DISTRICT COURT, GRAND COUNTY, COLORADO Court Address: 307 Moffat Ave., Hot Sulphur Springs, CO 80451	DATE FILED September 12, 2024 11:20 PM FILING ID: D880B5DBDFCDA CASE NUMBER: 2021CV30008
Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado v. **Defendants:** 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.	▲COURT USE ONLY▲
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GRMD'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Granby Ranch Metropolitan District ("GRMD"), by and through its attorneys, Burg Simpson Eldredge Hersh & Jardine, P.C., respectfully submits its Reply in Support of Its Motion for Partial Summary Judgment (its "Motion"), and states, as follows:

I. INTRODUCTION

The 2010 Exclusion Agreement does not contain an agreement to shift attorney's fees. The arguments Headwaters presents in its Response are unavailing and should be rejected and it remains that entry of summary judgment in favor of GRMD is proper.[1] *First*, it is evident that Headwaters is taking a single provision of the 2010 Exclusion Agreement—Section 8.5.2—wholly out of context and misinterpreting it in an attempt to attack GRMD with a claim for attorney's fees. GRMD has not violated any provision of the 2010 Exclusion Agreement and Headwaters has sought an award of its attorney's fees here without basis. This is critical context for the Court's analysis. *Second*, § 8.5.2. is not an agreement to shift attorney's fees; it is a reservation of rights, as evidenced by its language, its context, and black letter Colorado law. *Third*, the distinction that Headwaters labors to exploit—that between attorney's fees as damages and as costs—is one without a difference here.

Interpretation of the provision remains as set out in GRMD's Motion and the relevant question is still: does the 2010 Exclusion Agreement contain a clear, express, unambiguous agreement to shift fees? It doesn't. Looking to the language of the provision, its context, the context of the 2010 Exclusion Agreement, and Colorado law, there is no basis to award attorney's fees in this case. Respectfully, GRMD submits that judgment in its favor should enter and this Court should determine that Headwaters has no claim to damages.[2]

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[1] GRMD endeavors to be efficient with the Court's time and so has attempt to avoid repetition. To be clear however, to the extent points from the Motion are not reargued here, they are not waived.

[2] Headwaters' response to GRMD's statement of facts and its additional fact (which is not relevant and is objected to as the underlying document speaks for itself) do not alter the arguments

II. THE 2010 EXCLUSION AGREEMENT DOES NOT CONTAIN AN AGREEMENT TO SHIFT FEES

A. Headwaters Mischaracterizes the 2010 Exclusion Agreement and the Specific Provision at Issue – Section 8.5.2.[3]

Headwaters works to isolate the specific provision of the 2010 Exclusion Agreement from any context.[4] But, as discussed below, Section 8.5.2 exists within the context of the 2010 Exclusion Agreement. And, equally important (and as discussed in detail in GRMD's Response to Headwaters and GR Terra's Motion for Summary Judgment), the 2010 Exclusion Agreement exists within the context of the multiple agreements between and among the parties at that time and afterwards.

Fundamentally, Headwaters misconstrues the purpose and context of the 2010 Exclusion Agreement in an attempt to hold GRMD responsible for its attorney's fees and costs. The purpose of the 2010 Exclusion Agreement is evident: to exclude certain property in the development from GRMD's boundaries and restate obligations for bonds issued during development. During this time in 2010, the LPA, the Amenity Fee Resolution and Agreement, and other intergovernmental agreements, in combination with the 2010 Exclusion Agreement, provide the proper context for the parties' relationship and the meaning of the 2010 Exclusion Agreement itself. Importantly,

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made in GRMD's Motion. GRMD provided a statement of facts for the Court's context. The issue remains one of contract interpretation but the facts and context present remains relevant.

[3] In its August 15, 2024, Response to Headwaters and GR Terra's Motion for Summary Judgment, GRMD set out a broader discussion – one that may be helpful as context for the Court on this point – and so GRMD refers the Court to that discussion as background for the point made here. That is: interpretation of § 8.5.2 of the 2010 Exclusion Agreement must take into account the language of the provision, the language of the Agreement generally, Colorado law, *and* the broader context of the Agreement and the parties' relationship. A brief discussion of those points is presented here.

[4] The 2010 Exclusion Agreement was attached to GRMD's Motion as Exhibit 2.

during this time, Headwaters and GRMD still had a symbiotic relationship whereby Headwaters was created to benefit and serve GRMD.

The following points are critical context to the Court's analysis: (1) At no time prior to the commencement of this lawsuit did Headwaters ever claim that GRMD was in breach of the 2010 Exclusion Agreement; (2) the 2010 Exclusion Agreement does not contain any provision or language that the parties terminated the LPA; (3) the 2010 Exclusion Agreement cannot be read in isolation from the other agreements between the parties at that time; (4) GRMD did not breach any provision of the 2010 Exclusion Agreement by bringing its good faith lawsuit and no facts substantiate Headwaters' argument that GRMD is in breach thereof; and (5) Headwaters may not use the 2010 Exclusion Agreement to allege GRMD breached provisions of another separate agreement or document.

During the relevant time, the purpose of Headwaters collecting the amenity fees from GRMD property owners to maintain the amenities and acquire them for the public had not changed and was in full force and effect pursuant to the LPA and amenity fee governing documents. GRMD is not in breach of the 2010 Exclusion Agreement because of language that, once the fees were paid in accordance with their stated purpose, it was Headwaters' responsibility to manage the funds and to maintain the amenities. Furthermore, at the relevant time, GRMD never attempted to operate or maintain the amenities independent of Headwaters and never interfered with Headwaters' operation and maintenance services. (In fact, the developer later fired Headwaters and replaced it with a different management company.) Finally, GRMD's exercise of its rights in good faith to keep the amenities publicly owned, as intended and as memorialized in documents from the same time as the 2010 Exclusion Agreement, does not equate to its breach of that Agreement.

Headwaters should not be permitted to cherry-pick language from one agreement in isolation, to the exclusion of other important documents, and without proper context to claim, years later, that GRMD is in breach of those provisions. GRMD, in good faith, sought to enforce the parties' years-long course of conduct and agreements to keep the amenities publicly owned. GRMD's lawsuit brought before the Court does not breach any provision of the 2010 Exclusion Agreement or provide any basis for Headwaters to have to enforce the 2010 Exclusion Agreement now, over a decade later. The 2010 Exclusion Agreement is, simply put, not relevant in this context.

B. Section 8.5.2 Is Not a Fee-Shifting Agreement.

Looking to its language and context, Section 8.5.2 is not a fee-shifting provision, it is a reservation of rights. Section 8.5.2 states:

> The Parties ***may*** protect and enforce their rights under this Agreement by such suit, action, or special proceedings ***as they shall deem appropriate, including without limitation*** any proceedings 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 this Agreement, including attorney's fees and all other costs and expenses incurred in enforcing this Agreement.

Exhibit 2 (2010 Exclusion Agreement) (emphasis added). Looking first to the specific language of § 8.5.2, it states that the parties "*may*" take action that they "*deem appropriate*," and that may include, "*without limitation*," a range of legal actions. This is not a *grant* of rights; it is a *reservation* of rights. Just as § 8.5.2. does not grant a right to specific performance absent a basis for such a claim, it does not grant a right to attorney's fees. It simply states that a party can seek them if there is a basis.

This is confirmed by looking to the context of § 8.5.2: Section 8.5 (which addresses the

decision of the Resolution Committee and appeal of that decision to the District Court) and Article VIII generally (which addresses default and throughout reserves rights that the parties otherwise hold).

First, § 8.5 (of which § 8.5.2 is a subpart) states that the parties may appeal the decision of the Agreement's "Resolution Committee" to the District Court and that notwithstanding their participation in the Resolution Committee process, a party "***may seek such other remedies as may be allowed by law***." That is: while there is a resolution procedure outlined in the Agreement, the parties have reserved to themselves the right to seek other relief that may be permitted under Colorado law. They are not being granted rights; they maintain whatever rights they might already have within the context of the Agreement's dispute resolution mechanisms. Within that context, § 8.5.2 elaborates: the parties may take whatever legal action they deem appropriate and that can include, for example, a claim that may include attorney's fees (as stated by § 8.5) "*as may be allowed by law*."

Second, Article VIII more broadly contains a number of provisions that, after describing default and the resolution procedure, reserve rights to the parties. Sections 8.2.1, 8.5, 8.5.1, 8.5.2, 8.5.3, 8.5.4 each do so. Again, these are not grants of affirmative rights; they are reservations of rights. For example, provisions of Article VIII state: no waiver shall "impair any rights or remedies consequent thereon" (§ 8.2.1); the non-defaulting party "may seek such other remedies as may be allowed by law" (§ 8.5); no recovery shall "in any manner or to any extent affect any rights, powers, and remedies . . . ." (§ 8.5.3).

Looking to black letter Colorado, § 8.5.2 is not a fee-shifting provision. Colorado law requires that an agreement to shift fees must be clear, express, and unambiguous. *See, e.g., Bunnett*

v. Smallwood, 793 P.2d 157, 162-63 (Colo. 1990); *Cont'l W. Ins. Co. v. Heritage Estates Mut. Hous. Ass'n*, 77 P.3d 911, 913 (Colo. App. 2003). It must put the parties on notice that an award of attorney's fees may be entered against them. *Morris v. Belfor USA Grp.*, 201 P.3d 1253, 1260 (Colo. App. 2008). While specific language is not required, the agreement cannot be ambiguous. *Id*. (no "formulaic language" required); *Bunnett*, 793 P.2d at 162-63 (agreement must be unambiguous).

Thus, in cases where Colorado's appellate courts have concluded that an agreement contained an enforceable fee-shifting provision, clear language that fees will be awarded is present: the court "***shall award***" fees, *Bedard v. Martin*, 100 P.3d 584, 593 (Colo. App. 2004) (emphasis added throughout); the party does "***agree to pay***" fees, *Morris*, 201 P.3d at 1260; the breaching party "***shall pay***" fees, *Wheeler v. T.L. Roofing, Inc.*, 74 P.3d 499, 501 (Colo. App. 2003); the breaching party "***will be responsible***" for fees, *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187 (Colo. 2001); the prevailing party "***shall be entitled***" to fees *Grynberg v. Agri Tech, Inc.*, 985 P.2d 59, 64 (Colo. App. 1999). Even the cases that Headwaters points to, *Butler v. Lembeck*, 182 P.3d 1185 (Colo. App. 2007) and *Morris*, contain mandatory language. Response at 10 (citing *Butler*, at 1188-89 (tenant "will reimburse" landlord for reasonable attorney's fees); *Morris*, 201 P.3d at 1259-60 (plaintiffs "agree to pay all costs" (alteration incorporated))).

Here, mandatory language is absent. §§ 8.5.2 (parties "*may*" bring legal action as they "deem appropriate"), 8.5 (permitting actions "as may be allowed by law")). Section 8.5.2 does not state that GRMD "shall pay," "will pay," "agrees to pay," or that Headwaters "shall be entitled" to, or that "the court will award" attorney's fees against it. It says the parties "may" bring whatever action they "deem appropriate" to enforce the Agreement, actions that may include a claim for

attorney's fees "as may be allowed by law." §§ 8.5.2, 8.5.

In reality, Headwaters has not responded to GRMD's core argument that § 8.5.2 is not an enforceable fee-shifting provision. It does not answer how the permissive language of § 8.5.2 (language that reserves rights, and not mandatory language that affirmatively grants rights to relief) is an enforceable fee-shifting provision under Colorado law. As discussed below, arguing these are "damages" rather than "costs" is irrelevant and fails to save Headwaters' argument. The language is not mandatory, it does not clearly indicate an intent to impose fee-shifting, and it is materially different from language in cases where Colorado's appellate courts have determined there were enforceable fee-shifting agreements. At best, this shows that the language is ambiguous—there could be an agreement to fee-shifting—which means the provision fails as a matter of law. *Bunnett*, 793 P.2d at 162-63 (such an agreement cannot be ambiguous).

C. Headwaters' Attempt to Argue around Black Letter Colorado Law Fails: Whether Characterized as Damages or Costs, There Is No Basis to Shift Attorney's Fees between the Parties.

Colorado follows the American Rule: without a contractual or statutory basis to shift fees, each party is responsible for their own attorney's fees. *See, e.g., Bunnett*, 793 P.2d at 160 ("In the absence of a statute or private contract to the contrary, attorney fees and costs generally are not recoverable by the prevailing party in a breach of contract case."); *Guarantee Tr. Life Ins. Co. v. Estate of Casper*, 2018 CO 43, ¶ 23 ("We have repeatedly affirmed that Colorado typically subscribes to the 'American Rule' under which each party in a contract or tort suit is responsible for funding their own legal burden.").

Bunnett is informative here. There, in a dispute over the breach of a release where there was no agreement to shift fees between the parties, the Colorado Supreme Court expressly rejected

the argument that fees were nonetheless recoverable because they were foreseeable damages of the breach. "*Unless we are prepared to abandon the American rule* and award attorney fees and costs to the prevailing party, it is difficult to construct any principled way to contain the 'exception' to the American rule which would be created by characterizing attorney fees as the subject of the lawsuit because a release is raised as a defense." *Id.*, 793 P.2d at 161 (emphasis added). Thus the Court held: "In the absence of a plain, unambiguous agreement for the award of attorney fees and costs, *we will not create such a remedy for the parties*." *Id*., 163 (emphasis added).

Where other cases may have considered whether attorney's fees are properly denominated as damages or costs, that issue is not relevant here. That may be relevant where the amount of "damages" matters, say for the calculation of punitive damages, *Estate of Casper*, 2018 CO 43, ¶ 1 n.1. But whether fees are classified as damages or costs, it remains that there must be a contractual or statutory basis before they can be shifted. *Bunnett*, 793 P.2d at 163. The Colorado Supreme Court did not create a contrary rule in *Estate of Casper*. There, based on the clear statement of C.R.S. § 10-3-1116, it determined that attorney's fees may, on proper facts, be classified as damages. *Id*., ¶ 24. True. But it did not overrule or undercut *Bunnett* in doing so.

> The two conclusions found in [*Bunnett*]—that attorney 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 inverses are 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., ¶ 23 (emphasis added). This is uncontroversial: where there is no agreement (*Bunnett*), fees may not be shifted; where there is an agreement (*Estate of Casper*), fees may be shifted. This simply restates the American Rule. It does not somehow create a new, lesser standard for

evaluating a fee-shifting provision when fees may be argued to be "damages." This runs afoul of *Bunnett's* exhortation that unless we are abandoning the American Rule, we must apply it.

Thus, whether the fees claimed are said to be "costs" or "damages" is irrelevant here. Colorado law requires a fee-shifting provision, regardless of how the fees might be categorized. And, because, for the reasons discussed above and in GRMD's Motion, § 8.5.2 is not a fee-shifting provision, Headwaters' argument that its fees are damages is irrelevant and fails to demonstrate that there is an enforceable fee-shifting provision here.

III. CONCLUSION

For the reasons discussed here and in its Motion, GRMD respectfully requests that this Court enter an order granting partial summary judgment in its favor on Headwaters' Counterclaim One, determining that Headwaters has no damages and is not entitled to a monetary award.

Respectfully submitted September 12, 2024.

BURG SIMPSON
ELDREDGE HERSH & JARDINE, P.C.

Duly signed original is on file in this office and available for inspection and/or copying upon request.

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CERTIFICATE OF SERVICE

I certify that on September 12, 2024, a true and correct copy of this **GRMD'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was filed and served upon all counsel of record via CCE.

Duly signed original is on file in this office and available for inspection and/or copying upon request.

/s/ D. Dean Batchelder
D. Dean Batchelder