THE CITY OF MISSOULA,

Claimant and Counterclaim
Respondent,

and

CARLYLE INFRASTRUCTURE PARTNERS, LP; ROBERT DOVE; THE CARLYLE GROUP EMPLOYEE CO., LLC; and BRYAN LIN,

Respondents and
Counterclaimants,

and

THE CARLYLE GROUP L.P.,

Respondent.

Case No. 01-19-0000-1366

INTERIM AWARD

We, the Undersigned Arbitrators, having been designated in accordance with the arbitration agreement entered into between the City of Missoula (“the City”), Carlyle Infrastructure Partners, L.P. (“CIP”),¹ and the Clark Fork Coalition (“CFC”) and dated September 22, 2011 (“the Letter Agreement”), and the other parties having consented to

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¹ The CIP entity is referred to in the caption of this arbitration, in pleadings in this arbitration and other proceedings, in exhibits, and in various other materials as both “Carlyle Infrastructure Partners, LP” and “Carlyle Infrastructure Partners, L.P.” The legal name of the entity, as set forth in the Amended and Restated Limited Partnership Agreement of the entity, appears to be “Carlyle Infrastructure Partners, L.P.” J2. That agreement permits variations of that name to be used. J2.24. The entity is referred to in this Interim Award as “Carlyle Infrastructure Partners, L.P.”
the jurisdiction of the Panel to determine the claims in this Arbitration, and having been
duly sworn, and having duly examined the submissions, proofs, and allegations of the
Parties, hereby issue this Interim Award2 as follows:

The City of Missoula had long wanted to own the water system that provides
water the City. The City was the only one of 129 municipalities in Montana that did not
own its own water system. City of Missoula v. Mountain Water Co., 384 Mont. 193, 197,
378 P.3d 1113 (2016). At the time of most of the events at issue, the water system was
owned by Mountain Water Company (“Mountain Water”). In turn, Mountain Water
was one of three water systems owned by Park Water Company (“Park”), and Park was
owned by Henry Hugh (Sam) Wheeler Jr. and his family3 and, later, by CIP, an
investment fund.

This proceeding pertains to a portion of the saga of the City’s efforts to acquire
the water system. The essence of the City’s claims is that CIP reneged on its promise to
sell the water system to the City. The City ultimately acquired the water system, but by
condemnation rather than by purchasing it from CIP.

2 As provided in Paragraph 8(a) of Report of Further Preliminary Hearing and Scheduling
Order No. 3 (signed September 15, 2019 and effective as of August 21, 2019), the Panel is to issue
reasoned awards. “[A] reasoned award is something more than a line or two of unexplained
conclusions, but something less that full findings of fact and conclusions of law on each issue
raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on
the central issues raised before it. It need not delve into every argument made by the parties.”
Leeward Const. Co., Ltd. v. Am. Univ. of Antigua-College of Medicine, 826 F.3d 634, 640 (2nd. Cir.
2016). See also Rain CII Carbon, LLC v. ConocoPhillips Co., 674 F.3d 469 (5th Cir. 2012); Cat
Charter, LLC v. Schurtenberger, 646 F.3d 836 (11th Cir. 2011); Norwalk Medical Group v. Yee, 199

3 For the purpose of simplicity, Wheeler will be referred to as the owner of Park Water.
After the City was unsuccessful in its efforts to buy the system from CIP, it filed a lawsuit against, among others, CIP; two persons employed by CIP at the time of the events in question, Robert Dove and Bryan Lin; and CIP’s indirect upstream owner, The Carlyle Group L.P. That lawsuit ultimately led to this Arbitration.

The City claimed that by refusing to sell the water system to the City, Respondents had breached agreements with the City and otherwise engaged in wrongful conduct. Over the course of this Arbitration, the Panel determined that eight causes of action were properly arbitrable, in whole or in part: fraud, fraudulent inducement, deceit, constructive fraud, negligent misrepresentation, breach of the duty of good faith and fair dealing (in part), breach of oral contract or verbal agreement, and unjust enrichment (in part). The City pursued all eight of those causes of action against Respondents, some more vigorously than others. The Panel concludes the City cannot prevail on any of the eight causes of action to the extent the Panel determined they were arbitrable, and those eight causes of action will be dismissed with prejudice.

In this Arbitration, Respondents asserted a counterclaim against the City for breach of the Letter Agreement, claiming that the City breached the arbitration clause of that agreement by initiating proceedings in Montana State Court that required

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4 As discussed further in fn. 9, the City, Respondents, and the Panel have not always used consistent terms to describe the Respondents. In this Interim Award, the Panel will endeavor to use the following terms: “Carlyle Infrastructure Partners, L.P.” or “CIP” to describe that entity; “The Carlyle Group L.P.” to describe that entity; “The Carlyle Group Employee Co., LLC” to describe that entity; “The Carlyle Group” as a trade name that includes within its scope multiple companies; and “Respondents” to describe the Respondents in this arbitration proceeding; that is, Carlyle Infrastructure Partners, L.P.; The Carlyle Group L.P.; The Carlyle Group Employee Co., LLC; Robert Dove; and Bryan Lin. The Panel also attempts in this Award to identify the actual party being discussed in testimony or a document, even if an incorrect or more general name is used in that testimony or document.
I

Introduction and Procedural History

The Letter Agreement between the City, CIP, and CFC largely relates to the possible sale of Mountain Water by CIP to the City. It also includes an arbitration provision. That provision, Paragraph 2(e), provides as follows:

This Paragraph 2 of this Letter Agreement shall be construed in accordance with and governed by the internal Laws of the State of Montana applicable to contracts executed and performed with the State of Montana, but without reference to the choice of law provisions thereof. Any and all disputes, controversies and claims arising out of or relating to this Paragraph 2 or concerning the respective rights or obligations of the parties hereto shall be settled and determined by arbitration in or near Missoula, Montana before a panel of three (3) arbitrators pursuant to the Commercial Rules then obtaining of the American Arbitration Association. Each party shall select one arbitrator, and the two chosen arbitrators shall mutually agree on the third arbitrator. The parties agree that the arbitrators shall have the power to award damages, injunctive relief and reasonable attorneys’ fees and expenses to any party in such arbitration. The arbitration award shall be final and binding upon the parties and judgment thereon may be entered in any court having competent jurisdiction.

(emphasis added).

To describe and understand the procedural history of this Arbitration, it is also necessary to describe related litigation as well.
When the City’s attempts to purchase the water system from CIP were unsuccessful, it sought to acquire the water system through the power of eminent domain. The City filed for condemnation of the water system on April 2, 2014. R322, C514.2. After lengthy proceedings that included a three-week bench trial, on June 15, 2015, District Judge Karen Townsend issued the court’s 68-page Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation in favor of the City. C514 (Preliminary Order of Condemnation). That decision was later confirmed by the Montana Supreme Court. City of Missoula v. Mountain Water Co., supra.

On October 1, 2015, while the valuation phase of the Condemnation action was still pending in District Court, the City filed a separate lawsuit—a Complaint in Montana District Court against CIP; two employees who worked for CIP, Robert Dove and Bryan Lin; The Carlyle Group L.P., and other individuals and entities. R398. Thereafter, on July 23, 2018, the City filed its First Amended Complaint, naming as Defendants CIP, Dove, Lin, The Carlyle Group L.P., The Carlyle Group Employee Co., LLC, and John Does 1-10 and XYZ Corporations 1-10. In its overview in the First Amended Complaint, the City alleged that the Defendants engaged in tortious conduct and breaches of duty to deal fairly and in good faith with the City in its efforts to acquire the water system, causing “the City to incur significantly higher costs to acquire the Water System than would have been incurred if Defendants had cooperated, as they

5 The First Amended Complaint was attached to the City’s Amended Demand for Arbitration as Exhibit 1.

6 For purposes of this Award, where the distinction is significant CIP, Dove, Lin, and the Carlyle Group, are referred to as “Carlyle.”
had agreed to do, in transferring ownership to the City in a negotiated transaction.” In
the First Amended Complaint, the City asserted the following 12 causes of action:

Count 1 Fraudulent Inducement;
Count 2 Common Law Fraud, Actual Fraud, and Malice;
Count 3 Constructive Fraud;
Count 4 Negligent Misrepresentation;
Count 5 Unjust Enrichment;
Count 6 Deceit;
Count 7 Breach of Oral Contract or Verbal Agreement;
Count 8 Tortious Interference;
Count 9 Conversion;
Count 10 Abuse of Process;
Count 11 Civil Conspiracy; and

Carlyle and The Carlyle Group Employee Co., LLC moved to compel arbitration
of the City’s claims. The City opposed the motion.

On November 23, 2018, Montana District Court Judge Dan Wilson stayed the
District Court proceedings and ordered the parties to proceed to arbitration in
compliance with Paragraph 2(e) of the Letter Agreement. R419. In so ruling, Judge
Wilson noted that the Letter Agreement contained a broad and unambiguous
arbitration provision. He also noted that the incorporation of the AAA Commercial
Arbitration Rules into the arbitration provision was “clear and unmistakable evidence
of the parties’ intent to delegate questions of arbitrability to the arbitrators,” but he
went on to opine that “the City’s claims fall within the arbitration provision.”

After Judge Wilson issued his order compelling arbitration, on January 11, 2019,
the City filed with the AAA an Amended Notice of Intent to Arbitrate (“Notice”) and an
Amended Demand for Arbitration ("Demand").\textsuperscript{7} The Notice reflected that the City intended to arbitrate the issues set forth in the Demand. In turn, the Demand sought “the determination of arbitrability and/or arbitration of the issues and claims herein and any counterclaims to be asserted by Respondents.” The City noted that the specific claims and parties subject to arbitration and the facts giving rise to such claims were described in the First Amended Complaint and Judge Wilson’s Order, both of which were attached to the Demand for Arbitration. The Demand for Arbitration and the First Amended Complaint are the operative documents setting forth the City’s claims in this proceeding.

Carlyle and The Carlyle Group Employee Co., LLC, filed an Initial Answering Statement and Counterclaim on January 28, 2019. Those parties asserted a counterclaim for breach of contract against the City because the City filed a lawsuit in court rather than initiating an arbitration, in contravention of Paragraph 2(e) of the Letter Agreement.

On May 30, 2019, The Carlyle Group L.P. filed a Motion to Dismiss. The motion sought the dismissal of The Carlyle Group L.P. from the Arbitration, claiming that for multiple reasons it was not a necessary or proper party to this proceeding.

On June 17, 2019, the City also filed a Motion to Dismiss. In its motion, the City asserted that the case should be dismissed because the claims were not arbitrable,

\textsuperscript{7} Although styled “Amended Notice of Intent to Arbitrate” and “Amended Demand for Arbitration,” the cover letter provided to the AAA by one of the City’s law firms refers to a “Notice and Demand for Arbitration” and the AAA’s files appear to reflect that the Amended Notice of Intent to Arbitrate and the Amended Demand for Arbitration were the first documents filed in this proceeding.
claiming that CIP and The Carlyle Group L.P. had waived the right to arbitrate under the Letter Agreement and that many of the City’s claims were outside the scope of the arbitration clause in the Letter Agreement.

On August 14, 2019, the Panel issued orders on both the Motion to Dismiss of The Carlyle Group L.P. and the Motion to Dismiss of the City. The Panel denied without prejudice The Carlyle Group L.P.’s Motion to Dismiss because it was persuaded that the City had not yet had an adequate opportunity to explore the involvement of The Carlyle Group L.P. in matters that were the subject of this Arbitration. In its Order, the Panel provided a process for limited discovery designed to elicit information regarding the involvement of The Carlyle Group L.P., including information related to its corporate structure, questions of agency, and the dissipation of CIP’s assets.8

The Panel granted in part and denied in part the City’s Motion to Dismiss. The Panel did not adopt the City’s position that none of its claims were arbitrable. Nor did the Panel adopt Respondents’ position that all of the City’s claims were arbitrable. Instead, cognizant that it only had jurisdiction to hear disputes that parties had agreed to arbitrate, the Panel dismissed the following causes of action:

Count 5 Unjust Enrichment;
Count 8 Tortious Interference;
Count 9 Conversion;
Count 10 Abuse of Process;
Count 11 Civil Conspiracy; and

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8 After further discovery and briefing, on February 27, 2020 the Panel denied the Motion to Dismiss of The Carlyle Group L.P.
The Panel explained its decision to dismiss part of Count 12:

The Panel does consider arbitrable in this proceeding only those portions of Count 12 implicated in the allegations (a) that Respondents “failed to act in good faith and acted unreasonably with the effect of denying the City an opportunity to purchase the water system on terms that were consistent with the parties’ 2011 understandings and agreements,” that Respondents “acted arbitrarily, capriciously, unreasonably, and dishonestly, in fact, and did not abide commercial standards of fair dealing,” and that Respondents “breached their duty of good faith and fair dealing,” (First Amended Complaint, ¶221) and (b) that Carlyle’s tortious delay of the City’s purchase of the water system inflated the fair market value of the system and resulted in additional deferred maintenance of the utility and litigation expenses (First Amended Complaint, ¶227).

Respondents moved for reconsideration of the Panel’s Order insofar as the Order dismissed Count 5 (Unjust Enrichment). After briefing, the Panel granted, in part, and denied, in part, Respondents’ motion for reconsideration. In its Order, the Panel set forth its ruling:

The claim for unjust enrichment set forth in Count 5 of the City of Missoula’s First Amended Complaint and Demand for Jury Trial alleging that Respondents wrongfully obtained a benefit in the form of “Carlyle’s purchase of Park Water, the ownership of Park Water and the benefit of the revenue generated by Park Water’s subsidiaries, and/or the sale of Park Water by Carlyle to Liberty” is arbitrable, and to that extent Respondents’ Motion is GRANTED.

The other claims for unjust enrichment set forth in Count 5 of the City of Missoula’s First Amended Complaint and Demand for Jury Trial (i.e., claims relating to the retention of intercompany “loans” and post-retirement benefits) are not arbitrable, and to that extent Respondents’ Motion in [sic] DENIED.
As a result of the Panel’s rulings on arbitrability, the following claims were determined by the Panel to be arbitrable and properly before the Panel:

Count 1  Fraudulent Inducement;
Count 2  Common Law Fraud, Actual Fraud, and Malice;
Count 3  Constructive Fraud;
Count 4  Negligent Misrepresentation;
Count 5  Unjust Enrichment (to the extent set forth above);
Count 6  Deceit;
Count 7  Breach of Oral Contract or Verbal Agreement;

On February 5, 2020, the Panel issued its Order on Respondents’ Motion for Summary Judgment on Its Counterclaim and the City of Missoula’s Motion for Partial Summary Judgment on Respondents’ Counterclaim. In its Order, the Panel concluded that, at least as to some of the causes of action asserted in its initial Complaint and its First Amended Complaint, the City was contractually obligated to assert those causes of action in arbitration, not state court, and that the City breached that contractual

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9 In fn. 1 in its Order, the Panel noted the confusion that had been generated by the somewhat inconsistent use of various terms to identify the parties in this proceeding. The Panel stated, “The Panel notes that in Respondents’ Initial Answering Statement and Counterclaim, the Counterclaim is asserted on behalf of CIP; The Carlyle Group Employee Co., LLC; Robert Dove; and Bryan Lin. The motion before the Panel is brought by CIP, but is joined in by The Carlyle Group Employee Co., LLC; Robert Dove; and Bryan Lin. See Motion, fn. 1. The Motion, however, variously refers to (i) the entitlement of CIP to damages, (ii) damages incurred by ‘CIP and others,’ (iii) attorneys’ fees and costs that ‘Respondents would seek,’ (iv) ‘the City’s exposure to significant liability for Carlyle’s attorneys’ fees and costs,’ and (v) the claim that ‘Respondents are entitled to recover damages.’ Because of these inconsistent references, the Panel is uncertain which of Respondents may be seeking an award of damages. And because of that uncertainty, the Panel generally refers in this Order to ‘Respondents’ Counterclaim’ and ‘Respondents’ Motion,’ and portrays the assertions made and arguments being advanced as those of Respondents.” (emphasis in original.) Through the course of this proceeding, the parties’ and the Panel’s use of terms to describe CIP, The Carlyle Group L.P., CIP and The Carlyle Group, Respondents not including The Carlyle Group Employee Co., LLC, and all Respondents has been—understandably—not always consistent and the source of some confusion at times. The Panel attempts in this Order to provide some internal clarity and consistency.
obligation. The Panel ruled that there were no genuine issues of material fact and that Respondents were entitled to judgment as a matter of law.

In granting Respondents’ motion and denying the City’s, the Panel stated this:

[T]he Panel expressly notes that in reaching this decision the Panel is taking no position and expressing no opinion about the entitlement of any Respondent to damages, either (i) as a remedy for breach of contract, or (ii) pursuant to that portion of Paragraph 2(e) of the Letter Agreement that provides the Panel, without standards, “the power” to award attorneys’ fees to any party. The Panel also takes no position and expresses no opinion about the entitlement of any Respondent to attorneys’ fees or the quantum of attorneys’ fees that might be available to a Respondent. More specifically, the Panel takes no position and expresses no opinion about any of the following issues, for example: whether the American Rule, as employed in Montana, permits an award of attorneys’ fees under these circumstances; whether the breach of an arbitration provision allows for the recovery of attorneys’ fees and expenses; how the language used in Paragraph 2(e) of the Letter Agreement that provides to the Panel the power to award reasonable attorneys’ fees and expenses should be interpreted and applied; what factors should be considered by the Panel in determining the reasonable attorneys’ fees and expenses, if any, to award under these circumstances; and which of the Respondents may be entitled to an award of attorneys’ fees and expenses. These issues, some of which were addressed in the submissions of the parties, are not presently before the Panel.

On February 27, 2020, the Panel granted Respondents’ Motion to Bifurcate, dividing the evidentiary hearing into two phases; the first phase to focus on liability, reserving damages issues for further proceedings, if necessary. The bifurcation was confirmed in the Panel’s May 4, 2020 Order re Case Schedule and Bifurcation. In that Order, the Panel confirmed the hearing would be bifurcated, with liability to be the
subject of one evidentiary hearing and with a second hearing that would address, to the extent necessary, (a) damages, (b) punitive damages, and (c) attorney’s fees and costs.

By letter dated June 5, 2020, CIP requested leave from the Panel to file an additional counterclaim against the City. The counterclaim for which leave was sought asserted that the City violated the implied covenant of good faith and fair dealing by filing its condemnation action in order to dissuade potential buyers of Park Water and force CIP to sell the system to the City at a below market price, and by encouraging other communities where Park Water operated to pursue similar threats of condemnation to frustrate CIP’s efforts to sell Park Water. After briefing by the parties, Panel denied CIP’s request for leave in its August 20, 2020 Order on Motion of Carlyle Infrastructure Partners, L.P. for Leave to File Additional Counterclaim.

After delays in the originally-scheduled liability hearing, due in large part to the Covid-19 pandemic, in its November 24, 2020 Order on Scheduling and Form of Hearing, and after considering the Parties’ arguments on the merits of in-person and virtual hearings, the Panel ordered that the hearing on liability occur in person in Missoula, Montana during the weeks beginning June 28, 2021 and July 26, 2021, unless the Panel should later determine that the hearing should be held virtually.

Consistent with that Order, the hearing of this matter occurred during the full weeks beginning June 28, 2021 and July 26, 2021. Representing the City were Harry H. Schneider Jr. and Perkins Coie; and Scott M. Stearns, Natasha Prinzing Jones, and Tyler Stockton, and Boone Karlberg. Representing Respondents were Robert A. Van Kirk, Anne C. Malinee, R. Kennon Poteat III, William Snyderwine, and Matthew W.
Lachman, and Williams & Connolly. Testifying at the hearing were Karen Knudsen, Robert Dove, John Flaherty, Bryan Lin, Daniel D’Aniello, Matt McKenna, Thorvald Nelson, Roger Wood, Mayor John Engen, Randy Bishop, Jim Larocque, Hugh Babowal, Howard Gold, Chris Schilling, Guhan Subramanian, Louis Dudney, Dale Bickell, and Gail Gutsche. The Panel also viewed excerpts of the video depositions of Andrew Mason, David Ebershoff, and Henry Hugh (Sam) Wheeler Jr., and reviewed designations and counter-designations of the transcripts of the deposition testimony, trial testimony, and/or testimony before the Montana Public Service Commission (“PSC”) of Bruce Bender, James Nugent, Glenn Youngkin, Roy Koegen, Mayor Engen, Bickell, Wood, Ebershoff, and Wheeler.

In addition to the described testimony, the Panel also received into evidence more than 600 evidentiary and demonstrative exhibits and the expert reports of Dr. Thomas Power and Professor John Coates, and more than 580 pages of pre-hearing and post-hearing briefing.

Closing argument occurred on October 1, 2021, following which the hearing was closed.

II

Facts

Mountain Water provided potable water to the City of Missoula. Park Water, founded in 1937, was the owner of Mountain Water and also owned two other water utilities located in California, Park Water Central Basin, a division of Park Water
(“Central Basin”) and Apple Valley Ranchos Water Company (“Apple Valley”). The primary owners of Park Water were Henry Hugh (Sam) Wheeler Jr. and his family.

The City of Missoula had long wanted to acquire the water system that served it. There were many reasons for this. See, e.g., Tr. 208-12 (Knudsen), Tr. 217-20 (Knudsen), J30.6 (Engen Pre-Filed PSC Test.), J41 (Engen PSC Responses).

CIP is an investment fund that was launched in 2006 and had an anticipated life of 12 years. Tr. 596-7 (Dove), J29.9, J2.24-5. CIP raised $1.2 billion to invest in transportation, energy, and water projects in North America. Tr. 596 (Dove), Tr. 598 (Dove), C42.4, J28. Although the formal investment period for CIP ended in 2012, it made the last of its 12 investment in 2013. Tr. 598 (Dove), C629.1.

Dove was a Managing Director of The Carlyle Group and Co-Head of a 10 to 12 person investment team that managed CIP. Tr. 596 (Dove), J28.4 Also on the team was Bryan Lin. Both Dove and Lin were employees of The Carlyle Group Employee Co., LLC. Tr. 399-400 (Dove), Tr. 945-7 (Lin).

An investment committee, composed of Carlyle Group co-founders Bill Conway, Daniel D’Aniello, and David Rubenstein, and Dove’s direct report, Greg Summe (“the Investment Committee”), had authority over decisions to buy and sell companies in the CIP portfolio. Tr. 600 (Dove). The basic role of the Investment Committee was to decide to purchase or dispose of investments. Id., Tr. 1169 (D’Aniello), Tr. 1212 (D’Aniello). The Investment Committee did not advise on decisions regarding day-to-

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10 References to excerpts of mini-transcripts are to deposition pages cited in the mini-transcript, rather than the mini-transcript page.

11 The investment team was also referred to at times as the management team.
day management of CIP, nor did it provide advice to the investment team when it was considering an investment but had not reached a decision. Tr. 600 (Dove), Tr. 1212 (D’Aniello).

In an Agreement and Plan of Merger dated as of December 21, 2010, CIP, through its subsidiary Western Water Co., agreed to purchase Park Water from Wheeler for $158.8 million. In 2009, Wheeler had declined to sell Park Water to CIP, but by 2010 he had additional motivations that were not present at the time of CIP’s earlier overtures, including personal health issues and his concern about potential increases in estate taxes and a lack of liquidity in his estate. ¶24 (Preliminary Condemnation Order), R453.23-5 (Ebershoff Dep.), R454.21-24 (Wheeler Dep.), R454.52 (Wheeler Dep.).

In 2010 Wheeler asked his lawyer, Ebershoff, to reinitiate contact with CIP to see if CIP was still interested in a sale. Ebershoff did so, but advised Wheeler that there was a substantial likelihood he could obtain a higher price if he pursued an auction rather than direct negotiation. R453.45-6 (Ebershoff Dep.). Schilling thought Park Water might be worth as much as $250 million. Tr. 2682-3 (Schilling).

Wheeler elected to proceed with the sale to CIP and the transaction was announced publicly on December 22, 2010. R25.

After the public announcement of the agreement to purchase Park Water, CIP engaged in a comprehensive effort to connect with parties that would have an interest in the purchase by CIP of Park Water, including representatives of the City and CFC.

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12 $158.8 was the enterprise value of Park Water. The purchase price was paid by paying cash for the equity in the approximate amount of $102 million and assuming debt for the balance. Tr. 951 (Lin), Tr. 2401-2 (Larocque), C28 (Investment Committee Memo).
R26, R30. To enable the purchase of Park Water, there was some concern that it would be advisable, if not necessary, to obtain the consent of the Montana Public Service Commission (“the PSC”). Tr. 1366-7 (Nelson), Tr. 2496 (Larocque), R21. Indeed, getting the approval of the PSC was a condition to closing the purchase. Tr. 958 (Dove), Tr. 1796 (Engen), Tr. 2496-7 (Larocque), C86.

The PSC had five commissioners, each representing a specific district. The Commissioner representing the district that included the City of Missoula, Gutsche, was also the Vice-Chair of the Commission. Tr. 772 (Flaherty), Tr. 2511 (Larocque), J67.1. As the Commissioner from the district that encompassed the City, Gutsche’s approval was crucial to getting PSC approval. Tr. 790 (Flaherty), Tr. 1839-40 (Engen), Tr. 2511-12 (Larocque), C72, C136.1. Gutsche was prepared to vote against approving the purchase by CIP. Tr. 3060 (Gutsche). Two other commissioners on the PSC were prepared to vote with Gutsche. Id., J37.

It was clear that to get Gutsche’s approval it would be necessary to get the support of the City, Mayor Engen, and the CFC. Tr. 938-9 (Flaherty), Tr. 1249 (McKenna), Tr. 1797 (Engen), Tr. 3061-2 (Gutsche), Tr. 3064 (Gutsche), Tr. 3083-4 (Gutsche), C72, C96. In short, the support of Mayor Engen would be helpful, if not key, to getting the PSC to approve the transaction. Tr. 398 (Dove), Tr. 431 (Dove), Tr. 446-7 (Dove), Tr. 461-2 (Dove), Tr. 482-3 (Dove), Tr. 763 (Flaherty), Tr. 768-9 (Flaherty), Tr. 936 (Flaherty), Tr. 1797 (Engen), Tr. 1829 (Engen), C72, C95.

Gaining the trust of Mayor Engen was important to Carlyle and its advisors. Tr. 1265 (McKenna). And the efforts to gain Mayor Engen’s trust were successful. C216,
J37. In a July 15, 2011 memo to Dove, Flaherty set forth CIP’s immediate objectives to confirm that Mayor Engen would publicly support the sale of Mountain Water to CIP, and that he would demonstrate that support in an op-ed he was preparing for publication, to the City Council, in discussions with Gutsche, in his testimony to the PSC, and to the CFC. J33.2. Flaherty also indicated that Mayor Engen was being asked to give up a request that CIP give the City a right of first refusal on any sale of Mountain Water, and expressed the hope that Mayor Engen “will trust you enough to give this up—even if you or I probably wouldn’t if we were in his shoes.” J33.2-3.

Carlyle recognized that it had gained Mayor Engen’s support, that his support may carry great weight with Commissioner Gutsche, and that it had gained Mayor Engen’s support “without written commitments on a sale to the City.” C694.

Virtually all the important players accepted that the City would not be able to purchase the system if Wheeler remained the owner of the system. Wheeler had made it clear that he would not sell the system to the City. Wheeler’s refusal to sell to the City stemmed from the City’s earlier efforts to condemn the system following Park Water’s purchase. Tr. 1962 (Engen), R448.230 (Bender Condemnation Dep.) (“Mr. Wheeler had always represented he would never sell to the City, because the City had obviously tried to condemn it in the ‘80s and that created a lot of ill will with him.”).

Mayor Engen repeatedly testified that the City’s only chance to own the system was if CIP purchased it. Tr. 1962 (Engen), Tr. 1970 (Engen) (“Q. I got Sam Wheeler, no chance. Or I got Carlyle, some chance, right? A. Correct.”), Tr. 2012 (Engen), Tr. 2076 (Engen), J41.8, J67.231 (Engen PSC Test.) (“The status quo today, I believe, is the City of
Missoula has no opportunity to own this utility.”), J41.9, R449.75-6 (Engen Trial Dep.) (I don’t believe there was an opportunity for municipal ownership under Mr. Wheeler . . .”).

Engen was not the only one who knew that a sale of the system to the City was unlikely so long as Wheeler owned Park Water; it was widely understood by others that Wheeler had made it clear that he would not sell the system to the City. Tr. 309-10 (Knudsen), Tr. 397 (Dove), Tr. 1297 (McKenna), Tr. 1684 (Wood), see also C514.¶24 (Preliminary Order of Condemnation) (“Mr. Wheeler was opposed to selling the Water System generally and he was opposed to City Ownership of Mountain Water in particular.”).

The City did possess some very limited rights in the event of a potential sale of Mountain Water or the system. In August 1997, Missoula’s Mayor, Mike Kadas, received from Wheeler, the President of Mountain Water, and Arvid Miller, the Vice President and General Manager, a written assurance that if Mountain Water decided to sell the Missoula water system or all the stock of Mountain Water, the City would be notified and given at least 90 days to determine “whether it wished to purchase the system.” J1 (“the Kadas Letter”). The Kadas Letter also provided that during that 90-day period of time, Mountain Water committed to not sell the system to any third party. The Kadas Letter expressly excluded from its scope transactions involving Park Water.

Because Mayor Engen and the City viewed the Kadas Letter as inadequate and wanted to provide to the City greater rights to purchase the water system than those limited rights, and because the City’s prospects of buying the system were greater
under CIP’s ownership than the non-existent opportunity under Wheeler’s continued ownership, the City supported the sale of Park Water to CIP. J40.1, J41.9 (Engen PSC Responses) (“Because all evidence suggests that there is no chance of municipal ownership under Park’s watch and because there is a chance at municipal ownership under Carlyle’s watch, the City supports the transaction.”), Tr. 319 (Knudsen), Tr. 339 (Knudsen), Tr. 621 (Dove), Tr. 1981-2 (Engen), Tr. 2045 (Engen), J12.1, J40.1, J53.1.

On January 24, 2011, Mountain Water filed with the PSC a petition asking it to disclaim jurisdiction over the sale of Park Water or, alternatively, to approve the sale. R35. Largely because the approval by the PSC of the purchase of Park Water was desired and because the support of the Mayor was critical in obtaining that approval, the City, CIP, and others had multiple communications over many months for the purpose of obtaining the support of the Mayor and the City. The City, CFC, and CIP all intervened in the PSC proceeding. Tr. 1377-8 (Nelson), R40, R42, R43.

It is the nature, content, and legal effect of communications between various parties, and the conduct of those parties both before and after the execution of the Letter Agreement, that are at the heart of this dispute.

Both the City and CIP had teams of experienced sophisticated, and specialized advisors. Tr. 1986 (Engen) (The City was not lacking for advice from sophisticated advisors), see R486.¶97 (Coates Rebuttal Report). And both the City and CIP were responsible for taking care of their own interests. Tr. 1728-9 (Wood).

In addition to the City’s internal players—Mayor Engen, Chief Administrative Officer Bruce Bender, Finance Director Brentt Ramharter, and City Attorney Jim
Nugent—the City had experienced outside advisors—bond counsel Roy Koegen of Koegen Edwards (and later, Kutak Rock), investment banker Roger Wood of Moelis & Co., municipal financing advisor David MacGillivray of Springsted, and mergers and acquisitions attorney Roy Tucker of Perkins Coie. In addition to Dove and Lin, CIP was assisted by government relations professional John Flaherty, government relations and communications specialist Matt McKenna, and lawyers Nelson and William Mercer of Holland & Hart, and Brad Helms at Latham & Watkins.

McKenna was hired (through his company) to help navigate the political landscape in Montana by providing government relations consulting services. Tr. 1230 (McKenna), C57.3. McKenna knew Mayor Engen and had a good relationship with him. Tr. 1230 (McKenna). After being retained on behalf of CIP, McKenna’s first call was to Mayor Engen. Tr. 1236 (McKenna).

McKenna attended a meeting in the field office of Senator Max Baucus with the Senator’s field staff and Flaherty on February 1, 2012. Tr. 1299 (McKenna), Tr. 1303-4 (McKenna). The purpose of the meeting was to introduce CIP to the Missoula staff of Senator Baucus. Tr. 1300 (McKenna). Following that meeting, J.J. Adams, a Baucus office staffer present for only a portion of the meeting, prepared an email to Mayor Engen containing the following language:

Jenn [Jennifer Ewen], Lauren [Lauren Caldwell] & I met with John Flaherty and Matt McKenna from the Carlyle Group this morning. I made two requests that I understand to reflect your priorities. First, we asked that they work with you on a plan that achieves the goal of public (meaning City of Missoula) ownership. John Flaherty made a commitment to develop a long term agreement that achieves this goal. Second, John Flaherty
made it very clear that neither ownership or usage [sic] (transfer of the right to consume/use water by lease or other mechanism) will ever be transferred out of the Missoula valley and he will work with you and the PSC to articulate this commitment in a way that makes both the community and regulators (Public Service Commission of Montana) comfortable. These are encouraging indications of Carlyle’s intent to structure a deal that is in the best interest of the community and we look forward to seeing what agreements develop out of these statements of intent. As always, we are at your disposal and eager to see the best interests of the community protected through this acquisition.

C55.

Mayor Engen regarded the email as good news and consistent with the conversations that he had already had with CIP, primarily Dove. Tr. 1788 (Engen). McKenna, on the other hand, testified that at the meeting he did not commit CIP to anything and that Flaherty did not commit to some plan to achieve City ownership of the water system. Tr. 1301 (McKenna). Flaherty also testified that he made no commitments during the meeting. Tr. 883 (Flaherty). After the meeting, McKenna complained to John Lewis, Senator Baucus’ State Director and Adams’ immediate supervisor, about Adams’ conduct. Tr. 1301 (McKenna). Other than the complaint to Lewis, and even though McKenna and Dove regarded the email from Adams to Mayor Engen as inaccurate, they took no action to correct or clarify the contents of the email. Tr. 885-6 (Flaherty).

The first meeting that McKenna arranged between Mayor Engen and Dove occurred two weeks later, on February 15, 2011. Tr. 1266 (McKenna), J12, see C65. On
that day, Mayor Engen and Bender met for dinner with Dove and McKenna in Missoula. Tr. 1304 (McKenna),

After the dinner, Dove wrote an email to Schilling referring to the “good meeting with the Mayor” and the Mayor’s recognition “that we are a better party to deal with than the current owner.” R44.

Mayor Engen prepared an email the following day. That email, reflecting his perception that the meeting had been far more substantive than reflected in Dove’s email, included this language:

During a frank, cordial and productive discussion, I believe we have an agreement in principle, to wit:

1. The City of Missoula will publicly support Carlyle’s purchase of Park Water Co. and its holdings, including Mountain Water Co., through its processes at the California and Montana public utility commissions.

... 

3. In exchange for this assistance, Carlyle’s Dove will work with Roger Wood to draft an agreement that describes a financial transaction between the City of Missoula and the Carlyle Group to purchase Mountain Water one year from the date of Carlyle’s closing on the Park Water transaction. This would not be a public document until such time as Carlyle has closed its transaction with Park and is comfortable with revealing its contents. As that point, the City of Missoula and Carlyle would announce the intended transaction and begin the public process to consummate the deal.

J12.1.

The email also included “additional background”:

1. Robert confirmed that California is where Carlyle’s interest lies.
2. The deal with Sam Wheeler (Park’s owner) retains Sam as a non-voting board member for a year, hence the year-long lag between purchase and sale.

... 

5. Mr. Dove wanted our support on a handshake, which I wouldn’t offer. Then he suggested we rely on the old letter from Hiller to Mike Kadas; again, I declined. Finally, I told him that while I appreciated his reluctance, I needed him to work out some instrument that gives both of us comfort and security in moving forward.13

Robert needs confidentiality, which I promised.

J12.1-2.

From his discussions with Dove, Mayor Engen believed that the transaction would be less likely to close if Wheeler learned of any potential acquisition of the system by the City. Tr. 1791-5 (Engen). Even before speaking with Dove, Mayor Engen was concerned that Wheeler might “kill the deal.” Tr. 1979 (Engen), see J11.

Dove agreed with much of the content of Mayor Engen’s email. Dove told Mayor Engen that confidentiality was important, advised Mayor Engen that Wheeler would be a non-voting member of the Board of Park Water for about a year—something Mayor Engen had not known before—and that any deal between the City and CIP had to remain confidential until Wheeler left the Board in order not to upset the morale of the Mountain Water work force. C514 ¶29, Tr. 644 (Dove), Tr. 649-50 (Dove). For that

13 Given the focus of the City’s efforts in this proceeding, it is more than a little ironic that it was Mayor Engen who was reluctant to agree to a deal on a handshake, insisting instead on an “instrument that gives both of us comfort and security in moving forward.” See also Tr. 1793 (Engen).
reason, Dove did not want to announce he was having discussions with the City about a transaction within months of announcing the acquisition by CIP. Tr. 434-7 (Dove). Dove and Mayor Engen were both concerned that if the City made known its plan to purchase the system before Wheeler was off the Park Water Board, the sale to CIP would be jeopardized. Tr. 482 (Dove), Tr. 690-1 (Dove), C514.¶28. Mayor Engen agreed to wait a year to pursue acquisition of the system, until Wheeler left the Park Water Board. C514.¶28.14

The portion of Mayor Engen’s account that Dove disagreed with was Paragraph 3. Dove’s recollection was that Mayor Engen wanted to move quickly, but he (Dove) wanted to talk with Wood. Tr. 434-6 (Dove).

Regardless, after the meeting, Wood and Dove spoke. Wood’s email to Mayor Engen and others afterward stated Dove’s “feedback on the meeting was very consistent with the Mayor’s.” J13.1. But the email went on to provide more detail about Dove’s position. The email reflected that Dove was agreeable to the concept of a sale “at a market price to be determined,” that Dove and Wood discussed several methods by which a price might be determined, and that Dove “left the ball in our court to come up with a proposal on how to provide greater definition to the purchase price [if we agree this is something that we want to do.]” J13.1 (brackets in original). This email also stated that Dove would not commit to doing a deal less than 12 months following

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14 Mayor Engen observed his commitment to maintain confidentiality, largely limiting his discussions of his negotiations with CIP to City representatives and his advisors. Consistent with his commitment, he arranged with Wood and Koegeen that they would work on a contingency fee basis in order to limit public awareness. Tr. 1538-41 (Wood), Tr. 1547 (Wood), Tr. 1818-9 (Engen), C81, J26.
closing, that he wanted to have an agreement with the City as soon as possible, and that he suggested the City provide a draft of the proposed agreement. Id.

An email from Wood to Dove on March 2, 2011 was accompanied by a proposal that essentially provided that in exchange for providing the City certain rights to purchase Mountain Water, Mayor Engen would support the acquisition by “The Carlyle Group” of Park Water before the PSC and in proceedings in Apple Valley. J21.2. The proposal was described as a “Preliminary Draft,” it was undated and unsigned, and it contained terms developed by the City and its advisors that had not been discussed with, let alone agreed to, by CIP. The proposal was also developed after the City and its advisors spent weeks discussing the terms of a proposed deal and developing drafts that preceded the draft presented to Dove. And the proposal was sent well before Wheeler would be leaving the Park Water Board in an effort by Mayor Engen “to once again clarify the nature of our deal.” Tr. 1821 (Engen).

Dove considered the proposal “totally one-sided” in favor of the City and was shocked when he received it. Tr. 449-50 (Dove). On March 4, 2011, Dove rejected the proposal. J22. Dove also told Mayor Engen and Wood that he was not going to negotiate a deal because CIP didn’t own the business. Tr. 456 (Dove). That CIP could not negotiate a deal for the City to buy Mountain Water before CIP owned Park Water had been a consistent CIP theme before the execution of the Letter Agreement. Tr. 447-8 (Dove), Tr. 456 (Dove), Tr. 763 (Flaherty), Tr. 2041 (Engen), C92, J.34.1 (Engen Op-Ed), J36.4, J.67.222-3 (Engen PSC Test.). Dove advised Wood on March 18, 2011 that CIP was not going to negotiate a deal “now.” J24.
Even though Mayor Engen understood that CIP would not commit to sell to the City because CIP did not yet own the system, he agreed to support CIP’s purchase of Park Water. In a letter to Dove written on March 23, 2011, just days following Dove’s statement that he was not going to negotiate a deal “now,” Mayor Engen wrote, in part:

[W]hile my advocacy [for public ownership] will continue, I am willing to put it on hold for now and redirect my energies towards informed support of Carlyle’s purchase of Park Water and the businesses which it owns.

I understand that you don’t own the company today and that you can’t promise anything in the future.

C92. Consistent with that, Mayor Engen provided his support for CIP’s purchase of Park Water in multiple ways, including, importantly, in his responses to PSC inquiries in advance of the PSC hearing, in his testimony under oath before the PSC, and in writing a guest column (op-ed) that was published in the Missoulian. J34. In none of the documents listed above did there appear any reference to an agreement between the City and CIP for the purchase of Mountain Water, save for the early reference to an agreement “in principle.” J12.1.

Responses to written inquiries from the City to CIP during the course of the PSC proceedings also reflect the absence of any existing agreement at the time those inquiries were propounded on May 18, 2011. The City asked:

25. Would Carlyle be willing and able to enter into an agreement providing the City of Missoula the right of first refusal to purchase Mountain Water Company’s Missoula water system if it is ever considered or placed up for sale?
26. If Carlyle were to ever sell or transfer ownership of Park Water, would Carlyle be willing to first segregate Mountain water [sic] Company from Park Water and sell Mountain Water Company to the City of Missoula prior to selling the remainder of Park Water Company to someone else?

R80.6-7. In response to these inquiries from the City, CIP indicated only that it would honor the Kadas Letter. R81.26, 27. No one contacted CIP or CIP’s attorney, Nelson, during the PSC proceedings to suggest CIP’s answers were incorrect or inconsistent with what CIP had told the City previously. Tr. 1381-2 (Nelson).

The PSC also submitted inquiries to CIP. Those inquiries asked for information about Carlyle’s various “exit opportunities” and under what circumstances they would be implemented in regard to Park Water and Mountain Water. In response, CIP wrote:

Carlyle\textsuperscript{15} intends to be a long-term holder of Park Water and Mountain. Therefore, Carlyle has only conducted an initial review of possible exit scenarios. These possible exit scenarios include (a) an IPO to take the company public by listing shares on one of the domestic stock exchanges and (b) a strategic sale to transfer ownership of Park to one or more other owners. Currently, Carlyle does not envision selling Mountain separate from Park. Having said all this, upon owning Park Water, Carlyle will honor the August 14, 1997, letter from Mr. Arid M. Hiller to then City of Missoula Mayor Kadas.

J29.6. The City’s attorney, Nugent, who had been served with CIP’s responses did not seek any corrections or clarifications of this response. Tr. 1384 (Nelson).

Mayor Engen’s pre-filed testimony in the condemnation proceedings was also devoid of any suggestion that there existed any agreement between the City and CIP.

\textsuperscript{15} In the responses to the PSC inquiries, “Carlyle” was defined to mean CIP.
regarding the purchase of the water system. In his June 13, 2011 pre-filed testimony, submitted under oath, Mayor Engen stated:

I believe that the City of Missoula should have a reasonable opportunity to purchase Mountain Water Company. I believe that the City of Missoula should have the opportunity to negotiate a reasonable good-faith purchase of Mountain Water Company with the Carlyle Group, if the Carlyle Group is both successful in acquiring Mountain Water and is interested in and/or chooses to sell . . . . I believe that this opportunity should be afforded to the City of Missoula at such time as the Carlyle Group decides to sell either Mountain Water Company or Park Water.

J30.6 (Engen Pre-Filed PSC Test.).

The guest column that was authored by Mayor Engen and that appeared in the Missoulian on July 18, 2011 lacked any suggestion that an agreement had been reached between the City and CIP regarding the purchase of Mountain Water. The column read, in part, as follows:

The Montana Public Service Commission will consider the sale of Mountain Water Co., Missoula’s privately owned water system, to the Carlyle Group, a global investment fund, in September. As part of that proceeding, I’ve submitted sworn testimony expressing the city of Missoula’s hope that if Carlyle Group is successful in purchasing the system from California-based Park Water Co., the city would have a chance to make a reasonable offer to purchase Mountain Water and bring it into public ownership.

. . . . I’ve had a number of conversations with Carlyle executives expressing our clear interest in purchasing the company, and Carlyle has been consistent and clear in its response: It doesn’t own the company and therefore can’t talk to me about selling it. . . .

J34.1.
The guest column concluded by quoting the language that Mayor Engen provided in his sworn testimony to the PSC, cited above, reflecting his belief “that the city of Missoula should have a reasonable opportunity to purchase Mountain Water Company” and “that the city of Missoula should have the opportunity to negotiate a reasonable good-faith purchase of Mountain Water Company if the Carlyle Group is both successful in acquiring Mountain Water and is interested in and/or chooses to sell . . . .” J34.4 The guest column, like prior statements by Mayor Engen regarding the City’s potential purchase of the system from CIP, was devoid of any hint that there existed any agreement between the City and CIP.

Comments made by Mayor Engen in his August 10, 2011 statements to the Public Works Committee of the City Council not only made no reference to any agreement with CIP, but confirmed, consistent with Dove’s frequently stated position, that CIP “cannot even entertain the thought” of a sale to the City until they owned it. J36.4.

Given the apparent lack of any agreement between the interested parties, there were multiple communications between the City, CIP, and CFC in an effort to come to a settlement. Without a settlement, Gutsche would have not have approved the transaction. Tr. 1839 (Engen). These communications between the parties culminated in the execution of the Letter Agreement by the City, CFC, and CIP on September 22, 2011. Tr. 304 (Knudsen).

These discussions began on July 15, 2011 when Mayor Engen met with Dove. In an email to the City’s team recounting the meeting, Mayor Engen stated that Dove was interested in working with the interveners in the PSC case. R95.1. Mayor Engen also
stated that Dove would “stipulate to the City’s first right of purchase and reaffirm Mountain’s commitment in the [Kadas Letter].” Id.

Not only was the City interested in negotiating a right to purchase the system, but the PSC also expressed interest in what rights the City would have to buy the system. In its August 11, 2011 Notice of Additional Issues and Procedural Schedule, it directed “Carlyle and/or Mountain Water” to provide additional testimony on several issues. Included among the PSC’s requests was the following:

Please explain whether Carlyle is open to negotiation of providing the City of Missoula with a ROFR and under what terms and situations. Would Carlyle consider agreeing to a sale of Mountain Water earlier in its investment horizon of Park Water, or only at the time of a future sale of Park Water/Mountain Water? If Carlyle is open to negotiations, how would Carlyle establish a value for Mountain Water if and when a ROFR is agreed to and a future sale of Park Water/Mountain Water is commenced?

R100.3.

As before, CIP was not willing to agree in advance to sell the system to the City. Dove regarded as unacceptable the PSC’s efforts to make that a condition of its approval of the sale of Park Water. Tr. 486 (Dove).

On August 12, 2011, Flaherty emailed Dove talking points for a conversation with Mayor Engen. J37. Dove used these talking points with the Mayor. Tr. 488 (Dove). Among other things, the talking points reflected that Dove would not agree to conditions on approval that amounted to “a back door condemnation procedure,” nor would Wheeler; that both Mayor Engen and Dove wanted a fair settlement, that the
City and CFC had not made a settlement offer despite Dove’s request three weeks earlier, and that if the PSC approval was not forthcoming,

one of two things is going to happen. I’ll go into a courtroom with Mountain Water and we’ll win. And unless Missoula plans to sue the PSC with me, I’m going to own a utility where the city did nothing for me except cost me a lot of time and money.

Or, we’ll take it to court and lose. We’ll leave, and Park Water will own Mountain. And Sam Wheeler will make sure that Mountain Water is owned by Park Water or some one [sic] who will never sell it to the city.

J37.3. Flaherty closed the talking points he prepared for Dove by encouraging the Mayor to come to a fair settlement. Dove conveyed the talking points to Mayor Engen on or slightly before August 14, 2011. J38. According to Dove, Engen promised a draft settlement agreement by the end of the week. Id.

On August 16, 2011, Mayor Engen sent an email to Knudsen and others at CFC, to Bender, and to others for the purpose of arranging a time to “begin crafting a settlement proposal.” J40.1. Mayor Engen’s email, which was also sent to Dove, set forth the City’s “critical points.” The first two critical points were these:

• The City of Missoula supports to [sic] the sale of Mountain Water Company to the Carlyle Group because our goal is municipal ownership of the utility and we believe that achieving that goal is much more realistic under Carlyle’s ownership than under Park Water’s ownership, or that of other potential successors in interest if the Carlyle transaction fails.

• The City of Missoula acknowledges the existence of the “Kadas Letter” from Arvid Hiller to former mayor Mike Kadas indicating that Mountain would be willing to sell to the city in the event
Mountain were to be sold. We do not, however, believe that letter offers as much security as we’d like and would like Carlyle to consider, as part of this settlement, some further acknowledgement of a right of first refusal for the City of Missoula.

J40.1.


On August 31, 2011, Dove sent to Alke a draft settlement agreement prepared by Nelson and dated August 26, 2011. R109. The draft included provisions relating to the City’s rights in the event of a potential sale of Mountain Water and Park Water. R109.3-4 The draft was prepared following extensive discussions with both Mountain Water and Park Water. Tr. 1404-5 (Nelson). The draft did not provide the City any right to make an offer without a triggering event. Alke expressed some confusion about the trigger in the section that dealt with a potential sale of Mountain Water. C162, R114. In response to Alke’s concern, and also concern expressed by Leigh Jordan, Nelson prepared another draft, dated September 2, 2011. Tr. 414-6 (Nelson), R114.4-8. This September 2, 2011 draft, like the August 26, 2011 draft, did not include a provision that permitted the City to make an offer absent a triggering event. This September 2, 2011 draft was later provided to the City.
Mayor Engen viewed the September 2, 2011 draft as providing more comfort than the Kadas Letter. J45.1. After multiple discussions among the City’s team, Mayor Engen sent Dove an email on September 14, 2011, that had as an attachment the City’s proposed changes to CIP’s September 2, 2011 draft. J50. Among its proposed changes to CIP’s draft, the City included what was generally later included as Paragraph 2(d) of the Letter Agreement, obligating CIP to consider in good faith an offer from the City to purchase Mountain Water, even in the absence of a third party offer or a proposal by CIP to sell Mountain Water. The change was proposed by the City. Tr. 1422 (Nelson), Tr. 1509 (Nelson), C169. This good faith provision had been suggested by Wood as an alternative if CIP would not commit to selling the system to City by a date certain. Tr. 1557 (Wood), C169.1. This was the first time such a provision had been proposed. Tr. 1509-10 (Nelson). CIP accepted the idea that an offer made by the City would be considered in good faith, although Alke had objections to it. Tr. 1423-7 (Nelson), J53.3.

Absent from any communications from the City—including Mayor Engen or the City’s advisors—is any suggestion that there was an agreement other than the Letter Agreement between the City and CIP regarding the purchase of the system by the City. Indeed, the strong inference from the documents is that there was no agreement between the City and CIP regarding the purchase of the system by the City, and that the absence of any such commitment provided the impetus for the parties’ continued discussions. For example, Wood wrote this in an email to the City’s team on September 16, 2011:

In an ideal world the City would have a commitment to buy Mountain Water from Carlyle by a specific date and
on pre-agreed terms. I think we agree that we are unlikely to get this from Carlyle. At the other end of the spectrum, we would have nothing more than the current letter to Mayor Kadas. In my view, while the proposal that is on the table is far from risk-free to the City, it represents a reasonable compromise on which to proceed.

J53.1.

Contrary to Wood’s position that the proposed Letter Agreement was a reasonable compromise, CFC did not agree. Knudsen was not pleased with the proposed language, suggesting in a meeting with Mayor Engen on September 20, 2011 that the City’s language reading its good faith obligation was not binding, not enforceable, not a legal commitment, and lacking remedies. Tr. 281-2 (Knudsen), C713.5, J149.1.

Lin also had his views on the good faith obligation in the proposed Letter Agreement. This is reflected in part in an email that Lin sent to Dove on September 20, 2011. J56. In that email, Lin provided advice to Dove about what to say to Wheeler when he spoke with him. Dove was concerned whether Wheeler would back out from the sale of Park Water if the Letter Agreement was signed. Tr. 504 (Dove). Lin advised Dove that in speaking with Wheeler he should emphasize that CIP had an obligation to evaluate any offer by the City in good faith, “which means we have to go through the proper evaluation process . . . .” and could not be forced to accept any deal. If, wrote Lin, the City put in an offer shortly after the deal closed, CIP would tell the City that CIP was not a buy-and flip investor. And if the City put in a $50 million offer, Lin continued, CIP would tell the City that the whole of Park Water is worth more than the
sum of its parts, and any offer would have to reflect the loss of value associated with
the reduced size and marketability of Park Water.16

The very next day, September 21, 2011, the day prior to the signing of the Letter
Agreement, Lin wrote an email to Schilling. The email focuses solely on the obligation
of CIP to consider in “good faith” any offer made by the City, as is required under
Paragraph 2(d) of the proposed Letter Agreement.

I didn't feel as strongly as Mr. Alke did on provision 2d. The way I look at it, nothing prevents the City from
submitting a proposal, our sole obligation is to evaluate it “in good faith” which means that we have to go through
the proper internal evaluation process, but we won't be forced into a sale. Let's say the City puts in an offer, for
whatever price, shortly after we close the deal. We can go through the internal evaluation process, but I think
we'll have very good reason to reject the offer after we go through the probe process based on the arguments that
(a) as we represented, we are a long-term investor, and
don't want to develop a reputation of buy-and-flip and
(b) value creation for utility operation means we need to
see some rate base growth which takes time. We can also
use the argument that the whole is worth more than the
sum of parts, a point that CFC's own expert pointed out
in his testimony – by selling off Mountain, the remaining
value of Park is reduced disproportionally due to
reduced size and marketability.

I guess the lawyers can debate the point of “good faith”,
and Dave Ebershoff’s view here would be interesting.
From talking to Latham, the “good faith” obligation is an
obligation to go through the proper process and
document it, but “good faith” does NOT impose
obligation on your ultimate decision or reason for the

16 As discussed later, a sale of Mountain Water to the City should take into account the
diminution in value of Park Water by virtue of the sale of Mountain Water, according Charles
Rial, CFC’s private equity expert. J43.5 (Rial PreFiled PSC Test.), Tr. 2427 (Larocque). This
would include stranded overhead. Tr. 2937-9 (Dudney).
decision, provided that the reason is not laughable/ridiculous/nonsense.

R146.1 (emphasis in original).

On September 22, 2011, on the very morning that the Letter Agreement was signed, Mayor Engen wrote an email to Knudsen strongly implying the City does not yet have an agreement with Carlyle. That email reads, in part, as follows:

I need to spend my time and energy today working with my folks to reach an agreement with Carlyle . . . .

Once we’ve reached an agreement with Carlyle, which we expect to do today, I’ll make time to meet on Friday if you think there’s something productive to be accomplished.

R147.1

The Letter Agreement was signed on September 22, 2011 by the City, CFC, and CIP, but not by Mountain Water.17 The Letter Agreement provided that the City and CFC would support the sale of Park Water before the PSC.18 Expressly in consideration of that support, the Letter Agreement described opportunities for the City to compete for acquisition of Mountain Water. And the Letter Agreement expressly contemplated

17 Mountain Water’s lawyer, Alke, wrote to Nelson on the day prior to the signing of the Letter Agreement that Mountain Water would not sign the Letter Agreement because of the inclusion of Paragraph 2(d) in the Letter Agreement. Alke read Paragraph 2(d) as, among other things, suggesting that Mountain Water was for sale when the filed PSC testimony of Mountain Water said that it was not, suggesting that CIP was not purchasing for the long haul contrary to Mountain Water’s interpretations of CIP’s representations, damaging to the morale of Mountain Water employees, and potentially limiting Mountain Water’s right to contest necessity and have a judicial determination of value and damage to the remainder. R145. The next day, Alke wrote to Nelson to confirm that Mountain Water would not sign the Letter Agreement, but that Wheeler would honor the transaction agreement with CIP. J62.

18 In fact, Mayor Engen testified that he was never opposed, publicly or privately, to Carlyle’s ownership of the water system. Tr. 1974 (Engen).
the potential sale of Park Water as a complete entity, which would necessarily include its subsidiary, Mountain Water.

The Letter Agreement included three substantive provisions regarding the potential purchase of Park Water, Mountain Water, and the system:

- Paragraph 2(a) effectively provided a right of first refusal to the City if an offer was received for Mountain Water or the system and CIP proposed to sell. In that event, the City would be notified and have an option to submit its own proposal. If the proposal met or exceeded the price offered and had substantially similar terms, CIP was obligated to sell to the City.

- Paragraph 2(b) provided that if CIP proposed to sell Mountain Water, the system, Park Water, or Park Water’s upstream parent, the City was to be notified and given 120 days to make an offer to purchase Mountain Water, the system, or the stock in Mountain Water, which offer CIP would consider in good faith.

- Paragraph 2(d) provided that CIP would “consider in good faith any offer from the City to purchase Mountain Water, the Missoula water system, each in its entirety, or the stock in Mountain Water at any time.”

These provisions created opportunities for the City to buy the system, including the right of the City to submit its own offer independent of efforts by third parties to buy Mountain Water or efforts by CIP to sell Mountain Water or Park Water. The effect of the Letter Agreement was to provide opportunities to the City to buy Mountain
Water or the system that were far greater than the limited rights provided under the Kadas Letter. J59.

The Letter Agreement was provided to the PSC on September 26, 2011. During the course of the PSC hearing that began on September 26, 2011, Mayor Engen, Dove, and Knudsen testified that the Letter Agreement was the only agreement between the parties. J67.97 (Dove), J67.222 (Engen), J67.257 (Knudsen).

The purchase of Park Water by CIP closed in December 2011. Tr. 537 (Dove), Tr. 743 (Flaherty), Tr. 1561 (Wood), Tr. 2744 (Schilling).

In purchasing Park Water, the testimony and other evidence presented by the parties demonstrates that CIP paid less than fair market value. Tr. 2908-10 (Dudney), J17.7, 9 (Moelis February 2011 Discussion Materials) (“Note that Carlyle Group’s acquisition of Park Water Co., the parent company of Mountain Water, was agreed to at generally lower [EBITDA] multiples than other recent transactions.”), J7.7, C243.15. CIP’s internal valuation calculated that as adjusted EBITDA multiple of 7.4 of the enterprise value of Park Water. J23. Multiple witnesses, including Mayor Engen, acknowledged that CIP got a deal when it purchased Park Water. Tr. 612 (Dove), Tr. 1095 (Lin), Tr. 1999 (Engen), Tr. 2003 (Engen), Tr. 2683 (Schilling), C243.15. Indeed, Mayor Engen had been told as early as January 2011 that The Carlyle Group “buys undervalued assets for a dollar and sells them for a dollar-fifty.” R.32.1.

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19 In his report, Dr. Power did not acknowledge that the sale of Park Water to Carlyle was below fair market value. To the extent his analysis assumes that the sale was at fair market value, it is flawed.
Wheeler also realized that he may have received a higher price for Park Water had he approached the sale differently. Wheeler conceded he was “under extreme pressure” and “couldn’t be very choosy,” but acknowledged that CIP had “conceded a lot of different things” and was willing to pay all cash, as he wanted. R454:43-5 (Wheeler Dep.). There was only one bidder for Park Water, CIP, and Wheeler did not engage a financial advisor in connection with the sale. R453.21-22 (Ebershoff Dep.). Wheeler had been advised that by selling Park Wheeler at the price offered by CIP he could be leaving substantial money on the table. Tr. 2682 (Ebershoff), R453.27 (Ebershoff Dep.), R453.45-6 (Ebershoff Dep.).

Because Mountain Water, Central Basin, and Apple Valley had similar profiles and financial returns, multiple parties consistently calculated that each of the three utilities was valued at about one-third of the total price paid for Park Water of $158.8 million, or roughly $53 million. Tr. 1669-70 (Wood), Tr. 2049 (Engen), Tr. 2906-7 (Dudney), J8.2, J41.6, J74, R289.20

Both the City and CIP expected that the City would not make an offer to purchase Mountain Water while Wheeler remained on the Park Water Board. Consistent with the shared understanding of the City and CIP, any offer made by the City for Mountain Water while Wheeler remained on the Board would have been unsuccessful. Tr. 529 (Dove), Tr. 1699 (Wood), Tr. 2108-9 (Engen).

20 The City itself, as recently as its Pre-Hearing Brief, notes that the purchase price for Park Water “implied a price for Mountain Water alone of roughly 1/3, or approximately $50 million. City’s Pre-Hearing Brief 26.
In early January 2012, just weeks after the PSC approved the sale of Park Water to CIP, Mayor Engen testified that Dove suggested in a conversation with him that they should be able to announce a deal about the same time the following year. Tr. 1852 (Engen), C244. Dove did not recall making that statement. Tr. 529 (Dove).

On February 8, 2012, Dove, Mayor Engen, Wood, Koegen, Bender, and Flaherty had dinner in Washington, D.C. at Fiola, a restaurant in which Dove had an interest. Tr. 819-24 (Flaherty), Tr. 930 (Flaherty). The dinner was at the invitation of Mayor Engen. Tr. 824 (Flaherty), Tr. 640-1 (Dove), Tr. 929 (Flaherty), C256. Flaherty regarded the dinner as celebratory, because the Letter Agreement had been signed. Id. Mayor Engen regarded the dinner as celebratory because the PSC had approved the sale of Mountain Water. Tr. 1853-4 (Engen). Descriptions of what happened at the dinner differ.

Flaherty testified that at the end of the dinner Wood said something along the lines of “you’re going to let us buy the company,” to which Dove responded by saying that he wasn’t, he was going to let the City have an opportunity to buy the company. Tr. 931 (Flaherty). Bender testified that Dove “put his arm around Mayor Engen and said, ‘Mr. Mayor, do you want to buy a water company?’” R464.272 (Bender Dep.). Bender had earlier testified that Dove asked, “Mayor, are you ready to own a water system?” C699.145 (Bender Condemnation Test.). Mayor Engen testified that at the end of the dinner Dove put his arm around him and “asked if I was ready to own a water company.” Tr. 1854 (Engen), C699.145 (Bender Condemnation Test.). Dove testified in his April 2015 deposition that he “might well have said” “are you ready to buy a water company?” C707.102 (Dove Condemnation Test.).
Wheeler’s service on the Board ended in December 2012. Tr. 528 (Dove), Tr. 544 (Dove), Tr. 1856 (Engen).

In early January 2013, Lin advised Dove that he expected Mountain Water to end 2012 with an EBITDA of approximately $7 million, and that taking into account that Park Water would have to absorb overhead of about $2 million, the “real EBITDA loss” resulting from a sale of Mountain Water would be roughly $9 million. J74. The $2 million in overhead — “stranded overhead” — would be lost if Mountain Water was sold separately. Tr. 994 (Lin), Tr. 2450-1 (Larocque), Tr. 2457 (Larocque), Tr. 2701-3 (Schilling).

On January 14, 2013, Wood and Dove spoke on the phone. Dove suggested that the City make an initial offer on the basis of public information only, but said the City should assume that Mountain Water’s 2012 EBITDA was $7 million and that it contributed $2 million toward head office/corporate allocations. J75. Wood has acknowledged that “in any acquisition situation, you can get quite a long way with public information . . . .” Tr. 1569 (Wood).

On behalf of the City, on February 8, 2013, Wood sent an email to Dove that had attached to it an undated, unsigned “Preliminary Draft” letter setting forth the terms upon which the City would agree “to enter into exclusive negotiations” to purchase Mountain Water. J78. A non-binding term sheet accompanying the letter set forth a purchase price of $65 million, subject to described adjustments.

Despite the information he had received about Mountain Water’s 2012 anticipated EBITDA and stranded overhead, Wood prepared a valuation for the City
that was based upon a contribution of $7 million to Park Water’s 2012 EBITDA. J77.8.

Using an EBITDA analysis based on precedent transactions and assuming Mountain
Water had an EBITDA of only $7 million, Wood concluded that Mountain Water’s value
rang from $80 million to $110 million.21 J77.3. Wood also calculated that the City
could raise between $60 and $75 million to finance a purchase transaction. Id., J77.7.22

After receiving the City’s proposal, Lin calculated that the effect of CIP accepting
an offer of $65 million would have resulted in a $23.5 million write-down to CIP, not
including tax effects, make-whole payments, and stranded overhead. J82, Tr. 1140-4
(Lin), Tr. 2444 (Larocque), Tr. 2912-3 (Dudney). To account for the write-down alone on
a sale of Mountain Water instead of Park Water, the City would have had to offer $88.5
million. Tr. 1143-4 (Lin).

On March 26, 2013, Dove sent to Wood a letter dated March 25, 2013 in which
CIP rejected the City’s proposal.23 J94. In his letter to Wood rejecting the proposal,
Dove stated that CIP concluded that the proposal did not reflect the full value of

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21 EBITDA is commonly-used metric to value companies. It is one of the most common statistics
used to value a company because it is representative of the ability of an entity to generate cash
flow. Tr. 2900 (Dudney).

22 The discussion materials prepared by Moelis using publicly-available information also
calculated indicated values based on trading multiples of publicly-traded companies and based
on discounted cash flow. Those indicated values were lower than the value based on EBITDA.
The precedent transaction valuation compared Mountain Water with generally-similar utilities.
Moelis also calculated the mean trailing 12-month EBITDA multiple for the precedent
transactions as 12.3x and the median as 13.8x, but recognized the trailing 12-month multiple for
Carlyle’s Park Water purchase was 8.1x. J77.10.

23 The City claims in its Post-Hearing Brief that in declining the City’s $65 million offer, CIP
“falsely represented the water system was not for sale, a statement that the City would later learn
was patently false.” (Emphasis in original). The cites Dove’s letter for this proposition. Dove’s
letter can not fairly be read as stating that the system was not for sale.
Mountain Water’s business and prospects, and raised other issues that made the offered price unattractive, including an inability to shelter a significant taxable gain at the corporate level (the taxable gain or double taxation issue), substantial make-whole payments (the make-whole issue), and the overhead of Park Water borne by Mountain Water that would be lost in the event of a sale of Mountain Water (the stranded overhead issue). J94.2. In this letter, Dove related that CIP, with the assistance of its various special advisors, believed these issue to be insurmountable. J94.3. According to Dove, those special advisors included Holland & Hart; Nossaman; Sullivan & Cromwell; Hill, Farrer & Burrill; Fulbright & Jaworski, and Ernst & Young. J94.2, J89.3, Tr. 1144-7 (Lin). CIP also consulted with Bank of America Merrill Lynch, which developed an estimate of the make-whole payment. J86.

Prior to Dove’s March 25, 2013 letter, he had not spoken to Mayor Engen about double taxation, make-whole payments, or stranded overhead. Tr. 1864 (Engen). There is no evidence that CIP raised any of these issues with anyone representing the City or any of the City’s advisors before Dove’s letter of March 25, 2013.

According to CIP, a sale of Mountain Water to the City would have resulted in adverse double taxation costs of $18.6 million, make-whole penalties of $27 million, and stranded overhead of $2 million.24 J89.3. In addition, CIP would not have had the opportunity to realize a higher price on exiting its investment after having created value, which was one of CIP’s stated goals. Tr. 538 (Dove), Tr. 596 (Dove), Tr. 633-5

24 The stranded overhead was a loss that would repeat on an annual basis, unlike the cost of double taxation or the make-whole payment.
(Dove), Tr. 979-81 (Lin), Tr. 1082 (Lin), Tr. 1111-2 (Lin), Tr. 1990 (Engen), J67.67, 68, 69, 103, 104 (Dove PSC Test.).

On April 2, 2013, Dove and Lin discussed the double taxation and make whole premium issues with Wood. Tr. 658 (Dove), Tr. 1718-9 (Wood), R222. The following day, Dove sent an email to Wood that quantified the estimated tax cost and the make-whole premium. R222.

Though there is nothing in the record to reflect that the issues raised by CIP as obstacles to a sale of Mountain Water for $65 million were the focus of earlier discussions between the parties, CIP did not contrive these issues. Despite the efforts of CIP’s advisors, CIP could not realistically eliminate or blunt the double taxation attendant upon a sale of the subsidiary Mountain Water on a standalone basis. Further, while follow up exchanges revealed that although it may have been possible to reduce the make-whole payment from $27 million to $9 million under threat of condemnation, this was not certain. And it was not likely that the $2 million in stranded overhead could have been recovered by the California utilities through increases due to regulatory constraints.26

25 The actual proposal of the City was not for a fixed $65 million, but because of anticipated adjustments could have been lower than or higher than $65 million. Tr. 1715-7 (Wood).

26 Conversely, there was testimony that the City would not necessarily incur $2 million in overhead expenses because it had existing facilities. Tr. 643 (Dove), R457.827, 830, 837, 849 (Bickell Condemnation Test.). Mayor Engen recognized the potential cost savings in January 2011. R42.1 (“Our expenses in operating the utility would be considerably lower than current expenses.”).
Sometime in September or October 2013 (likely September 8), CIP told the City that to be competitive the City would need to propose a purchase price of $85 million, net of taxes. Tr. 660-1 (Dove), Tr. 1149-50 (Lin), Tr. 1613-9 (Wood), R246, R247.

On October 21, 2013, the Missoula City Council adopted an ordinance that provided notice to “the Carlyle Group” that the City desired to purchase the system, authorized the Mayor to enter into negotiations to acquire the system, and determined to acquire the system either by purchase or by condemnation. J103.16.

In a letter dated October 29, 2013 to Dove, Mayor Engen offered to purchase all of the equity of Mountain Water for $65 million in cash.27 J105. The $65 million offer was the same price that the City had offered in March 2013 and that CIP had rejected. In its offer letter, the City did not attempt to address the double taxation, make-whole payment, or stranded overhead issues that Dove had raised in response to the City’s earlier offer. Indeed, the City did not even mention those issues. Mayor Engen admitted that the City offered the same purchase price because it had the hammer of condemnation over Dove’s head. Tr. 2198 (Engen). The City also attempted to justify its offer based upon, among other things, an EBITDA comparison with a transaction involving the City of Fort Wayne, Indiana that was inapposite, and disregarded other comparable transactions. Wood admitted that his use of the Fort Wayne EBITDA of 7.3

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27 The material that Mayor Engen sent to Dove consisted of a letter, a separate “exclusivity letter,” and a confidential term sheet. The letter was signed by Mayor Engen, but by its terms it was “not intended to, and shall not, create a legally binding agreement or contract in any respect and shall not create any rights, either expressed or implied, in favor of the City, Park Water or any other person.” The “exclusivity letter” was unsigned, as was the confidential term sheet. By its terms the confidential term sheet was preliminary and non-binding. J105.
was “cherry-picked” in an effort to argue to Dove that the offer of $65 million was “full and fair.” Tr. 1728 (Wood).

Dove rejected the City’s offer by letter dated November 26, 2013. J111. His letter did not provide a counteroffer or suggest that one would be forthcoming. Mayor Engen subsequently invited Dove to enter into negotiations and provide a counteroffer. J112. Dove declined that invitation and conveyed once again that CIP had considered the City’s offer in good faith. J114.

Sometime in late December 2013, after Dove had again rejected a $65 million offer from the City, Mayor Engen and Dove spoke. J115. In that conversation, Mayor Engen asked Dove for a “it’s-not-for-sale-today” price. The price Mayor Engen was given through a proxy “was about $120 million.” Id., J120.3. Mayor Engen did not interpret CIP’s statement as a counteroffer. Tr. 1886 (Engen), Tr. 2216 (Engen). Dove testified that through a proxy he communicated a “not-for-sale-today” price of $120 million and that he was prepared to accept that number. Tr. 673-4 (Dove).

On January 28, 2014, the City made yet another offer to CIP; this time to purchase the system’s assets for $50 million. J118. CIP declined the offer. C395. Schilling considered the City’s offer “absurd” because it was less than the offers the City had previously made and was for the purchase of assets only and did not include liabilities. Tr. 2723 (Schilling).

On April 2, 2014, the City filed its condemnation action against Mountain Water. R322, C514.2.
As stated earlier, on June 15, 2015, District Judge Karen Townsend issued the court’s Findings of Fact, Conclusions of Law, and Preliminary Order of Condemnation in favor of the City. C514. That decision was later confirmed by the Montana Supreme Court. City of Missoula v. Mountain Water Co., supra. On November 17, 2015, the three commissioners appointed by Judge Townsend determined the value of the condemned property (the assets of Mountain Water), was $88.6 million as of May 6, 2014.28 R399, R408.13. This amount was to be paid to Mountain Water.29

On January 11, 2016, CIP sold its interest in Park Water (actually, Western Water), which included its interest in Mountain Water, to Liberty Utilities Co. (“Liberty”), a subsidiary of Algonquin Power and Utilities Corp. (“Algonquin”). C541.2 The sale was pursuant to a Plan and Agreement of Merger entered into on September 19, 2014. C541.1, R380. The purchase price received by CIP was $327 million. Tr. 153 (Dove), J136. The purchase price suggested an implied value of Mountain Water of roughly $109 million. Tr. 1707 (Wood). The sale price of Park Water to Liberty provides useful information about Mountain Water because it resulted from an auction process with many potential buyers. R486.¶105 (Coates Rebuttal Report).

CIP had not received approval from the PSC for the sale and had withdrawn its request for approval. Tr. 1922-3 (Engen), C527. In connection with the sale, Liberty and CIP entered into a closing agreement that included a holdback of $14.4 million because

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28 Pursuant to statute, the valuation in the condemnation proceeding did not account for, among other things, taxable gain on sale, make-whole payments, or stranded overhead that would be dealt with in a private sale. Tr. 2161-4 (Engen), R228.

29 The commissioners also determined that CIP was not to receive any amount as a result of the condemnation. R399.
the transaction was being closed without PSC approval. J144, C541.2. This amount was held back because Algonquin was assuming all liabilities associated with the consummation of the transaction without PSC approval. C527.

The Final Judgment in Condemnation was entered by Judge Townsend on June 15, 2017. R408.

III

Discussion

As the City elected not to pursue an action based on the express terms of the Letter Agreement, including the express obligation of good faith under Paragraph 2(d), the Panel must determine whether there are enforceable verbal agreements or promises; determine whether there is an applicable obligation of good faith and fair dealing under Montana law and, if so, whether that obligation has been breached; and resolve issues relating to the independent causes of action within the scope of the arbitration agreement.

A. Breach of Oral Agreements or Promises.

The foundational allegation by the City through most of the pendency of these proceedings has been the existence of an enforceable unwritten contractual obligation by CIP to sell Mountain Water on a standalone basis to the City of Missoula. The City has long argued that CIP breached a verbal agreement with the City. In its cause of action for Breach of Oral Contract or Verbal Agreement in the First Amended

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30 Engen had earlier testified that when he signed the Letter Agreement, he knew it wasn’t a “locked deal;” that all that was required if the City made an offer was that it consider that offer in good faith and either reject it, accept it, or make a counter, and that as far as he was concerned, the Letter Agreement was not violated. R455.231-2 (Engen Condemnation Test.).
Complaint, the City states, “In their various discussions and negotiations with the City, Defendants made verbal promises that constitute an enforceable oral contract or verbal agreement.” First Amended Complaint ¶172. For multiple reasons, both factual and legal, the City cannot prevail on its claims that there was an enforceable contractual commitment that CIP made to the City regarding a sale of Mountain Water other than as expressly set forth in the Letter Agreement.\textsuperscript{31}

It is undisputed that the City’s motivation for its support of CIP’s acquisition of Park Water was always to acquire Mountain Water. The evidence is clear that Mayor Engen expected that the acquisition of Mountain Water could be achieved without the risks and costs of condemnation. The evidence is also clear that he exhausted every reasonable avenue at his disposal to maximize the opportunity for the City to acquire the system it had so long sought. Mayor Engen clearly felt he had laid the groundwork with Dove for a negotiated purchase of the system. He fulfilled his commitment of confidentiality and waited for Wheeler to leave the Board of Park Water before making a proposal on behalf of the City.

To the extent necessary relationships required development and management, Mayor Engen did that as well, attempting to appease all parties in an effort to support CIP’s acquisition and obtain a benefit and future opportunity for his constituents. He testified at length with respect to both his expectations based on his interactions with

\textsuperscript{31} Given the City’s assertion that there was a verbal agreement between the City and CIP, it is more than a little ironic that it was Mayor Engen who, early in the discussions between the City and CIP, would not agree to provide the City’s support on a handshake, wanting instead “to work out some instrument that gives us both comfort and security in moving forward.” J14.3, J22 (“He [Dove] still wants me to trust him, but said he understands that I’d like more than that. I said the term sheet is a place to start.”).
Dove and other CIP representatives and his efforts to prepare the City to make the arrangements for acquisition. But as Mayor Engen candidly admitted in his testimony and earlier deposition, at the end of the day the opportunity he sought might well have been “only a chance.” Tr. 1954 (Engen), see also R449.204-5 (Engen Trial Dep.).

Mayor Engen, through tenacity and the leveraging of his position on behalf of his constituents, was tireless in his efforts to exact the greatest benefit for them. The evidence is virtually undisputed that the support of Mayor Engen was necessary to obtain PSC approval for the sale of Park Water to CIP, which eventually allowed the City to acquire Mountain Water through its successful condemnation action. His unrealized goal, of course, was to avoid that through the parties’ compliance with the alleged, undisclosed, to-be-negotiated terms of a sale—“a deal to make a deal” encompassed within the alleged oral agreement with or commitment by CIP to “work with” the City outside of, and in addition, to any commitments in the Letter Agreement.

But irrespective of the lengthy and vigorous efforts of Mayor Engel to acquire the system for the City, there is little evidence that he or anyone else acting for the City reached an enforceable verbal agreement with Dove or anyone else acting for CIP regarding the acquisition by the City of Mountain Water, and substantial evidence that no such agreement was reached.

More than ten years after the Letter Agreement, more than five years after the City filed its initial Complaint in Montana District Court, more than three years after the City filed its First Amended Complaint, more than two years after the City filed its Demand for Arbitration, after substantial discovery in this and other related
proceedings, and after two weeks of hearing in this Arbitration, both the alleged agreement and the promises on which the City bases its contractual claims remain unclear. The City has at times described a verbal buy-sell agreement it entered into with CIP prior to signing the Letter Agreement. The City has also claimed that CIP breached oral promises it made to the City. Whether characterized as a verbal buy-sell agreement CIP it claims to have entered into with the City or oral promises CIP made to the City, multiple different and conflicting descriptions of the agreement and promises have been provided, both in the City’s pleadings and in the evidence presented at the hearing.

In the City’s First Amended Complaint, the City stated, “Dove promised that if the City withdrew its previous opposition to Carlyle’s acquisition, and publicly supported a sale of Mountain Water to Carlyle, Dove would make sure that Carlyle would turn around within a short time and sell the Water System to the City.” First Amended Complaint 3 (emphasis added). Later in the First Amended Complaint, the City alleged,

Carlyle promised it would sell the Water System to the City two years later, on a standalone basis, at fair market value, and at a price that would be determined by good faith negotiation and utilization of various methods of business valuation as were discussed by the parties in 2011. Carlyle represented that the purchase price in 2013 would be based on the implied value that Carlyle paid for Mountain Water in 2011 plus an additional premium for its brief period of ownership.

First Amended Complaint 4 (emphasis added).

In the City’s Pre-Hearing Brief, the City describes the obligation this way:
The parties orally agreed that if the City supported Carlyle’s purchase of Park Water to secure PSC approval, Carlyle would sell Mountain Water to the City after a short period of ownership. . . . They also agreed to use one of several methods to determine a price if the parties did not reach agreement.

The City of Missoula’s Pre-Hearing Brief 47 (emphasis added).

After the hearing, the City stated that it never claimed it had a verbal buy-sell agreement, but alleged “Carlyle promised it would provide the City a genuine opportunity to buy Mountain Water Company for a fair market price plus a reasonable premium to be determined.” The City of Missoula’s Post-Hearing Brief 34 (emphasis added). Later in the same Brief, the City claims “Carlyle verbally committed to working with the City to sell Mountain Water Company, on a standalone basis, for a to-be-determined sum that provided Carlyle with a reasonable return on its roughly $50 million investment.” The City of Missoula’s Post-Hearing Brief 84 (emphasis added).32

In its Post-Hearing Response Brief, the City states, “The City’s claim is, and always has been, that Robert Dove promised Carlyle would give the City of Missoula a genuine opportunity to buy Mountain Water in exchange for the City’s support of

32 The City also (a) claimed in its Pre-Hearing Brief that “the fact of the oral contract has already been judicially established,” and (b) claimed in its Post-Hearing Brief that both “the contours of the parties’ understanding . . . and Carlyle’s representations to the City” and “the fact of the oral contract” had been judicially established, citing for both propositions Paragraphs 28 and 29 of the Preliminary Order of Condemnation entered by Judge Townsend. These claims reflect an unjustifiably generous reading of Paragraphs 28 and 29 of Judge Townsend’s Order. The Panel declines to adopt such a reading.
Carlyle’s purchase of Mountain Water.” 33 The City of Missoula’s Post-Hearing Response Brief 33 (emphasis added).

More significant, though, than the City’s characterization of the claimed agreement or promises in the First Amended Complaint and in the City’s Pre- and Post-Hearing Briefs is the inconsistent evidence and lack of specificity regarding the alleged agreement and promises. Multiple examples illustrate this:

[The agreement that had been reached in principle was that the City] would, in exchange for support in front of the Montana Public Service Commission, wait a year to provide an offer to Carlyle and purchase the company through a negotiated sale.34

Tr. 1792 (Engen) (emphasis added).

Q. What discussion was there about how -- if any, about how a price would be set.

A. Over time, our conversations about price were based on what we knew and what we agreed that Carlyle had paid for the system. We talked about -- we talked

33 The City argues multiple times, both in its Post-Hearing Brief and in its Post-Hearing Response Brief, that Dove and CIP “assured,” “promised,” and “made repeated representations” to Mayor Engen that the City would have a “genuine opportunity” to purchase Mountain Water, and that the City was misled and tortiously induced to support CIP’s purchase of Mountain Water by those assurances, promises, and representations. From a brief review, it appears that the only times the phrase “genuine opportunity” was uttered during the course of the hearing were (a) by Kennon Poteat in his examination of Flaherty as he reviewed the language of a presentation to be made to the Chamber of Commerce that Flaherty drafted for John Kappes, and (b) by Natasha Jones and Flaherty in the same context. Tr. 852 (Flaherty), Tr. 935-6 (Flaherty), J153.3. That phrase does not appear to have been used by Dove, Engen, or anyone else during the course of the PSC hearing. J67. Nor does that phrase appear in Mayor Engen’s deposition in the condemnation case. R449. Or in Mayor Engen’s testimony during the condemnation case. R455. That aside, the City had express, negotiated opportunities to purchase the system pursuant to the Letter Agreement. That was the contractual bargain that the City and CIP struck. There is no justification to consider those opportunities other than genuine.

34 Left unaddressed is Mayor Engen’s authority to “purchase the company.”
about Mountain Water being a third of that, which was somewhere in the ballpark of 50 million bucks, and talked about a premium on top of that.

Tr. 1792-3 (Engen) (emphasis added).

Q. Let’s look at the first page of the memo [C98]. Mr. Flaherty describes what he calls “successes,” as of March 31, 2011. The first one he mentions is, “gaining the mayor’s support.” And had you expressed that willingness to support the sale by then?

A. In exchange for the opportunity to enter into a negotiation to purchase.

Tr. 1803-4 (Engen) (emphasis added).

A. . . . My assumption was that we would reimburse them for what they paid and pay a premium for their time, money, and effort, and get them return on that investment for the shareholder.

Q. Did you give any thought as to what that so-called premium on top of $50 million would be?

A. Yeah. We talked -- we talked in the ballpark of $65 million.

Tr. 1808 (Engen) (emphasis added).

Q. What did you understand market price to be as discussed between you and Mr. Dove?

A. Fair market value, plus premium.

Tr. 1812 (Engen) (emphasis added).

Our deal was — was that we would, upon the transaction, begin doing what Robert [Dove] and I talked about, entering into a negotiation to have the City of Missoula purchase the water [system].

Tr. 1846-7 (Engen) (emphasis added).
Q. Did you still understand that there was going to be some sort of market value price that the parties would either agree upon or use some methodology to reach it otherwise?

A. Yes.

Q. Did you have in mind the various methods that Mr. Wood had described and attributed to Mr. Dove previous to the letter?

A. I did.

Tr. 1848 (Engen) (emphasis added).

I decided to sign [the Letter Agreement], because I had an oral agreement with Mr. Dove that would have provided me the -- all but a guarantee to purchase the water company . . . .

Tr. 2084 (Engen) (emphasis added).

The City’s financial advisor, Wood, had an understanding of the purported agreement that was no more consistent than Mayor Engen’s.

Q. Did you think that, at the time of this conversation you had with Mr. Dove [following the February 11, 2011 dinner], that there was a pledge on the part of Carlyle Infrastructure Partners to sell Mountain Water, if it acquired it from Sam Wheeler, to the City of Missoula?

A. I believe there was an understanding that provided the city offered a fair market price, that Carlyle would, indeed, sell to the City.

R452.150 (Wood Condemnation Dep.) (emphasis added).

[The original understanding was that] in exchange for the City agreeing to support the acquisition by Carlyle of Park Water that Carlyle would allow the City the opportunity to buy Mountain Water on reasonable terms to be agreed.
[Dove] is willing to agree to the concept of a sale by Carlyle at “a market price to be determined”, but does not want to define today exactly what that price should be.

Additional examples of inconsistent positions populate the record before the Panel; the most recent and significant of which is the verbal agreement alleged to exist—at least until the time of the City’s Post-Hearing Brief and Post-Hearing Response Brief. As detailed here, the City offers little in the way of positions that are consistent or reconcilable. As in the past, the City is unable to offer cogent explanations about the circumstances under which any enforceable agreement was reached, or when.

As stated above, there is scant evidence that the City and CIP actually had an agreement regarding the City’s purchase of Mountain Water at any time prior to the execution of the Letter Agreement on September 22, 2011, and substantial evidence that they did not. There is little doubt that the City’s potential ownership of the system was frequently discussed by Mayor Engen and Dove, and that Dove assured Mayor Engen that the City would have the opportunity to buy the system. Tr. 1253-8 (McKenna). But that is a far different proposition than that there was a mutually enforceable agreement reached on the terms of a potential purchase by the City, or a process by which a sale would be consummated.
As is discussed below, the changing, non-specific, and inconsistent descriptions of the alleged agreement reached between the City and CIP and the alleged promises made by CIP are fatal to the City’s claims there was a enforceable contract between the City and CIP.

It is an elementary rule of law that, to constitute an enforceable contract, the agreement of the parties to it must be sufficiently certain and explicit that their full intention may be ascertained to a reasonable degree of certainty.

If an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties.


Here, the City’s uncertain, non-specific, dynamic, and conflicting versions of the agreement it reached with CIP and the promises made by CIP defeat any factual argument that any such agreement or promises created a valid contract or were enforceable as a matter of contract law. The City’s most recent restatement or repackaging of its bad faith claims to constitute a verbal agreement by the City to negotiate a sale avails the City nothing.  

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35 “The City has never claimed it had a verbal buy/sell agreement. Rather, the City has alleged—and proven—that Carlyle verbally committed to working with the City to sell Mountain Water Company, or a standalone basis, for a to-be-determined sum that provided
commitment is at most an example of a “deal to make a deal” or an “agreement to agree” that is unenforceable under Montana law. *GRB Farm v. Christman Ranch, Inc.*, 326 Mont. 236, 239, 108 P.3d 507 (2005); *Long v. Needham*, 37 Mont. 408, 423, 96 Pac. 731 (1908) (“An agreement to enter into an agreement upon terms to be afterward settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled.”). The City correctly notes that an agreement need not include every term, or even every key term, if sufficient “to make the parties’ obligations clearly ascertainable.” *Hurley v. Lake Cabin Development, LLC*, 364 Mont. at 432. But the City does not come close to satisfying that standard.

But of greater significance than these inconsistent and conflicting descriptions of the alleged verbal agreements are the written statements made and earlier testimony under oath provided by Mayor Engen that there was no agreement other than the Letter Agreement. J67.222-3 (Engen PSC Test.), J67.239-40 (Engen PSC Test.), J41.10-11 (Engen Responses to Data Requests), R449.195 (Engen Condemnation Dep.) (Before the Letter Agreement, Engen had abandoned efforts to get commitments from CIP regarding terms and timing of a transaction “because Mr. Dove would have no part of it”). R449.199-200 (Engen Condemnation Dep.) (The City did not reach oral terms with anyone representing CIP), R.449.204-7 (Engen Condemnation Dep.) (Engen unable to say when Dove made a promise to sell Mountain Water).

Mayor Engen testified at his 2014 deposition that he did not reach an oral agreement with anyone representing CIP. R449.199. During the same deposition, he

Carlyle with a reasonable return on its roughly $50 million investment.” The City’s Post-Hearing Brief 84.
testified that CIP promised to sell Mountain Water “in one or more conversations with Dove,” but that he couldn’t say when the conversations occurred, that there was no discussion of terms, and that he had no writings documenting the promise. R449.204-7, R449.214, 215. Engen also testified in his 2014 deposition, that every conversation he had with Dove included discussion of a transaction, but the “depth of those discussions was shallow.” R449.211, 211.

Further, in a February 5, 2014 email to himself in anticipation of a City Council meeting, Mayor Engen prepared a chronology of events from the time CIP announced its intention to purchase Mountain Water to January 2014. In that email to himself, Mayor Engen writes:

The City of Missoula, in the wake of a number of conversations with Carlyle, agreed to support the sale of Mountain Water to Carlyle with some assurance that Carlyle would provide the city an opportunity to make an offer on the company in the event of a sale in the future. Carlyle would not agree to a firm, bilateral agreement with the city.

J120.2, see also J121.33 (emphasis added). In that same email, Mayor Engen went on to write this:

Carlyle managing director, Robert Dove, told John Engen that Mr. Wheeler would remain on the board of Park Water for one year, after which we could begin discussing a sale to the City of Missoula.

Id. (emphasis added).

These statements, made years after the Letter Agreement was signed, are largely consistent with the Letter Agreement and virtually inconsistent with any of the many
variations of the agreement or promises upon which the City bases its breach of oral contract claim.

Indeed, Mayor Engen was ultimately the only witness who testified that that there was a verbal agreement in addition to the Letter Agreement. Dove and Knudsen both testified at the PSC hearing that the Letter Agreement was the only agreement between the parties. J67.97 (Dove PSC Hearing Test.), J67.257 (Knudsen PSC Hearing Test.). Knudsen also testified at the hearing that there was no agreement beyond that contained in the parties’ Letter Agreement. Tr. 299 (Knudsen), Tr. 305 (Knudsen) (“Q. There were no side deals, oral promises, anything that wasn’t reduced to writing before the September 22, 2011 Letter Agreement, correct? A. Correct, and we didn’t feel like we needed one.”), Tr. 361-2 (Knudsen). Wood had earlier testified that he believed the Letter Agreement was “the only legal agreement that exists between the various parties.” R452.162-3 (Wood Condemnation Dep.). Consistent with that, he testified in his deposition that his early discussion with Dove as reflected in his February 18, 2011 email to Mayor Engen and others on the City’s team “was part of the beginning of the negotiation that subsequently ended up in the letter agreement . . . .” R469.154 (Wood Dep.); see J16.

The lack of specificity about the substance of the claimed verbal agreement and the earlier denials that a verbal agreement existed are independently fatal to the City’s claim that there was an enforceable oral agreement with CIP or that there were enforceable promises by CIP. Beyond that, the City’s attempt to prove such is contrary to Montana law. However the City describes the alleged agreement or promises, they
indisputably concern the same matters addressed by the Letter Agreement and no reasonable reading of the City’s claims can reach a conclusion otherwise.

The City argues in its Post-Hearing Brief that Dove’s oral promises “were not inconsistent with, or offered to modify, the Letter Agreement.” The City also argues in its Post-Hearing Brief that “the oral contract here did not add to, vary, or contradict the Letter Agreement” and that “Dove’s oral promises were not inconsistent with, or offered to modify, the Letter Agreement.” The Panel disagrees. As one example, Mayor Engen testified that the agreement he reached in principle with Dove was that the City “would, in exchange for support in front of the Montana Public Service Commission, wait a year to provide an offer to Carlyle and purchase the company through a negotiated sale.” Tr. 1792 (Engen), see also Tr. 1793 (Engen), Tr. 1817 (Engen), Tr. 1847 (Engen), Tr. 2247 (Engen). This testimony by Mayor Engen is directly contrary to the Letter Agreement, which permitted the City to make an offer “at any time.” The allegation by the City that CIP had committed to sell Mountain Water to the City provides another example of an inconsistency with the Letter Agreement, which in Paragraphs 2(a) and 2(b) clearly contemplated the possibility of sales by CIP to third parties. Mayor Engen conceded this inconsistency. Tr. 2083 (Engen).

The City also claims in its Post-Hearing Brief that the parties did not intend the Letter Agreement to be a final embodiment of their agreement, as evidenced by the lack of an integration clause. The Panel disagrees with this as well. The testimony of two of the signatories to that agreement is contrary. Further, the weight of the evidence, including the first paragraph of the Letter Agreement itself, supports the notion that the
only agreement reached by the parties was the Letter Agreement, even absent an integration clause.\textsuperscript{36}

As a result, under Montana’s parol evidence Rule, Mont. Code Ann. §28-2-904, any oral negotiations that preceded the execution of the Letter Agreement are superseded.\textsuperscript{37} And Mont. Code Ann. §28-2-905(1) prohibits consideration of the terms of the subject matter addressed by the Letter Agreement other than the Letter Agreement itself.\textsuperscript{38}

The parol evidence rule is the public policy of Montana and it is clearly established by statute and the decisions of this Court. If this public policy and rule is not upheld, contracting parties that include lawful provisions in written contracts would be under a cloud of uncertainty as to whether or not their written contracts may be relied

\textsuperscript{36} The absence of an integration clause is not fatal to a claim that an agreement is final and complete. \textit{Richards v. JTL Group, Inc.}, 350 Mont. 516, 523, 212 P.3d 264 (2009).

\textsuperscript{37} Judge Wilson reached the same conclusion in his November 21, 2018 Order Granting, in Part, and Denying, in Part, Defendants’ Motion to Compel Arbitration and to Dismiss or Stay These Proceedings, stating, “The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter which preceded or accompanied the execution of instrument. § 28-2-204. [sic] [It is clear that the court is summarizing and intending to refer to § 28-2-904.] Therefore, disputed facts concerning the parties’ negotiations and other promises allegedly made (and breached) by CIP are not material.” R419.8.

\textsuperscript{38} Mont. Code Ann §28-2-905(2) provides that evidence under which the agreement was made or to which it relates, or other evidence to explain an extrinsic ambiguity or to establish fraud, is not excluded. But “that exception only applies when the alleged fraud does not relate directly to the subject of the contract. Where an alleged oral promise directly contradicts the terms of an express written contract, the parol evidence rule applies. \textit{Continental Oil Co. v. Bell} (1933), 94 Mont. 123, 133, 21 P.2d 65, 67. \textit{Accord, Superior Oil Company v. Vanderhoof} (D. Mont. 1969), 297 F. Supp. 1086.” \textit{Sherrodd v. Morrison-Knudsen}, 249 Mont. 282, 285, 815 P.2d 1135 (1991). Given this, the City may introduce evidence of fraud for other purposes, but not for the purpose of providing evidence of terms at odds with the contents of the Letter Agreement. \textit{Richards v. JTL Group, Inc.}, 350 Mont. 516 , 212 P.2d 264 (2009).
upon. The public policy and law does not permit such uncertainty to occur.


The City’s cause of action for Breach of Oral Agreements or Promises is dismissed with prejudice.

**B. Breach of Implied Covenant of Good Faith and Fair Dealing.**

The City has argued that CIP breached the implied covenant of good faith and fair dealing in multiple respects. Among other things, the City alleges that CIP falsely claimed that it intended to remain in the Missoula community, that it falsely represented that the system was not for sale at the same time it was secretly marketing the system, that it never intended to perform its agreement with the City, that it refused to negotiate in response to the reasonable offers made by the City, that it never made a counteroffer to the City, that during the condemnation proceedings it failed to disclose an offer from Northwestern Energy to buy the system, that it withheld information from the City that would have disclosed that the system was worth significantly less than one-third of Park Water, that it was engaged in an effort to marshal opposition to ownership by the City, and that the reasons offered for its rejection of the City’s offers were contrived and, in any event, could have been addressed and solved had it made the effort to do so. This and other conduct, according to the City, breached the implied covenant of good faith and fair dealing. And this and other conduct, according to the
City, also provides factual support for the City’s causes of action for fraudulent inducement, fraud, deceit, negligence, and constructive fraud.39


Montana statutory law defines the conduct that constitutes a breach of the implied covenant as “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” Mont. Code. Ann. §28-1-211. “[T]he covenant is a mutual promise implied in every contract that the parties will deal with each other in good faith, and not attempt to deprive the other party of the benefits of the contract through dishonesty or abuse of discretion in performance.” Phelps v. Frampton, 339 Mont. 330, 341, 170 P.3d 474 (2007); see also House v. U.S. Bank National Assn., 403 Mont. 287, 305, 481 P.3d 820 (2021); Darnels v. BNSF Ry. Co., 403 Mont. 437, 483 P.3d 495 (2021). Irrespective of whether a claim for breach of the implied covenant is a contract claim or a tort claim based upon a special relationship, the “honesty in fact” standard of conduct

39 The City does not address separately the legal requirements for prevailing on a claim for fraudulent inducement. The City’s Post-Hearing Brief refers only to its four tort theories of fraud, constructive fraud, deceit, and negligent misrepresentation. However, the City refers to fraudulent inducement multiple times in its Post-Hearing Brief. The City’s Post-Hearing Brief i, 11, 34, 36, 88, and 96.

In order to prevail on a claim that the implied covenant of good faith and fair dealing has been breached, “there must be an enforceable contract to which the covenant attends.” *Knucklehead Land Co. v. Accutitle, Inc.*, 340 Mont. 62, 69, 172 P.3d 116 (2007); *Hurly v. Lake Cabin Development, LLC*, 364 Mont. 425, 434, 276 P.3d 854 (2012), *Phelps v. Frampton*, 339 Mont. at 343, *GRB Farm v. Christman Ranch, Inc.*, 326 Mont. 236, 240, 108 P.3d 507 (2005). The lack of a valid unwritten contract between the City and CIP is fatal to the City’s claim that there was a breach of the duty of good faith and fair dealing based on a verbal agreement or promises alleged by the City.

To the extent the City’s cause of action for breach of the implied covenant of good faith and fair dealing relates to the conduct of CIP in connection with any alleged verbal agreement with CIP or promises by CIP, it is dismissed with prejudice.

But the City also suggests other breaches of the implied covenant of good faith and fair dealing that relate to obligations of CIP under the Letter Agreement.

That the Letter Agreement was a valid contract between the City, CIP, and CFC is not disputed. In Paragraphs 2(b) and 2(d), CIP agreed, under the circumstances

40 Respondents suggest that the City’s claim for breach of the implied covenant is legally barred because the covenant functions only as a gap filler, citing *Hannon v. Avis Rent A Car System, Inc.*, 107 F. Supp. 2d 1256, 1261 (D. Mont. 2000). Respondents accurately reflect what the court in *Hannon* expressed, but the *Hannon* decision did not cite a Montana case for that proposition, nor does the *Hannon* decision appear to have been cited by any Montana federal or appellate court for that—or any other—proposition in the 21 years since it was published. Indeed, the court in *Hannon* acknowledged that the issue before it was an issue of first impression in Montana. The notion that the implied covenant functions as a gap filler is an outlier and would appear to be quite inconsistent with the tenor of Montana case law.
described in those paragraphs, to consider in good faith offers from the City to purchase Mountain Water, the Missoula water system, or the stock in Mountain Water. As a function of those express provisions, as a matter of contract law clearly CIP was obligated to consider those offers in good faith.

Because the implied covenant of good faith and fair dealing is contained “in every contract, regardless of type,” Story v. City of Bozeman, 242 Mont. at 450, it is not abrogated by the presence of the express good faith obligations that appear in Paragraphs 2(b) and 2(d) of the Letter Agreement. It would be untenable to contend that the inclusion of good faith obligations in Paragraphs 2(b) and 2(d) would effectively negate the applicability of the implied covenant of good faith and fair dealing to the Letter Agreement as a whole, or even solely to Paragraphs 2(b) and 2(d). Further, the Letter Agreement provides in Paragraph 2(e) that it is to be “construed in accordance with and governed by the internal laws of the State of Montana applicable to contracts executed and performed within the State of Montana . . . .” J63.3. There exists no compelling reason why the implied covenant of good faith and fair dealing would be inapplicable to the Letter Agreement or any portion of it.

That the City has not pursued a claim that CIP violated its contractual obligation to consider the City’s offers in good faith does not preclude the City from claiming that the duty of good faith and fair dealing has been breached. As stated earlier, a breach of an express contractual term is not a prerequisite to breach of the implied covenant. Story v. City of Bozeman, 242 Mont. at 450; House v. U.S. Bank, 403 Mont. 287, 305, 481
P.3d 820 (2021) (“breach of the implied covenant of good faith does not require or depend on the breach of an express contract term.”).

But the City has not demonstrated that CIP violated the duty of good faith and fair dealing. The Panel concludes that the City has not demonstrated the factual support necessary to establish a violation of that legal obligation.41

The City contends there was never any plan or intention to sell Mountain Water in isolation and that CIP’s entire campaign for the acquisition of Park Water was a fraudulent and deceitful scheme designed to enlist public support for its acquisition and gain the PSC’s approval through the support of Mayor Engen and the Clark Fork Coalition. The Panel rejects the City’s argument that CIP never intended to perform its agreement.

In support of its position, the City has cited a statement made by Nelson in an email dated September 2, 2011 in which he states, “Frankly, there is next to no chance that Carlyle will try to sell Mountain by itself.” C162.1. But Nelson’s next sentence states, “But, if someone were to make us an offer we would give the City a change [sic]

41 The discussion that follows assumes that matters pre-dating the Letter Agreement can give rise to a claim that the implied covenant of good faith and fair dealing has been violated. But there exists authority for the proposition that only conduct related to the performance of a contract can support a claim for breach of the implied covenant, and that therefore conduct before the date of a contract cannot support such a claim. House v. U.S. Bank National Assn., 403 Mont. 287, 305, 481 P.3d 820 (2021); Accusoft Corp. v. Palo, 237 F.3d 31, 45 (1st Cir. 2001) (“[T]he prohibition contained in the covenant applies only to conduct during performance of the contract, not to conduct occurring prior to the contract’s existence, such as conduct affecting contract negotiations.”); Sonoran Scanners, Inc. v. Perkinelmer, Inc., 585 F.3d 535, 542 (1st Cir. 2009) (“[S]tatements that are made before a contract is executed are ‘inadequate’ for a claim of breach of the implied covenant of good faith and fair dealing.”) (emphasis in original); Scott Timber Co. v. United States, 692 F.3d 1365 (Fed. Cir. 2012).
to compete for the asset.” 42 Id. That sentence is at odds with the City’s proposition that CIP never intended to perform, and indeed suggests just the opposite. The substantial weight of the evidence demonstrates that CIP remained willing to sell to the City.

Left unanswered by the City during these proceedings, including by way of a response to an invitation from the Panel at the time of oral argument, is an explanation of what motivation existed for CIP to refuse to sell Mountain Water to the City if it were to make a competitive offer. Indeed, the testimony was consistent that CIP would have sold to the City and was as interested in selling the system to the City as it would be selling to another party. Tr. 492 (Dove), Tr. 532 (Dove), Tr. 658 (Dove), Tr. 966 (Lin), Tr. 1119 (Lin), Tr. 1981 (Engen), Tr. 2055-6 (Engen). The City has simply failed to demonstrate that CIP never intended to sell the system to the City.43

42 Notably, Nelson added, accurately, “We see this as a concession to the City above and beyond what is in the 1997 [Kadas] letter.”

43 For example, the City cites as demonstrating that CIP never intended to sell the system an email from David Marchick to Dove and others dated February 3, 2014. J119.1. In that email, Marchick wrote, “Ultimately we are going to sell to someone else . . . .” The City also finds support a response from Dove to Marchick’s comment: “The most likely outcome is that we find a buyer and then we negotiate a sale with the Mayor buying Montana.” Id. What was written in these emails in the context of what was taking place in 2014 provides little support for the City’s contention that CIP never intended to sell to the City. At the time of this email chain, the City had twice offered $65 million for Mountain Water, the City Council had authorized the acquisition of Mountain Water through purchase or condemnation, and the City had just offered $50 million for the assets of Mountain Water. Similarly, given the time and the context, the comment of Leigh Jordan to the Apple Valley Town Council in July 2015 that “[t]here is no plan, and there never was a plan to sell Park’s subsidiaries individually” is also of little persuasive affect. R394.3. Jordan was responding to a question that asked why, if Park Water was being sold to Algonquin, wouldn’t “it” be sold to the Town of Apple Valley. (From the context, it is clear that the word “it” is a reference to Apple Valley Ranchos.) Immediately following Jordan’s statement quoted above, he says, “So, Apple Valley Ranchos is not and has not ever been for sale.” (The Panel would also note that not only does the City misquote Jordan’s comment, but it unjustifiably substitutes in brackets the words “Mountain Water” for what was actually said – “Park’s subsidiaries.”)
Both the City and Respondents address when the City and CIP knew that CIP intended to factor in the effect of double taxation, make-whole payments, and stranded overhead as it evaluated the City’s offer. J94. Consideration of these factors became contentious only when CIP rejected the City’s first proposal to purchase Mountain Water in early 2013. Tr. 1864-5 (Engen), J94.

There is little question that double taxation, make-whole payments, and stranded overhead attendant upon a sale of Mountain Water represented legitimate concerns of CIP, and the financial implications each of those served to significantly reduce CIP’s return on its investment. None of these concerns were contrived. Tr. 2137-8 (Engen), R449.231 (Engen Condemnation Dep.), R456.343 (Engen Condemnation Test.), R460.187 (Koegen Dep.). Nor, contrary to the City’s contentions, were these concerns “solved,” “avoidable,” or “easily addressed,” despite the concerted efforts of CIP’s advisors to find ways in which the impact could be reduced or eliminated. Contrary to the City’s express claim, the tax consequences of a sale to the City could not have been easily deferred. Contrary to the City’s express claim, there were not ways in which the make-whole payments could have been avoided, although it may have been possible to reduce them. And contrary to the City’s express claim, CIP made efforts to address or overcome the obstacles it identified. The Panel finds that CIP made reasonable and good faith efforts to address these obstacles to a sale to the City. However, CIP’s efforts and the efforts of CIP’s advisors were not successful.

At all times, the City was well aware that CIP was a financial investment fund whose business it was to maximize return for its investors. Tr. 1808 (Engen), Tr. 1812
(Engen), Tr. 1969, (Engen), Tr. 2013-14 (Engen), Tr. 2083-84 (Engen), Tr. 2113 (Engen), Tr. 2175-76 (Engen). The City actually knew before it signed the Letter Agreement that there was a potential for double taxation. Tr. 2145-6 (Engen), Tr. 2148 (Engen). The City actually knew before it signed the Letter Agreement that there were indentures and potential make-whole payments. Tr. 2144-5 (Engen). And the City actually knew before it signed the Letter Agreement that Mountain Water paid more than $1 million toward Park Water’s overhead. Tr. 2051 (Engen), J41.8.

Even if the City was unaware of the potential for double taxation, make-whole payments, and stranded overhead, the City’s advisors were aware—or should have been aware—that each of these three factors may have had an impact on CIP’s response to any offer made by the City and that these three factors would have to be taken into consideration in calculating any return on investment. Tr. 1675 (Wood), Tr. 2137-8 (Engen), Tr. 2145-6 (Engen). And even if the financial impact of these considerations could not be determined with certainty because of dynamic factors such as tax rates and interest rates, the City’s advisors had access to sufficient information to advise the City of the potential for an impact. Tr. 2143 (Engen), Tr. 2450 (Larocque), Tr. 2452 (Larocque), Tr. 2454 (Larocque), Tr. 2455 (Larocque), R468.62-65 (Koegen Dep.).

The Panel rejects the City’s argument that CIP was duty-bound to explain to the City during the course of negotiations leading up to the Letter Agreement the existence and potential impact of these issues given the City had its own sophisticated advisors and given the then-unknown and unknowable actual future impact of these issues. See R486.¶102 (Coates Rebuttal Report). The Panel’s conclusion may have been otherwise
had there been an enforceable agreement to sell Mountain Water at fair market value, but the Panel has found that the only enforceable agreements between the City and CIP regarding the sale of Mountain Water are those appearing in the Letter Agreement, and the only provision of the Letter Agreement implicated by the facts before the Panel is Paragraph 2(d), which requires only that CIP consider the City’s offers in good faith.

The City has also failed to demonstrate that CIP refused to negotiate in response to the proposals made by the City. The obligation to negotiate in good faith is a very limited obligation and “amorphous at best.” Tr. 2805 (Subramanian), Tr. 2835 (Subramanian), Tr. 2836 (Subramanian). It is a stretch to consider the discussions about the actual purchase of the system, beginning with the presentation by the City of its unsigned, undated proposal in February 2013, as formal, binding, and legally enforceable offers by either the City or CIP.44 To that extent, the discussions and writings between the parties were legally deficient.45 However informal, unstructured, and infrequent as they may have been, the parties carried on negotiations. Tr. 2837-8 (Subramanian).

It is also worth noting that CIP was under no duty to negotiate at all. CIP’s express obligation was “to consider in good faith” offers made by the City. Such a contractual provision does not require that counteroffers be made in response to an offer or that there be any negotiation at all. Tr. 2805 (Subramanian), Tr. 2835

44 This is so, even if Dove characterized the City’s first proposal as “a formal offer.” J79.1.

45 Neither the proposals by the City to CIP nor the statements by CIP to the City about what it believed would be a suitable purchase price were dismissed or ignored by the other party because of a lack of formality. They were considered by the receiving party.

More compelling, as early as January 2011 and continuing after that, the City discussed internally a provision that would require that the City and CIP negotiate the acquisition of the System. J.10.4, J14.5, J17, R38.4. But the City decided not to include in its proposal an obligation to negotiate in good faith. Tr. 2002-3 (Engen), J20.8, R.56.1. The City did not include an obligation to negotiate in good faith in its first proposal to CIP. J21.3. Nor was it included in the City’s response to CIP’s September 2, 2011 draft agreement. J50.3. And the Letter Agreement contains no such requirement. J63. Against that evidentiary background, the argument that CIP violated a good faith obligation to negotiate is untenable.47

The Panel also discounts the City’s suggestion that CIP did not act consistent with its obligation of good faith and fair dealing when, during the course of the condemnation proceedings, it did not disclose an offer received from Northwestern Energy (“Northwestern”) to buy the system.48 Even if the City’s withholding of that

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46 At the PSC Hearing, Nelson testified that CIP had an obligation to negotiate in good faith. J67.75 (Nelson PSC Test.). The Panel does not deem Nelson’s response to a Commissioner’s question during the course of the hearing sufficient to create an obligation not present in the Letter Agreement that was signed by the parties.

47 Wood testified at the hearing that he expected there would be negotiations based on his lengthy experience in the business. Tr. 1562 (Wood). But based on the evidentiary background referred to above, and especially Wood’s role in it, his expectation was not well-founded and clearly at odds with Paragraph 2(d) of the Letter Agreement that he recommended and helped draft.

48 The “offer” by Northwestern to purchase was solely for the assets of the system and was made in its “preliminary, non-binding indication of interest.” J133. The City is in error to the extent it has represented that Northwestern’s offer was for the whole of Mountain Water. And,
information during the course of the condemnation proceeding was inappropriate—and it may have been—any marginal relevance in this proceeding of Northwestern’s offer is tempered by the price Northwestern offered for the entirety of Park Water, which was below all but one of the 13 offers received for Park Water and substantially below the highest offers, and the price that it offered was only for the assets of Mountain Water.

The Panel also rejects the City’s contention that CIP withheld information from the City that would have disclosed that the system was worth significantly less than one-third of Park Water. The implied covenant of good faith and fair deal does not require that CIP voluntarily disclose all information in its possession about the value of either Park Water or Mountain Water. More importantly, the City had its own advisors prepare estimates of the value of Mountain Water and, based on those analyses, concluded the value was approximately one-third. Tr. 1670 (Wood), J17, J41.6-7, R452.166.

per the Letter Agreement, CIP expressly preserved to itself the right to maximize value to investors by selling Park Water as a whole.

Northwestern Energy offered $215 million for Park, whereas the three highest offers received were for $300 million or more. J134. Dove was not interested in either Northwestern’s offer to buy Park Water or its offer to buy the assets of Mountain Water. Tr. 682 (Dove).

Nor does the Panel attach any significance to the fact that CIP may not have prepared a standalone valuation of Mountain Water. Without question, CIP was a sophisticated investor with sufficient information about the value of Park Water and Mountain Water that it did not need to separately determine the standalone value of Mountain Water in order to conclude that all of the City’s proposals were inadequate to justify a sale to the City.

Wheeler, who had owned Park Water for decades, had also never officially valued Park Water’s utilities separately, but when specifically asked in his deposition about the relative values of those utilities, testified that Mountain Water “was the absolute star in the crown” and explained the reasons for that opinion. R454.53-55 (Wheeler Condemnation Dep.).
The City has claimed that it was not good faith for Dove to make commitments on behalf of CIP when he lacked the actual authority to do so. But while Dove may have lacked the actual authority to commit to sell Mountain Water, the City failed to demonstrate that Dove lacked the authority to agree that CIP would consider in good faith any offer the City made to purchase Mountain Water, that he lacked the authority to make the other commitments he made on behalf of CIP in the Letter Agreement, or that he was required to inform the Investment Committee of the existence of the Letter Agreement.\(^{52}\)

To prevail on its breach of the implied duty of good faith and fair dealing claim, the City was required to demonstrate an unreasonable deviation from prevailing commercial standards in the mergers and acquisition field.

Proof of an alleged breach of the implied covenant merely requires proof that the offending party acted within the framework of the express contract in a manner that was an unreasonable deviation from prevailing commercial standards of reasonableness in the trade at issue.

*Dannels v. BNSF Ry. Co.*, 403 Mont. 437, 466, 483 P.3d 495 (2021) (citing cases) (Eddy, J., concurring). The City has not proven the required unreasonable deviation.

\(^{52}\) Dove “acted at all times relevant to these [condemnation] proceedings as the person with apparent authority to speak on behalf of Mountain Water with regard to the City’s efforts to acquire the Water System.” C514.§8.
For the reasons set forth above and others, the City’s claim that CIP’s conduct amounted to a contractual breach of the implied covenant of good faith and fair dealing, is dismissed with prejudice.


Even if the City had proven a violation of the implied covenant of good faith and fair dealing—and it has not—the remedy of a tortious violation would be unavailable to it.

A claim of tortious breach of the implied covenant of good faith and fair dealing is dependent on the existence of a special relationship, and five elements must be

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53 For example, the City suggests that a four-point strategy set out by Flaherty in a January 30, 2012 memo was designed to drum up public opposition to defeat City ownership. C693.3. But CIP offered legitimate explanations that put that element of the strategy in context, and the memo itself offered a rational explanation for that element. Tr. 540 (Dove), Tr. 1052-3 (Lin), C693.1.

54 In its Pre-hearing Brief, the City sets forth as one of the questions to be answered in the liability hearing the following: “Did Carlyle fail to perform its written obligation to consider in good faith a sale of Mountain Water Company (‘Mountain Water’), or the Missoula water system owned and operated by Mountain Water, to the City on a standalone basis at a fair market value?” The question implies that there was a written obligation to consider in good faith a sale at fair market value. The Letter Agreement says nothing of the sort; it only requires CIP “to consider in good faith any offer from the City . . . .” There is no writing that imposes upon CIP a contractual obligation to consider in good faith a sale of Mountain Water on a standalone basis at fair market value.
proven to establish the necessary special relationship: (1) the contract must be such that the parties are in inherently unequal bargaining positions; (2) the motivation for entering the contract must be a non-profit motivation; (3) ordinary contract damages are not adequate because (a) they do not require the party in the superior position to account for its actions, and (b) they do not make the inferior party whole; (4) one party is especially vulnerable because of the type of harm it may suffer and of necessity places trust in the other party to perform; and (5) the other party is aware of this vulnerability. *Story v. City of Bozeman*, 242 Mont. 436, 451 (2009), *House v. U.S. Bank*, 403 Mont. 287, 305, 481 P.3d 820 (2021).

The tort remedy is not available here because there was no special relationship between the City and CIP: CIP was not in a superior position, the City was not vulnerable as required, the parties were not in inherently unequal bargaining positions, and the City has not proven that contract remedies would be inadequate.

To the extent arbitrable, the City’s claim for tortious breach of the implied covenant of good faith and fair dealing is dismissed with prejudice.

C. **Other Tort Claims.** The City’s pure tort causes of action (fraudulent inducement, fraud, constructive fraud, negligent misrepresentation, and deceit) (“the tort claims”) fare no better than the City’s claims from breach of contract and breach of the implied covenant of good faith and fair dealing. Beyond the City’s failure to meet its burden of proof on its factual allegations, the City cannot surmount legal hurdles that limit the extent to which it can introduce the evidence it claims supports these causes of action.
As is the case with the City’s efforts to claim that CIP violated the implied covenant of good faith and fair dealing, here, too, the City is generally barred by the parol evidence rule from relying on representations that are contrary to the terms of the Letter Agreement. Those representations that directly relate to and contradict the subject matter of the Letter Agreement cannot be considered, although the parol evidence rule does not bar the admission of evidence bearing upon a claim of fraud in the inducement. *Savik v. Entech, Inc.*, 278 Mont. 152, 158, 923 P.2d 1091 (1996); *Sherrodd v. Morrison-Knudsen*, 249 Mont. 282, 285, 815 P.2d 1135, 1137 (1991); *Dew v. Dower*, 258 Mont. 114, 120, 852 P.2d 549, 552 (1993).

But even if evidence of fraud is admissible, the City has not made the demonstration required to prevail on any of its five tort claims.

It is significant that, even after voluminous discovery and ten days of hearing in this arbitration proceeding—not to mention substantial discovery and testimony in related proceedings—in addressing the representations that support the City’s fraud and deceit claims the City can only claim, “Dove and others acting on behalf of Carlyle made repeated representations to the effect that it would provide the City a genuine opportunity to buy the utility.” The City’s Post-Hearing Brief 33.

The crux of the City’s tort claims is that it was denied “a genuine opportunity to buy” the system—a statement seemingly forged by the City based upon other representations that may actually have been made. Those tort claims fail. As detailed above, the City, through lengthy discussions and exchanges with CIP, negotiated and was provided an opportunity to buy the system.
To the extent the City’s tort claims rely upon individual representations it claims were made by CIP, the tort claims fail as well.

The elements of four of the City’s tort claims (fraudulent inducement, fraud, constructive fraud, and negligent misrepresentation) expressly include a requirement that the City “justifiably rely” or “have a right to rely” on the asserted representations. While the statutory deceit claim, Mont. Code Ann. § 27-1-712, does not contain an express provision requiring reasonable reliance, it does require an induced alteration in position resulting in damage; that is, reliance.55 To prevail on a claim of deceit under the statute would require a demonstration of damage resulting from reliance. Cf. Pfau v. Mortenson, 858 F. Supp. 2d 1150, 1158 (D. Mont. 2012) (“Deceit is essentially grounded in fraud . . . .”).

Accepting for the sake of argument that CIP made the representations claimed by the City, to the extent they were patently inconsistent with other representations upon which the City relies, any reliance by the City on any of those representations was unreasonable. And as noted by the Panel previously, the effort of the City to weave these representations together to construct a general obligation of CIP to provide to the

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55 In its Post-Hearing Brief, the City quotes Mont. Code Ann. § 27-1-712(1) as it existed before its amendment by Sec. 585, Ch. 56, Laws of 2009. Prior to that amendment, the statute read, “One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.” This is what the City quotes. As a result of the 2009 amendment, the statute now reads, “One who willfully deceives another with intent to induce that person to alter the person’s position to the person’s injury or risk is liable for any damage that the person suffers.” In addition to language changes making the statute gender neutral, the legislature also deleted the word “thereby.”
City “a genuine opportunity” to purchase the system beyond that expressly set forth in the Letter Agreement fails as well.\textsuperscript{56}

Three of the City’s tort claims (fraudulent inducement, fraud, and deceit) also require proof of an intent to deceive. Here, too, there is a failure of proof by the City that CIP harbored any intent to deceive the City.

The City’s negligent misrepresentation claim also fails because the City has not demonstrated that CIP misrepresented a material past or existing fact. \textit{Kitchen Krafters, Inc. v. Eastside Bank of Montana}, 242 Mont. 155, 165, 789 P.2d 567 (1990), overturned on other grounds, \textit{Busta v. Columbus Hospital Corp.}, 276 Mont. 342, 916 P.2d 122 (1996).

The City cites \textit{Restatement (Second) of Torts} § 552 in support of its negligent misrepresentation claims. The Montana Supreme Court approved the definition of negligent misrepresentation in § 552 in its opinions in \textit{Brown v. Merrill Lynch, Pierce, Fenner & Smith}, 197 Mont. 1, 640 P.2d 453 (1982) and \textit{State Bank of Townsend v. Maryann's Inc.}, 204 Mont. 21, 664 P.2d 295 (1983). But repeatedly (if not consistently) since that time, to prevail on a claim of negligent misrepresentation, the Montana Supreme Court has required six elements not mentioned in § 552, but first set forth in \textit{Kitchen Krafters}.\textsuperscript{57}

\textsuperscript{56} To the extent in its Post-Hearing Brief the City later characterizes the misrepresentation as a promise by CIP that it would provide to the City “a genuine opportunity to buy Mountain Water Company \textit{for a fair market price plus a reasonable premium to be determined...},” the claim fails not only because it is contrary to other evidence offered by the City, but also because it was also not a representation upon which the City could justifiably rely.

\textsuperscript{57} “Montana's standard for tortious negligent misrepresentation had been previously based upon \textit{Restatement (Second) of Torts} § 552 (1997) since \textit{Brown v. Merrill Lynch, Pierce, Fenner & Smith}, 197 Mont. 1, 12, 640 P.2d 453, 458–59 (1982). There, we adopted a ‘reasonable care’ test for determining whether one who in the course of business has supplied false information to another in the conduct of his business transactions should be held liable for negligent misrepresentations. Subsequently, we set forth the six-prong list of elements in \textit{Kitchen Krafters}. “
One of those elements is that there be a demonstration of a material fact already in existence that is untrue. Most recently, the Court in *WLW Realty Partners, LLC v. Continental Partners VIII, LLC*, 381 Mont 333, 339, 360 P.3d 1112 (2015), expressly required that the misrepresentation be untrue when made. The elements of negligent misrepresentation set forth in § 552 are different, but also include a requirement that false information be supplied.

The City’s claim that CIP misrepresented its intention to perform in the future does not support a claim for negligent misrepresentation under either the *Kitchen Krafters* standards or under § 552, but as detailed above, was not proven. The City’s claim that CIP misrepresented that it would sell the system to the City likewise does not support a claim for negligent misrepresentation and also was not proven.

Respondents contend that Montana’s two-year statute of limitations bars the City from asserting causes of action for fraudulent inducement, fraud, constructive fraud, and deceit. MCA § 27-2-203. Respondents argue that the statute of limitations began to run on March 26, 2013, with Dove’s letter to the City rejecting the City’s $65 million proposal and providing the reasons why, including issues relating to double taxation, make-whole payments, and stranded overhead—reasons that the City had not heard before. This letter, according to Respondents, gave notice to the City of facts on which it bases its fraud-based claims. Because the City did not file its lawsuit in Montana

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. . . We have since applied these six prongs in numerous cases . . . .” *Harpole v. Powell Cnty. Title Co.*, 371 Mont. 543, 550, 309 P.3d 34 (2013).
District Court until October 1, 2015, its fraud-based claims are barred, according to Respondents. The Panel does not agree.

Respondents do not dispute that certain documents the City relies upon as substantive evidence in support of its tort claims were not produced except in discovery in this proceeding. Respondents’ position is simply that the City’s fraud-based claims are encompassed within the Complaint the City filed in October of 2015 and are based on occurrences alleged to have occurred more than two years prior. The Panel does not agree with the predicate on which Respondents’ argument is based; namely, that the March 26, 2013 letter provided notice to the City of its fraud-based claims. That letter may have provided new information to the City, but it did not provide notice to the City it had been defrauded. In fact, in the narrative of the original Complaint filed by the City on October 1, 2015, the City referred no less than 17 times to the transcript of the necessity hearing in the condemnation proceeding, a hearing that did not end until early-April 2015. Respondents have not demonstrated that the City discovered, or should have discovered, the acts giving rise to its fraud claims based on the March 26, 2013 letter. The statute of limitations does not bar the City’s fraud-based claims. But as discussed above, the City’s tort claims fail nonetheless.

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58 There is also an argument to be made that the requirements to prove the representations supporting the fraud-based claims in this arbitration proceeding should be at least as stringent as the pleading requirements of Montana law and procedure.

M. R. Civ. P. 9(b) requires a party alleging fraud to plead the circumstances constituting fraud with sufficient particularity. *Fossen v. Fossen*, 2013 MT 299, ¶9, 372 Mont. 175, 311 P.3d 743. “A sufficiently pled fraud complaint should allege not only that a representation was made, but also the time and place of the representation.” *Fossen*, ¶ 9 (citing *C. Haydon Ltd. v. Mont.*
The City’s claims for fraudulent inducement, fraud, constructive fraud, negligent misrepresentation, and deceit are dismissed with prejudice.

D. Unjust Enrichment. The City’s claim of unjust enrichment also fails. Unjust enrichment is an equitable claim that does not have any application where the matter at issue is governed by an enforceable contract. *Welu v. Twin Hearts Smiling Horses, Inc.*, 386 Mont. 98, 109, 386 P.3d 937 (2016); see also *Associated Mgmt. Servs. v. Ruff*, 392 Mont. 139, 170, 424 P.3d 571 (2018); *Maxted v. Barrett*, 198 Mont. 81, 87, 643 P.2d 1161 (1982) (“The theory of unjust enrichment and restitution is brought into play when no contract between the parties exists and the court implies a contract in law.”). The existence of the Letter Agreement precludes the City’s claim for unjust enrichment.

To the extent arbitrable, the City’s claim for unjust enrichment is dismissed with prejudice.

E. Causation.

In view of the preceding discussion, the issue of causation does not require a detailed analysis.

Adding to the City’s challenges—assuming a separate enforceable verbal commitment, a violation of the obligation of good faith and fair dealing in connection with performance of a verbal agreement or the Letter Agreement, and/or proof that CIP

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*Odom v. Bank of N.Y. Mellon*, 399 Mont. 552, 459 P.3d 225 (2020). Here, the City has generally been unable to either plead or prove with particularity the circumstances, time, and place of many of the representations upon which it bases its claims. In addition, the threads woven together by the City to create a fraud claim based on “repeated representations to the effect that it would provide the City a genuine opportunity to buy the utility” do not satisfy the applicable particularity standard.
was tortfeasor—is the issue of causation. From the purely practical, admittedly ironic perspective, the City’s support of CIP’s acquisition of the Park Water cleared the way for a successful condemnation suit, unencumbered by the disputed valuation challenges and procedural barriers necessitated by a direct purchase, and at a price acceptable to the City. Stated succinctly, the City’s goal of achieving public ownership of its water supply at fair market value has been realized.

While the City argues its $65 million offer was reasonable, the City never goes so far as to suggest it had any agreement on either a purchase price for Mountain Water or a mechanism for determining such a purchase price. At most, the City reached an unenforceable agreement to agree to material terms at some future date. The City has not alleged it reached any agreement to purchase at a price below fair market value or any value that would constitute a “sweetheart deal.” To the contrary, the City acknowledges it was going to have to compete in the market place to acquire the system. Tr. 1658-9 (Wood), Tr. 2113 (Engen). The City must likewise acknowledge that CIP preserved the right to sell all of Park Water to a third party.

The overwhelming evidence on valuation (including contemporaneous materials prepared by both the City’s advisors and CIP, the opinions of Wheeler and Ebbershoff, the comments of Wells Fargo, the indications of interest of bidders in the auction process, the ultimate price paid for Park Water through the auction process, and the valuation ultimately determined in condemnation) reflects that at no time was an offer by the City of $65 million competitive, not even taking into account issues of double taxation, make-whole premiums, and stranded overhead. Moreover, given the offers
CIP received for Park Water, the imputed value for Mountain Water upon sale, and even the City’s analysis of asset value and the City’s borrowing capacity, it was likely that the City could not afford to finance the acquisition of Mountain Water at anything approaching market value. As a result of the City’s decision to pursue condemnation and its successful conclusion, it avoided those challenges.

IV

Order

The City’s cause of action for breach of oral agreements or promises is dismissed with prejudice.

The City’s cause of action for breach of the implied covenant of good faith and fair dealing is dismissed with prejudice to the extent the City claimed (a) that Respondents “failed to act in good faith and acted unreasonably with the effect of denying the City an opportunity to purchase the water system on terms that were consistent with the parties’ 2011 understandings and agreements,” that Respondents “acted arbitrarily, capriciously, unreasonably, and dishonestly, in fact, and did not abide commercial standards of fair dealing,” and that Respondents “breached their duty of good faith and fair dealing,” as set forth in ¶221 of the City’s First Amended Complaint, and (b) that Respondents’ tortious delay of the City’s purchase of the water system inflated the fair market value of the system and resulted in additional deferred maintenance of the utility and litigation expenses as set forth in ¶227 of the City’s First Amended Complaint.

The City’s causes of action for fraudulent inducement, fraud, constructive fraud,
negligent misrepresentation, and deceit are dismissed with prejudice.

The City’s cause of action for unjust enrichment is dismissed with prejudice to the extent that the City claimed Respondents wrongfully obtained a benefit in the form of “Carlyle’s purchase of Park Water, the ownership of Park Water and the benefit of the revenue generated by Park Water’s subsidiaries, and/or the sale of Park Water by Carlyle to Liberty,” as set forth in ¶159 of the City’s First Amended Complaint.

The parties are directed to confer and if, possible, reach agreement on schedules for briefing issues relating to (a) matters that remain to be addressed in light of the Panel’s prior grant of summary judgment on Respondents’ Motion for Summary Judgment on Its Counterclaim, and (b) any petitions for attorney’s fees and costs that are to be filed in this proceeding. The parties shall also confer and, if possible, reach agreement on whether a hearing is recommended with respect to either issue. The parties shall report to the Panel in due course on any agreements that have been reached on these matters and any issues that remain in dispute.

Dated: November 30, 2021.

Stew Cogan, Arbitrator

Richard Chernick, Arbitrator

Micheal Lamb, Arbitrator