

<p>DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue Hot Sulphur Springs, CO 80451</p>	
<p><b>Plaintiff:</b> GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,</p> <p>v.</p> <p><b>Defendants:</b> HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC, GRANBY PRENTICE, LLC; and GR TERRA, LLC.</p>	
<p><i>Attorneys for Headwaters Metropolitan District and GR Terra LLC:</i> Jamie H. Steiner, #49304 JoAnn T. Sandifer (<i>Admitted Pro Hac Vice</i>) Husch Blackwell LLP 1801 Wewatta St., Suite 1000 Denver, CO 80202 Phone: 303-749-7200 Fax: 303-749-7272 E-mail: jamie.steiner@huschblackwell.com joann.sandifer@huschblackwell.com</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p> <p>Case No. 2021CV30008</p> <p>Division 1</p>
<p><b>HEADWATERS METROPOLITAN DISTRICT’S MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND IV OF ITS COUNTERCLAIMS AND GR TERRA LLC’S MOTION FOR SUMMARY JUDGMENT ON COUNT IV OF COUNTERCLAIM</b></p>	

Defendant Headwaters Metropolitan District (“Headwaters”) seeks summary judgment on Count I of Headwaters’ Counterclaims to the Third Amended Complaint and both Headwaters and Defendant GR Terra LLC (“GR Terra”) (collectively “Movants”) seek summary judgment on Count IV of both parties’ Counterclaims to the Third Amended Complaint. In support of their Motion, Movants state as follows.

**CERTIFICATION PURSUANT TO C.R.C.P. 121 § 1-15(8)**

The undersigned counsel has conferred with Plaintiff’s counsel and Plaintiff opposes the relief requested herein.

**INTRODUCTION**

Granby Ranch Metropolitan District (“GRMD”) sued Headwaters in February of 2021, and joined GR Terra as a defendant shortly after it purchased the ski and golf amenities at Granby Ranch in May of 2021. In doing so, GRMD began a multi-year effort to secure funds and rights for itself that it was never entitled to under the plain terms of its Service Plan, the relevant governmental and other agreements, or Colorado law. GRMD filed several claims (amending its Complaint three times), all with the overarching goals of: (1) forcing Headwaters to operate the ski and golf facilities and ultimately purchase and transfer those facilities to GRMD; and (2) obtaining a judgment of over six million dollars based upon amenities fees paid by homeowners who purchased lots within GRMD’s boundaries. This Court has soundly (and correctly) rejected GRMD’s claims in its Orders dated July 30, 2023.

The remaining claims, at issue in this Motion for Summary Judgment, seek damages for GRMD’s breach of the 2010 Exclusion Agreement and ask this Court to enjoin GRMD’s breach or improper modification of its Service Plan. The undisputed facts entitle movants to this relief.

GRMD’s damages request flatly contradicts the plain language of the Exclusion Agreement, wherein, among other things, GRMD agreed that it had *no right, title or interest* in the amenities fees. And GRMD’s attempt to impose unfounded obligations upon Headwaters violates the provisions of the Exclusion Agreement wherein GRMD agreed (i) not to interfere with Headwaters’ operation or maintenance responsibilities (ii) not to interfere with or restrict

future development of Granby Ranch; and (iii) not to seek to operate facilities independently of Headwaters. Moreover, by asserting that Headwaters has on-going obligations to GRMD, GRMD is acting contrary to the terms of Service Plan, which was amended in 2016 to eliminate any such obligations.

### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

The following undisputed material facts should be taken as true for purpose of this motion.<sup>1</sup>

#### **The Districts and their Service Plans**

1. Counterclaim Plaintiff Headwaters is a Metropolitan District organized and existing pursuant to the Colorado Special District Act, § 32-1-101 et seq., C.R.S. *See* Headwaters’ Counterclaim (“CC”) ¶ 4 and GRMD Answer.

2. Counterclaim Plaintiff GR Terra is a taxpayer of GRMD. *See* Affidavit of Robert P. Glarner, attached hereto as **Exhibit A**, at ¶ 4.

3. Counterclaim Defendant GRMD is a Metropolitan District organized and existing pursuant to the Colorado Special District Act, § 32-1-101 et seq., C.R.S. *See* Headwaters’ CC ¶ 5 and GRMD Answer.

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<sup>1</sup> A more expansive set of material facts was provided to the Court in GR Terra’s and Headwaters’ Motion for Summary Judgment filed on February 8, 2023, and their Renewed Motion to Dismiss for Lack of Standing, filed on January 25, 2023. The Court made extensive findings about the parties’ agreements, relationship, and contractual and statutory obligations in its July 30, 2023 Orders. Movants incorporate the underlying facts and documents filed with those Motions by reference as necessary to provide additional context for this Motion for Summary Judgment.

4. In 2003, the Town of Granby approved Service Plans for Headwaters and GRMD relating to the development of Granby Ranch. *See* Headwaters' CC ¶ 9 and GRMD Answer.

The Service Plan for GRMD is attached as **Exhibit B**.

5. Headwaters was organized to coordinate the acquisition, financing, and construction of public improvements, including streets and roadways, safety protection systems, water improvements, sanitary sewer and storm drainage, and park and recreation facilities, benefitting Granby Ranch (collectively, the "Facilities") and for the management, operation and maintenance of improvements not conveyed to the Town. *See* Headwaters' CC ¶¶ 11 & 13 and GRMD Answer.

6. GRMD was organized contemporaneously with Headwaters, to provide funding for the Facilities and other purposes as set forth in its Service Plan. *See* Headwaters' CC ¶ 12 and GRMD Answer.

7. GRMD's Service Plan provided that the interrelationship between the Districts would be governed by a master intergovernmental agreement, to be executed by the Districts, clarifying the dual responsibilities and the nature of the functions and services to be provided by each District. *See* Exhibit B, § I(5).

8. Pursuant to their Service Plans, Headwaters and GRMD entered into an intergovernmental agreement in 2006 ("2006 Master IGA"), replacing a prior agreement from 2003. *See* Headwaters' CC ¶¶ 17, 20 and GRMD's answer.

#### **The Amenity Fee Agreement and Resolution**

9. In May of 2005, Headwaters and GRMD approved a Joint Resolution to Establish an Amenity Fee ("2005 Fee Resolution"), providing that Headwaters would impose and collect a

one-time amenity fee to be paid to Headwaters upon the initial transfer of a lot or residential unit, which fee was to be used for the acquisition, leasing, construction, and replacement of amenities. *See* Headwaters' CC ¶ 25 and GRMD's answer.

### **The Parties' Exclusion Agreement**

10. On April 21, 2010, GRH, Headwaters and GRMD entered an Exclusion Agreement ("Exclusion Agreement") to, among other things, document the terms and conditions under which GRMD would exclude certain property from its boundaries. A copy of that agreement is attached as **Exhibit C**. *See* Headwaters' CC ¶ 38 and GRMD's answer.

11. The Exclusion Agreement provides that unless otherwise agreed to by Headwaters, Headwaters would continue to impose and collect the Amenity Fee, and that

GRMD acknowledges and agrees that the **Amenity Fees are payable to HWMD [Headwaters] and GRMD has no right, title or interest thereto**. Accordingly, any Amenity Fees received by GRMD shall be paid over to HWMD by GRMD as soon as practical, and GRMD agrees to execute any necessary documents to assign all right, title, and interest in any Amenity Fee to HWMD. *See* Exhibit C, § 3.2 & 3.2.1.

12. GRMD agreed in the Exclusion Agreement that "it shall not attempt to provide, independent of HWMD [Headwaters], any operation and maintenance services for the Facilities." *See* Exhibit C at § 6.1. "Facilities" is defined to include "park and recreation facilities" at Granby Ranch. *See Id.*, Recital C.

13. GRMD also agreed in the Exclusion Agreement to "not interfere with the operations and maintenance responsibilities of HWMD [Headwaters]," and to not "interfere with or restrict future construction or development with the Granby Ranch development." *See Id.* at §§ 6.2 & 6.3.

14. As consideration for the promises made by GRMD in the Exclusion Agreement, Headwaters agreed that upon issuance of certain subordinate bonds, all debt obligations of GRMD to Headwaters under the 2006 Master IGA (then stated to be over \$12 million) were deemed paid in full. *See Id.* at Recital L and § 4.2.

15. In addition, GRMD agreed it would “from time to time execute and deliver such further reasonably acceptable instruments as the other Party or its counsel may reasonably request to effectuate the intent of this Agreement” and to “to fully cooperate to give effect to the intent and purposes of this Agreement” and to act in good faith in the performance of that Agreement. *See Id.* at §§ 9.5 & 9.6.

#### **The Lease Purchase Agreement**

16. On December 31, 2012, Granby Realty Holdings (“GRH”), then owner and developer of Granby Ranch, as “Landlord” and Headwaters as “Tenant” entered into a Second Amended and Restated Lease Purchase Agreement (“LPA”) for the stated purpose of giving Headwaters the right to operate, and an option to purchase, the ski area and golf course facilities at Granby Ranch and other amenities (as defined in the LPA, referred to herein as the “Leased Premises” or “Amenities.”). *See* Headwaters CC ¶ 46 and GRMD’s answer.

17. Annual rent under the LPA consisted of an amount equal to all the Amenities Fees collected by Headwaters. *See* Headwaters CC ¶ 50 and GRMD’s answer.

#### **The Amended Fee Resolution**

18. In 2013, GRMD and Headwaters entered an Amended and Restated Fee Resolution confirming the one-time Amenity Fee to be paid to Headwaters, by the transferor,

upon the transfer of a lot or unit from the developer to an end user. *See* Headwaters’ CC ¶ 66 and GRMD’s answer.

**2016 Amendment to Service Plans and Severance of The District’s Obligations To One Another**

19. On August 22, 2016, GRMD, Headwaters, GRMD No. 8 and GRH entered into a Letter Agreement (“Letter Agreement”), whereby, among other things, GRH agreed to release any right to payment on GRMD’s 2010 bonds (in the amount of \$11.1) held solely by GRH, GRH assumed obligations with respect to refunding GRMD’s 2006 bonds, and the parties agreed to *“eliminate any obligations between the parties other than GRMD’s funding of road operations, maintenance and minor repairs.”* A copy of the agreement is attached hereto as **Exhibit D**. *See also* Headwaters’ CC ¶ 67 and GRMD’s answer.<sup>2</sup>

20. On October 11, 2016, the Town of Granby approved a second amendment to the GRMD Service Plan, stating:

The Original Service Plan is amended as a whole to clarify that ***the District IGA between GRMD and HMD will be terminated [and] GRMD will provide all its own operation and maintenance functions .... with the intent that any role or relationship of GRMD as a “Tax District” and HMD as a “Service District” is terminated.***

A copy of the Amendment is attached hereto as **Exhibit E**. *See also* Headwaters’ CC ¶ 71 and GRMD’s answer.

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<sup>2</sup> The 2016 Letter Agreement was modified by the parties in 2017 and 2018 to account for delays in the refunding of the 2006 bonds; the above-quoted provision was not modified in those amendments other than to note that the parties had satisfied this obligation and terminated their obligation to one another in 2017. *See* Headwaters’ CC ¶ 68 and GRMD’s answer.

21. On November 17, 2017, GRMD, GRMD Nos. 2-8, entered a Termination of Intergovernmental Agreement (“Master IGA Termination”), stating that both the 2006 Master IGA (and a later subsequently repudiated 2008 Master IGA) were terminated and of no further force and effect, a copy of which is attached as **Exhibit F**, at §§ 2-3. *See also* Headwaters’ CC ¶ 73 and GRMD’s answer.

22. The Master IGA Termination stated that “the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently from Headwaters,” and that “[d]ue to the amended service plans and the intention of certain of the Parties to operate independently from each other, there is no further need for the Master IGAs, and it acknowledged that Headwaters and GRMD have “fully satisfied their obligations under the Master IGAs and are released from any further obligations thereunder.” *See Id.* at Recital H, § 4.

23. In April of 2018, in consideration of the various prior agreements between them, GRH, Headwaters, GRMD, and GRMD No. 8 entered into an agreement entitled Agreement Re Waiver and Release of Claims, which acknowledges that the Master IGAs “are no longer necessary,” and the parties broadly released each other and their successor and assigns from all claims, demands, obligations, duties, liabilities, damages, costs, and remedies relating to formation, administration, and operation of the District. A copy of this Agreement is attached hereto as **Exhibit G**. *See also* Headwaters’ CC ¶ 86 and GRMD’s answer.

### **Termination of the LPA**

24. In the spring of 2020, the holder of a deed of trust on Granby Ranch property conducted a foreclosure and public sale of the property, and in August of 2020, Gray Jay, took

title to that property, including the Leased Premises. *See* Headwaters' CC ¶ 95 and GRMD's answer.

25. On November 11, 2020, Gray Jay notified Headwaters that the LPA had been terminated by the foreclosure, and even if not so terminated, Gray Jay was electing to terminate the LPA based on Headwaters' failure to operate the Amenities for more than thirty days. A copy of that letter is attached as **Exhibit H**. *See* Headwaters' CC ¶ 99 and GRMD's answer.

26. Headwaters did not take any action to oppose the termination notice or try to enforce the LPA; Headwaters had no funds to exercise the option to purchase prior to the foreclosure, no funds to redeem at the foreclosure, and no funds to make necessary investment in the Amenities or manage the Amenities, so the lender who purchased at the foreclosure contracted directly with a new management company and Headwaters essentially relinquished its role. *See* Excerpts of Deposition Testimony of Lance Badger, former board member of Headwaters, attached hereto as **Exhibit I**, pp. 9:17-25, 201:1–202:12, 204:24-205:10, 217:5-7, 251:14-17, 278:24– 283:23. *See also* **Exhibit J**, Excerpts of Deposition Testimony of C. Randel Lewis, former board member of Headwaters, pp. 5:4-7:5, 94:4-95:14 (confirming that Amenities were suffering from deferred maintenance and neglect following the foreclosure, that the new owner invested millions of dollars on improvements, and that Headwaters did not have the funds to make those improvements because it was “for all practical purposes, insolvent.”).

### **GRMD's Lawsuit**

27. On February 23, 2021, GRMD filed its first Complaint in this action against Headwaters (and other defendants) and amended it twice before answers were filed.

28. The Lawsuit asserted that GRMD was entitled to recover as damages the alleged “equity” in property now owned by GR Terra, specifically the \$6 million dollars in Amenity Fees paid as rent under the LPA. *See* Second Amended Complaint, ¶¶ 21, 22, 42, 56, & 86.

29. Before Headwaters filed its first Answer, Affirmative Defenses and Counterclaims, it sent GRMD a notice of continuing default under the Exclusion Agreement and, following the dispute resolution process therein, the parties agreed that they had completed the process without resolution of the dispute. *See* Headwaters’ CC ¶¶ 126-128 and GRMD Answer.

30. After motion practice and more than a year of litigation, on October 13, 2022, GRMD filed the Third Amended Complaint – the operative Complaint in this pending lawsuit.

31. The Third Amended Complaint continued to assert that GRMD was entitled to \$6 million dollars from Headwaters based on Amenity Fees allegedly collected from its residents and members and paid under the LPA. *See* Third Amended Complaint, at ¶¶ 20, 42.

32. GRMD’s discovery and corporate representative testimony confirmed that the \$6.1 million in damages sought by GRMD in the litigation was comprised of amenities fee payments paid on 611 lots located within the boundaries of GRMD on the property. *See* Excerpts of GRMD Responses and Supplemental Responses to GR Terra’s First Set of Interrogatories, attached hereto as **Exhibit K**. *See also* Excerpts of Deposition of GRMD Corporate Representative, Lauren Kaestner, volume II, attached hereto as **Exhibit L**, pp. 444:15-449:6.

33. GRMD’s sixth claim for relief, asserted against Headwaters, GR Terra and other defendants, sought a declaration that the LPA was not terminated and was binding upon

Headwaters and GR Terra as parties thereto and for injunctive relief to enforce the terms of the LPA against those defendants. *See* Third Amended Complaint, at ¶ 55.

34. GRMD asserted that Headwaters had a duty to enforce the obligation to act as tenant under the LPA, to operate the Amenities, and to eventually acquire the Amenities or transfer them to the Town or another public entity such as GRMD. *See* **Exhibit M**, Response to Interrogatory Nos. 7 -10 and Response to Request to Admit Nos. 5-7.

35. GRMD’s corporate representative later clarified that the transfer should be to GRMD, stating that Headwaters had a duty to “acquire the Amenities on behalf of GRMD” and then “GRMD has a right to have the property – this property deemed [sic] over them,” and GRMD could issue bonds or find other funds to operate the Amenities. *See* Kaestner Dep., Exhibit L, pp. 324:16-325:2, 326:3- 328:4, 417:7-20.

36. From the time of its first Answer, Headwaters relied upon the Exclusion Agreement in defense of the Lawsuit and asserted a separate counterclaim for breach. *See* Answer, Affirmative Defenses and Counterclaims to Second Amended Complaint, Affirmative Defense Nos. 6-7 and First Counterclaim; Headwaters’ Answer and Affirmative Defenses to Third Amended Complaint, Affirmative Defense Nos. 3, 7, 8, 9 and First Counterclaim.

**GR Terra’s Purchase of The Ski and Golf Amenities**

37. In May 2021, GRCO LLC (“GRCO”) and GR Terra LLC (“GR Terra”) purchased approximately 4,300 acres of property (the “Property”), which comprised most of the Granby Ranch development and the ski and golf facilities at issue in the lawsuit. *See* Glarner Affidavit, Exhibit A, ¶ 3.

38. On May 20, 2021, when GRMD added GR Terra as a defendant, it also filed with the County Clerk and Recorder, a “Notice of Commencement of Action” stating that it had commenced an action affecting title to the described property, which included the Amenities purchased by GR Terra (“Lis Pendens Notice.”). A copy of the Notice is attached hereto as **Exhibit N**. See also Headwaters’ Counterclaim, ¶ 107 and GRMD’s answer.

### **The Court’s July 30, 2023 Orders**

39. On July 30, 2023, following extensive discovery and competing summary judgment motions, the Court granted GR Terra’s Cross Motion for Summary Judgment on its first three Counterclaims (“Summary Judgment Order”), finding that the LPA was terminated by the 2020 foreclosure and/or terminated by operation of its own language because Headwaters failed to appropriate rent.

40. Additionally, on July 30, 2023, the Court granted GR Terra and Headwaters’ renewed motion to dismiss the Third Amended Complaint under 12(b)(1) for lack of standing (the “Dismissal Order”). In that Order, the Court relied upon the terms of the Exclusion Agreement and GRMD’s express agreement that it had no right, title or interest in the Amenity Fees to support its conclusion that GRMD lacked standing to bring its claims and had no right to the requested damages. Dismissal Order, pp. 11, 14-15, 18-19.

41. The Court further held that GRMD could not enforce Headwaters’ obligations under the 2012 LPA to pay rent and keep the LPA in place, *Id.* at pp. 15-17, and that it had no basis to require Headwaters to acquire title to the Amenities or to transfer them to GRMD if it did. *Id.* at pp. 13-14. And the Court recognized that GRMD waived and relinquished any rights

it had against Headwaters related to the Master IGAs and formation, administration, and operation of the Districts, including any obligations under the LPA. *Id.* at pp. 17, 23-24.

### **The Lawsuit's Interference With Development**

42. At that time of GRCO's and GR Terra's purchase in 2021, due to the previous developer's financial difficulties, only a small portion of the planned development was completed. Glarner Affidavit, Exhibit A at ¶ 5. GRCO and GR Terra purchased for the purpose of completing the residential development and improving and operating the ski, golf and related facilities. *Id.* at ¶ 6.

43. GRMD's claims in the lawsuit raised serious concerns for GRCO and GR Terra in that GRMD claimed the right to own and operate the ski and golf facilities. *Id.*, at ¶8. For that reason, GR Terra asked to be joined as defendant in the litigation and vigorously defended GRMD's claims. In addition, GRCO loaned funds to Headwaters Metropolitan District – also a defendant in the litigation – so that it could vigorously defend GRMD's claims. *Id.*

44. GRMD's lawsuit interfered with and restricted construction and development of the Property in the following ways:
- a. GRMD's filing of this complaint and notice of same filed in the land records created a cloud on title to the Property, which made obtaining any traditional bank financing impossible and decreased the value of the Property. *Id.* at ¶ 9. GRCO and GR Terra were unable to obtain a loan to purchase the Property and had to pursue non-traditional funding sources at a greater cost and on a delayed timeline. *Id.* The litigation also caused delays in obtaining financing for improvements. *Id.*

- b. Because of the cloud on title, major capital improvements to the ski and golf facilities have been significantly delayed. Despite the desire to make major capital improvements earlier, GRCO and GR Terra were finally able to make some planned improvements in the fall and winter of 2023, after this Court made significant rulings in this matter in July 2023. These delayed capital improvements included:
  - i. construction of new grip bay house for the ski facilities;
  - ii. installation of new “magic carpet” for the ski facilities; and
  - iii. major improvements to Base Camp Lodge. *Id.*
- c. GRCO and GR Terra incurred significant legal expenses, which only further delayed development of the Property as funds have been diverted to this lawsuit that could otherwise have been invested in the development. At this time, GRCO has paid a total of \$2,176,001 in legal fees and costs related to this lawsuit, on behalf of Headwaters and GR Terra. *Id.* at ¶ 9.

45. GRMD’s lawsuit continues to interfere with and restrict construction and development of the Property. Potential homeowners have cancelled contracts for the purchase of homes expressly due to the litigation, and lenders are requiring additional due diligence, additional assurances, and more significant guarantees before extending financing for improvements, on terms less favorable than financing not hindered by a cloud on title. This process is lengthy, costly, and continues to delay additional major capital improvements we have planned for the Property. *Id.* at ¶ 10.

### **Headwaters' Damages**

46. Because Headwaters does not have sufficient funds, GRCO has paid Headwaters' legal fees and costs incurred in this Lawsuit pursuant to the terms of GRCO and Headwater's Funding Agreement. *See also* Affidavit of Roxanne Hoover, attached as **Exhibit O**, (attaching Summary of Paid Invoices Through April 30, 2024, as Exhibit A thereto); *See also* Excerpts of Deposition Testimony of Roxanne Hoover, attached hereto as **Exhibit P**, pp. 5:6–6:22, 236:18–237:9. 244:24–245:9; Glarner Affidavit, Exhibit A at ¶ 11.

47. At this time, Headwaters is seeking to recover **\$860,949.83** for attorneys' fees and costs paid by GRCO on Headwaters' behalf, which sum now represents an obligation of Headwaters under the terms of the Funding Agreement. *See* Hoover Affidavit, Exhibit O at ¶ 2, 5, 6. It is anticipated that GRCO will continue to advance fees as necessary for Headwaters' continued pursuit of its counterclaims.

### **LEGAL STANDARD**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, establish that there is no genuine issue as to a material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Georg v. Metro Fixtures Contractors, Inc.*, 178 P.3d 1209, 1212 (Colo. 2008). The moving party bears the initial burden of informing the court of the basis for the motion and establishing the nonexistence of a genuine issue of material fact. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987). Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial

would be useless and the moving party is entitled to summary judgment as a matter of law. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

## **ARGUMENT**

Despite the complex nature of the parties' relationships and agreements, the remaining counterclaims are straightforward. First, GRMD breached the Exclusion Agreement by filing this lawsuit, and Headwaters is entitled to recover the legal fees and costs expended to enforce the Exclusion Agreement under the plain language of that document. Second, GRMD's lawsuit and the positions it has taken seek to expand and alter its and Headwaters' obligations to one another as set forth in GRMD's own Service Plan, and Movants are entitled to injunctive relief to prevent any further improper attempt to modify that Service Plan.

### **A. GRMD Breached the Parties' Exclusion Agreement When it Filed and Pursued this Lawsuit.**

"It has long been the law in Colorado that a party attempting to recover on a claim for breach of contract must prove the following elements: (1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted).

Here, the first element, the existence of a contract, is not in dispute. Statement of Undisputed Material Facts ("SUMF"), at 11. As to the second element, despite many years of litigation, GRMD has not alleged (and could not prove) that Headwaters failed to perform obligations under the Exclusion Agreement. As set forth below, the undisputed facts establish the third and fourth elements of Headwaters' claim, GRMD's breach and Headwaters' damages.

1. GRMD's Breach.

Section 8.1 of the Exclusion Agreement provides that an "Event of Default" occurs under that Agreement if any party fails to perform any of its obligations therein, including but not limited to:

8.1.1. The violation of or failure to perform any material provision of this Agreement by any Party or the failure of any representation or warranty of a Party to be true;

8.1.3. The failure to perform or observe any other covenants, agreements, or conditions in this Agreement on the party of any Party and to cure such failure in accordance with Section 8.3.

8.1.4. Any effort by any Party .... that might reasonably be believed to result in the avoidance by court order or otherwise of any Party's obligations under this Agreement."

8.1.5. Any act or omission by and Party .... That might reasonably be believed to result in the interference in the exercise of any Party's rights hereunder; and/or

8.1.6. The failure of any Party to take such action as is required by law to enable each Party to perform its obligations hereunder, .....

SUMF, at § 10 (attaching Exclusion Agreement). GRMD has breached several provisions of the Exclusion Agreement.

a. Section 3.2.1.

In bringing claims against Headwaters seeking over \$6 million of Amenity Fees, GRMD breached § 3.2.1. Under that provision, GRMD plainly "acknowledges and agrees that the **Amenity Fees are payable to HWMD [Headwaters] and GRMD has no right, title or interest thereto**" and "agrees to execute any necessary documents to assign all right, title, and interest in any Amenity Fee to HWMD." SUMF, at § 11. Where, as here, written contracts that are complete and free from ambiguity will be found to express the intention of the parties and

will be enforced according to their plain language.” *Ad Two, Inc. v. City & Cnty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000).

This Court’s Dismissal Order recognized that GRMD’s claims were contrary to the plain language of § 3.2.1. In that Order, the Court noted that it did not have the Exclusion Agreement when it denied Defendants’ initial Motion to Dismiss for lack of standing, and the Court quoted GRMD’s acknowledgement in that Agreement that it “had no right, title or interest” to the Amenity Fees. Dismissal Order, p. 11. The Court then relied on that language to support its conclusion that GRMD lacked standing.

In holding that GRMD was not a third-party beneficiary of the LPA, the Court rejected GRMD’s argument that its interest in the Amenity Fees supported third-party beneficiary status, stating:

The Court acknowledges that the Amenity Fees could not have been imposed without GRMD’s cooperation and consent as the tax district, but GRMD expressly acknowledged that it did not have any right, title or interest in the Amenity Fees. . . . the Court now concludes the Amenity Fees are not a factor supporting third-party beneficiary status for GRMD.

*Id.* at 14-15. The Court similarly rejected GRMD’s claimed injury based on lost equity in the form of Amenity Fees paid under the LPA, stating that “GRMD expressly recognized it did not have any right, title or interest in the Amenity Fees, so there can be no injury to GRMD’s interest on that basis.” *Id.* at 18-19.

Thus, despite the plain language of the Exclusion Agreement wherein GRMD expressly agreed “to fully cooperate to give effect to the intent and purposes of this Agreement” and to act in good faith in the performance of that Agreement, (SUMF, § 15), GRMD did the opposite. It sought to recover all Amenity Fees paid between 2006 and 2020, in direct contravention of its

express relinquishment of any right or interest in those fees. By filing the lawsuit and seeking those damages, GRMD failed to perform material provisions of the Exclusion Agreement, failed to perform its obligations under the Agreement, and failed to observe the covenants of the Exclusion Agreement – all events of default under § 8.1 of the Exclusion Agreement. And there can be no question that its actions constituted an effort “that might reasonably be believed to result in the avoidance by court order or otherwise of any Party’s obligations under this Agreement,” giving rise to default under § 8.1.4. The undisputed facts establish GRMD’s breach of § 3.2.1 of the Exclusion Agreement.

Sections 6.1, 6.2, and 6.3

Under §§ 6.2 and 6.1 of the Exclusion Agreement, GRMD agreed, respectively, “not to interfere with the operations and maintenance responsibilities of Headwaters” and “not to attempt to provide, independent of HWMD [Headwaters] any operation and maintenance services for the Facilities.” SUMF, § 13. In bringing its lawsuit, GRMD has violated both provisions.

First, GRMD’s lawsuit sought to force Headwaters to perform the tenant’s obligations under the LPA, including operating the ski and golf amenities and eventually purchasing the Amenities under the option in the LPA. SUMF, §§ 33, 34. In so doing, GRMD’s lawsuit sought to impose operation and maintenance responsibilities on Headwaters that Headwaters did not believe (correctly) that it was obligated to assume, did not have the right to assume, and had no means to effectuate, thus “interfering” with Headwaters’ operation and maintenance responsibilities under § 6.2.

At the time the new owner sent the notice of termination, Headwaters had no funds to operate or maintain the Amenities and had ceased doing so. SUMF, § 26. Not did it have any funds to purchase the Amenities or redeem during the foreclosure. *Id.* Therefore, Headwaters did not challenge the new owner’s termination; both Headwaters (tenant) and the property owner (landlord) treated the LPA –and the obligations thereunder – as terminated. *Id.*

This Court recognized that the LPA had in fact been terminated by the foreclosure. Summary Judgment Order. It also agreed with Headwaters’ position that, in any event, GRMD could not enforce Headwaters’ obligations under the LPA to pay rent and keep the LPA in place, given the terms of the LPA and the established rule in Colorado that prohibits imposition of future payment obligations on a public body. Dismissal Order, pp. 16-17. And the Court correctly recognized that “GRMD has not identified any single document *actually requiring* Headwaters to acquire title to the Amenities or *actually requiring* Headwaters to transfer the Amenities to GRMD if or when titled vested.” *Id.*, at p. 13 (emphasis in original). Finally, the Court held that following amendment of their Service Plans to operate independently, GRMD waived and relinquished any rights it had against Headwaters related to the Master IGAs and the formation, administration, and operation of the Districts, including Headwaters’ obligations, performance, and rights under the 2012 LPA. *Id.* at pp. 23-24.

GRMD’s attempt to impose these obligations on Headwaters was not only unfounded, it was a breach of the express terms of § 6.2 of the Exclusion Agreement. That breach gave rise to default under the above-cited provisions of § 8.1 of the Exclusion Agreement. In addition to the other provisions, the lawsuit unquestionably constituted an attempt to obtain a court order allowing GRMD to avoid the obligations and agreements of the Exclusion Agreement.

GRMD's lawsuit also gave rise to a breach of § 6.1 GRMD's lawsuit asserted that Headwaters had a duty to transfer the Amenities to GRMD, for GRMD to operate independently. SUMF, § 12. That position is clearly stated in GRMD's Response to Defendants' Renewed Motion to Dismiss, wherein GRMD stated:

It was never intended for HWD to permanently operate and maintain the infrastructure – it was always the expectation that such responsibility would vest in GRMD.

...

The agreements show that the relationship of HMD and GRMD changed, consistent with the original intent of the parties, so that HWD could eventually be dissolved and GRMD could independently own and operate the Amenities.

*See* Plaintiff's Response In Opposition To Renewed Motion to Dismiss filed on February 27, 2023, pp. 2, 12 (emphasis added). In response, this Court's Dismissal Order contains an entire section analyzing and rejecting "GRMD expectation of Eventual Ownership of the Amenities." Dismissal Order, p. 13.

Thus, GRMD admitted that its lawsuit was an attempt by GRMD to provide operation and maintenance services for the Facilities independent of Headwaters – a clear violation of § 6.1 of the Exclusion Agreement and an event of default under § 8.1 of that Agreement.

Finally, GRMD's decision to file this lawsuit – and to vigorously pursue it for over three years now – has significantly interfered with and restricted development at Granby Ranch in violation of § 6.3. GRMD's Lis Pendens, recorded in the land records, created a cloud on title of the Amenities. SUMF, § 44. As a result, the lawsuit (and threatened loss of the Amenities – a valuable portion of Granby Ranch) made it difficult for the developer to obtain financing and increased the cost of that financing. *See Id.* The cloud on title also impeded or delayed planned

capital improvements for the Property. *Id.* And it has diverted over \$2 million dollars to legal fees that otherwise could have been invested in the Property. *Id.*

With the specter of losing title to the Amenities hanging over its head and the significant expense of over three years of intense litigation, the developer has not been able to work with Headwaters to implement all the public improvements it would otherwise have undertaken the past three years. SUMF, § 45. In short, GRMD’s actions in filing and pursuing this lawsuit significantly hindered – and continues to hinder – the development of Granby Ranch, giving rise to a breach of § 6.3 and an event of default under § 8.1.

## 2. Headwaters’ Damages.

Headwaters was forced to expend significant legal fees to enforce the terms of the Exclusion Agreement in this litigation, and those fees are recoverable as damages under the plain language of the Exclusion Agreement and Colorado law. Section 8.5.2 of the Exclusion Agreement provides (emphasis added):

The Parties may protect and enforce their rights under this Agreement by such suit, action, or special proceeding as they shall deem appropriate, including without limitation any proceeding for specific performance of any covenant or agreement contained herein, for the enforcement of any other appropriate legal or equitable remedy, **or for the recovery of damages caused by breach of the Agreement, including attorney’s fees and all other costs and expenses incurred in enforcing this Agreement.**

The Colorado Supreme Court has confirmed that, under these circumstances, attorneys’ fees are recoverable as damages for breach of contract. *In Burnett v. Smallwood*, 793 P.2d 157 (Colo. 1990), the Colorado Supreme Court held that a non-breaching party who successfully defends a lawsuit brought in violation of an agreement cannot recover attorneys’ fees and costs as damages “unless (1) the agreement expressly provides that remedy, or (2) such an award is permitted by

statute or court rule.” *Id.* at 162 (emphasis added).

The Colorado Supreme Court applied *Burnett’s* reasoning in *Guarantee Trust Life Ins. Co. v. Estate of Casper*, 418 P.3d 1163 (Colo. 2018). An insured brought a claim for unreasonable delay or denial of an insurance policy, and the jury awarded damages under the policy as well as the insured’s attorneys’ fees and costs. On appeal, the Court considered whether the fees and costs were “actual damages” that could be considered in calculating punitive damages. Because the Colorado statute that authorized the cause of action authorized recovery of the insured’s attorneys’ fees and court costs for bringing such a claim, the Court held that the fees and costs were a component of the plaintiff’s actual damages:

The two conclusions found in *Burnett* – that [absent contractual or statutory authorization] attorneys fees are not recoverable in the typical breach of contract or tort suit and that attorney fees and costs are not actual damages where they are not the ‘legitimate consequence’ of the suit – indicate that the inverse is also true. **In other words, when there is a contractual or statutory basis for the recovery of attorney fees, they are recoverable. And when that recovery is the ‘legitimate consequence’ of the suit, the fees and costs are deemed to be actual damages.**

*Id.* at 1172 (emphasis added).

The same is true here. The Exclusion Agreement authorizes the recovery of attorneys’ fees and costs incurred to enforce that Agreement **as damages**. The legal expenses incurred by Headwaters were incurred to oppose GRMD’s request for repayment of Amenity Fees, to prevent GRMD’s improper interference with Headwaters’ maintenance and operation responsibilities, to prevent GRMD’s independent operation of Facilities, and to prevent interference with the development of Granby Ranch. Accordingly, Headwaters is entitled to its recovery of its attorneys’ fees and costs in the amount of \$860,949.83, along with additional fees incurred through the resolution of this case. SUMF, § 47.

**B. GRMD Breached its own Service Plan When it Filed and Pursued this Lawsuit.**

As set forth in Count IV of both Headwaters’ and GR Terra’s Fourth Counterclaims, GRMD’s actions in filing this Lawsuit and the positions it has taken constitute a breach or improper modification of the terms of its own Service Plan. As the Court recognized, “Special districts are creatures of statute and may exercise only those powers that are expressly conferred by the constitution or statute or exist by necessary implication.” Dismissal Order, p. 18. A district’s powers and authorized functions are set forth in its Service Plan. *See* 32-1-207(1) (“the facilities, services, and financial arrangements of a special district shall conform so far as practicable to the approved service plan.”).

In 2016, after the developer agreed to cancel some \$11.1 million in bond debt then owed by GRMD, GRMD amended its Service Plan to provide that the Master IGA between the Districts would be terminated, GRMD would operate independently of Headwaters and provide own maintenance and operation functions, that GRMD would operate independently of Headwaters and, except as set forth in the road maintenance and snow removal agreement, with the intent that any role or relationship of GRMD as a “Tax District” and HMD as a “Service District” is terminated. § II(B) (emphasis added). SUMF, §§ 19, 20.

In direct contravention of that language, and the IGA terminations reflecting obligations under the Service Plan, GRMD filed the present lawsuit for the express purpose of forcing Headwaters to assume all obligations as tenant under the LPA, to operate and maintain the Amenities on GRMD’s behalf, to acquire the Amenities on GRMD’s behalf, and to transfer the Amenities to GRMD. GRMD’s Service Plan gives it no right to impose those obligations on Headwaters; to the contrary, the 2016 Amendment makes clear that the prior relationship

between those parties – and any obligations they previously had to one another under their service plans or Master IGA – was terminated.

Under C.R.S. § 32-1-207(2)(a), material modifications of a Service Plan can only be made by the governing body of such special district *only by* petition to and approval by the board of county commissioners or the governing body of the municipality that has adopted a resolution of approval of the special district. “Material modifications” include: “changes of a basic or essential nature, including but not limited to the following: Any addition to the types of services provided by the special district; [o]r a decrease in the level of services; ...” C.R.S. § 32-1-207(2)(a). GRMD’s attempt assertion of obligation and services owed to it from Headwaters is a basic alteration of its amended Service Plan. And that material modification was never presented to or approved by the Town of Granby as required by C.R.S. § 32-1-207(2)(a).

C.R.S. § 32-1-207(3)(a) permits the Court to enjoin any material departure from the Service Plan, which constitutes a material modification of the plan. *See also Plains Metro. Dist. v. Ken-Caryl Ranch Metro. Dist.*, 250 P.3d 697, 700 (Colo. App. 2010) (holding that court can compel special districts to comply with mandatory terms of their service plans). Based on the facts before this Court, this Court should permanently enjoin GRMD’s material departure from its Service Plan, specifically its attempt to impose obligations on Headwaters other than as set forth in the road maintenance and snow removal agreement.

### **CONCLUSION**

WHEREFORE, for the reasons set forth above, Movants respectfully request that the Court grant their Motion for Summary Judgment and grant the relief requested herein, in addition to any other relief this Court finds just and proper.

Dated this 11th day of July, 2024.

HUSCH BLACKWELL LLP

*s/ Jamie H. Steiner*

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served via the Colorado Courts e-filing system on July 11, 2024, addressed to the following:

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