DISTRICT COURT, PITKIN COUNTY, COLORADO 506 EAST MAIN STREET, SUITE 300 ASPEN, CO 80161 (970) 925-7635	DATE FILED October 21, 2025 8:52 PM CASE NUMBER: 2023CV30102
Plaintiff / Counterclaim Defendant: **HILLARY THOMAS** vs. Defendant / Counterclaim Plaintiff**: JEAN PIERRE CONTE aka J-P CONTE**	CASE NO: 2023CV30102 DIV: 5

ORDER ON DEFENDANT/COUNTERCLAIM PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter comes before the Court on a Second Motion for Partial Summary Judgment ("Motion") filed by Defendant / Counterclaim Plaintiff, Jean Pierre Conte. The Motion is opposed by Plaintiff / Counterclaim Defendant, Hillary Thomas. Having reviewed the pleadings, and the pertinent record, and being otherwise fully advised, the Court finds, concludes, and orders as follows:

BACKGROUND

Ms. Thomas alleges Mr. Conte verbally abused and physically injured her during an altercation that broke out in the late evening, on or about January 8-9, 2022. Ms. Thomas filed this suit seeking damages and other forms of civil relief for this incident, as well as for certain actions Mr. Conte allegedly took afterwards causing injury to her existing and prospective business interests. Mr. Conte countersued seeking damages and a permanent injunction for defamation, slander and slander *per se*.

STANDARD OF REVIEW

A court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *Matter of Kennedy*, 2024 CO 21, ¶48, 546 P.3d 1160. A material fact is one that would impact the outcome of the case. *City of Aurora v. ACJ Partnership*, 209 P.3d 1076, 1082 (Colo. 2009). The trial judge's proper function at the summary judgment stage is not "to weigh the evidence and decide what occurred, but to determine whether or not a genuine issue exists for the jury." *Andersen v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007). In doing so, the court resolves any doubts about whether a triable issue of fact exists against the moving party and grants the nonmoving party the benefit of "all favorable inferences that may be drawn from the undisputed facts." *AviComm, Inc. v. Colorado Pub. Utilities Comm'n*, 955 P.2d 1023, 1029 (Colo. 1998). Summary judgment is "a drastic remedy" that is only warranted when it is clear the requirements of C.R.C.P. 56(c) have been met*.* *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

The moving party bears the initial burden of showing that there is no genuine issue of material fact to be resolved at trial. *Greenwood Trust*, 938 P.2d at 1149. Where a party moves for summary judgment on an issue on which [it] would not bear the burden of persuasion at trial, this may be accomplished by "identifying those portions of the record and of the affidavits, if any, which [it] believes demonstrate the absence of a genuine issue of material fact." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987); *Norton v. Ruebel*, 2024 COA 108, ¶49 562 P.3d 96. However, if the moving party would bear the burden of proof on the issue at trial, then it "must establish every element of their claim or defense by sufficient, competent evidence to set forth a prima facie case." *In re Ribozyme Pharms., Inc. Sec. Litig.*, 209 F. Supp. 2d 1106, 1112 (D. Colo. 2002);[1] C.R.C.P. 56(c) and (e); Charles A. Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE, CIVIL 3d, § 2727.

If the moving party clears this initial hurdle, then the burden shifts to the nonmoving party to demonstrate the existence of a triable issue of material fact. *Greenwood Trust*, 938 P.2d at 1149; *Keenan*, 731 P.2d at 713. The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). *See also*, *Roberts v. Am. Family Mut. Ins. Co.*, 144 P.3d 546, 550 (Colo. 2006). "[T]he nonmoving party may not rest on its mere allegations or denials of the opposing party's pleadings but must provide specific facts demonstrating a genuine issue for trial." *City of Longmont v. Colorado Oil & Gas Ass'n*, 2016 CO 29, ¶8, 369 P.3d 573. *See also*, *Larimer Cnty. Bd. of Equalization v. 1303 Frontage Holdings LLC*, 2023 CO 28, ¶28, 531 P.3d 1012 (same). A genuine dispute exists if the evidence presented in opposition to the motion adequately demonstrates that a reasonable jury could return a verdict for the non-moving party. *See*, *Liberty Lobby*, 477 U.S. at 248; *Lindenbaum*, 160 P.3d at 239. An affirmative showing of specific facts by the moving party, uncontradicted by any admissible evidence to the contrary, "leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists." *Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶27, (quoting *Civ. Serv. Comm'n v. Pinder*, 812 P.2d 645, 649 (Colo. 1991)).

[1] Because the Colorado Rules of Civil Procedure are patterned on the federal rules, "we may also look to the federal rules and decisions for guidance." *Garrigan v. Bowen*, 243 P.3d 231, 235 (Colo. 2010). *Barnes v. State Farm Mut. Auto. Ins. Co.*, 2021 COA 89, ¶11, 497 P.3d 5.

DISPUTED / UNDISPUTED FACTS

The Court enters the following rulings concerning the statement of undisputed facts presented by the moving party. If the record on a motion for partial summary judgment shows "material facts exist without substantial controversy" the court "shall if practicable" specify those facts. C.R.C.P. 56(d). At trial, "the facts so specified shall be deemed established, and the trial shall be conducted accordingly." *Id.*

SOF 1. Ms. Thomas's Seventh through Eleventh Claims for Relief, in order, are Tortious Interference with a Contract, Tortious Interference with Prospective Economic Relations, Negligent Misrepresentation, Breach of Contract, and Promissory Estoppel. Exhibit A, First Amended Complaint (FAC), ¶¶ 109-150. **Mr. Conte met his initial burden to show the lack of any genuine dispute. C.R.C.P. 56(c). Ms. Thomas does not raise any dispute. SOF 1 is undisputed.**

SOF 2. Ms. Thomas and Mr. Conte began seeing each other in February 2012**. Exhibit B1**, Transcript of Hillary Thomas's Deposition and Exhibits ("TR Thomas Depo.") at 11:12-16. **Mr. Conte met his burden as moving party by presenting prima facie evidence of SOF 2. *See, In re Ribozyme* at 1112. Ms. Thomas does not articulate any dispute. SOF 2 is undisputed.**

SOF 3. Ms. Thomas and Mr. Conte entered into a written agreement on May 27, 2021, entitled "Final agreed upon Separation agreement – JP and Hillary May 27, 2021" (the "May 27, 2021 Separation Agreement"). Exhibit B1, Thomas Depo. at 122:7-124:9; Exhibit B2, TR Thomas Deposition Exhibit 107**. Ms. Thomas raised no objection to the authenticity or admissibility of Exhibit B1**. ***See, Silver v. Colorado Cas. Ins. Co.,* 219 P.3d 324, 331 (Colo. App. 2009) (a party that fails to object to the authenticity or admissibility of a document has waived any such objections for purposes of summary judgment). Mr. Conte met his burden by presenting prima facie evidence of SOF 3. Ms. Thomas partially denies SOF 3, but the denial is nonspecific, and fails to identify any evidence that would allow a reasonable jury to find in her favor. Naked denials are insufficient to overcome a properly supported factual assertion in a motion for summary judgment. *See*, *City of Longmont* ¶8; *Frontage Holdings,* ¶28; *Anderson*, 477 U.S. at 248; *Lindenbaum*, 160 P.3d at 239; *Griswold*, ¶27. Therefore, SOF 3 is not subject to genuine dispute.**

SOF 4. Ms. Thomas and Mr. Conte signed and accepted a binding Second Amended Mediator's Proposal by Judge Elizabeth White on March 10, 2023 (the "March 10, 2023 Agreement"). Exhibit B1, Thomas Depo. at 166:7-168:16; Exhibits B3 and B4, Thomas Deposition Exhibits 114 and 115; Exhibit C, Ms. Thomas's Amended Responses and Objections to Defendant/Counterclaimant's Second Set of Written Discovery Requests, at pp. 3-4. **The authenticity of Exhibit B3 and B4 is not disputed. It is also undisputed that the parties executed the Second**

Amended Mediator's Proposal. Whether or not the terms of the Second Amended Mediator's Proposal are sufficiently definite, so as to constitute a binding agreement, in whole or in part, is a question of law, not a factual dispute. *See, Stice v.Peterson*, 144 Colo. 219, 355 P.2d 948 (1960). This issue, as well as Ms. Thomas' objection to the admissibility of Exhibit B3 based §13-22-307, C.R.S., will be addressed below.

SOF 5. Ms. Thomas alleges that her "breach of contract and promissory estoppel damages occurred in January 2022 when Mr. Conte stopped performing on his obligations under the "Final agreed upon Separation agreement – JP and Hillary May 27, 2021**."** See Exhibit D, Ms. Thomas's Responses and Objections to Defendant/Counterclaimant's Second Set of Written Discovery Requests at p.11. **The authenticity of Exhibit D is not disputed. It is a sworn statement by Ms. Thomas dated January 31, 2025. Mr. Conte has met his burden as moving party. Ms. Thomas partially denies SOF 5, but the denial is vague, and fails to identify evidence of a particular factual question to be determined at trial. Therefore, SOF 5 is not subject to genuine dispute.**

SOF 6. During, and as a result of Ms. Thomas's relationship with Mr. Conte, Ms. Thomas was contracted for interior design services on a real estate project in Aspen located at 227 East Main Street, in which Mr. Conte was an investor and signatory to the contract (the "227 East Main project"). See Exhibit E1, Mark Friedland Deposition at 45:11-46:1, 60:16-61:10, Exhibit E2, Friedland Exhibit 9. **The authenticity of Exhibit E2 is undisputed. However, causation is generally a question of fact reserved for the jury, except when the "facts are undisputed and reasonable minds could draw but one inference from them." See, *Gibbons v. Ludlow*, 2013 CO 49, ¶ 13, 304 P.3d 239. Mr. Conte has not met his burden to show that no reasonable jury could find Ms. Thomas was hired for reasons other than her relationship with him. The remainder of SOF 6 is undisputed. Ms. Thomas does not offer any evidence showing a genuine *factual* dispute. Her argument concerning the legal effect of Mr. Conte's signature on the contract will be discussed below. Therefore, SOF 6 <u>is subject to a limited dispute</u>.**

SOF 7. Ms. Thomas would not have been involved as a designer on any of Mr. Friedland's projects if not for Mr. Conte's involvement. Exhibit E1, Friedland Depo. at 60:16- 61:10. **For the same reasons as SOF 7, Mr. Conte has not met his burden. Ms. Thomas has identified specific facts that demonstrate a genuine factual dispute. Therefore, SOF 7 <u>is genuinely in dispute</u>.**

SOF 8. Mr. Friedland did not use "most of [Ms. Thomas'] work and substituted other products" because Ms. Thomas's designs were "noneconomic or impractical." Exhibit E1, Friedland Depo. at 76:20-77:1; 80:1-81:23. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 8. Ms. Thomas denies SOF 8, and presents arguments on the legal issues, but fails to identify any contradictory evidence. When responding to a properly supported motion for summary judgment, a party may not rest on "mere allegations or denials**

of the opposing party's pleadings." C.R.C.P. 56(e). SOF 8 is not subject to genuine dispute.

SOF 9. Ms. Thomas was paid for her design work, despite the fact that another employee was also paid for designs which were used on the project. Exhibit E1, Friedland Depo. at 80:12- 82:6, 86:13-87:6. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 9. Ms. Thomas denies the statement without reference to any affidavit or evidence. Therefore, SOF 9 is not disputed.**

SOF 10. Indeed, Mr. Conte told Mr. Friedland "Pay [Ms. Thomas] 100 percent of what she's owed," and Mr. Friedland did. Exhibit E1, Friedland Depo. at 82:3-6. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 10. Ms. Thomas does not present any contradictory evidence. Therefore, SOF 10 is not disputed.**

SOF 11. Ms. Thomas was paid for her work as a designer on the 227 East Main Street project after she submitted four quarterly invoices for $25,000 each, totaling $100,000. Exhibit E1, Friedland Depo. at 72:24-73:8; 74:11-22. **Mr. Conte has not met his burden as moving party on summary judgment to identify portions of the record which "demonstrate the absence of a genuine issue of material fact." See, *Keenan*, 731 P.2d at 712. Mr. Friedland indicated that he did not have firsthand knowledge of whether Ms. Thomas' four invoices, each for $25,000, had been paid. Exhibit E1, 74:11-23. No other competent evidence of these specific payments was offered. On summary judgment, any doubts about whether a triable issue of fact exists will be resolved against the moving party. *AviComm, Inc.* 955 P.2d at 1029. Therefore, SOF 11 is genuinely disputed.**

SOF 12. Mr. Conte has always told Mr. Friedland to do whatever Mr. Friedland thinks is right with respect to Ms. Thomas. Exhibit E1, Friedland Depo. at 80:12-21. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 12. Ms. Thomas denies SOF 12, but does not reference any contradictory evidence. Therefore, SOF 12 is not subject to genuine factual dispute**.

SOF 13. Mr. Friedland is not aware of Mr. Conte ever directing anyone to not work with Ms. Thomas. Exhibit E1, Friedland Depo. at 80:12-21. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 13, however Ms. Thomas presented contradictory evidence that would allow a reasonable jury to find otherwise. Therefore, SOF 11 is genuinely disputed.**

SOF 14. Ms. Thomas was contracted for another Aspen real estate project, located at 208 East Main Street, on which Mr. Conte was an investor and signatory to the contract (the "208 East Main project"). Exhibit E1, Friedland Depo. at 21:4-21, Exhibit E3, Friedland Exhibit 10. **The authenticity of Exhibit E3 is undisputed. Mr. Conte has met his burden by presenting prima facie evidence of SOF 14. Ms. Thomas does not offer any evidence of a factual discrepancy. Her argument concerning the legal effect of Mr. Conte's signature on the contract will be discussed below. SOF 14 is not the subject of a genuine factual dispute.**

SOF 15. Ms. Thomas did not do any design work on the 208 East Main project. Exhibit E1, Friedland Depo. at 75:2-5. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 15. Ms. Thomas denies SOF 15, but fails to identify any contradictory evidence that would allow a reasonable jury to find in her favor. Mere allegations or denials of the opposing party's pleadings are insufficient to defend against a properly supported motion for summary judgment. *See,* C.R.C.P. 56(e). SOF 15 is not disputed.**

SOF 16. Ms. Thomas was paid her share of the net profits for the 208 East Main project despite the fact that she did not provide any design services on the project. Exhibit E1, Friedland Depo. at 75:2-18. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 16. Ms. Thomas denies SOF 16, referencing Mr. Friedland's testimony that "Well, yes, there's always trailing de minimis distributions when we close the accounts, so there might be a couple thousand bucks." Ms. Thomas does not identify any other contradictory evidence. Consequently, SOF 16 <u>is subject to a limited dispute</u> concerning whether Ms. Thomas is owed a portion of any "trailing de minimis distributions."**

SOF 17. Ms. Thomas was discussed as a possible designer on the "Pioneer Park" project, another real estate project in Aspen, if Mr. Conte were involved in that project. However, that project did not come to fruition because the property was acquired by Mr. Friedland as a life estate and the individual benefited by the life estate is still alive. Exhibit E1, Friedland Depo. at 53:1-54:24. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 17. Ms. Thomas does not dispute this statement.**[2]

SOF 18. As of October 20, 2024, Mr. Friedland was not doing any new real estate projects. Exhibit E1, Friedland Depo. at 209:8-12. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 18. Ms. Thomas does not dispute this statement.**

SOF 19. Ms. Thomas alleges that she received $20,000 monthly payments for her interior design services for the property located at 127 American Lane, Aspen, CO, sometimes referred to as "Leila Ranch," and these payment obligations were documented in the "Final agreed upon Separation agreement – JP and Hillary May 27, 2021." Exhibit D at p. 6. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 19. Ms. Thomas does not dispute this statement.**

SOF 20. Ms. Thomas alleges that Mr. Conte tortiously interfered with "the 'Final agreed upon Separation agreement – JP and Hillary May 27, 2021', the oral contract she had for the property located at 127 American Lane, Aspen, CO, sometimes referred to as 'Leila Ranch,' and other Aspen projects." Exhibit D at p. 16. **Mr.**

[2] Ms. Thomas asserts she is without sufficient knowledge or information as to SOF 17 & 18, but she did not file a motion pursuant to C.R.C.P. 56(f). Mere allegations or denials are insufficient to overcome a properly supported motion for summary judgment. *See*, *City of Longmont* ¶8; *Frontage Holdings,* ¶28; *Anderson*, 477 U.S. at 248; *Lindenbaum*, 160 P.3d at 239; *Griswold*, ¶27.

Conte has met his burden by presenting prima facie evidence of SOF 20. Ms. Thomas does not dispute this statement.

SOF 21. Ms. Thomas alleges that Mr. Conte tortiously interfered with her prospective economic relations when he "demanded that Ms. Thomas be removed from all communications and websites, as documented in several text message communications between Mr. Conte and William Conte, Mark Friedland, Lexi Zavad and Stephen Moser." Exhibit D at p. 7. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 21. Ms. Thomas does not dispute this statement.**

SOF 22. Ms. Thomas alleges that she would be a part of at least two development projects in Aspen in which Mr. Conte had a substantial economic interest. Exhibit A, FAC, ¶110. **Mr. Conte has met his burden by presenting prima facie evidence of SOF 22. Ms. Thomas does not dispute this statement.**

SOF 23. Ms. Thomas alleges that Mr. Conte made a series of negligent misrepresentations when he, among other alleged misrepresentations, "repeatedly told Ms. Thomas over the course of their 10-year relationship that his plan was to build and create wealth for her of $40 to $50 million so she would not have to worry about finances." Exhibit C at p. 5.

a. Ms. Thomas also alleges that Mr. Conte promised to pay Ms. Thomas $20,000 a month for her interior design services until the completion of Leila Ranch. Mr. Conte stopped making those payments to Ms. Thomas approximately two years prior to the completion of the project.

b. Mr. Conte promised that Leila Ranch would be one of the biggest projects of her career and that it would be extremely beneficial for her design business, and that she would be able to add it to her website and portfolio. However, after the assault, Mr. Conte made a point of removing Ms. Thomas from the project in all respects.

c. Mr. Conte also promised Ms. Thomas that she would receive payments for her design work on 208 East Main Street and 227 East Main Street; however, Ms. Thomas has not received payments for 227 East Main Street.

d. Mr. Conte also relied on Ms. Thomas to do the majority of the decision-making with regards to design and designing logos for Mr. Conte's yacht Perseus 3 and also for Mr. Conte's private plane Jean P-Air. Mr. Conte promised Ms. Thomas that she would be able to publish this work on her website and include it in her portfolio, but she has been unable to do so.

e. Mr. Conte negligently made promises to Ms. Thomas regarding payments and design credits she would receive for improvements she made to Mr. Conte's various properties including the Contento property located in Napa Valley, California; 1 Cherry St, San Francisco, California; the Cemento property located in Aspen, Colorado; [and] 936 King Street, Aspen, Colorado … [and]

f. Mr. Conte also stripped Ms. Thomas of her investments in Genstar. Exhibit C at pp. 5-6

The authenticity of Exhibit C is not disputed. Mr. Conte has met his burden by presenting prima facie evidence of SOF 23. Ms. Thomas asserts that SOF 23 is inaccurate, but fails to identify any particular discrepancies or reference any contradictory evidence. Consequently, SOF 23 is not subject to genuine dispute.

LAW & ANALYSIS

I. Tortious Interference with a Contract

A claim alleging tortious interference with a contract has five elements under Colorado law: "(1) existence of a contract between the plaintiff and a third party; (2) knowledge of that contract by the defendant; (3) the defendant's intentional, improper interference with that contract; (4) breach of that contract by the third party; and (5) resulting damages to the plaintiff." *Arapahoe Surgery Center, LLC v. Cigna Healthcare, Inc.,* 171 F. Supp. 3d 1092, 1120 (D. Colo. 2016) (citing *Colo. Nat'l Bank of Denver v. Friedman*, 846 P.2d 159, 170 (Colo. 1993).

In *MDM Group Assocs., Inc. v. CX Reinsurance Co. Ltd.*, 165 P.3d 882, (Colo. App. 2007), the Colorado Court of Appeals held that defendants cannot be held liable for tortious interference with a contract to which they are a party.

> It is impossible for one party to a contract to maintain against the other party to the contract a claim for tortious interference with the parties' own contract. Neither party is a stranger to the contract. Each party has agreed to be bound by the terms of the contract itself, and may not thereafter use a tort action to punish the other party for actions that are within its rights under the contract.

MDM Group, 165 P.3d at 886 (quoting *Shrewsbery v. Nat'l Grange Mut. Ins. Co*., 395 S.E.2d 745, 748 (W. Va. 1990)).

Tortious interference claims are not intended to allow one party to a contract to impose duties on the other parties that were not bargained for.

> The tortious conduct occurs when the defendant, not a party to the contract, induces the third party to breach the contract, or interferes with the third party's performance of the contract. (citations omitted) Under Colorado law, the tort exists to protect parties to a contract; accordingly, it is the conduct of the third person **who is not a party to the contract** that is punished for inducing a breach or preventing performance of the contract.

Colorado Nat. Bank of Denver v. Friedman, 846 P.2d 159, 170 (Colo. 1993) (emphasis in original). These constraints are appropriate because "[t]he goal to be achieved by these forms of the tort is to protect the integrity of contracts." *Harris Grp., Inc. v. Robinson*, 209 P.3d 1188, 1196 (Colo. App. 2009).

Mr. Conte argues that Ms. Thomas cannot prevail on her claim for tortious interference with a contract because he was a party to all of the contracts at issue. *See*, Motion, pp.7-10; Reply, pp.2-4; Exhibits E2, E3. In response, Ms. Thomas argues that Mr. Conte was not a party to these contracts in his individual capacity and/or that other people or entities were also parties to the contracts in question. *See*, Response, pp.8-11. Ms. Thomas does not dispute Mr. Conte's statement of the applicable law. Likewise, Ms. Thomas does not cite, and the Court did not find, any legal authority for the proposition that a defendant can be held liable for tortiously interfering with his own contract, simply because there are one or more other parties to the same contract besides the plaintiff. Thus, the question of whether or not Mr. Conte is properly deemed a party to the underlying contracts, will determine the motion for summary judgment on Ms. Thomas' claim against him for tortious interference with those contracts.[3]

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[3] Ms. Thomas alleges tortious interference with design services contracts between herself, a developer, and Mr. Conte related to <u>two</u> investment properties in Aspen. FAC, ¶¶110-111. These have been further identified as the contracts relating to 208 Main St. and 227 East Main St., signed by Mr. Mark Friedland and Mr. Conte. Exhibits E2 & E3. The FAC does not articulate any tortious interference claims with regard to the alleged oral contract for design services at 127 American Way ("Leila Ranch"), or the parties' May 27, 2021 Separation Agreement. After a responsive pleading has been filed, amendment of a complaint may only be made by leave of the court or with the written consent of the opposing party. C.R.C.P. 15(a). None the less, by filing this Motion seeking adjudication of Ms. Thomas' tortious interference claims with regard to Leila Ranch and the May 27, 2021 Separation Agreement, the Court finds Mr. Conte explicitly consented to their adjudication. *See*, C.R.C.P. 15(b); *Soicher v. State Farm Mut. Auto. Ins. Co*., 2015 COA 46, ¶¶32-33.

(a) May 27, 2021 Separation Agreement

It is undisputed that Mr. Conte was a party to the May 27, 2021 Separation Agreement. Exhibit B1; SOF 3. Because he is not a third party to the contract, Mr. Conte cannot be held liable for tortious interference with that agreement. *See, MDM Group*, 165 P.3d at 886 ("It is impossible for one party to a contract to maintain against the other party to the contract a claim for tortious interference with the parties' own contract."); *Friedman*, 846 P.2d at 170 ("it is the conduct of the third person **who is not a party to the contract** that is punished for inducing a breach").

(b) 127 American Way ("Leila Ranch")

In her sworn statement dated January 31, 2025, Ms. Thomas alleges the existence of an oral agreement between herself and Mr. Conte for design services related to Leila Ranch. Exhibit D, p.6. On their face, these allegations cannot support a claim for tortious interference by Mr. Conte. In her Response, Ms. Thomas asserts that title to Leila Ranch is held in a limited liability company. She references Exhibits 10 and 11, which appear to be building permit documents identifying Leila Ranch, LLC as the owner of property located at 127 American Way. However, neither of these exhibits demonstrate a genuine dispute concerning her own alleged facts, i.e. that it was Mr. Conte who promised to pay her for design services. Exhibit D, p.6. The existence of an LLC that, at some point, obtained title to Leila Ranch is not inconsistent with the allegation that Mr. Conte verbally promised to pay her for her design contributions.

To overcome a properly supported motion for summary judgment, the nonmovant "must provide specific facts demonstrating a genuine issue for trial*." City of Longmont* ¶8. *See also*, C.R.C.P. 56(e); *Lindenbaum*, 160 P.3d at 239. *Griswold*, ¶27.Ms. Thomas offers no competent evidence that contradicts her own allegation that there was an oral agreement between herself and

Mr. Conte. Her attempt to hold Mr. Conte liable for tortiously interfering with a verbal agreement he allegedly made with her fails, as a matter of law.

(c) 227 East Main and 208 Main

It is undisputed that Mr. Conte signed two contracts, concerning design services for 227 East Main and 208 Main, on behalf of The Jean-Pierre Conte Revocable Trust ("Trust"). Exhibits E2, E3; SOF 6, 14. "A revocable trust is '[a] trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income.'" *Pandy v. Indep. Bank,* 2016 CO 49, ¶16, 372 P.3d 1047 (citing BLACK'S LAW DICTIONARY (10th ed. 2014)). As such, "the settlor of a revocable trust necessarily retains the functional equivalent of ownership of the trust assets." *Id*. (citing RESTATEMENT (THIRD) OF TRUSTS §§ 25, 74). Likewise, a living settlor's interest in a revocable trust is subject to levy and execution by the settlor's judgment creditors. *Id*. In light of *Pandy*, the prevailing view is that Colorado law does not regard *inter vivos* revocable trusts as separate legal entities.

> While *Pandy* does not use the term "alter ego" to define the relationship between the settlor of a revocable trust and the trust itself, secondary sources considering Colorado trust law in other circumstances have made such a comparison. See § 25.3.8--Tax Savings Characteristics, *Colo. Est. Planning Handbook* 25.3.8, ("the revocable trust is a living settlor's alter ego, from a tax perspective..."); Jennifer M. Spitz, *The Lifecycle of A Revocable Trust*, Colo. Law., February 2020, at 56, 58 ("The revocable trust is essentially an alter ego of the settlor.").

Herman v. PBIA & Co., 19-CV-00584-RMR-GPG, 2022 WL 18777070, *3 (D. Colo. Feb. 1, 2022). Many states have reached a similar conclusion. *See, Pandy*, ¶18 (discussing concurring decisions in Kansas, New Hampshire, Hawaii and California.); *In re Brock*, 494 B.R. 534, 548 (Bankr. D. Colo. 2013) (applying California law) (the *inter vivos* revocable trust "is not a legal entity; it is simply a collection of assets and liabilities.")

Once again, the *Friedman* case is instructive. In *Friedman*, the defendant bank was the trustee of a revocable trust that held the settlor's interest in a mobile home resort (and subsequently became the personal representative of the estate upon the settlor's death). There, the Colorado Supreme Court held that "the Bank cannot be liable for tortiously interfering with the performance of the 1978 Agreement because the Bank is obligated to perform [settlor] 's duties under the 1978 Agreement or be liable in breach." *Friedman*, 846 P.2d at 171. Thus, *Friedman* holds that the defendant/trustee of a trust that enters into a contract with a plaintiff cannot be sued for tortious interference with that contract. The rationale for this approach is only strengthened where, as here, the settlor and the trustee of the revocable trust were the *same* individual.

The 208 Main and 227 East Main contracts obligate the Trust to pay to Ms. Thomas "five percent (5%) of any distributions that such member may receive in the future from [the LLC] attributable to net profits." In his simultaneous roles as trustee and settlor of the Trust, Mr. Conte retained an immediate financial interest in these contracts. Because the trust is revocable, and Mr. Conte is its living settlor, his relationship to the 208 Main and 227 East Main contracts is not that of a third-party interloper, but that of a contracting party. Thus, Ms. Thomas' remedy for the alleged nonpayment of her interior design fees sounds in contract, not tort.

For the reasons discussed above, summary judgment is granted in Mr. Conte's favor with regard to Ms. Thomas' claim for tortious interference with a contract. FAC, Seventh Claim, ¶¶ 109-116.

II. Tortious Interference with Prospective Business Relations

A plaintiff seeking relief for the tort of intentional interference with prospective business relations, must demonstrate "intentional and improper interference preventing the formation of a contract." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 500 (Colo.1995) (citing *Dolton v. Capitol Fed. Sav. & Loan Ass'n*, 642 P.2d 21, 23 (Colo.App.1981)).

> One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of
>
> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

Id. at 500 (quoting THE RESTATEMENT (SECOND) TORTS, §766(b)). For these purposes, "a protected relationship exists only if there is a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a mere hope." *Klein v. Grynberg*, 44 F.3d 1497 (10th Cir. 1995).

Ms. Thomas alleged she "expected to complete two projects in Aspen and further her relationship with that developer and the architects and builders on that project to contract for future projects." FAC, ¶121. Ms. Thomas' contracts for design services relating to 208 Main and 227 East Main contained no provisions guaranteeing that the owners of those properties would accept/implement her design proposals. None the less, all Colorado contracts contain an implied duty of good faith and fair dealing. *Amoco Oil,* 908 P.2d at 498. Whether a party acted in good faith is a question of fact, to be determined by the jury. *Id.* at 499.

Ms. Thomas also stated that she was prohibited from "using the various projects above for marketing purposes" and "unable to add references to these projects to my website and portfolio." Exhibit 33, Thomas Affidavit, ¶4. The written contracts for 209 Main and 227 East Main do not contain any terms allowing Ms. Thomas to publish photographs or other details about the projects for her own marketing purposes. Exhibits E2, E3. However, Ms. Thomas alleges that Mr. Conte represented to her that she would enjoy these privileges with regard to various real properties and his yacht. Exhibit 33, Thomas Affidavit, ¶3.

Ms. Thomas additionally alleged that Mr. Conte tortiously interfered with her prospective business relations when he "demanded that Ms. Thomas be removed from all communications and websites as documented in several text message communications between Mr. Conte and William Conte, Mark Friedland, Lexi Zavad and Stephen Moser." Exhibit D, p.7. Exhibit 8. She also offered evidence that Mr. Conte instructed Tiffany Phipps (an employee of Mr. Friedland) to tell Ms. Thomas she could not visit the Leila Ranch property site on or about February 22, 2022, and to offer a pretextual explanation that would not reveal his involvement in the decision. Exhibit 4. At the summary judgment phase, Ms. Thomas benefits from "all favorable inferences" that may be drawn from these facts. *AviComm, Inc*., 955 P.2d at 1029.

In addition to proving improper interference by Mr. Conte, Ms. Thomas must also demonstrate that, but for such interference, she would have obtained contracts or business transactions. "While the existence of an underlying contract is not required for this tort, there must be a showing of improper and intentional interference by the defendant that prevents the formation of a contract between the plaintiff and a third party." *MDM Group*, 165 P.3d at 886; *Omedelena v. Denver Options*, Inc., 60 P.3d 717, 721 (Colo. App. 2002) (same). Mr. Friedland testified that he did not have any pending real estate development projects that he could hire Ms. Thomas to perform work on. SOF 17-18. However, it could be reasonably inferred from the record that Mr. Moser could encourage his architectural clients to retain Ms. Thomas for interior design, and/or that Brikor could have become a source of business referrals for her. *See, e.g*. Exhibit 15. The extent to which her removal from communications and websites relating to properties being developed by Mr. Conte prevented the formation of a contract, and whether such interference was improper (or simply due to her designs not being used), are questions of fact for a jury to decide. *See, Amoco Oil*, 908 P.2d at 500. The trial judge's proper function at the summary judgment stage is not "to weigh the evidence and decide what occurred, but to determine whether or not a genuine issue exists for the jury." *Lindenbaum*, 160 P.3d at 239.

Ms. Thomas' arguments concerning her admission to certain private clubs are more tenuous. Ms. Thomas does not allege that she was prevented from joining such clubs, by paying the membership dues, or otherwise qualifying for membership in her individual capacity. To the contrary, her Exhibit 13 strongly suggests that Ms. Thomas' access to the Barbuda and AMC clubs was predicated on her romantic relationship to Mr. Conte, as his "plus one". *See*, Ex. 13, Ln. 19 ("Who told Luky we are not together?"). In Exhibit 14, Casa Cipriani appears to invite Ms. Thomas to submit an application for individual membership. The legal duty imposed on Mr. Conte to refrain from improperly interfering with Ms. Thomas' prospective business relationships does not extend to pretending they were still a couple, so that she could enjoy private club privileges under the auspices of his personal or family membership.

None the less, overall Ms. Thomas has met her burden to demonstrate that triable issues of material fact are genuinely in dispute and therefore summary judgment is denied as to her interference with prospective business relations claim. FAC, Eighth Claim, ¶¶117-126.

III. Negligent Misrepresentation

Colorado has adopted §552 of the RESTATEMENT (SECOND) OF TORTS in defining negligent misrepresentation. *See, Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A.*, 892 P.2d 230, 235–36 (Colo.1995). The elements of a negligent misrepresentation claim are:

> (1) one in the course of his or her business, profession or employment; (2) makes a misrepresentation of a material fact, without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party justifiably relied on the misrepresentation to his or her detriment.

Allen v. Steele, 252 P.3d 476, 482 (Colo.2001). "Colorado cases demonstrate that the tort of negligent misrepresentation is intended to provide a remedy for, and is in fact limited to, "**money**

losses due to misrepresentation in a business transaction." *Id.* at 484 (quoting *W. Cities Broad., Inc. v. Schueller*, 849 P.2d 44, 49 (Colo.1993) (emphasis added). A "business transaction" in this context accords with the commonly understood meaning, i.e. "the misrepresentation must be given for the plaintiff's business or commercial purposes." *Id.* at 484. Some of the factual allegations offered in support of Ms. Thomas' negligent misrepresentation claims do not satisfy this requirement.

> Defendant told me that he intended to build wealth of $40 to $50 million for me and I relied on his statements. Defendant and I were in a long-term partnership and although we were not married, he consistently told me we were "better than married" and "more married than any other married couple," and that was the reason why he wanted to create wealth for me. He said that because we were not married, he wanted to ensure my financial safety and security.

Exhibit 33, Thomas Affidavit, ¶5. Even if Mr. Conte said these things, these statements cannot support a negligent misrepresentation claim because the kind of economic benefit they describe is purely interpersonal in nature Consequently, Ms. Thomas' disappointment in not receiving such benefits is not actionable under Colorado's negligent misrepresentation law.[4]

Also, in support of her negligent misrepresentation claims, Ms. Thomas alleges:

- Mr. Conte represented that Ms. Thomas would be part of at least two development projects in Aspen in which Mr. Conte had a substantial economic interest. Ms. Thomas began work on those projects believing that she would have a primary role in the interior design, as well as an important role in coordinating the work of the builders and architects. Despite his representations, Mr. Conte has since directly or indirectly prevented Ms. Thomas from assuming her primary design role on the project, including by exercising his influence over others involved in the project to exclude Ms. Thomas.
- [Ms. Thomas] would receive design credit for various design projects [she] worked on at Defendant's request including for work performed at Defendant's various properties including the Contento property located in Napa Valley, California; 1 Cherry St, San Francisco, California; the Cemento property located in Aspen, Colorado; 936 King Street, Aspen, Colorado; 127 American Lane, Aspen,

[4] . Such statements are also the kind of "vague generalities that no reasonable person would rely on as assertions of particular facts." *See, Renfro v. Champion Petfoods USA, Inc.*, 475 F. Supp. 3d 1242, 1247 (D. Colo. 2020). *See also, Grossman v. Novell, Inc.,* 120 F.3d 1112, 1119 (10th Cir. 1997) (statement that plaintiff would "double his money" is mere puffery that no reasonable investor would rely upon).

Colorado, sometimes referred to as "Leila Ranch"; 227 East Main Street, Aspen, Colorado; 208 East Main Street, Aspen, Colorado; Defendant's yacht Perseus ^3; and Defendant's private plane Jean-P-Air.

- Defendant would pay [Ms. Thomas] $20,000 a month for interior design services until the completion of Leila Ranch.
- [Ms. Thomas] would be able to add Leila Ranch, other properties in Colorado, and properties in California to her website and portfolio.
- [Ms. Thomas] would be paid pursuant to agreements for real property located at 208 East Main Street and 227 East Main Street in Aspen, Colorado.
- [Ms. Thomas] would be able to publish the work [she] performed on Defendant's yacht Perseus ^3 and private plane Jean-P-Air on [her] website and in my portfolio.

FAC, Ninth Claim, ¶¶127-131. Response Exhibit 33, Thomas Affidavit, ¶3. Ms. Thomas' allegations do not state with any particularity when each of these statements were made, or by what medium (verbal, text, email), but Mr. Conte has not argued that she should be required to meet the heightened pleading standard of C.R.C.P. 9(b).

"A claim for negligent misrepresentation applies only if there has been a misrepresentation of an existing fact. Such claim cannot be based solely on the nonperformance of a promise to do something at a future time." *Branscum v. American Community Mut. Ins. Co*., 984 P.2d 675, 680 (Colo. App. 1999) (citing *High Country Movin', Inc. v. U.S. West Direct Co*., 839 P.2d 469 (Colo.App.1992)). "The misrepresentation must be of a material past or present fact." *Bedard v. Martin,* 100 P.3d 584,, 592 (Colo. App. 2004). Without such a limitation, the distinction between breach of contract and negligent misrepresentation would be lost. One exception to this general rule involves "[a] promise concerning a future act, when coupled with a present intention not to fulfill the promise." *Kinsey v. Preeson*, 746 P.2d 542, 551 (Colo. 1987). *See also*, *Mehaffy, Rider*, 892 P.2d at 237; *Van Leeuwan v. Nuzzi*, 810 F. Supp. 1120, 1124 (D. Colo. 1993)

At no point, however, does Ms. Thomas allege that Mr. Conte intended to break his alleged promises at the time they were made. FAC, ¶¶127-131. Exhibit 33, Thomas Affidavit, ¶3. To the contrary, she alleges that he stopped following through on his promises after the January 8-9, 2022 incident. FAC, ¶¶43-71. She also presents evidence tending to show that Mr. Conte repeatedly signed written documents that would implement various aspects of these alleged promises. Exhibit 17 (227 East Main contract); Exhibit 18 (208 Main contract); Exhibit 19 (Promissory Note, secured by Class B Non-Voting Units of JPHILL STAR9 LLC); Exhibit 20 (Letter of Intent to any successor trustee of the Trust); Exhibit 21 (Letter Agreement between Mr. Conte, Ms. Thomas and JPHILL STAR9 LLC); Exhibit 22, (Limited Liability Company Agreement of JPHILL STAR9 LLC).

The Court finds that there are no material facts in genuine dispute that would permit a reasonable jury to find in Ms. Thomas favor on this claim. The conduct Ms. Thomas alleges here is the failure to fulfill promises to perform certain future acts, absent any intent not to perform at the time the promise was made. As alleged, Mr. Conte's conduct would not support a claim for negligent misrepresentation, and summary judgment enters in favor of Mr. Conte on this claim. FAC, Ninth Claim, ¶¶127-131.

IV. Breach of Contract

Mr. Conte argues that he should be granted summary judgment on Ms. Thomas' breach of contract claim, because (i) the claim is predicated on Mr. Conte's purported breach of the May 27, 2021 Separation Agreement (SOF 5)(Exhibit B2), and (ii) the May 27, 2021 Separation Agreement was rescinded when Ms. Thomas and Mr. Conte accepted and signed the Second Amended Mediator's Proposal by Judge Elizabeth White, dated March 10, 2023 ("Mediation Agreement"). Motion, pp. 17-18; Exhibits B3, B4.

Ms. Thomas counters that the Mediation Agreement was a mere "agreement to agree" because it did not contain all material terms, contained no integration clause, and was not intended by the parties to be a final, enforceable agreement. Response, p.23-26. Alternatively, she argues the Mediation Agreement was repudiated by Defendant, who failed to perform any of its material terms. Response, pp. 23-26.

Ms. Thomas objected to admission of Exhibits B3 and B4 on the grounds that these documents are inadmissible as confidential mediation communications. Motion, p.3. At the same time, Ms. Thomas offered the parties' post-mediation communications (through counsel and in a private text exchange) as evidence in support of her position that the fully executed Mediator's Document should be not be treated as an enforceable settlement agreement. Motion, pp. 3, 25. Exhibits 1, 30, 31,32.

The admissibility of Exhibits B3 and B4 hinges upon whether or not the signed Mediator's Proposal it is a "final written agreement reached as a result of a mediation service proceeding or dispute resolution proceeding, which has been fully executed." See, §13-22-302(2.5), C.R.S. (excluding "a final written agreement reached as a result of a mediation service proceeding or dispute resolution proceeding, which has been fully executed" from the definition of a confidential "mediation communication").

Section 13-22-308(1), C.R.S. provides:

> If the parties involved in a dispute reach a full or partial agreement, the agreement upon request of the parties shall be reduced to writing and approved by the parties and their attorneys, if any. **If reduced to writing and signed by the parties, the agreement may be presented to the court by any party or their attorneys, if any, as a stipulation and, if approved by the court, shall be enforceable as an order of the court.**

(emphasis added). In construing a statute, a court's primary purpose is to ascertain and give effect to the legislature's intent. *People ex rel. Rein v. Meagher*, 2020 CO 56, ¶22, 465 P.3d 554 (citations omitted). To do so, courts attend to the language of the statute, giving its words and phrases their "plain and ordinary meanings." *Id.*

The Court's interpretation is guided by *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008), our supreme court's "seminal interpretation of the [Dispute Resolution] Act." *Tuscany Custom Homes, LLC v. Westover*, 2020 COA 178, ¶20, 490 P.3d 1039. In *Yaekle*, the parties to a civil lawsuit participated in a half-day mediation session, with counsel in attendance. At the end, the mediator prepared a form outlining the "basic terms of settlement" (the "September document"). 195 P.3d at 1104. The defendant's attorney was "to draft 'formal documents' for this agreement within fourteen days. The last line of the agreement read, '[t]he parties understand that this document is a binding enforceable agreement.'" *Id*. During the following weeks, the formal documents were drafted ("October documents"), but the terms of the parties' mutual release from liability became the subject of dispute, leading to further negotiations between the parties. *Id.* at 1104-1105. In December, the defendant's attorney sent a revised settlement agreement to plaintiff's attorney containing all of the revisions plaintiff had demanded (the "December document"), but plaintiff refused to sign. *Id*. at 1105.

The *Yaekle* court decided that the Dispute Resolution Act was not intended to supplant the common law principles of contract formation, but rather to lay out a non-exclusive process for turning an agreement reached at mediation into an enforceable court order. *Id*. at 1106-1108. Applying those common law principles, the supreme court entered the following conclusions:

- The September agreement was signed by both parties and their lawyers at the conclusion of the half-day mediation session. The September agreement was understood by the parties as a binding and enforceable agreement, as evinced by the document's own provisions and the later representations to the court of both parties. It therefore satisfies the "final written document" exception to mediation communications, and so is not protected by the Act's confidentiality provision. §§ 13–22–302(2.5), 13–22–307(2). Thus, that document was properly before the court, and supplies prima facie evidence of contract formation.

- The October documents were drafted at the behest of the mediator, as stipulated in the September agreement, and so were made "pursuant to" a mediation services proceeding. §13–22–302(2.5). Had the October documents been themselves fully

> executed, they would have taken the place of the September agreement as the final written agreement. Thus they would have been admissible under the exception to the mediation communication definition as evidence of contract formation. As it is, though, the October documents are confidential mediation communications not to be contemplated by courts.

Id. at 1110-1111.

Whether a contract exists is a question of law. *Univ. of Denver v. Doe*, 2024 CO 27, ¶6, 547 P.3d 1129. "When we interpret a contract, our goal is to determine and effectuate the parties' intent." *Univ. of Denver*. at ¶48 (citing *French v. Centura Health Corp*., 2022 CO 20, ¶ 25, 509 P.3d 443, 449.) We derive our understanding of the parties' intent primarily from the language of the document itself, giving the words used their commonly accepted meanings. *Id*. Likewise, the determination of whether or not an executed document is sufficiently definite in its terms to be enforced is a question to be determined by the court. *See, Stice v. Peterson*, 355 P.2d 948 (1960). If a contract is "is too uncertain to gather from it what the parties intended," it cannot be enforced. *Id.* at ¶49 (quoting *Newton Oil Co. v. Bockhold*, 176 P.2d 904, 908 (1946)). When assessing whether one or more terms in a contract are ambiguous, courts consider the contract "as a whole." *Id*. at 50 (citing *State Farm Mut. Auto. Ins. Co. v. Stein,* 940 P.2d 384, 387 (Colo. 1997)).

The parties, and their counsel, participated in mediation with mediator Judge White in February/March 2023. Exhibit B1, 161-168. Ms. Thomas and Mr. Conte both signed the "Second Amended Mediator's Proposal" dated March 10, 2023. Exhibit B1, 161-168; Exhibit C, pp.3-4; Exhibit B2, B3. Viewed as a whole, the Mediation Agreement expresses the parties' intention to agree and be bound by its terms. Even though the Mediation Agreement is in bullet point form, it lays out "basic terms of settlement" (much like the September agreement in *Yaekle*). The language of the Mediation Agreement explicitly states the parties' intent for its terms to be enforceable:

- The fifth paragraph of the document states "In the event this proposal is accepted, it will constitute a recission of the May 27, 2021, signed and bullet pointed 'separation agreement' except as to any terms which have already been complied with by the parties."

- The final paragraph of the document further declares "**The terms of this proposal, if accepted, are enforceable** pursuant to Code of Civil Procedure 664.6. "If parties to pending litigation stipulate, in a writing signed outside the presence of the court or orally before the court, for settlement of the case, or a part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."[5] (emphasis added)

- Immediately above the parties signatures, in capital letters, the Mediation Agreement states "IF YOU ARE AGREABLE [sic] TO THESE TERMS, PLEASE SO INDICATE BY SIGNING AND DATING BELOW"

Exhibits B2, B3.[6]

The Mediation Agreement consists of two pages, setting forth various terms to settle the dispute between Ms. Thomas and Mr. Conte. It is basic and informal, but its terms are definite enough to allow a court to determine whether or not its provisions were complied with, or not. Deadlines for performance were not established. However, Colorado "recognizes that every contract contains an implied duty of good faith and fair dealing." *Univ. of Denver*, ¶52 (quoting *Amoco Oil*, 908 P.2d at 498). "The covenant may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." *Id.* "[I]f a contract contains no explicit provision concerning the time for a party's performance of obligations, the party must perform within a 'reasonable time' as determined by the circumstances of the case." *Gravina Siding & Windows Co. v. Gravina*, 2022 COA 50, ¶20, 516 P.3d 37 (citing *Shull v. Sexton*, 154 Colo. 311, 317, 390 P.2d 313, 316 (1964)). "A reasonable time is 'determined

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[5] According to *Levy v. Superior Ct.,* 896 P.2d 171, 172 (Cal.1995) the language of Code of Civil Procedure 664.6 is intended to protect parties from "hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle..."

[6] As discussed above (SOF 4), the authenticity of Exhibits B3 and B4 is undisputed and Ms. Thomas' deposition testimony concerning their signatures on those documents is uncontroverted by any competent evidence.

upon consideration of the subject matter of the contract, what was contemplated at the time the contact was made, and other surrounding circumstances." *Id*. at ¶21.

Consequently, this Court concludes that the Mediation Agreement signed by both parties (Exhibits B2 and B3) is not a confidential mediation communication within the meaning of §13-22-302(2.5), C.R.S. because it is "a final written agreement reached as a result of a mediation service proceeding or dispute resolution proceeding, which has been fully executed," just like the September "basic terms of settlement" in *Yaekle*. By contrast, the email and text communications between the parties, their attorneys and the mediator in June and August 2023 (Exhibits 1, 30, 31, 32) did not result in a written, executed agreement. Rather, it is undisputed that these discussions did not result in any "meeting of minds" concerning additional terms or amendments to the agreement already reached. Thus, Exhibits 1, 30, 31 and 32 are inadmissible mediation communications, like the October documents in *Yaekle*.

Based on the foregoing, the existence of an enforceable Mediation Agreement as of March 10, 2023 is established as fact. *See*, C.R.C.P. 56(d). By its terms, recission of the May 27, 2021 Separation Agreement was effective as of the date of the parties' acceptance, by execution, of the Mediation Agreement. Exhibits B2 and B3, ¶5.

The Court's analysis of the motion for summary judgment on Ms. Thomas' breach of contract claim, however, is not complete. To prevail on his Motion, Mr. Conte needs to demonstrate the lack of any triable issues of fact concerning the enforceability of the Mediation Agreement. Ms. Thomas raised the issue of repudiation in her response. Response, p. 25. Mr. Conte's Reply in support of the Motion did not respond to this argument. Repudiation occurs when one party to a contract, by word or conduct, indicates that they cannot or will not perform at least some part of its obligations under the contract. *Interbank Invs., L.L.C. v. Vail Valley Consol. Water*

Dist., 12 P.3d 1224, 1231 (Colo. App. 2000) By itself, repudiation does not "excuse a repudiator from performing its part of a contract" but it does allow the "innocent non-repudiating party, if it so chooses, to terminate the contract without performing its part of the bargain." *Id.* "A repudiating party cannot enforce the provisions of the contract." The record of undisputed facts before the Court is insufficient to decide the question of whether a repudiation of the Mediation Agreement occurred, when any repudiation occurred, or, for that matter, which party was the first to do so. Consequently, the motion for summary judgment as to Ms. Thomas' breach of contract claim is denied. FAC, Tenth Claim, ¶¶132-141.

V. Promissory Estoppel

The elements of a claim for promissory estoppel are: (1) the promisor made a promise to the promisee; (2) the promisor should reasonably have expected that the promise would induce action or forbearance by the promise; (3) the promisee in fact reasonably relied on the promise to the promisee's detriment; and (4) the promise must be enforced to prevent injustice. *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008).

In Colorado, a party is allowed to plead "two or more statements of a claim or defense" hypothetically or in the alternative. C.R.C..P. 8(e)(2). It follows that Ms. Thomas may assert a breach of contract claim and a promissory estoppel claim "based on the same conduct or document" in the alternative. *United Water & Sanitation Dist. v. Geo-Con, Inc.*, 488 F. Supp. 3d 1052, 1058 (D. Colo. 2020); *Clark v. Green Tree Serv'g LLC*, 69 F. Supp. 3d 1203, 1222 (D. Colo. 2014).[7] "However, where an enforceable contract exists, a party cannot ultimately recover on a theory of promissory estoppel." *Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, LLC,* 176 P.3d 737, 741 (Colo. 2007). As discussed in the preceding section, triable issues of fact

[7] *See*, footnote 1.

remain concerning the enforceability of the written agreements entered into by the parties. Therefore, the motion for summary judgment as to Ms. Thomas promissory estoppel claim is denied. FAC, Eleventh Claim, ¶¶142-150.

CONCLUSION

The Court has jurisdiction over the subject matter pursuant to pursuant to Colo. Const. art. VI, § 9(1). The Court has personal jurisdiction over the plaintiff because she filed her complaint in this county and over the defendant pursuant to §13-1-124(1)(a)-(c), C.R.S. Venue is proper in this judicial district pursuant to C.R.C.P. 98(c).

The Defendant's second motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART.

SO ORDERED AND ADJUDGED:
October 21, 2025

BY THE COURT

Laura C. Makar
District Court Judge