

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez**

Civil Action No. 10-cv-02216-WJM-KLM

STROH RANCH DEVELOPMENT, LLC, a Colorado limited liability company,

Plaintiff,

v.

CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 2,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 3,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 4,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 5,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 6,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 7,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 8,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 9,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 10,
CHERRY CREEK SOUTH METROPOLITAN DISTRICT NO. 11,
THE PIVOTAL GROUP, INC.,
PIVOTAL PARKER INVESTMENTS, LLC, a Delaware limited liability company a/k/a Parker
Investments 2009, LLC,
PIVOTAL COLORADO II, LLC,
NORTH PARKER INVESTMENTS, LLC,
KURT WOLTER,
KIMBERLY JENSEN,
GREG MCILVAIN,
MARK EAMES,
GREG EPP,
BILLY HARRIS, and
JOHN DOES 1 through 8,

Defendants.

ORDER DENYING AS MOOT INDIVIDUAL DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on the Motion to Dismiss filed by Defendants Kurt Wolter, Kimberly Jensen, Greg McIlvain, Mark Eames, Greg Epp, and Billy Harris (the "Individual Defendants"). (ECF No. 46.) The Motion to Dismiss seeks dismissal of

Plaintiff's 42 U.S.C. § 1983 claims in the operative Amended Complaint (ECF No. 38) brought against the Individual Defendants. Specifically, the Motion to Dismiss argues that (1) the Amended Complaint does not allege individualized conduct sufficient to give rise to individual capacity liability, (2) the Individual Defendants are entitled to absolute legislative immunity, (3) the Individual Defendants are entitled to qualified immunity, and (4) Plaintiff's claims against the Individual Defendants in their official capacities should be dismissed because they are duplicative of the claims against Cherry Creek South Metropolitan Districts 2-11 ("Metropolitan Districts"). (ECF No. 46.)

The Court has not yet addressed this Motion to Dismiss and this case has now proceeded through discovery. The Individual Defendants, in coordination with the Metropolitan Districts, have now filed a Motion for Summary Judgment. (ECF No. 167; see also ECF No. 165.) This Motion for Summary Judgment makes the very same arguments made in the Motion to Dismiss. (ECF No. 167, at 23-28.) Further, this Motion for Summary Judgment explicitly incorporates by reference the Motion to Dismiss. (*Id.* at 23-24 n.10.) Because of this, the Court deems the Motion to Dismiss moot. See *Drake v. City & Cty. of Denver*, 953 F. Supp. 1150, 1152 n.1 (D. Colo. 1997) (holding that motions to dismiss were "subsumed by the Motions for Summary Judgment and are denied as moot."); *Neff v. Coleco Indus., Inc.*, 760 F. Supp. 864, 865 n.1 (D. Kan. 1991) (same).

Accordingly, the Court ORDERS as follows:

1. The Motion to Dismiss filed by Defendants Kurt Wolter, Kimberly Jensen, Greg McIlvain, Mark Eames, Greg Epp, and Billy Harris (ECF No. 46) is DENIED WITHOUT PREJUDICE AS MOOT; and

2. The Court will resolve the issues raised in the Motion to Dismiss when it rules on the Metropolitan District Defendants' Motion for Summary Judgment.

Dated this 5th day of April, 2012.

BY THE COURT:



William J. Martínez
United States District Judge