

<p>DISTRICT COURT</p> <p>CITY & COUNTY OF DENVER, COLORADO</p> <p>1437 Bannock Street</p> <p>Denver, Colorado 80202</p>	<p>DATE FILED: November 30, 2018 11:22 AM</p>
<p>Plaintiff:</p> <p>EVERGREEN ALLIANCE GOLF LIMITED, L.P., d/b/a ARCIS GOLF;</p> <p>v.</p> <p>Defendant:</p> <p>CLAYTON EARLY LEARNING, AS TRUSTEE OF THE GEORGE W. CLAYTON TRUST, a Colorado Trust</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2018CV31475</p> <p>Courtroom: 275</p>
<p style="text-align: center;">ORDER RE: DEFENDANT'S MOTION TO DISMISS</p>	

THIS MATTER comes before the court on Defendant's July 18, 2018 Motion to Dismiss Plaintiff's Amended Complaint Pursuant to C.R.C.P. 12(b)(5). Plaintiff filed its Response on August 7, 2018; and Defendant filed a Reply on August 14, 2018. The Court, having reviewed the Motion, Response, Reply, the relevant legal authority, the court file, and being otherwise fully advised in the premises, **HEREBY ORDERS** as follows:

I. BACKGROUND

This case arises from Defendant Clayton Early Learning's ("Clayton") attempted sale of Park Hill Golf Course ("Park Hill") to the City and County of Denver (the "City"). Plaintiff Arcis Golf ("Arcis") is the lessee of Park Hill and has operated the golf course since December 2008. Am. Compl. ¶ 7. The contract between the parties provides that if Clayton receives a bona fide offer, Arcis' right of first refusal provision is triggered and Arcis has thirty days from the receipt of written notice to purchase Park Hill on the term and conditions set forth in the offer. *Id.* ¶ 5-8.

Plaintiff filed their Amended Complaint on June 20, 2018 alleging breach of contract and implied covenants of good faith and fair dealing, and a further claim for declaratory judgment to determine if the Agreement between Arcis and the City constituted a “bona fide offer” under the lease. Plaintiff is requesting the court order specific performance of the right of first refusal provision and to allow Arcis to purchase Park Hill on the same terms as had been offered to the City.” *Id.* The predominate issue is whether Clayton received a “bona fide offer” from the City to purchase Park Hill thus triggering Arcis’ right of first refusal. *Id.*

On July 18, 2018, Clayton filed its Motion to Dismiss arguing that all of the claims fail and the Amended Complaint should be dismissed because the City did not have the capacity to make a “bona fide offer” without City Council approval. On August 7, 2018, Arcis filed its Response arguing that it had alleged sufficient facts to demonstrate a “bona fide offer.” On August 14, 2018, Clayton filed its Reply in support of dismissal.

II. STANDARD OF REVIEW

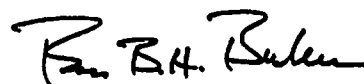
To survive a C.R.C.P. 12(b)(5) motion, a complaint must state a plausible claim for relief. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). The Court “must base its decisions solely on the complaint itself,” accept all factual allegations in a complaint as true, and make all reasonable inferences in favor of the plaintiff. *Bristol Co., LP v. Osman*, 190 P.3d 752, 755 (Colo. App. 2007); see *Warne v. Hall*, 373 P.3d at 591. However, “a document referred to in the complaint . . . is not considered a matter outside the pleading.” *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). C.R.C.P. 12(b)(5) is not an appropriate vehicle for factual determinations, and only tests the adequacy of the pleadings. See *Bristol Bay Productions, LLC v. Lampack*, 312 P.3d 1155, 1164 (Colo. 2013).

III. ANALYSIS

Arcis’ Amended Complaint properly alleges a breach of the lease and implied covenants of good faith and fair dealing, and properly requests declaratory judgment. The parties dispute whether the City’s actions constitute a “bona fide offer.” The court accepts as true the allegations in the Amended Complaint including the allegations that the City agreed to purchase Park Hill from Clayton. Am. Compl. ¶ 9–12. Additionally, whether the actions constitute a “bona fide offer” is a mixed question of law and fact which the court cannot properly address on a 12(b)(5) motion. In conclusion, Arcis’ Amended Complaint meets the *Warne* plausibility standard, and therefore, the Motion is DENIED. Clayton shall have ten (10) days from the date of this to answer Plaintiff’s Amended Complaint.

DATED this 30th day of November, 2018.

BY THE COURT.



Ross B.H. Buchanan
Denver District Court Judge