

Memo



Date: April 15, 2025
To: Midway City Council
From: Midway City Planning
Re: Lundin Extension Request

Item 15: Lundin Extension Request

At its City Council meeting held June 20, 2023, the City Council approved a commitment of bond funds in the amount of \$1 million dollars to place a conservation easement on 119 acres owned by Lundin Farms, LLC, at approximately 900 West Bigler Lane, Midway. The commitment included an easement to the City for emergency access, evacuation and trail. The water rights necessary for agriculture and other uses would be encumbered as part of the conservation easement in perpetuity.

On January 16, 2024, the City Council extended the commitment through May 15, 2024.

On June 18, 2024, pursuant to a request from Wendy Fisher, Utah Open Lands, on behalf of the Lundin Farm, the City Council approved a Regional Conservation Partnership Program (RCPP) commitment letter for the Lundin property.

On December 3, 2024, the City Council extended the commitment through December 31, 2024, to allow the parties time to complete the purchase agreement for the conservation easement and any other outstanding conditions precedent for use of Midway Open Space bond funds, subject to conditions, including generally the following: 1. 40 unencumbered Midway Irrigation Shares would be encumbered by the Conservation Easement and remain with the property in perpetuity; 2. An additional 10 unencumbered shares of Midway Irrigation would be escrowed or otherwise secured to the satisfaction of Midway and Wasatch County as security for their respective Open Space Bond Fund grants pending recordation of the Conservation Easement; 3. An emergency access and evacuation route and public trail across the property; 4. Incorporating by reference any conditions placed by Wasatch County on the release of Wasatch County Open Space Bond

Funds; and 5) a purchase and sale agreement and conservation easement agreement acceptable to the City.

The City Council held a special meeting on December 10, 2024, to discuss alternatives for the emergency access, evacuation route and trail. The City Council reviewed the matter again on December 17, 2024. Counsel reported that the deal could not be finalized because the Lundins were not willing to escrow water as collateral pending recording of the conservation easement or, in the alternative, record the conservation easement at the time bond funds were released.

On January 21, 2025, the City Council, pursuant to request from Wendy Fisher, Utah Open Lands, on behalf of Lundin Farms, LLC, extended the funding commitment until April 30, 2025, pursuant to the former findings and conditions.

Wendy Fisher, UOL, on behalf of Lundin Farms, is requesting an additional extension with date not specified as of this time. The request references a February 3, 2025, decision of District Court Judge Mabey dismissing without prejudice the Fuller lawsuit against the Lundins on a claimed right of first refusal. The applicants request that references to the Fuller lawsuit be removed from any purchase and sale agreement for the conservation easement, or potentially be replaced with references to the decision, to which Staff has no objection. However, this would not change the requirements and conditions for funding, including but not limited to the emergency access, evacuation and trail as approved by the City and the water shares to be held in escrow pending recordation of the conservation easement. Staff therefore recommends that any extension continue to be conditioned on the conditions identified in the December 3, 2024, extension, subject to clarification of the access/trail location as discussed and agreed upon by the parties in the special City Council meeting held December 10, 2024.

Please contact me with any questions.

Katie Villani, City Planner

Date of Meeting: April 15 City Council

Regarding: Lundin Extension

Request: Utah Open Lands requests additional time to work with the County and the City and the Lundin's to the necessary documents in light of the dismissal of the Fuller Right of First Refusal Lawsuit.

Background:

Utah Open Lands, Midway City, Wasatch County and the Lundin family worked toward a possible conservation solution for the Lundin Family farm, approximately 119 acres at the end of Bigler Lane. Of significance, after the Lundin family had reached a settlement, the family was sued in conjunction with a Right of First Refusal which was granted to Robert Fuller. The initial conservation solution had been to provide up front funding for the Lundin Conservation Easement to enable the members of the family interested in saving the land the ability to buy out the other members of the family not interested in the conservation easement and further pursue NRCS funding. As part of the negotiations Midway City and Wasatch County required additional collateral in the form of Water Shares in part due to the risk of the Fuller litigation. To that end part of the purchase and sale agreement the parties had been working through addressed the concerns and the risk of the Fuller Lawsuit under section 5.7 of the agreement and elsewhere in the document.

5.7 Should the Fuller Litigation or Fuller First Right of Refusal cause the Conservation Easement to become void or otherwise adversely affect the transfer of good title when Buyers seek to record the Conservation Easement, Seller shall have 180 days from any final court ruling finding the Conservation Easement to be void or from the date Buyers may first record the Conservation Easement to repay the Obligated Funds to Midway and the County. Seller shall repay the Obligated Funds, including interest at the respective bond rates, in which case Midway and the County shall destroy all copies of the Conservation Easement and release any Deed of Trust under this Section. To secure repayment, Midway and the County shall be entitled to record a Deed of Trust upon the Property in the form set forth in Exhibit E. Should Seller fail to repay the Obligated Funds to Buyer within 180 days, Midway and the County shall be entitled to foreclose the Deed of Trust to obtain repayment of the Obligated Funds, together with interest at the respective bond rates. Alternatively, once Midway and the County record the Conservation Easement with good title to transfer, Midway and the County shall release the Deed of Trust. Seller and Buyers recognize the time periods and deadlines set forth in Sections

5.6 and 5.7 may be affected by the actions of third parties not within their control and will consider reasonable extensions as necessary on a case-by-case basis.

Status: As of February 3, 2025 the Fuller Lawsuit was dismissed. Both the County and the City attorney have been provided a copy of the dismissal. As the Council is aware the deadline identified in the settlement between the Lundin family members was December 20, 2024. That deadline passed and following the lawsuit the parties to the settlement agreement have renegotiated the settlement deadline, pending previously obligated funding still being available.

Request: With the dismissal of the Fuller Lawsuit and specifically the finding articulated by the Judge regarding the ability for the Lundin's to enter into a conservation easement not in violation of the right of first refusal it makes sense to remove from the purchase and sale agreement references to the Right of First Refusal and the Lawsuit and potentially replace language with references to the Judges decision. Utah Open Lands requests time to work with City and County staff to accomplish a new agreement to bring before council for approval.

IN THE FOURTH JUDICIAL DISTRICT, WASATCH COUNTY
STATE OF UTAH

ROBERT L. FULLER, an individual,

Plaintiff,

vs.

LUNDIN FARMS, LLC, a Utah limited liability company; LUNDIN LAND COMPANY, LLC, a Utah limited liability company; and SWISS HEIGHTS MOBILE HOME PARK, LLC, a Utah limited liability company,

Defendants.

RULING AND ORDER

Case No.: 240500116

Judge: JENNIFER A. MABEY

The above-entitled matter is before the Court on Defendants' Request to Submit for Decision their Motion to Dismiss ("Motion"), filed on or around October 21, 2024. Having reviewed the parties' related filings, and having heard oral arguments on the matter on December 10, 2024, the Court now issues this Ruling and Order.

Background

Plaintiff's Complaint was filed July 17, 2024, alleging three causes of action including: (1st) Breach of Contract, (2nd) Breach of Implied Covenant of Good Faith and Fair Dealing, and (3rd) Quasi Contract, Unjust Enrichment, and/or Quantum Meruit.

Plaintiff's claims arise from Plaintiff's and Randy Lundin's Right of First Refusal ("ROFR") Agreement entered into on or around November 6, 1998. Notably, Plaintiff asserts in relevant part that

[t]he ROFR imposed an obligation on the heirs to the Estate, or a subsequent holding company owned by those heirs, to offer the real

property subject to the ROFR (as described in Exhibit A to the ROFR) (the “Property”) to Plaintiff to purchase prior to any sale or marketing of the Property to or by another third party.

Compl., 3.

In August 2022, Plaintiff states that he became aware that “some of the Lundin siblings had entered into or were actively negotiating agreements with various third parties and public entities to purchase the Property and put it into a conservation easement in exchange for significant funds[.]” *Id.* at 6. Although Plaintiff maintains that he made two offers to purchase the Property in September 2023, and October 2023, on June 3, 2024, he became aware of a potential settlement between the Lundin siblings, involved in a separate suit before the Court, case number 210500099, and continuation of the proposed Conservation Easement.

Analysis

On August 30, 2024, Defendants filed their Motion to Dismiss Complaint (“Motion”). The primary basis of Defendants’ Motion is Plaintiff’s alleged misunderstanding of the terms of the ROFR. Defendants argue in relevant part:

Plaintiff’s Complaint fundamentally misunderstands the concept of a right of first refusal. First, by its own express terms, this ROFR is limited, applying only to third-party offers to purchase all or part of the fee simple Property, not rights distinct from ownership and control of the Property. This ROFR expressly allows Defendants to retain development rights and to encumber the Property. The Conservation Easement does not trigger the ROFR.

Defs.’ Mot., 2.

Motion to Dismiss Standard, Generally

As explained by the court in *Pioneer Home Owners Ass'n v. TaxHawk Inc.*, 2019 UT App 213, ¶ 19, 457 P.3d 393,

The purpose of a rule 12(b)(6) motion is to challenge the formal sufficiency of the claim for relief, not to establish the facts or resolve the

merits of a case. Accordingly, dismissal is justified only when the allegations of the complaint clearly demonstrate that the plaintiff does not have a claim.

(citation and quotations omitted). That is,

[a] district court should grant a rule 12(b)(6) motion only when, “assuming the truth of the allegations” that a party has made and “drawing all reasonable inferences therefrom in the light most favorable” to that party, “it is clear that [the party] is not entitled to relief.”

Calsert v. Estate of Flores, 2020 UT App 102, ¶9, 470 P.3d 464 (citing *Mitchell v. ReconTrust Co.*, 373 P.3d 189; see also *Hudgens v. Prosper, Inc.*, 243 P.3d 1275 (stating that a dismissal is warranted only when a party “would not be entitled to relief under the facts alleged or under any state of facts they could prove to support their claim.”)).

Here, Defendants do not challenge Plaintiff’s factual allegations. Rather, Defendants attack Plaintiff’s interpretation of the ROFR claiming that “Plaintiff’s Complaint fails to state a claim for relief as a matter of law.” Defs.’ Mot., 7. Defendants assert that even if the facts are true (which must be assumed at this stage of the proceedings), their entering into a conservation easement does not constitute a breach of the ROFR or otherwise entitle Plaintiff to recover damages. And while Defendants did not attach any other materials outside of their Motion, they cited two sections of the ROFR in support of their request for dismissal, which was attached to Plaintiff’s Complaint, along with approximately eight other exhibits.

Consideration of Documents Attached to Complaint

The Utah Supreme Court addressed how a court may consider documents attached and referenced in the initial complaint and a related motion to dismiss, explaining:

Rule 12(b) mandates that a motion to dismiss shall be converted into one for summary judgment if “matters outside the pleadings are presented to and not excluded by the court” and all parties receive “reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Utah R. Civ. P. 12(b).1 “Matters outside the pleading’ include

any written or oral evidence ... which ... substantiat[es] ... and does not merely reiterate what is said in the pleadings.” Moore's et al., *supra*, § 56.30[4]. If a court does not exclude material outside the pleadings and fails to convert a rule 12(b)(6) motion to one for summary judgment, it is reversible error unless the dismissal can be justified without considering the outside documents. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir.1997).

Notwithstanding these general principles, the majority of federal circuits recognize two exceptions. First, if “a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss.” *Id.* The classic example is a contract where the complaint alleges a breach of contract. *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir.2002). The rationale for this exception is that “[a] document that is referred to in the complaint, even though not formally incorporated by reference or attached to the complaint, is not considered to be a ‘matter outside the pleading.’ ” Moore's et al., *supra*, § 56.30[4]. This exception exists because “[i]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.” *GFF Corp.*, 130 F.3d at 1385. Second, most federal circuits permit review of “ ‘mere argument contained in a memorandum in opposition to dismiss’ without converting the 12(b)(6) motion into a motion for summary judgment,” on the ground that such argument reiterates but does not substantiate claims in the pleadings. *County of Santa Fe v. Pub. Serv. Co.*, 311 F.3d 1031, 1036 (10th Cir.2002) (quoting *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir.1991)).

Oakwood Vill. LLC v. Albertsons, Inc., 2004 UT 101, ¶¶ 12-14, 104 P.3d 1226.

As per the *Oakwood* standard, because both parties incorporated by reference the ROFR attached to the Complaint, the Court does not find the ROFR is a matter outside of the pleadings to convert the entitled matter to a summary judgment proceeding¹.

In light of the foregoing standards, the Court reviews each of Plaintiff's causes of action in its consideration of Defendants' Motion. In doing so, the Court notes that interpretation of the

¹ The Court also addressed this issue with counsel during oral argument. The parties were in agreement that this Court may interpret the ROFR pursuant to the Motion to Dismiss, and the consideration of that document does not convert Defendants' Motion to a summary judgment motion.

parties' contract (the ROFR) is a matter of law unless the Court determines that the contract is ambiguous.

In interpreting a contract, the intentions of the parties are controlling. *Dixon v. Pro Image, Inc.*, 1999 UT 89, ¶ 13, 987 P.2d 48 (quotation omitted). “[W]e first look to the four corners of the agreement to determine the intentions of the parties.” *Ron Case Roofing & Asphalt v. Blomquist*, 773 P.2d 1382, 1385 (Utah 1989); *see also Reed v. Davis Co. Sch. Dist.*, 892 P.2d 1063, 1064–1065 (Utah Ct.App.1995). If the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law. *Dixon*, 1999 UT 89 at ¶ 14, 987 P.2d 48 (citing *Willard Pease Oil & Gas Co. v. Pioneer Oil & Gas Co.*, 899 P.2d 766, 770 (Utah 1995)). If the language within the four corners of the contract is ambiguous, however, extrinsic evidence must be looked to in order to determine the intentions of the parties. *Id.* In evaluating whether the plain language is ambiguous, we attempt to harmonize all of the contract's provisions and all of its terms.

Cent. Fla. Invs., Inc. v. Parkwest Assocs., 2002 UT 3, ¶ 12, 40 P.3d 599, 605

Defendants' Motion

1. Breach of Contract

“The elements of a prima facie case for breach of contract are (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages.” *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 15, 342 P.3d 224 (citation and quotations omitted). *See also e.g. id.* at ¶¶ 16-17². Here, Plaintiff's Breach of Contract claim asserts in relevant part:

² Explaining:

Beyond stating the elements required to show a prima facie case for breach of contract, we have not specified what it means to provide a “short and plain statement” of a breach of contract claim “showing that the party is entitled to relief.” We, as well as the court of appeals, have hinted at the requirements. We take this opportunity to clarify what is required for a “short and plain” statement for relief for a breach of contract claim under the Utah Rules of Civil Procedure.

The Utah Rules of Civil Procedure contain an appendix of forms, and we turn to those forms for guidance in outlining the pleading requirement of a “short and plain statement” for breach of contract. Form four, entitled “Complaint—Promissory Note,” and form five, entitled “Complaint—Multiple Claims,” are particularly helpful. These forms

44. The ROFR constitutes a valid enforceable contract by and between Plaintiff and Defendants.

45. Among other provisions, the ROFR *entitles Plaintiff to notice of any and all bona-fide offers to purchase* part or all of the Property and to match such offers within 30 days of receipt of such notice. ROFR, ¶ 4.

46. Likewise, the ROFR is triggered when Defendants place *the Property on the market for sale at a specified price*, which price Plaintiff may match (so long as it does “not exceed an amount at which there is a reasonable prospect for selling such property”). *Id.*

47. Although members of Defendants have sent notice on one offer of purchase in October 2021, based on representations to public entities, purported signed purchase agreements, and continued efforts to raise funding to purchase and place the Property into a Conservation Easement, Plaintiff should have received notice of other transactions regarding the marketing, financing, and other development with regard to the proposed Conservation Easement and allowed to *purchase the Property on the same terms* set forth by Defendants. . . .

49. Under the terms of the ROFR, *any sale or transfers of the Property* are subject to the right of first refusal unless such transfers are “gifts or bequests . . . in which no consideration at all (whether direct or indirect) is paid.” ROFR, ¶ 7.
50. Because the proposed sale or transfer of the Property into the Conservation Easement includes direct and/or indirect consideration of millions of dollars in committed funds, this transaction triggered the ROFR.

51. Defendants have breached the ROFR in the following ways:

- a. failing to provide proper notice to Plaintiff of any and *all offers to purchase* the Property;
- b. engaging in financing, marketing, and other *efforts to sell* the Property or *transfer the Property for consideration* into the Conservation

illustrate the standard of pleading in a complaint for a breach of a promissory note, which is a contract, and a multi-count complaint that specifically includes a breach of contract. As exemplars, these forms indicate that, *at a minimum, a breach of contract claim must include allegations of when the contract was entered into by the parties, the essential terms of the contract at issue, and the nature of the defendant's breach. These essential elements are required to fulfill the requirements of a "short and plain" statement under our pleading standard.* These minimal allegations will “give the defendant fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.”

(footnote citations omitted) (emphasis added).

Easement without allowing Plaintiff to exercise his rights under the ROFR; and

- c. purportedly entering into purchase agreements to *sell the Property* without allowing Plaintiff to exercise his rights under the ROFR.

Compl., 11-12 (emphasis added).

As noted above, Defendants' Motion is primarily premised on the fact that the Conversation Easement has *not* triggered the ROFR. Specifically, "[i]n granting the Conservation Easement, Defendants [argue that they] have merely exercised their express right to control the development of the Property and how the Property can be used[.]" Defs.' Mot, 4. Even by Plaintiff's own Breach of Contract claim, the ROFR is triggered "when Defendants *place the Property on the market for sale at a specified price*, which price Plaintiff may match[.]" Compl., 11, No. 46 (emphasis added); *see also id* at No. 45³.

Notably, the allegations in Plaintiff's Complaint *do not* assert that the Defendants "[(i)] *place[d] the property on the market for sale at a [(ii)] specified price[.]*" *Id.* at 3, No. 12 (citing ROFR, ¶ 12); *compare id.* at 6-7, Nos. 26⁴-27⁵ (reflecting a portion of the communication from

³ Stating:

Among other provisions, the ROFR entitles Plaintiff to notice of any and all bona-fide *offers to purchase* part or all of the Property and to match such offers within 30 days of receipt of such notice. ROFR, ¶ 4.

(emphasis added).

⁴ Reflecting that "Plaintiff detailed his *understanding of this easement* in a letter sent to counsel for both Lundin factions on approximately August 18, 2022[.]" (emphasis added).

⁵ Stating in relevant part in the communication at issue:

It has come to our attention through news media and other sources that your clients—purportedly on behalf of Lundin Farms, LLC—have entered into an agreement with the Wasatch Open Lands Board ("WOLB") to have WOLB pay \$6.5 million to Lundin Farms, LLC to place the Property—nearly in its entirety—in a Conservation Easement. . . .

Here, by having received an offer from and working to consummate the conservation easement transaction with WOLB, your clients have received *an offer of purchase* with respect to at least part of the Property.

Plaintiff to Defendants addressing the proposed Conservation Easement). On the contrary, by Plaintiff's own allegations

25. . . . [I]n August 2022, Plaintiff became aware that some of the Lundin siblings had entered into or were actively negotiating agreements with various third parties and public entities to purchase the Property and *put it into a conservation easement in exchange for significant funds—between at least six and eight million dollars (the “Conservation Easement”). . . .*

Id. at 6 (emphasis added). Here, as alleged, the Property was not marketed for *sale* nor was there a *specified* price for an alleged sales transaction. Rather, as stated, Defendants are alleged to be negotiating the terms of a conservation easement of the Property for an unspecified, or otherwise inexact, amount of funds.

Based upon the allegations in the Complaint, Plaintiff misconstrues the rights and interests granted in the Property under an *easement*. As well- established by Utah law,

An easement is a ‘*nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.*’ ” *Marvin M. Brandt Revocable Trust v. United States*, — U.S. —, 134 S.Ct. 1257, 1265, 188 L.Ed.2d 272 (2014) (quoting Restatement (Third) of Prop.: Servitudes § 1.2(1) (1998)); accord *Alliant Techsystems, Inc. v. Salt Lake Cnty. Bd. of Equalization*, 2012 UT 4, ¶ 22 n. 26, 270 P.3d 441.

Wellberg Invs., LLC v. Greener Hills Subdivision, 2014 UT App 222, ¶ 3, 336 P.3d 61 (emphasis added). See also *Judd v. Bowen*, 2017 UT App 56, ¶ 41⁶, 397 P.3d 686; see also e.g. § 1. [Definitions], Unif. Conservation Easement Act § 1⁷.

(emphasis added).

⁶ Explaining:

An easement is an incorporeal right. See *Clawson v. Wallace*, 16 Utah 300, 52 P. 9, 10–11 (1898) (explaining that an easement “is incorporeal” and that it is a right “incapable of possession or occupancy”); 28A C.J.S. *Easements* § 5 (2016) (explaining that one of the “essential qualities of easements” is that “they are incorporeal” rights “imposed on corporeal property”). It is a property interest that consists of the privilege to merely use—rather than occupy or possess—the land of another for a circumscribed, limited purpose. See *Alliant Techsystems*, 2012 UT 4, ¶ 22 n.26, 270 P.3d 441 (explaining that an easement consists of “the right to use the land”); *Nyman v. Anchor Dev., LLC*, 2003 UT

As an easement is a right or advantage which one has in the lands of another, *it is distinct from the ownership of the land to which it is attached[.]*

28A C.J.S. Easements § 5 (footnote citations omitted)(emphasis added). *See also* 28A C.J.S. Easements § 4⁸.

Plaintiff, however, has not alleged any facts in his Complaint that under the ROFR, Defendants are restricted or otherwise prohibited in how they develop or otherwise use the Property, including granting a conservation easement to a third-party for consideration. Nor, has Plaintiff explained how the granting of such an easement constitutes a “sale” of the Property as prescribed under the ROFR. *See supra* fns. 6-8.

As argued by the Defendants:

The ROFR specifically carves out development choices and encumbrances from its scope:

Nothing in this Agreement shall be construed to or shall be allowed to interfere with the development of the property by [Defendants] ... Any rights under this Agreement shall be subordinated to any institutional lender or investor for funding the development of the property or any portion of it and no right of

27, ¶ 18, 73 P.3d 357 (“[T]he term ‘use’ implies an inherent distinction in the property rights conferred by an easement, on the one hand, and outright ownership, on the other.”).

⁷ Providing:

(1) “Conservation easement” means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.

⁸ Explaining:

While it is not an estate in land, and does not confer title to the land, or constitute a lien thereon, an easement is property. While an easement is neither an estate in land nor the land itself, it is, however, property or an interest in land, and thus, an easement is real property. *Although an easement is a real property interest in land, it is a right distinct from ownership of the land itself and does not confer title to the land on which the easement is imposed.*

(footnote citations omitted) (emphasis added).

first refusal shall be exercisable in the event of granting a security or similar interest in any portion of the property ... and any such lender or investor or any transferee from them shall be entirely free of the right of first refusal under this Agreement. (Id. ¶ 11 (emphasis added).)

~~Here, none of the defendants has sold, or proposes to sell, any part of the Property subject to the ROFR; Defendants continue to hold exclusive legal title to all of the Property and will continue to do so after granting the Conservation Easement.~~

Defs.' Mot., 3 (emphasis in the original). Plaintiff does not dispute this. Rather, Plaintiff counters

[t]hat Plaintiff is not himself a qualified person sufficient to acquire a Conservation Easement is thus of no moment. The *ROFR requires that Defendants give Plaintiff notice of any transfer of the Property for consideration*—which undoubtedly includes the Conservation Easement transaction—and they did not. Plaintiff is, accordingly, entitled to specifically enforce the ROFR.

Pl.'s Opp'n to Defs.' Mot., 6-7 (emphasis added). Plaintiff has yet again failed to assert any facts in his Complaint that the alleged "transfer" of the Property into the Conversation Easement for consideration is precluded under the ROFR, or that Plaintiff is required notice of the same.

See supra fns. 6-8.

Plaintiff appears to contradict the foregoing statement noted above, alleging in relevant part in his Complaint,

12. The ROFR imposed an obligation on the heirs to the Estate, or a subsequent holding company owned by those heirs, *to offer the real property subject to the ROFR (as described in Exhibit A to the ROFR) (the "Property") to Plaintiff to purchase prior to any sale or marketing of the Property to or by another third party.* In relevant part, that right reads as follows:

[The heirs to the Estate or their LLC] shall be obligated to offer the real property described in Exhibit A (attached to this Agreement and incorporated by this reference) to Mr. Fuller for a period of thirty (30) days after Personal Representative or successor members of the Lundin Family either (i) *receives an offer of purchase* with respect to all or part of the property from

any third party and gives written notice to Mr. Fuller of a bona-fide and binding sale transaction Personal Representative or the appropriate members of the Lundin Family intends to consummate (subject only to this right of first refusal) or (ii) *places the property on the market for sale at a specified price*, including through advertisement or engagement of a realtor.

ROFR, ¶ 4[.]

(emphasis added). First, Plaintiff's allegations clearly assert that he is to receive notice of "offer[s] of purchase[.]" not of "transfers." Additionally, and more notably, it is unclear in his opposition, how Plaintiff is meaning to use/apply the word "transfer." Even if the granting of the Conversation Easement would be deemed a "transfer" of the Property, there is nothing in the Complaint, or related ROFR terms cited by Plaintiff, that could reasonably be inferred to trigger the ROFR for the grant of an easement of the Property. In fact, the ROFR is drafted to provide Plaintiff a right to acquire the Property *if* Defendants sell it (either affirmatively, or by accepting an unsolicited offer). The ROFR specifically states that development of the Property does not trigger the ROFR. *See* Defs.' Mot., 3. The only reasonable interpretation under the language of the ROFR is that the ROFR is not triggered if the Defendants maintain ownership of the Property but agree not to develop it. *See Erickson v. Canyons Sch. Dist.*, 2020 UT App 91, ¶ 10, fn. 5, 467 P.3d 917 (explaining in relevant part that on a motion to dismiss a plaintiff is entitled to the benefit of all reasonable inferences from the facts alleged, but is not entitled to unreasonable inferences based on pure speculation or conjecture). It is common for easements to be granted during the development of property (which requires utilities, roads, etc.). Given that the ROFR specifically allows for development, which would likely require easements to be granted, so long as the Defendants retain ownership of the Property, the Court interprets the ROFR to allow for easements to be placed on the Property by which Defendants agree not to develop it, so long as they retain ownership of the Property.

Accordingly, Plaintiff has failed to adequately state a claim for relief of Breach of Contract because Defendants have not acted in a manner that is precluded by the ROFR.

2. Breach of the Implied Covenant of Good Faith and Fair Dealing

As explained by the court in *Shah v. Intermountain Healthcare, Inc.*, 2013 UT App 261, ¶ 16, 314 P.3d 1079, “An implied covenant of good faith and fair dealing *inheres in every contract*, and a party breaches the covenant by intentionally injuring the other party's right to receive the benefits of the contract.” (citations and quotations omitted). However, because the Court has interpreted the ROFR to apply only to sale of the Property, Plaintiff is not entitled to impose a new, independent, duty or restriction on Defendants that does not exist in the ROFR.

This premise is explained more fully in *Oakwood*.

In Utah, virtually every contract imposes upon each party a duty of good faith and fair dealing, the violation of which gives rise to a claim for breach of contract. [*St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d 194, 199-200 (Utah 1991)]. The obligation of good faith requires each party to refrain from actions that will intentionally “destroy or injure the other party's right to receive the fruits of the contract.” *Id.* at 199. *To determine the legal duty a contractual party has under this covenant, a court will assess whether a “party's actions [are] consistent with the agreed common purpose and the justified expectations of the other party.” Id.* at 200. *This court determines the “purpose, intentions, and expectations” by considering “the contract language and the course of dealings between and conduct of the parties.” Id.*

While a covenant of good faith and fair dealing inheres in almost every contract, some general principles limit the scope of the covenant[.] *First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree ex ante. Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991). *Second, this covenant cannot create rights and duties inconsistent with express contractual terms. See id.; Rio Algom Corp. v. Jimco, Ltd.*, 618 P.2d 497, 505 (Utah 1980). *Third, this covenant cannot compel a contractual party to exercise a contractual right “to its own detriment for the purpose of benefitting another party to the contract.” Olympus Hills Shopping Ctr. v. Smith's Food & Drug Ctrs.*, 889 P.2d 445, 457 n. 13 (Utah Ct.App. 1994). Finally, we will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract. *See Dalton v. Jerico Constr. Co.*, 642 P.2d 748, 750 (Utah 1982).

2004 UT 101, ¶¶ 43, 45 (emphasis added).

As discussed above, Plaintiff's Complaint does not contain averments regarding the parties' course of dealings or conduct, focusing only on the language contained in the ROFR. What Plaintiff is seeking in his Complaint, in asking this Court to allow him to "purchase" the proposed Conversation Easement Property, is not supported by the language of the ROFR, and in fact, contradicts the very language Plaintiff cites and relies on in his Complaint. Plaintiff's requested relief would require Defendants to sell the Property, something that is not contemplated by the conservation easement that is being discussed. Nothing in the ROFR allows Plaintiff to force a sale of the Property; only to match an offer that Defendants intend to accept to sell the Property (whether that offer is received unsolicited, or whether the Defendants affirmatively list the Property for sale). Accordingly, Plaintiff's claim for breach of the duty of good faith and fair dealing fails as a matter of law.

3. Quasi Contract, Unjust Enrichment, and/or Quantum Meruit

Quantum meruit has two distinct branches—contracts implied in law and contracts implied in fact. . . . *Contracts implied in law, also termed quasi-contracts or unjust enrichment, "is a doctrine under which the law will imply a promise to pay for goods or services when there is neither an actual nor an implied contract between the parties."* A contract implied in law claim does not require a meeting of the minds. This is in contrast to contracts implied in fact, which are contracts established by conduct, and do require a meeting of the minds.

Contracts implied in law require the plaintiff to establish that the defendant (1) received a benefit, (2) appreciated or had knowledge of this benefit, and (3) retained the benefit "under circumstances that would make it unjust for the defendant" to do so.

Jones v. Mackey Price Thompson & Ostler, 2015 UT 60, ¶¶ 44-45, 355 P.3d 1000 (footnote citations omitted) (emphasis added).

Plaintiff's related claim asserts in part:

62. If for any reason the trier-of-fact in this case fails to identify the existence of an enforceable and binding contract between Defendants and Plaintiff, Plaintiff asserts an alternative claim for Quasi Contract, Unjust Enrichment and/or Quantum Meruit.

63. Plaintiff purchased from the Estate "a parcel of real estate," and as "part of the consideration for that transaction," the Estate granted to Plaintiff the right of first refusal in the Property. ROFR, ¶ 1.

64. To permit Defendants to retain the benefit received in connection with that purchase from the Estate without fully compensating Plaintiff would result in an unconscionable and unjust enrichment of Defendants at Plaintiff's expense.

65. The Defendants were fully aware of the benefit they received at Plaintiff's expense.

66. Plaintiff did not act as a volunteer in connection with Defendants and the transaction in which the ROFR was part of the consideration.

Compl., 14-15.

First, Defendants do not argue, nor has this Court found, that the ROFR is not an enforceable agreement between the parties. Additionally, given the Court's interpretation of the ROFR, Plaintiff retains the right to purchase the Property if and when Defendants agree to sell it. Given that Plaintiff retains that right, and Defendants remain obligated under the ROFR to afford that right to Plaintiff, Plaintiff cannot demonstrate that it would be unjust for Defendants to retain the consideration received pursuant to the ROFR. Plaintiff's claim for unjust enrichment fails as a matter of law.

4. Plaintiff's Request for Damages

Because the Court has determined that Plaintiff cannot prevail as a matter of law on the claims raised in the Complaint, Plaintiff is not entitled to damages. Therefore, although Plaintiff sought damages for what Plaintiff alleges is the difference in market value with and without the conservation easement, the Court declines to address this issue. Without a breach, or successfully demonstrating the elements of unjust enrichment, the issue of damages is moot.


Conclusion and Order

Based upon the foregoing, the Court HEREBY GRANTS Defendants' Motion. Accordingly, Plaintiff's Complaint is DISMISSED WITHOUT PREJUDICE.

This Ruling and Order stands as the order of the Court as to the matters addressed herein. No further order is required. Utah R. Civ. P. 7(j)(1).

Dated this 3rd day of February 2025.

BY THE COURT:


JENNIFER A. MABEY
DISTRICT COURT JUDGE

