

DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue Hot Sulphur Springs, CO 80451	DATE FILED September 12, 2024 3:23 PM FILING ID: 50D9BBDE3ED87 CASE NUMBER: 2021CV30008
<p>Plaintiff: GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado,</p> <p>v.</p> <p>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.</p>	
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<p>REPLY MEMORANDUM OF HEADWATERS METROPOLITAN DISTRICT AND GR TERRA LLC IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND IV OF HEADWATERS’ COUNTERCLAIMS AND COUNT IV OF GR TERRA’S COUNTERCLAIMS</p>	

Defendants Headwaters Metropolitan District (“Headwaters”) and GR Terra, LLC (“GR Terra”) (collectively “Movants”) submit this reply in support of their motion for summary judgment on Counts I and IV of Headwaters’ Counterclaims to the Third Amended Complaint and Count IV of GR Terra’s Counterclaims to the Third Amended Complaint.

Introduction

GRMD's response to Movants' motion for summary judgment confirms the groundless nature of the claims GRMD brought against Movants in breach of the express terms of the Exclusion Agreement. For almost two and a half years, GRMD tried to convince this Court of a continuing symbiotic relationship between GRMD and Headwaters that imposed some on-going obligation on Headwaters to purchase the LPA ski and golf amenities on GRMD's behalf. Now, following this Court's recognition that the agreements and other documents GRMD alleged gave rise to Headwaters' purported obligation had been terminated by the parties, GRMD does an about face, arguing for the first time that when the parties' "dual-district" structure was terminated in 2016, GRMD and Headwaters waived or eliminated any ongoing obligations between them, including obligations under the Exclusion Agreement.

GRMD's arguments fail to defeat Headwaters' right to summary judgment for several reasons. First, GRMD never asserted these waiver or termination arguments as affirmative defenses, and it therefore cannot raise those unpleaded defenses to oppose summary judgment. Second, the Exclusion Agreement was never terminated by the parties, and it could not be terminated or amended without agreement of all parties thereto, including GRH. Moreover, the facts do not prove that the parties to the Exclusion Agreement intended to terminate obligations under the Exclusion Agreement that were entirely independent of the Master IGAs and the Districts' prior roles as the tax/service districts under their Service Plans.

GRMD also asserts that it did not breach the Exclusion Agreement and that, even if it did, Headwaters cannot recover its attorneys' fees and costs as damages. The plain language of the Exclusion Agreement, however, defeats both arguments. The undisputed facts prove that

GRMD's actions in bring this lawsuit, and the relief requested therein, breached several provisions of the Exclusion Agreement. The Exclusion Agreement expressly allows Headwaters to recover its attorneys' fees and costs as damages for that breach. GRMD nonetheless seeks a hearing as to the amount of those damages. To simplify the issues now before this Court, Headwaters limits the requested relief in its Motion for Summary Judgment to a determination that GRMD breached the Exclusion Agreement and that Headwaters is entitled to recover its attorneys' fees and costs as damages. Headwaters will thereafter submit a motion as to amount of the requested damages, as directed by the Court.

Finally, GRMD's arguments in response to Movants' request for the Court to enjoin GRMD's breach of its service plan misstate the basis for Movants' claim and the nature of the requested relief. The record establishes Movants' right to the requested relief.

Statement of Facts

GRMD does not dispute – and it presents no evidence to controvert – any of the facts submitted by Movants in support of their summary judgment motion.¹ GRMD attaches seven documents to its response; Movants do not dispute that those documents are what they purport to be, though it disputes GRMD's interpretation of and reliance on particular documents.

While GRMD asserts no additional facts in its "Statement of Facts," the Introduction and Argument in its Response are replete with erroneous allegations regarding the Granby Ranch development and the parties' conduct. For instance, GRMD asserts that in 2020 the then developer "maneuvered to terminate the LPA (and original purpose of the Districts) through

¹ Movants referred to additional facts submitted with the parties' prior summary judgement submissions only as needed for context. All the material facts that entitle Movants to summary judgment were submitted with the instant Motion.

foreclosure,” that Headwaters is controlled by the developer, and that Headwaters brought this action to “punish” GRMD. Response, p. 2. These allegations have no bearing on the issues before this Court on the instant motion. And they are inaccurate and wholly unsupported by any evidence. Even after years of discovery, GRMD produced no evidence to support these or similar statements. Movants therefore request that this Court disregard any purported factual statements in the Response that are not supported by evidence in the summary judgment record.

Argument

I. GRMD’s Obligations Under The Exclusion Agreement Did Not Stem From The Districts’ Prior IGAs or Service Plans And Not Waived or Terminated.

A. GRMD’s Waiver Argument Fails.

GRMD asserts, for the first time in its response brief, that Headwaters waived its claims against GRMD for breach of the Exclusion Agreement under the terms of the 2017 Master IGA Termination Agreement. Response, pp. 10-11. Waiver and release are affirmative defenses that are themselves waived if not specifically pleaded. *Rudd v. Rogerson*, 424 P.2d 776, 779 (Colo. 1972) (holding that waiver is an affirmative defense, specifically identified in C.R.C.P. 8 (c), that must be affirmatively pleaded if it is to be used as a defense); *DeJean v. United Airlines, Inc.*, 839 P.2d 1153, 1161 (Colo. 1992) (holding that release must be properly asserted as an affirmative defense). GRMD did not assert these new waiver or release arguments as affirmative defenses to Headwaters’ Amended Counterclaims, *see* GRMD Answer/Affirmative Defenses dated November 11, 2022), and those it has waived those defenses. *Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 681 (Colo. 2007) (“If a defense is not raised in the answer or through a successful amendment of the answer, it is waived.”).

A party cannot constructively amend its answer by asserting a new defense on summary

judgment. *Id.* at 679-680. Rather, when the time to amend has expired and the opposing party objects, a defendant must seek leave of court to plead new affirmative defenses. *Id.* at 681 (upholding trial court’s denial of defendant’s motion to amend answer to assert new affirmative defense though defendant tried to raise the defense on summary judgment). *See also* C.R.C.P. 15(a)-(b). GRMD has not sought leave to amend, and Headwaters objects to GRMD’s attempt to assert these new defenses on summary judgment. For that simple reason, this Court should summarily reject GRMD’s waiver argument.

Moreover, amendment to GRMD’s Answer would be improper at this late date.² GRMD filed its affirmative defenses to Headwaters’ counterclaim in November of 2022, after obtaining leave to amend its own petition. The deadline to amend pleadings was June 17, 2022. *See* May 5, 2022 Case Management Order. There is no reason GRMD could not have timely asserted these defenses. GRMD referred to the Master IGA Termination in its Second Amended Complaint filed in July of 2021 and attached it as an exhibit to the pleading. Both Movants pleaded facts relating to the Master IGA Termination in their affirmative defenses and counterclaims to GRMD’s Second Amended and Third Amended Complaints. The document was explored during discovery and discussed in prior briefing. Yet GRMD never asserted that the Master IGA Termination barred Headwaters’ claim for breach of the Exclusion Agreement.³ Instead, GRMD chose to argue that the Master IGA Termination did not bar GRMD’s claims against Movants –

² Headwaters reserves the right to oppose any motion to amend and expand on its opposition herein.

³ When Headwaters first asserted its claim of breach of the Exclusion Agreement, GRMD participated in a dispute resolution process set forth in that Agreement without objecting that Headwaters’ claim was waived or that the Exclusion Agreement was terminated. *See* Headwaters Statement of Undisputed Facts in Support of Summary Judgment (“SOF”), ¶ 29.

claims premised on obligations in the Master IGAs. *See* GRMD Response to Renewed Motion to Dismiss filed on February 27, 2023, pp. 12 & 13. And all four versions of GRMD’s Complaint failed to acknowledge that the Master IGAs it continued to rely upon had been terminated.

Allowing GRMD to reverse course to assert waiver based on the Master IGA Termination at this late date in order to avoid its obligations under the Exclusion Agreement would unduly prejudice Headwaters. First, GRMD had not taken this position when Headwaters’ counsel deposed GRMD’s witnesses, including its corporate representative, and thus Headwaters lacked the opportunity to ascertain the precise nature of GRMD’s argument. Had GRMD’s witnesses taken the position at the time, as it does now, that the Master IGA Termination waived “all claims” between GRMD and Headwaters whenever they arose, that testimony would have defeated GRMD’s claims against Headwaters for breach of various contracts, including the obligations purportedly owed to GRMD as a third-party beneficiary of the LPA, and avoided several years of costly litigation on those claims.⁴ GRMD’s about face at this late date is pure gamesmanship.

Finally, GRMD’s waiver argument – even if considered by this Court – fails on the merits. The Master IGA Termination, and the waiver provision therein, relate specifically to the Master IGAs, all of which were expressly terminated in the Master IGA Termination in furtherance of the parties’ 2016 agreement to amend their Service Plans, terminate their relationship as the tax and service districts, and operate independently. *See* SOF, ¶¶ 19-22 &

⁴ Headwaters reserves the right, at the termination of this litigation, to seek recovery of any attorneys’ fees and costs not previously awarded as damages under C.R.S. § 13-17-103. GRMD has now admitted that its claims were substantially frivolous, groundless, or vexatious because they were barred by the termination and waiver of the prior rights and obligations under the Master IGAs and the 2016 amendments to the Service Plans.

Ex. F.⁵ The Master IGA Termination recognizes this amendment of the Service Plans, expressly terminates all Master IGAs, and states (more than once) that the parties have satisfied their obligations under the Master IGAs and are released from obligations thereunder. *See* Ex. F. The waiver language GRMD relies on is prefaced with that sentence. *Id.* at § 5. There is no similar language indicating an intent to terminate the Exclusion Agreement or to waive obligations or claims thereunder that do not flow from the Master IGAs or original Service Plans.

Moreover, GRMD’s argument ignores that the waiver agreement in the Master IGA Termination starts with the condition that “[t]o the extent permitted by law, each District hereby waives ….” *See* Ex. F, ¶ 5. As a matter of law, Headwaters and GRMD could not alone waive obligations under the Exclusion Agreement. The Exclusion Agreement is a three-party agreement that addresses the exclusion of several large tracts of land owned by GRH from GRMD and issues relating to capital cost allocations and obligations of the excluded property for existing and new debt. *See* SOF, ¶ 10 & Ex. C. The Exclusion Agreement expressly prohibits modification or termination absent written agreement of **all** parties. *See* Ex. C, §§ 9.1, p.4.

GRH – who benefitted from the promises GRMD made in the Exclusion Agreement and in exchange assumed obligations thereunder – was not a party to the Master IGA Termination. Thus, under the express language of the Exclusion Agreement, GRMD and Headwaters could not terminate or modify the parties’ rights and obligations hereunder. Colorado law is in accord. *See Western Air Lines, Inc. v. Hollenbeck*, 235 P.2d 792, 797 (Colo. 1951) (“A meeting of minds of [all] contracting parties is required not only to make a contract, but also to abrogate or

⁵ Exhibits referenced as letters refer to Headwaters’ summary judgment exhibits; numerical references are to GRMD’s summary judgment exhibits.

modify it after it is made.”); *Esecson v. Bushnell*, 633 P.2d 258, 261 (Colo. App. 1983) (An agreement to rescind a contract requires a “meeting of the minds” of all parties obligated thereunder with “the clear knowledge and understanding of the parties.”).

Termination of the Master IGAs and severance of the Districts’ prior relationship as tax and service district did not impact the obligations under the Exclusion Agreement at issue here. GRMD’s relinquishment of any claim to the amenities fees and its agreement not to interfere with Headwaters’ operations or with Granby Ranch development are not grounded in, and do not flow from, the Master IGAs, Service Plans, or the Districts’ prior roles as the tax and service districts. To the contrary, the relevant provisions of the Exclusion Agreement constitute promises by GRMD to *refrain from* taking certain actions and are entirely consistent with the Districts’ later agreement to sever their tax/service district relationship, with Headwaters and GRH assuming all development and operations responsibility.⁶⁷

For all these reasons, this Court should reject GRMD’s waiver argument.

⁶ The Exclusion Agreement is mentioned in a recital, but only to recognize the parties’ agreement to repudiate the 2008 Master IGA in favor of the 2006 Master IGA.

⁷ Headwaters’ position is consistent with its argument and this Court’s ruling on the Renewed Motion to Dismiss. Headwaters did not assert that the Master IGA Termination terminated the LPA or waived all rights thereunder. As this Court is aware, GRMD never claimed any express rights under the LPA, but instead asserted that other documents, primarily the Service Plans, Master IGAs, and Granby IGA, created a symbiotic relationship between the Districts that gave rise to obligations to GRMD as a third-party beneficiary of the LPA. In response, Headwaters pointed out that the District’s amended their Service Plans and Granby IGA and executed the Master IGA Termination, expressly terminating the Master IGAs and waiving obligations relating to those agreements and the Districts’ prior tax/service district roles, which included the obligations that GRMD asserted were owed to it under the LPA. GRMD’s obligations under the Exclusion Agreement, in contrast, do not originate from or depend upon the IGAs or the Districts’ prior roles under their original Service Plans.

B. GRMD's Termination Argument Fails.

Next, GRMD argues that, even if not waived, the parties' post-2010 agreements eliminated and terminated all obligations between them, including those under the Exclusion Agreement. Response, pp. 11-14. This argument fails for the same reasons set forth above. First, GRMD's argument that the Exclusion Agreement was terminated, not by its own terms but by other agreements, constitutes an "avoidance" of Headwaters' claim that is waived because not pleaded as an affirmative defense under C.R.C.P. 8 (c). *See Dinosaur Park Invs., L.L.C. v. Tello*, 192 P.3d 513, 516 (Colo. App. 2008) (holding that alleged rescission of contract was an affirmative defense that was waived when not timely pleaded). GRMD did not plead termination of the Exclusion Agreement, and it has not sought leave to do so.

Again, leave to amend, if sought, should not be granted. GRMD had ample notice of the facts giving rise to the defense; all the documents it relies upon were produced early in the litigation and attached to GRMD's own pleadings and Headwaters' answer and counterclaims. And for the reasons stated above, Headwaters would be prejudiced by such a reversal of GRMD's earlier position.⁸

Finally, GRMD's argument again fails on the merits. The only cited documents executed by GRH – the 2016 Letter Agreement and 2018 Waiver and Release Agreement – never mention

⁸ For instance, GRMD's corporate representative testified to GRMD's position that the 2018 Waiver did not impact GRMD's claims against Headwaters because the waiver was limited to issues relating to the Master IGA, bonds, and road maintenance and operations, *see Exhibit Q, Kaesnter Deposition Excerpts*, pp. 345-50 (attached hereto), and did not pertain to every single agreement the Districts had entered because "if the intent was to release any claim under every single agreement, they would have listed all the agreements that they want [] to be released from and that didn't happen." *Id.* at p. 150. This is directly contrary to the argument GRMD now makes.

the Exclusion Agreement. There is no indication in those documents of the requisite “meeting of the minds” or “clear knowledge and understanding of the parties” to terminate all obligations thereunder. *Esecson*, 633 P.2d at 261. GRMD’s agreement in the Exclusion Agreement to *refrain from* asserting an interest in the amenities fees or taking actions that would interfere with Headwaters’ operations and future development of Granby Ranch is entirely consistent with the parties’ subsequent severance of their prior relationship.

II. The Record Establishes GRMD’s Breach of the Exclusion Agreement.

GRMD’s tries to avoid the unequivocal obligations it assumed under the Exclusion Agreement by arguing that the Agreement had a “specific and limited purpose” to adjust the parties’ responsibility for roads and modify the outstanding bonds. In doing so, GRMD is impermissibly asking the Court to disregard the plain language of the Agreement. *See USI Properties East, Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997) (intent of unambiguous contract must be ascertained from the plain language). The Exclusion Agreement clearly states:

The purpose of this Agreement is to document the terms and conditions under which GRMD will exclude [certain] Property from the boundaries; **together with the maintenance, operations, and future obligations of each of the Parties.**

See Ex. C, at § 1.1 (emphasis added) (referring to all the “obligations” of the Parties that are enumerated at length in the remaining sections of the Exclusion Agreement. The latter encompassed provisions relating to the respective rights and obligations of GRMD, Headwaters, and the then developer, GRH, with respect to continued development of Granby Ranch. GRMD’s relinquishment of its rights in the Amenities Fees collected by Headwaters and its agreement not to interfere with Headwaters’ operations or with the future development of Granby Ranch benefitted both Headwaters and GRH and were integral components of the terms

and consideration for the agreement. The contract defeats GRMD's efforts to minimize the significance of these provisions.

GRMD's other arguments similarly lack merit.

A. The Record Establishes Headwaters' Performance.

GRMD tries to avoid summary judgment by arguing, without providing any dispute of facts or substance, that Headwaters has not established its performance of the Exclusion Agreement. Since GRMD has never identified any provision of the Exclusion Agreement that it asserts Headwaters failed to perform, the argument is a red herring. In any event, the summary judgment record sufficiently establishes Headwaters' performance.

The Exclusion Agreement imposed very few obligations on Headwaters, and the primary ones were effective *in the document itself* – specifically, Headwaters' agreement to amend the Master IGA and to forgive debt. Both of those were accomplished in the Exclusion Agreement without the need for further action by Headwaters.⁹ *See* Ex. C, §§ 4.2 & 4.3.

The only on-going obligation Headwaters assumed at the time it entered the Exclusion Agreement was its agreement that “consistent with the Service Plan, the Town IGA, and the 2006 Master IGA, Headwaters shall provide all general administrative services, operation and maintenance services and Facilities *for* GRMD.” (emphasis added). Ex. C, § 6.1 But, as the documents attached to parties' filings establish, the Districts eliminated any on-going obligation for Headwaters to provide any services *for* GRMD when they amended their Service Plans in 2016, terminated the Master IGAs, and agreed to operate independently. *See* Exs. D (also Ex. 2);

⁹ Sections 3.3.1 and 5.3 impose minor obligations on both Districts. Though the statute of limitations has long run, GRMD has never questioned Headwaters' performance of those provisions, which are now moot in any event.

E (also Ex. 3), F (also Ex. 6), G (also Ex. 7) & Ex. 5. GRMD never asserted Headwaters' failure to perform prior to 2016, and any claim for breach prior to that time would now be barred by the three-year statute of limitations. C.R.S. § 13-80-101(1)(a). The record sufficiently establishes Headwaters' performance of the Exclusion Agreement.

B. The Record Proves Headwaters' Breach.

GRMD asserts that Headwaters takes the Exclusion Agreement out of context by failing to recognize that under the Exclusion Agreement and the "symbiotic dual-district structure," GRMD funded the amenities fee and Headwaters had obligations regarding the amenities. Regardless of the accuracy of that statement, it has no bearing on the issues before this Court. GRMD's relinquishment of any interest in the amenity fees is not inconsistent with the structure of the Districts at the time or after the 2016 "severance"; nor is GRMD's agreement not to interfere with Headwaters' operations or with future Granby Ranch development. Those provisions speak for themselves and must be enforced as written.

As more fully explained in Headwaters' Motion, GRMD's action in filing this suit to recover amenity fees and to force Headwaters to acquire and operate the Amenities for GRMD (or transfer them to GRMD), its recording of the *lis pendens*, and its actions in causing the developer to divert millions of dollars in fees and costs to litigation rather than development projects all constitute breaches of §§3.2.1 and 6.1-3 of the Exclusion Agreement. It is noteworthy that GRMD recognizes that, under § 3.2.1, amenities fees, once paid "could not be clawed back by GRMD." Response, p. 16. But that is exactly what GRMD sought when it demanded the amenities fees paid since 2005 as damages for its breach of contract claims.

GRMD asserts that it did not breach §§ 6.1 or 6.2 because it did not offer competing

operations or maintenance. *Id.* at p. 17. That is not the point. Contrary to the terms of those provisions, GRMD sought to do so by seeking a court order giving it the right to ultimate ownership and operation of the Amenities. And it sought to interfere with Headwaters' operations in violation of § 6.2 by seeking a court order that would force Headwaters to acquire and operate the Amenities for GRMD's benefit or for transfer to and operation by GRMD. Thus, GRMD's litigation clearly constituted an "effort . . . that might reasonably be believed to result in the avoidance by court order of [its] obligations under this Agreement" and gave rise to an Event of Default under this and the other provisions of § 8.1 of the Exclusion Agreement cited in Headwaters' Motion.

Finally, Headwaters asserts that GRMD's litigation was in violation of GRMD's agreement in § 6.3 not to interfere with or restrict future construction or development. GRMD asserts that Headwaters' factual predicate for this claim lacks sufficient detail. But Headwaters' Motion and attached affidavit explain how this litigation and related *lis pendens* recorded against the Granby Ranch property, have interfered with and restricted construction, including interfering with financing, delaying capital improvements, deterring home buyers, and diverting funds for litigation expenses that otherwise could have been invested in the development. See SOF ¶¶ 27-47 & Ex. A thereto, ¶¶ 9-11. GRMD does not even try to challenge these facts, which provide more than sufficient detail to prove GRMD's breach.

GRMD then asserts that any breach of this provision did not harm Headwaters. Again, GRMD is wrong. As GRMD's Service Plan makes clear, Headwaters was created to facilitate development of Granby Ranch. *See* Exhibit B, § I(5) ("Without the Districts, the financing would be more expensive than necessary and the cohesive development of the mixed-use Development

as well as the ongoing operation and maintenance would be less certain.”). *See also Id.*, §§ II & IV (describing needed facilities and services and Headwaters’ role in providing services and facilities). Headwaters’ overall purpose of facilitating the development of Granby Ranch was not altered when the Districts severed their prior relationship and amended their Service Plans. *See Ex. 5*. Headwaters, GRMD, and the developer all have an interest in furthering the Granby Ranch development; any interference in that development by GRMD frustrates Headwaters’ essential purpose and function. Headwaters thus benefitted from GRMD’s agreement not to interfere with or restrict future construction or development, and it is entitled to enforce that provision of the Exclusion Agreement. The fact that GRMD’s lawsuit sought to force Headwaters to acquire and operate the Amenities – though it had no funds to do so – alone interfered with the Granby Ranch development. *See SOF*, ¶ 26 & Exs. I & J.

The record establishes Headwaters’ damages. As a result of the lawsuit giving rise to the breach, Headwaters was forced to hire counsel and to spend years defending against GRMD’s frivolous claims. *See SOF*, ¶¶ 27, 33, 46-47 & Exs. O & P. Because Headwaters lacks sufficient funds, GRCO paid Headwaters’ fees on its behalf under those parties’ funding agreement, and Headwaters now owes GRCO over \$860,000. *See SOF*, ¶¶ 46-47 & Exs. A, O & P.

C. Headwaters is Entitled To Recover Attorneys’ Fees and Costs as Damages.

GRMD’s Response incorporates by reference the argument in its own Motion for Partial Summary Judgment that the Exclusion Agreement does not allow recover of its attorneys’ fees and costs. As set forth in Headwaters’ Response to GRMD’s Motion, the plain language of § 8.5.2 of the Exclusion Agreement and governing Colorado law defeat GRMD’s argument. Headwaters incorporates herein by reference its Response, filed on August 15, 2024. As set forth

above, Headwaters is expressly limiting the requested relief in its Summary Judgment Motion to an order that GRMD has breached the Exclusion Agreement and that Headwaters is entitled to recover its attorneys' fees and costs as damages.¹⁰ The amount of its fees can be submitted and argued in separate motion practice, after entitlement to fees is established.

III. Movants Are Entitled To Relief on Their Respective Counts IV.

GRMD misstates the crux of Movants' claims, asserting that GRMD did not breach its Service Plan by seeking to enforce the LPA. GRMD ignores that its claims for breach of the LPA – and its assertion of third-party beneficiary rights thereunder – were based upon GRMD's position that under the Districts' prior dual-district relationship, original Service Plans, and Master IGAs, Headwaters had some obligation to act *on behalf of* GRMD under the LPA. But, as this Court found, after amendment of the parties' Service Plans and Granby IGA and related termination of the Master IGAs, Headwaters had no obligations *to GRMD* to acquire or operate the Amenities. Thus, GRMD's attempt to impose those obligations through this lawsuit represents a material departure from GRMD's amended Service Plan, which unequivocally states that the Districts will operate independently.

GRMD continues to maintain its position that it has the right to impose those obligations on Headwaters, as demonstrated by its response to Headwaters' motion. Therefore, Movants are entitled to the requested injunctive relief.

¹⁰ GRMD erroneously argues that if the Exclusion Agreement allows recovery of fees, it is entitled to a fee award. GRMD has not asserted any breach of the Exclusion Agreement that would entitle it to damages. Second, fees incurred by GRMD to defend against Headwaters' claim are not "expenses incurred in enforcing the Agreement" as required for recovery under § 8.5.2. *See Ex. C.* To the contrary, GRMD's defense asserts termination of the Exclusion Agreement.

Dated this 12th day of September, 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 September 12, 2024, addressed to the following:

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