Foundation, as Trustee of the George W. Clayton Trust, as Lessor, and American Golf Corporation, as Lessee, entered into a Lease dated December 23, 1998 (the "Original Lease"), as amended by that certain First Amendment to Lease dated April 30, 2004 ("First Amendment"), that certain Second Amendment to Lease dated February 23, 2013 ("Second Amendment"), and that certain Third Amendment to Lease dated April 8, 2015 ("Third Amendment" and, together with the Original Lease and First Amendment and Second Amendment, the "Lease") for the Park Hill Golf Course, as further defined in the Lease.

6. Clayton Early Learning is successor-in-interest to The Clayton Foundation as Trustee of the George W. Clayton Trust.

7. Arcis Golf is successor-in-interest, as Lessee, to American Golf Corporation under the Lease, and has been the tenant and operator of the Park Hill Golf Course since December 2008.

8. Arcis Golf has a right of first refusal to purchase the Trust's fee interest in the Park Hill Golf Course under Article 24 of the Lease, which states in relevant part:

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.

9. On information and belief, the City of Denver, Colorado ("City") began discussing a possible purchase of the Park Hill Golf Course with the Trust sometime in late 2016 or early 2017.

10. The City announced publicly in September 2017 that it had reached agreement to purchase the Park Hill Golf Course from the Trust.

11. The Trust and the City drafted an Agreement Concerning Park Hill Land, a purchase and sale agreement for the Park Hill Golf Course (the "PSA", a copy of which is Exhibit 1 hereto). 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.

12. 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 the Trust could earn up to \$24 million in total from the City depending on additional considerations.

13. 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. It was made clear in those discussions that if Arcis Golf did not agree to waive its right to extend the Lease early then the Trust would seek to collect millions of dollars from Arcis Golf at the end of the Lease term for repairs to Park Hill Golf Course that the Trust claims are required under the Lease, but that if Arcis Golf would agree to give up its right to extend the Lease term early, then the Trust would not make any claims against Arcis Golf for additional sums at the end of the Lease term. 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.

14. On November 28, 2017, Arcis Golf delivered to the Trust a letter demanding that the Trust 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.

15. On information and belief, the Trust shared the November 28, 2017 letter with the City.

16. On information and belief, the 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.

17. 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. According to the Trust's December 14 letter, the 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.

18. 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.

19. The Trust also clearly and unequivocally manifested its willingness in writing to be bound to sell the Park Hill Golf Course to the City.

20. The Trust has continued to deny Arcis Golf's right of first refusal under Article 24 of the Lease to purchase the Park Hill Golf Course on the same terms as had been offered to the City.

21. On January 2, 2018, the Denver City Council approved the City's use of condemnation proceedings to condemn the Park Hill Golf Course. On information and belief, including information the City disclosed, in early 2018, that the City is planning to condemn temporarily approximately 90 acres of the total 155 acre leased premises and get a permanent easement over approximately 25 acres for the detention pond.

22. On information and belief, as of the filing of this Complaint, the City has not released its construction plans for the site, nor has it announced what it plans to do to restore the golf course when it completes the construction of the detention pond.

23. The anticipated condemnation proceedings do not vitiate Arcis Golf's first right of refusal under Article 24 of the Lease.

24. Pursuant to the Lease, the Trust entered an agreement with Arcis Golf under which Arcis Golf was granted a right of first refusal to purchase the Park Hill Golf Course, and under which the Trust agreed to provide to Arcis Golf notice of its receipt of a bona fide offer for the purchase of the Golf Course property, with such notice to be provided before the City accepted such offer.

25. The Trust breached this agreement with Arcis Golf as specified above, and breached its implied covenant of good faith and fair dealing in the performance of its obligations under Article 24 of the Lease, by, among other things:

- a. Failing to provide Arcis Golf with notice of the City's purchase offer for the Golf Course;
- b. Refusing to recognize Arcis Golf's right of first refusal arising under Article 24 as a result of the City's offer and the Trust's acceptance of the offer; and
- c. Undertaking efforts and attempting to defeat or divest Arcis Golf of its right of first refusal. Such efforts by the Trust included, but were not limited to, cooperating with the City in formulating and attempting to implement, as an alternative to the City's planned purchase of the Golf Course as reflected by the PSA, a condemnation of certain portions of the Golf Course property, and then threatening Arcis Golf with a condemnation of the Golf Course property by the City if Arcis Golf failed to agree to waive its right to extend the Lease (and thus waive its right of first refusal contained therein).

26. As a result of the Trust's conduct, the City, among other things, halted the approval process it had undertaken with City Council, and took further steps, in cooperation with the Trust, in an attempt to avoid or defeat, Arcis Golf's first refusal right.

FIRST CLAIM FOR RELIEF

(Breach of Lease and Implied Covenant of Good Faith and Fair Dealing)

27. Arcis Golf repeats and realleges Paragraphs 1 through 120, above.

28. The Lease contains an implied duty of good faith and fair dealing, requiring the Trust to perform its contractual obligations, including those under Article 24, in good faith and in a reasonable manner.

29. The Trust is in breach of the Lease, and the implied covenant of good faith and fair dealing contained therein, due to (among other things) its failure to give notice to Arcis Golf of the City's purchase offer as required under Article 24 of the Lease, and its failure to recognize and honor Arcis Golf's right of first refusal, under Article 24 of the Lease, to purchase the Park Hill Golf Course on the same terms as offered by the City.

30. The Trust improperly exercised discretion in its performance of Article 24 of the Lease by not providing Arcis Golf with notice of the City's purchase offer when made, by the Trust's acceptance of that offer before providing Arcis Golf with the requisite notice, and by the Trust's negotiation and finalization of the PSA. Arcis Golf was made aware of the City's offer, and that the Trust and the City had negotiated PSA, only through public announcements. The Trust further improperly exercised discretion in its performance of Article 24 by denying Arcis Golf a right of first refusal based on the City's offer, by Clayton's acceptance of the City's offer

without the requisite notice to Arcis Golf, by Clayton's negotiation of the PSA, and by Clayton engaging in other conduct intended to avoid or defeat Arcis Golf's first refusal right.

31. The Trust's breaches are material.

32. Arcis Golf seeks specific performance of Article 24 of the Lease to purchase the Park Hill Golf Course on the same terms as were offered to the City. In the alternative and as a direct and proximate result of the Trust's material breaches of the Lease and the implied covenant of good faith and fair dealing contained therein, Arcis Golf has been and will be damaged in amounts to be proven at trial.

33. Arcis Golf has fully performed under the Lease, or its failure to perform in full was excused and/or justified.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment)

34. Arcis Golf repeats and realleges Paragraphs 1 through 33, above.

35. Arcis Golf contends, and the Trust disputes, that (a) a "bona fide offer" was solicited or received by the City to purchase the Park Hill Golf Course; (b) Arcis Golf's first right of refusal under Article 24 of the Lease was triggered by the offer; and (c) the Trust violated Article 24 of the Lease by denying Arcis Golf's right of first refusal to purchase the Park Hill Golf Course on the same terms as had been offered to the City.

36. Arcis Golf requests a declaratory judgment from the Court determining, among other things, that a "bona fide offer" was solicited or received by the City to purchase the Park Hill Golf Course; (b) Arcis Golf's first right of refusal under Article 24 of the Lease was triggered by the offer; (c) the Trust violated Article 24 of the Lease by denying Arcis Golf's right of first refusal to purchase the Park Hill Golf Course on the same terms as had been offered to the City; and (d) Arcis Golf is entitled to specific performance.

37. Arcis Golf reserves its right to request that the Court conduct "a speedy hearing of [this] action for a declaratory judgment and ... advance it on the calendar." *See, e.g.* C.R.C.P. Rule 57(m). *See also*, C.R.S. §§ 13-51-101, *et seq.*, Uniform Declaratory Judgments Law.

PRAYER FOR RELIEF

WHEREFORE, Arcis Golf is entitled to, and asks the Court to grant, the following relief:

A. An Order requiring the Trust's specific performance under Article 24 of the Lease, allowing Arcis Golf to purchase the Park Hill Golf Course on the same terms as had been offered to the City;

B. Judgment in Arcis Golf's favor and against the Trust for all damages resulting from the Trust's breach of the Lease, in amounts to be proven at trial;

C. Declaratory Judgment as set forth herein;

D. An award of interest, attorneys' fees, and costs; and

E. Such further relief as the Court deems proper.

_____, 2018

SENN VISCIANO CANGES P.C.

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

Frank W. Visciano, #7274

Charles E. Fuller, #43923

Devin N. Visciano, #45216

ATTORNEYS FOR PLAINTIFF

Address of Plaintiff

4851 LBJ Freeway, Ste 600

Dallas, TX 75244