

**DISTRICT COURT, GRAND COUNTY,
COLORADO**

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CASE NUMBER: 2021CV30008

Plaintiff:

GRANBY RANCH METROPOLITAN
DISTRICT, a quasi-municipal corporation
and political subdivision of the State of
Colorado,

vs.

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.; GR
TERRA, LLC.



COURT USE ONLY

Case No: 2021CV030008

**ORDER GRANTING IN PART HEADWATERS METROPOLITAN DISTRICT'S
MOTION FOR SUMMARY JUDGMENT ON COUNT I OF HEADWATERS'
COUNTERCLAIMS; ORDER DENYING HEADWATERS' MOTION FOR**

**SUMMARY JUDGMENT ON COUNT IV OF HEADWATERS' COUNTERCLAIMS;
ORDER DENYING GR TERRA LLC'S MOTION FOR SUMMARY JUDGMENT ON
COUNT IV OF GR TERRA'S COUNTERCLAIMS; ORDER DENYING GRMD'S
MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING DAMAGES ON
COUNT I OF HEADWATERS' COUNTERCLAIMS**

This matter comes before the Court on Headwaters Metropolitan District's ("Headwaters") Motion for Summary Judgment on Counts I and IV of Its Counterclaim and GR Terra LLC's ("GR Terra") Motion for Summary Judgment on Count IV of Counterclaim, filed on July 11, 2024. Granby Ranch Metropolitan District ("GRMD") filed its response on August 15, 2024.¹ Headwaters and GR Terra filed their reply on September 12, 2024.² The Court also addresses herein GRMD's Motion for Partial Summary Judgment filed on July 12, 2024. Headwaters filed its response to GRMD's motion on August 15, 2024.³ GRMD filed its reply on September 12, 2024. Both motions for summary judgment became ripe for ruling on September 13, 2024.

Upon being fully apprised of the facts and law, the court finds and rules as follows:

PROCEDURAL BACKGROUND

The Court set forth the procedural and substantive facts of this case in the Court's three orders issued on January 28, 2022, and the three orders the Court issued on July 30, 2023.

In the Court's July 30, 2023, Order Granting the Defendants Headwaters Metropolitan District and GR Terra's Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss, the Court dismissed without prejudice GRMD's Third Amended Complaint because GRMD did not have standing under the 2012 LPA, GRMD was not a third-party beneficiary thereto, and GRMD had waived and relinquished any rights it had against Headwaters related to the Master Intergovernmental Agreements ("IGA"s) and formation, administration, and operation of the Districts, which included the 2012 LPA. In a separate order issued on July 30, 2023, the Court deemed the following motions moot as a result of the Court's ruling dismissing GRMD's Third Amended Complaint: GR Terra's motion for summary judgment on GRMD's claims IV (breach of contract), V (declaratory judgment), and VI (declaratory judgment); Headwaters' motion for summary judgment on GRMD's claims II (breach of contract against Headwaters) and VI (declaratory judgment); and Gray Jay's and Granby Prentice's motion for summary judgment as to GRMD's claims III (breach of contract) and VI (declaratory judgment).

In a third July 30, 2023, Order the Court denied GRMD's renewed motion for summary judgment on Counts I, II, and III of GR Terra's counterclaims and granted GR Terra's cross-motion, entering judgment in favor of GR Terra and against GRMD on Counts I, II, and III of GR Terra's counterclaims. The Court held the 2020 foreclosure extinguished the 2012 LPA, and, even if it did not, the 2012 LPA terminated by operation of its own language because Headwaters failed to appropriate rent as required.

¹ The Court extended the time in which to file responses to August 15, 2024. (Order July 30, 2024).

² The Court extended the time in which to file replies to September 12, 2024. (Order August 25, 2024).

³ GR Terra did not join in Headwater's response.

At this time, the remaining claims in this matter are Headwaters' counterclaim for damages and equitable relief for GRMD's alleged breach of the 2010 Exclusion Agreement (the "Exclusion Agreement")(Headwaters' Counterclaim I), and Headwaters and GR Terra's counterclaim for GRMD's alleged breach of the Service Plan, (Headwaters and GR Terra's Counterclaim IV).⁴

On October 25, 2023, GRMD filed a motion for entry of final judgment. GRMD argued the July 30, 2023, Orders were dispositive of all issues and counterclaims. (Mot. Entry Final Judgment, p. 3). On November 22, 2023, Headwaters filed a motion to strike GRMD's motion for entry of final judgment or an alternative response to GRMD's motion. The Court disagreed with GRMD and denied GRMD's motion for entry of final judgment on June 4, 2024. In the Court's June 4, 2024, order, the Court, however, re-opened the briefing scheduled to allow the parties to file dispositive motions regarding the remaining claims in this matter.

Headwaters now moves for summary judgment on Count I (breach of the Exclusion Agreement) of Headwaters' Counterclaims to the (now dismissed) Third Amended Complaint. Both Headwaters and GR Terra move for summary judgment on their respective Count IV's (Breach of GRMD's Service Plan or Improper Modification of Same) of their counterclaims to the (now dismissed) Third Amended Complaint.

GRMD moves for summary judgment regarding damages on Headwaters' Count I (breach of the Exclusion Agreement) of Headwaters' Counterclaims to the (now dismissed) Third Amended Complaint.

STANDARD OF REVIEW

Summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Colorado Rule of Civil Procedure ("C.R.C.P.") 56(c). Thus, "[s]ummary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law." Lombard v. Colorado Outdoor Educ. Center, Inc., 187 P.3d 565, 570 (Colo. 2008); Morlan v. Durland Trust Co., 252 P.2d 98, 100 (Colo. 1952) (summary judgment is appropriate "only

⁴ On December 10, 2023, per the parties' stipulation, the Court: dismissed with prejudice Counts II and III of Headwaters' Counterclaims against GRMD, which Headwaters filed on November 3, 2022; approved Headwaters withdrawal of Headwaters' claim for damages in Count IV of Headwaters' Counterclaims against GRMD filed on November 3, 2022; dismissed without prejudice Counts V and VI of Headwaters' Counterclaims against GRMD filed on November 3, 2022, on the grounds that these claims were moot and/or redundant of other claims decided by the Court; dismissed with prejudice Count V of GR Terra's Counterclaims against GRMD filed on November 3, 2022; and approved GR Terra's withdrawal of GR Terra's claim for damages in Count IV of GR Terra's Counterclaims against GRMD filed on November 3, 2022. In the Court's order, the Court noted Headwaters' request for injunctive relief in Count IV of Headwaters' counterclaims and GR Terra's request for injunctive relief in County IV of Headwaters' counterclaims both remain viable claims.

where the facts are clear and undisputed, leaving as the sole duty of the court the determination of the correct legal principles applicable thereto.”).

The moving party bears the burden of establishing that there are no genuine issues of material fact. Barfield v. Hall Realty, Inc., 232 P.3d 286, 289 (Colo. App. 2010). The party must make a convincing showing that there are no genuine issues of material fact. A-1 Auto Repair & Detail, Inc. V. Bilunas-Hardy, 93 P.3d 598, 603 (Colo. App. 2004). A material fact is a fact that affects the outcome of the case. Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

When “a party moves for summary judgment on an issue on which that party would not bear the burden of persuasion at trial, the moving party's initial burden of production is satisfied by showing an absence of evidence in the record to support the nonmoving party's case.” Sanderson v. American Family Mut. Ins. Co., 251 P.3d 1213, 1216 (Colo. App. 2010). Once the party moving for summary judgment has made a convincing showing as to the nonexistence of material facts, the party opposing summary judgment must demonstrate with admissible facts that a real controversy of fact exists. A-1 Auto Repair, 93 P.3d at 603. In responding to a motion for summary judgment, by affidavit or otherwise, the nonmoving party “. . . must set forth specific facts showing that there is a genuine issue for trial.” C.R.C.P. 56(e). All doubts as to the existence of triable issues of fact are to be resolved in favor of the nonmoving party and all inferences that may be drawn from the undisputed facts must be made in favor of the nonmoving party. A.C. Excavating v. Yacht Club II Homeowners Ass'n, Inc., 114 P.3d 862, 865 (Colo. 2005).

“When ruling on a summary judgment motion, a court may consider only sworn or certified evidence.” Bjornsen v. Board of County Commissioners of Boulder County, 2019 COA 59, ¶ 14 (citing C.R.C.P. 56(e) and Cody Park Prop. Owners' Ass'n, Inc. v. Harder, 251 P.3d 1, 4 (Colo. App. 2009)); D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC, 215 P.3d 1163, 1166 (Colo. App. 2008) (“Unsworn expert witness reports are not admissible to support or oppose a motion for summary judgment.”). Unsworn exhibits or documents attached to motions, as well as unsworn exhibits or documents attached to an unverified complaint, must be disregarded. Bjornsen, 2019 COA 59, ¶ 21. “Failure to . . . otherwise submit evidence establishing [a document’s] admissibility precludes consideration of the document for purposes of summary judgment.” St. Croix v. University of Colorado Health Sciences Center, 166 P.3d 230, 244 (Colo. App. 2007).

A party, however, can waive objection to the lack of certification or affidavit by their reliance on such exhibits. Johnson v. Mountain Sav. & Loan Ass’n, 426 P.2d 962, 963 (Colo. 1967). A court may consider record evidence where neither party disputes the competence or admissibility of the evidence offered in support of and in opposition to the summary motion. Woodward v. Board of Directors of Tamarron Ass'n of Condominium Owners, Inc., 155 P.3d 621, 624 (Colo. App. 2007); People v. Gargano, 306 P.3d 109, 110-111 n.2, n.3 (Colo. O.P.D.J. 2012) (stating that where parties do not object to the sufficiency of exhibits in summary judgment motions and responses, objections are deemed waived and the court should take such exhibits into account when making a ruling).

The Court has considered all of the exhibits filed by the parties with the parties' motions for the Court's review because none of the parties object to the others' exhibits. . Headwaters and GR Terra attached thirteen exhibits to their motion for summary judgment plus two affidavits. GRMD filed seven exhibits to GRMD's response to Headwaters and GR Terra's motion. Headwaters and GR Terra attached one exhibit to their reply. GRMD attached four exhibits to an affidavit filed with GRMD's motion for partial summary judgment. Headwaters and GR Terra attached one exhibit to their response to GRMD's motion for partial summary judgment. GRMD did not attach any documents to its reply.

RULING

The Court denies Headwaters' Motion for Summary Judgment on Counts I and IV of Headwaters' Counterclaim to the Third Amended Complaint and the Court denies GR Terra's Motion for Summary Judgment on Count IV of Counterclaim to the Third Amended Complaint.

The Court denies GRMD's Motion for Partial Summary Judgment.

The Court addresses the Exclusion Agreement in Section (I) and the GRMD 2016 Service Agreement in Section (II) of this ruling.

(I) THE EXCLUSION AGREEMENT

The Court denies Headwaters' Motion for Summary Judgment on Count I (Breach of the Exclusion Agreement) of Headwaters' Counterclaim to GRMD's Third Amended Complaint.

On April 21, 2010, Headwaters, GRMD and Granby Realty Holdings ("GRH") entered into the Exclusion Agreement. (Headwaters and GR Terra's Mot., Ex. C, p. 1). The Exclusion Agreement repudiated the 2008 Master IGA and reinstated the 2006 Master IGA. (*Id.* at ¶ 4.1). The Exclusion Agreement stated that under the 2006 Master IGA, Headwaters would own, operate, construct, and maintain the Facilities,⁵ and GRMD would pay for costs related to the construction, financing, acquisition, operation, and maintenance of the Facilities. (*Id.* at Recitals G-H). The outstanding obligation of GRMD under the 2006 Master IGA was over \$900,000 in service costs and over \$14,000,000 in capital costs and an allocation reduced the capital costs to over \$10,000,000. (*Id.* at Recitals G-M). The parties agreed that upon the issuance of bonds in the amount of \$11,119,000, "all debt obligations of GRMD to [Headwaters] under the 2006 Master IGA" were deemed paid in full. (*Id.* at ¶ 4.2). Importantly, GRMD acknowledged and agreed the Amenity Fees were payable to Headwaters and that GRMD had "no right, title, or interest" to them. (*Id.* at ¶ 3.2.1).

Headwaters now moves the court for a determination that GRMD breached the Exclusion Agreement and that Headwaters is entitled to recover its attorneys' fees and costs as damages.

⁵ The Exclusion Agreement defined the "Facilities" as the "public improvements, including streets and roadways, safety protection systems, water improvements, sanitary sewer and storm drainage, and park and recreation facilities, benefitting Granby Ranch..." (Mot. Ex. C at Recital C).

(Headwaters and GR Terra's Mot., p. 12). Headwaters does not seek a specific monetary award of damages at this time.

GRMD moves for partial summary judgment, only contending that because Headwaters' alleged damages under the Exclusion Agreement are solely for attorney fees, Headwaters' alleged damages are unrecoverable under Colorado law. (GRMD's Mot., p. 2).

(A) Headwaters has failed to demonstrate, as a matter of law, with one exception, that GRMD breached the Exclusion Agreement when GRMD filed and pursued the present lawsuit

Headwaters has failed to demonstrate, as a matter of law, with one exception, that GRMD breached the exclusion agreement when GRMD filed and pursued the present lawsuit.

Headwaters moves for summary judgment on the issue of breach – specifically, that GRMD breached Sections 3.2.1, 6.1, 6.2, and 6.3 of the Exclusion Agreement when GRMD filed the present cause of action alleging Headwaters had a duty to acquire the Amenities and sought recovery of the Amenity Fees.

GRMD contends: (a) Headwaters waived any claims for breaches of the Exclusion Agreement when it executed the 2017 Termination of Intergovernmental Agreement; (b) GRMD's obligations under the Exclusion Agreement were eliminated or terminated by the 2016 Letter Agreement, the 2016 service plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims; (c) Headwaters failed to present undisputed facts that Headwaters performed, or that Headwaters' performance was excused, under the Exclusion Agreement, and Headwaters failed to present any evidence that GRMD breached the Exclusion Agreement.

(1) Headwaters has demonstrated GRMD waived GRMD's defense that the 2017 IGA Termination Agreement precludes Headwater's claims for breach of the Exclusion Agreement

Headwaters has demonstrated GRMD waived GRMD's defense that the 2017 Termination of Intergovernmental Agreement (the "2017 IGA Termination Agreement") Agreement precludes Headwater's claims for breach of the Exclusion Agreement.

GRMD argues Headwaters waived and released its claims against GRMD for breach of the Exclusion Agreement when it executed the 2017 IGA Termination Agreement. (GRMD's Resp. to Headwaters and GR Terr's Mot., p. 10). The 2017 IGA Termination Agreement, which was made between GRMD, GRMD Nos. 2-8, and Headwaters stated "the Parties intend for certain of the Granby Ranch Districts, specifically GRMD, to operate independently from" Headwaters, and "[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." (GRMD's Resp., Exh. 6, p.1 and p. 2, Recitals G and H). The 2017 IGA Termination Agreement further provided Headwaters, the Plaintiff, and GRMD Nos. 2-8

have satisfied their obligations under the Master IGAs and are released from any further obligations thereunder. To the extent permitted by law, each District hereby waives the right to recover from and generally, unconditionally, fully and irrevocably releases, waives, acquits and forever discharges each of the other Districts, their officers and directors ... from and against any and all costs, losses, claims, liabilities, damages, expenses, demands, debts, controversies, actions or causes of action, agreements, and promises, including reasonable attorneys' fees ... which has been raised or could have been raised, whether arising before, on or after the date hereof.

(Response Ex. 6 § 5).

According to Headwaters, GRMD waived this argument. (Headwaters and GR Terra's Reply, p. 4).

The Court agrees.

C.R.C.P. 8(c) states the defense of waiver or release must be affirmatively pleaded. See also Rudd v. Rogerson, 424 P.2d 776, 779 (Colo. 1967). "A waiver of an asserted right must be affirmatively pleaded if it is to be used as a defense." Rudd, 424 P.2d at 779; see 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 raise waiver or release as an affirmative defense to any of Headwaters' amended counterclaims. (GRMD Answer to Headwaters' Counterclaims, November 25, 2022). GRMD has not sought leave to amend its answer. The deadline to amend the pleadings in this matter was June 17, 2022, and there was no mention of this defense in the Case Management Order. (Case Management Order, May 5, 2022⁶). While the Court is within its discretion to disregard Headwater's objection to GRMD's waiver argument and allow an amendment of the pleadings, Town of Carbondale v. GSS Properties, LLC, 169 P.3d 675, 681 (Colo. 2007), GRMD has not sought leave to amend. The Court, therefore, finds GRMD cannot raise the 2017 Termination of Intergovernmental Agreement as a defense to Headwaters' motion for summary judgment. Id. To do so now would be to wrongly bypass C.R.C.P. 8 and 15. Id. at 680.

Even if GRMD had properly raised the defense, GRMD has not demonstrated Headwaters waived its rights to enforce the Exclusion Agreement. The 2017 IGA Termination Agreement specifically states it applies to the 2006 Master IGA and the 2008 Master IGA. (Headwaters and GR Terra's Mot., Ex. F, § 2 and § 3). Although the Exclusion Agreement is referenced once in the 2017 IGA Termination Agreement (as an agreement in which Headwaters and GRMD "repudiated the 2008 Master IGA as between them and intended to revert to the 2006 Agreement"), the Exclusion Agreement is notably absent from the "Covenants and Agreements" section wherein the 2006 and 2008 Master IGAs were expressly terminated. (Id. at Ex. F. Recital C and § 2 and § 3). There is no language in the 2017 IGA Termination Agreement

⁶ There is an Amended Case Management Order issued by the Court on December 4, 2022, but the only change was in the Court's portion of the original Case Management Order.

waiving rights specific to the Exclusion Agreement. Likewise, § 5 of the 2017 IGA Termination Agreement expressly releases the districts from their obligations under the Master IGAs. Again, there is no reference to the Exclusion Agreement.

The Court finds GRMD has not demonstrated the parties intended to waive Headwater's rights to enforce the Exclusion Agreement upon execution of the 2017 IGA Termination Agreement or that Headwaters waived its right to enforce the Exclusion Agreement upon execution of the 2017 IGA Termination Agreement.

(2) Headwaters has demonstrated GRMD waived its defense that the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated its promises under the Exclusion Agreement

Headwaters has demonstrated GRMD waived its defense that the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated its promises under the Exclusion Agreement.

GRMD next argues the 2016 Letter Agreement, the 2016 Service Plans, the 2016 IGA, the 2017 Termination Agreement, and the 2018 Waiver and Release of Claims eliminated/terminated its obligations under the Exclusion Agreement. (GRMD's Resp. to Headwaters and GR Terr's Mot., p. 11).

The Court disagrees with GRMD.

GRMD has waived its assertion that these agreements terminated GRMD's Exclusion Agreement obligations. GRMD's argument fails for the same reasons set forth above: that is, GRMD was required to plead GRMD's legal argument in GRMD's Answer. An "avoidance or affirmative defense" is "a legal argument that a defendant ... may assert to require the dismissal of a claim or to prevail at trial." Hawg Tools, LLC v. Newsco International Energy Services, Inc., 2016 COA 176M, ¶ 66; State v. Nieto, 993 P.2d 493, 507 (Colo. 2000); see also Soicher v. State Farm Mutual Automobile Insurance Company, 2015 COA 46, ¶ 18. "Under C.R.C.P. 8(c), a defendant waives all affirmative defenses and avoidances that do not appear in his or her answer." Hawg Tools, 2016 COA 176M at ¶ 41; Dinosaur Park Investments, L.L.C. v. Tello, 192 P.3d 513, 517 (Colo. App. 2008) (alleged rescission of contract is an affirmative defense that is waived when not timely pleaded). In fact, avoidance, discharge and waiver are affirmative defenses which "cannot be raised by motion but only by answer..." Markoff v. Barenberg, 368 P.2d 964, 965 (Colo. 1962). GRMD did not plead GRMD's arguments as affirmative defenses under C.R.C.P. 8(c) and has not sought leave to amend its answer.

Even if GRMD had properly raised waiver and release, the Court finds GRMD has not demonstrated the documents GRMD cites eliminated GRMD's promises under the Exclusion Agreement.

The Exclusion Agreement may be terminated only by "written agreement signed by all of the parties..." to the Exclusion Agreement. (Headwaters and GR Terra's Mot. Ex. C § 9.2). GRH

was a party to and signed the Exclusion Agreement. (Id. at pages 1 and 17). The Exclusion Agreement, therefore, could not be terminated with GRH's agreement. An agreement to rescind requires a "meeting of the minds" of the contracting parties "with 'the clear knowledge and understanding of the parties.'" Esecson v. Bushnell, 633 P.2d 258, 261 (Colo. App. 1983). GRH was not a party to the 2016 Service Plans, the 2016 IGA, or the 2017 Termination Agreement. These documents do not support GRMD's termination argument.

GRH was a party to the 2016 Letter Agreement and the 2018 Waiver and Release Agreement. The Court now turns to these documents.

The 2016 Letter Agreement, dated August 22, 2016, reflects an understanding between the parties to amend the "Intergovernmental Agreement between [Headwaters] and GRMD dated June 1, 2006 as amended on April 21, 2010" "to eliminate any obligations between the parties other than GRMD's funding of road operations, maintenance and minor repairs." (GRMD Resp., Ex. 2, p. 4). The 2016 Letter Agreement was therefore limited to the 2006 IGA as amended. GRMD has provided no evidence to this Court indicating the 2016 Letter Agreement extended to the Exclusion Agreement.⁷

It is impossible for the Court to determine whether the 2016 Letter Agreement terminated GRMD's promises. The record reflects the 2016 Letter Agreement was amended on November 17, 2017, and again on April 11, 2018. (Ex. 22, Recital T, Statement of Uncontroverted Facts, 1/25/2024). The parties have not provided the court with these amendments, so the Court cannot determine whether the 2016 Letter Agreement terminated GRMD's promises.

The Court, therefore, finds GRMD has not demonstrated the 2016 Letter Agreement terminated GRMD's promises made pursuant to the Exclusion Agreement.

As to the 2018 Waiver and Release Agreement, GRMD has not demonstrated the 2018 Waiver and Release Agreement terminated GRMD's promises under the Exclusion Agreement. The 2018 Waiver and Release Agreement does not reference the Exclusion Agreement nor contain any language effectuating the termination of the Exclusion Agreement. Instead, the

⁷ The Exclusion Agreement and the April 21, 2010, amendment to the 2006 IGA were executed on the same day. Had the parties intended for the 2016 Letter Agreement to amend the Exclusion Agreement (so as to eliminate any obligations thereunder), the 2016 Letter Agreement would have so stated.

2018 Waiver and Release Agreement contains a “waiver and release of claims” as follows:

1. **Waiver and Release of Claims.** Each Party, for itself, its respective successors, assigns, shareholders, directors, officers, employees, agents, attorneys, accountants, managers and other representatives, fully and forever irrevocably releases, waives, relinquishes and discharges the other Parties, and their respective successors, assigns, shareholders, directors, officers, employees, agents, attorneys and other representatives, including the Directors and Consultants (collectively, the “Released Parties”) from and against any and all claims, demands, obligations, duties, liabilities, damages, expenses, breaches of contract, acts, omissions, causes of action, promises, damages, costs, and remedies therefor of every kind, description, character or nature whatsoever now or in the future, whether known or unknown, raised or which could have been raised, which may otherwise exist or which may arise in relation to the Senior Bonds, the Subordinate Bonds, the Master IGA, the repair and operation and maintenance of the roads within Granby Ranch or any other matter related to the formation, administration, and operation of the Districts (the “Claims”) existing as of the Release Date (defined below in Paragraph 3). The foregoing release shall not apply to the obligations contained in the Letter Agreement as amended.

(GRMD Resp., Ex. 7, p. 3).

While this language is expansive, GRMD has not demonstrated that Headwaters’ claim involves the “formation, administration, and operation of the Districts.” (Court’s July 30, 2023, Order Granting the Defendants Headwaters Metropolitan District and GR Terra’s Renewed Motion Under C.R.C.P. 12(b)(1) to Dismiss). Headwaters’ claim involves GRMD’s failure to adhere to the promises GRMD made under the Exclusion Agreement – namely, its promise to refrain from administering or operating the Amenities. (Headwaters’ First Counterclaim, ¶¶ 117-118). This Court questions whether a promise not to do something is the same as doing the thing itself.

The Court finds the 2018 Waiver and Release Agreement does not apply to Headwaters’ breach of the Exclusion Agreement claim against GRMD because Headwaters does not seek for GRMD to administer or operate the Amenities (which is expressly waived and released in the in the 2018 Waiver and Release Agreement) and instead Headwaters seeks to prevent GRMD from administering and operating the Amenities.

GRMD has not demonstrated the 2018 Waiver and Release Agreement terminated GRMD’s promises made pursuant to the Exclusion Agreement.

(3) Headwaters has partially demonstrated GRMD breached the Exclusion Agreement as a matter of law

Headwaters has partially demonstrated GRMD breached the Exclusion Agreement as a matter of law.

Headwaters argues GRMD breached Sections 3.2.1, 3.4, 4.4, 6.1, 6.2, and 6.3 of the Exclusion Agreement when GRMD filed the present cause of action alleging Headwaters had a duty to acquire the Amenities and GRMD sought recovery of the Amenity Fees.

The Court disagrees because, with one exception, Headwaters has not demonstrated Headwaters is entitled to judgment as a matter of law.

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. Distributing Co. v. Diodosio, 841 P.2d 1053, 1058 (Colo. 1992) (internal citations omitted).

Section 8.1 of the Exclusion Agreement provides an “Event of Default” occurs under the agreement if a party fails to perform any of its obligations, including:

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;

8.1.2. The failure to pay any payment when the same shall become due and payable as provided herein and to cure such failure in accordance with Section 8.3.

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 ...

(Headwaters and GR Terra’s Mot. Ex. C, p. 10).

The Court disregards GRMD’s argument that Headwaters failed to perform under the Exclusion Agreement. GRMD argues Headwaters cannot pursue these breaches because Headwaters has “failed to present undisputed facts that [Headwaters] has performed, or that its performance is excused, under the 2010 Exclusion Agreement.” (Resp. to Headwaters and GR Terr’s Mot., p. 14), but GRMD has not cited any section of the Exclusion Agreement GRMD contends Headwaters failed to perform.

GRMD next disputes GRMD breached Sections 3.2.1, 6.1, 6.2, and 6.3 of the Exclusion Agreement.⁸ (Id. at p. 15).

Section 3.2.1 of the Exclusion Agreement provides

Assignment and Receipt. GRMD acknowledges and agrees that the Amenity Fees are payable to [Headwaters] and GRMD has no right, title or interest thereto. Accordingly, any Amenity Fees received by GRMD shall be paid over to [Headwaters] 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 [Headwaters].

(Headwaters and GR Terra’s Mot. Ex. C § 3.2.1). Headwaters moves for summary judgment because GRMD alleged in GRMD’s Third Amended Complaint that “[t]he termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately \$6.05 million dollars in equity already paid (out of a purchase price of \$18 million) subject to the LPA from fees collected from its residents and members and terminate the right of the Districts to acquire the Amenities.” (Headwaters and GR Terra’s Mot., p. 10; Third Amend. Compl. ¶ 42).⁹

According to GRMD, this section

simply confirmed, with the forgiveness of certain bond-debt and the parties’ changes, that the amenities fees, once paid, could not be clawed back by GRMD. This is confirmed by the other provisions of Section 3, which stated that the payments and obligations set out in other agreements remained in place.

⁸ GRMD does not address the breaches of Section 3.4 and 4.4 of the Exclusion Agreement alleged by Headwaters in Headwaters’ first counterclaim. (Headwaters’ Counterclaims, p. 29). Section 3.4 provides:

3.4 Operations and Maintenance Levy. The Property shall not be liable for any property tax levied by GRMD for operating costs of GRMD after the effective date of the Court’s order for exclusion and, in addition, shall not be liable or have any obligations for operations of GRMD of any kind.

Section 4.4 provides:

4.4 Conveyance of Improvements. GRMD shall convey and dedicate any public improvements for which it has ownership to [Headwaters] for ownership, operations, and maintenance. GRMD shall execute such necessary conveyance documents to transfer and public improvements and related appurtenances to [Headwaters]. Including as necessary and appropriate, special warranty deeds, bills of sale, assignment agreements, or other conveyance documents, conveying title to the public facilities, infrastructure, any property and any appurtenances thereto owned by GRMD to [Headwaters].

⁹ GRMD alleged the same thing in GRMD’s Second Amended Complaint: “The termination of the LPA will prevent GRMD from collecting fees pursuant to the LPA and will lose approximately \$6.05 million dollars in equity already paid (out of a purchase price of \$18 million) subject to the LPA from fees collected from its residents and members and terminate the right of the Districts to acquire the Amenities.” (Second Amended Complaint ¶ 42).

Again, this is wholly different than the issues raised by GRMD as to the LPA and the duties it asserted Headwaters had with regard to the amenities. That GRMD had paid Headwaters the amenity fee and had no direct right to the fee itself does not mean that Headwaters simply had no duties whatsoever. It remained bound by the LPA. The claims in this action did not breach § 3.2.1.

(GRMD Resp., p. 16).

The Court is largely underwhelmed by GRMD's argument as to Section 3.2.1 of the Exclusion Agreement. The party opposing summary judgment must demonstrate with admissible and specific facts that a real controversy of fact exists. A-1 Auto Repair, 93 P.3d at 603. In responding to a motion for summary judgment, by affidavit or otherwise, the nonmoving party ". . . must set forth specific facts showing that there is a genuine issue for trial." C.R.C.P. 56(e).

Filing a lawsuit for the recovery of the Amenity Fees is evidence that GRMD violated Section 3.2.1. GRMD agreed GRMD had "no right, title or interest" to the Amenity Fees, and agreed "any Amenity Fees received by GRMD shall be paid over to [Headwaters] by GRMD as soon as practical, and . . . to execute any necessary documents to assign all right, title, and interest in any Amenity Fee to [Headwaters]." (Headwaters and GR Terra's Mot., Ex. C, § 3.2.1). GRMD has not directed the court to any evidence disputing that its actions were not an attempt to collect the Amenity Fees.

The Court finds Headwaters has not demonstrated, as a matter of law, that GRMD breached Section 3.2.1. Regardless of whether there is an absence of material facts in dispute, a plaintiff must still establish all the requirements of summary judgment, including that it is entitled to judgment as a matter of law. Meyer v. State, Dept. of Revenue, Motor Vehicle Div., 143 P.3d 1181, 1184 (Colo. App. 2006). A plaintiff must demonstrate that the defendant failed to perform the contract. Diodosio, 841 P.2d at 1058.

At this stage in the proceedings, the Court finds whether GRMD breached Section 3.2.1 of Exclusion Agreement by attempting to recover Amenity Fees from Headwaters is an issue more properly reserved for trial. Headwaters has not demonstrated that an attempt to recover the Amenity Fees is a breach of Section 3.2.1. Until Headwaters provides the court with case law that an attempt at a breach is the same thing as an actual breach, summary judgment is improper. Headwaters has not argued or demonstrated any Amenity Fees were paid to GRMD or GRMD received any Amenity Fees. Headwaters has not argued or demonstrated that GRMD failed to execute the necessary documents to assign its right, title, and interest in the Amenity Fees to Headwaters.

Headwaters next contends GRMD breached Section 6.1 and 6.2 of the Exclusion Agreement by pursuing claims against Headwaters. (Headwaters and GR Terra's Mot., p. 19). These sections provide:

6.1 O&M Services. [Headwaters] and GRMD agree 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, and GRMD shall impose property taxes, fees, rates, tolls or charges and take other actions in cooperation with [Headwaters] that may be necessary to fund the O&M Costs and allow [Headwaters] to provide, operate and maintain the Facilities. GRMD agrees that it shall not attempt to provide, independent of [Headwaters], any operation and maintenance services for the Facilities.

6.2 Access to Improvements. GRMD shall not interfere with the operations and maintenance responsibilities of [Headwaters] and shall not impair [Headwaters]’s access to any Facilities through the adoption of any rules, regulations, policies, procedures or other action reasonably interpreted by [Headwaters] to impair [Headwaters]’s access, or access granted by [Headwaters] to others, to any Facilities.

(Id., Ex. C, § 6.1, 6.2).

“Facilities” is defined in the Exclusion Agreement as the “public improvements, including streets and roadways, safety protection systems, water improvements, sanitary sewer and storm drainage, and park and recreation facilities, benefitting Granby Ranch...” (Id. at Recital C).

The Court denies summary judgment as to these alleged breaches of Section 6.1 and 6.2 of the Exclusion Agreement because Headwaters has not demonstrated GRMD can interfere with a contractual obligation that no longer exists or that GRMD can attempt to provide contractual services that have since terminated.

The Court, therefore, questions whether a party can interfere with the responsibilities of another when those responsibilities have terminated. In 2020, Headwaters ceased to operate for 30 days and, per the 2012 LPA, was, therefore, no longer required to operate and maintain the ski area and golf course. (See Headwaters and GR Terra’s Mot., p. 9, ¶ 25 and Ex. H). Interfere is defined as “to enter into or take a part in the concerns of others; to interpose in a way that hinders or impedes: come into collision or be in opposition” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/interfere>. Accessed February 15, 2025. The definition necessarily implies that the hindrance or impediment must be to an on-going process of some kind. This is also true for the phrase “attempt to provide.” Here, the process – the operation and maintenance of the ski area and golf course – had terminated. Headwaters has not provided any legal authority that GRMD could “attempt to provide” or interfere with operation and maintenance services when Headwater’s obligations to provide those services had ceased. Headwaters has not provided any legal authority as to whether the imposition of responsibilities that no longer exist amounts to a breach of contract.

The Court finds Headwaters has not demonstrated, as a matter of law, that GRMD breached Sections 6.1 and 6.2 of the Exclusion Agreement by initiating and pursuing the present lawsuit.

Headwaters has demonstrated GRMD breached Section 6.3 of the Exclusion Agreement.

Headwaters next argues GRMD's "vigorous" pursuit of this lawsuit for more than three years was a breach of Section 6.3 and an event of default under § 8.1 of the Exclusion Agreement. (Headwaters and GR Terra's Mot., p. 21). Section 6.3 of the Exclusion Agreement provides "[n]either GRMD nor [Headwaters] shall interfere with or restrict future construction or development with the Granby Ranch development." Headwaters cites to:

- GRMD's Lis Pendens which created a cloud on title of the Amenities. The lis pendens made "obtaining any traditional bank financing impossible and decreased the value of the Property." (*Id.* at p. 13). GR Terra was unable to obtain a loan to purchase the Property, had to pursue non-traditional funding sources at a greater cost and on a delayed timeline, and was met with delays in obtaining financing for improvements. (*Id.*). The cloud on title also delayed major capital improvements to the ski and golf facilities including construction of new grip bay house for the ski facilities, installation of new "magic carpet" for the ski facilities; and major improvements to Base Camp Lodge (*Id.* at p.14);
- Significant legal expenses, which Headwaters contends delayed development of the Property (funds diverted to the present lawsuit could have been invested in the development). (*Id.*). Counsel contends legal expenses for Headwaters and GR Terra presently amount to \$2,176,001 (*Id.*);
- The cancellation of several residential home contracts (*Id.*); and
- Lenders 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." (*Id.*)

(*Id.*, Ex. A, ¶ 9-10).

GRMD contends these facts are deficient, vague, and self-serving because they don't specify "what loans could not be obtained, when, what interest rate would have been available, what substitutes were obtained and what were there terms)" and that "[t]his is insufficient to demonstrate breach." (Resp. Headwaters and GR Terra's Mot., p. 17).

The Court disagrees with GRMD.

Headwaters attached an affidavit to its Motion for Summary Judgment explaining how this litigation and the related lis pendens have inhibited construction and financing, deterred home buyers from purchasing residences, and diverted funds for litigation expenses that otherwise could have been invested in the development. (Headwaters and GR Terra's Mot., p. 13; Mot. Ex. A ¶ 9-10). This is evidence that GRMD interfered with or restricted "future construction or development with the Granby Ranch development" and GRMD has not provided any evidence rebutting the same. (Headwaters and GR Terra's Mot., p. 5).

GRMD next argues that any breach of Section 6.3 was not a breach of a duty owed to Headwaters. (GRMD's Resp. to Headwaters and GR Terra's Mot., p. 17 "[t]here is no allegation that Headwaters incurred costs, that it could not perform its duties, that it had losses, that its actions were impeded. (Again, by the time litigation was undertaken, Headwaters asserts it was

not operating the amenities.”)). GRMD fails to set forth any legal authority as to breach of contract and to whom contractual obligations are owed.

The Court, therefore, rejects this argument and finds Headwaters has demonstrated GRMD breached Section 6.3 of the Exclusion Agreement. The Court further finds Headwaters is entitled to summary judgment as to this specific breach because GRMD failed to meet its burden to establish a triable issue of material fact or to demonstrate that Headwaters was not entitled to judgment as a matter of law. McDonald v. Zions First National Bank, N.A., 2015 COA 29, ¶ 79; see Daugaard Real Estate, Inc. v. Lewis, 533 P.2d 935, 936 (a statement in an affidavit controls against an allegation in the complaint where the affidavit stands uncontradicted (citing C.R.C.P. 56(e)); In re Marriage of Vittetoe, 2016 COA 71, ¶ 39 (perfunctorily asserted and unsupported legal arguments will not be considered).

(B) The Exclusion Agreement Authorizes the Recovery of Attorney’s Fees and Costs as Damages for GRMD’s Alleged Breach of the Exclusion Agreement

The Court denies GRMD’s motion for partial summary judgment. The Exclusion Agreement authorizes Headwaters’ recovery of attorney’ fees and costs as damages for GRMD’s alleged breach of the Exclusion Agreement.

Headwaters and GRMD both move for summary judgment on whether Headwaters can recover its attorney fees and costs as damages. (Headwaters and GR Terra’s Mot., p. 22; GRMD Mot., p. 6).¹⁰

A plaintiff must demonstrate resulting damages to succeed on its claim for breach of contract. Diodosio, 841 P.2d at 1058.¹¹ Here, there is no dispute that Headwaters’ damages are limited to its attorneys’ fees and costs incurred in defending against GRMD’s claims and asserting its own counterclaims.

In Colorado, each party is to bear their own legal expenses. Bernhardt v. Farmers Ins. Exchange, 915 P.2d 1285, 1287 (Colo. 1996); Bunnett v. Smallwood, 793 P.2d 157, 160 (Colo. 1990) (collecting cases) (“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.”); Allstate Ins. Co. v. Huizar, 52 P.3d 816, 818 (Colo. 2002); Southern Colorado

¹⁰ GRMD made the same argument in its motion for entry of judgment, filed on October 25, 2023, but the Court did not address the argument at that time. In that motion, GRMD argued that because Headwaters seeks only attorneys’ fees as damages, Headwaters cannot prevail on counterclaim I because the Exclusion Agreement does not “contain an express, unambiguous fee-shifting provision” permitting an award of attorneys’ fees as damages. (Mot. for Entry of Judgment, p. 12). In its Order denying that motion, the Court rejected this argument because GRMD’s cited testimony demonstrated only that Headwaters seeks attorneys’ fees as damages “[a]s of now” and the legal team was seeking other damages, in addition to the attorney fees. (Court’s Order Denying GRMD’s Motion for Entry of Final Judgment, issued June 4, 2024, p. 5). The Court, therefore, at that time, did not address whether the Exclusion Agreement provides for such an award.

¹¹ 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. Diodosio, 841 P.2d at 1058.

Orthopaedic Clinic Sports Medicine and Arthritis Surgeons, P.C. v. Weinstein, 2014 COA 171, ¶ 10 (“Colorado courts follow the American rule, which requires parties to a lawsuit to pay their own legal expenses.”).

Conversely, attorney fees are recoverable where there is a “specific contractual, statutory, or procedural rule” providing for them. Waters v. District Court for the Seventeenth Judicial Dist., 935 P.2d 981, 990 (Colo. 1997); see also Burnett, 793 P.2d at 162-163; Continental Western Ins. Co. v. Heritage Estates Mut. Housing Ass’n, Inc., 77 P.3d 911, 913 (Colo. App. 2003) (“ . . . the parties may agree otherwise by express provision in their contract.”). Any agreement for fees must establish a plain and unambiguous basis for the award. Allstate Ins. Co. v. Orban, 855 P.2d 9, 11 (Colo. App. 1992).

A party may recoup attorney fees as damages if the contract provides for their specific recovery or if the fees are a legitimate consequence of the breach. “Attorney fees are neither costs nor damages, but a hybrid of each.” Butler v. Lembeck, 182 P.3d 1185, 1189 (Colo. App. 2007). In the absence of any contractual or statutory liability, attorney fees and costs are not recoverable as an item of damages either in a contract or a tort action. Lawry v. Palm, 192 P.3d 550, 568 (Colo. App. 2008). Attorney fees are generally not considered actual damages “because they are not the legitimate consequences of the tort or breach of contract sued upon.” Bunnett, 793 P.2d at 160.

“It is axiomatic that a contract should be interpreted ‘according to the plain and ordinary meaning of its terms.’” Morris v. Belfor USA Group, Inc., 201 P.3d 1253, 1259 (Colo. App. 2008); see In re Estate of Gattis, 2013 COA 145, ¶ 36. The court’s primary task in interpreting an agreement is to determine the parties’ intent, which is ascertained “from the language of the instrument itself” and in harmony with the plain and generally accepted meaning of the words employed. Johnson Nathan Strohe, P.C. v. MEP Engineering, Inc., 2021 COA 125, ¶ 12; see French v. Centura Health Corporation, 2022 CO 20, ¶ 25. The court will enforce agreements as written if their meaning is clear. FD Interests, LLC v. Fairways at Buffalo Run Homeowners Association, Inc., 2019 COA 148, ¶ 23 (quoting Pulte Home Corp. v. Countryside Cmty. Ass’n, 2016 CO 64, ¶ 23, 382 P.3d 821).

Section 8.5.2 of the Exclusion Agreement provides:

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.

(Headwaters and GR Terra’s Mot., Ex. C, § 8.5.2.).

GRMD argues this language cannot serve as a basis to award fees because it is unclear and ambiguous. (GRMD’s Mot., p. 9). According to GRMD, there is no agreement to shift fees,

Section 8.5.2. does not state fees will be awarded, and Section 8.5.2 does not contain any prevailing party language. (*Id.* at p. 12). Instead, GRMD contends Section 8.5.2 is a “reservation of rights” that does not provide a basis for an award of attorneys’ fees. (GRMD’s Mot., p. 8; GRMD Resp., p. 18).

First, the Court disagrees that Section 8.5.2. is ambiguous. GRMD has not set forth any legal authority that an agreement for the recovery of attorney fees must contain specific language as to prevailing parties or shifting fees or any other formulaic language. Section 8.5.2. plainly and explicitly authorizes remedies to enforce the Exclusion Agreement and authorizes the recovery of attorney fees and costs incurred to enforce the Exclusion Agreement as damages for any breach. Section 8.5.2. is the clear and unambiguous contractual basis for Headwaters to seek an award of attorneys’ fees and costs. The Court finds Section 8.5.2. unambiguous and finds Section 8.5.2 “clearly informs the parties that a breach . . . my result in an award of attorney fees.” *Morris*, 201 P.3d at 1260. “Unambiguous contract terms must be applied as written, according to their plain and ordinary meaning.” *Western Stone & Metal Corp. v. DIG HP1, LLC*, 465 P.3d 105, 107 (Colo. App. 2020).

Second, the Court disagrees that Section 8.5.2 is a reservation of rights, as a matter of law. GRMD has not cited any legal authority on reservation of rights, how such a reservation differs from Section 8.5.2, or that a reservation of rights cannot serve as a basis for an award. Most importantly, GRMD has not provided any authority that a contractual reservation of rights precludes the recovery of attorneys’ fees and costs. Such a showing is insufficient for a grant of summary judgment because GRMD must demonstrate, as a matter of law, not only that Section 8.5.2 is a reservation of rights but also that a reservation of rights is an insufficient basis to award attorneys’ fees.

GRMD also argues Headwater’s fees are not the “legitimate consequence” of GRMD’s alleged breach. (GRMD Resp., p. 5).

If attorney fees are part of the substance of a lawsuit and are sought as a legitimate consequence of the tort or breach of contract sued upon, they are damages However, if attorney fees are sought based on a contractual agreement to shift fees to a prevailing party, they should be treated as costs, at least where the fee-shifting contractual provision is not the subject of the dispute between the parties and the contract itself is proved to exist.

Butler v. Lembeck, 182 P.3d 1185, 1189 (Colo. App. 2007); *Guarantee Trust Life Insurance Company v. Estate of Casper by and through Casper*, 418 P.3d 1163, 1172 (Colo. 2018) (Where the recovery of attorneys’ fees is the “legitimate consequence” of the suit, the fees and costs are deemed to be actual damages).

GRMD argues, in a footnote, that Headwaters has failed to demonstrate Headwaters’ fees and costs are the “legitimate consequence” of GRMD’s breach of the Exclusion Agreement. (GRMD Resp., p. 18, fn. 8). GRMD does not specify how or why the fees are not a legitimate consequence of GRMD’s breach and, instead, GRMD focuses on its contention that Section 8.5.2 is a fee-shifting provision that this Court should treat as costs.

The Court is unconvinced. Section 8.5.2 of the Exclusion Agreement expressly provides either party may enforce their respective rights by “suit, action, or special proceedings” including “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.” (Headwaters and GR Terra’s Mot., Exh. C.). The attorney fees here are likely recoverable because they are part of the substance of Headwater’s claims – that is, Headwaters sought to enforce and protect its rights under Exclusion Agreement, including the recovery of “damages caused by the breach [of the Exclusion Agreement], including attorney’s fees and all other costs and expenses incurred in enforcing” the Exclusion Agreement. (Headwaters Count I, Counterclaims filed November 3, 2022). The Court finds GRMD has not demonstrated Headwaters may not seek its attorneys’ fees in enforcing and protecting Headwaters’ rights under the Exclusion Agreement because Headwaters’ fees are the subject of its counterclaim and “the fees represent a specific benefit of the contract breached by the opposing party.” See Bernhard v. Farmers Ins. Exchange, 915 P.2d 1285, 1288 (Colo. 1996) (citing Bunnett, 793 P.2d at 161).

In sum, the Court finds Headwaters has demonstrated the Exclusion Agreement authorizes the recovery of damages caused by breach of the Exclusion Agreement, which recovery includes “attorney’s fees and all other costs and expenses incurred in enforcing” the Exclusion Agreement.” (Headwaters Count I, Counterclaims filed November 3, 2022). GRMD has not demonstrated Section 8.5.2 is a reservation of rights that precludes an award of attorneys’ fees or the attorneys’ fees and costs are not a legitimate consequence of GRMD’s alleged breach of the Exclusion Agreement. GRMD has not raised any other facts or legal issues demonstrating the Exclusion Agreement’s authorization of attorneys’ fees does not apply.

The Court finds the Exclusion Agreement contains a valid and enforceable provision for the recovery of attorneys’ fees and costs and Headwaters is entitled to seek those fees as damages,.

The Court denies GRMD’s motion for partial summary judgment.

(II) THE 2016 SERVICE AGREEMENT

The Court denies Headwaters and GR Terra’s motion for summary judgment because Headwaters and GR Terra have not demonstrated, as a matter of law, that GRMD breached the GRMD 2016 Service Agreement by pursuing the present lawsuit.

Headwaters and GR Terra (the “Counterclaimants”) next move for summary judgment on their respective fourth counterclaims, Breach of GRMD’s Service Plan or Improper Modification of Same, which allege GRMD breached or improperly modified the terms of the Second Amendment to Service Plan of GRMD. (Headwaters and GR Terra’s Mot., p. 24 and Ex. E) (the Second Amendment to the Service Plan of GRMD is hereinafter referred to as the “GRMD 2016 Service Agreement”). According to the Counterclaimants, GRMD’s claims and its positions herein constitute a breach of the GRMD 2016 Service Agreement and were an effort to alter GRMD and Headwaters’ obligations thereunder. (Headwaters and GR Terra’s Mot., p. 25). The Counterclaimants seek damages, including attorney fees and costs, and injunctive relief. (Count IV Headwaters’ counterclaims and Count IV GR Terra’s counterclaims).

GRMD contends the GRMD 2016 Service Agreement did not eliminate Headwater's duties imposed by the 2012 LPA and the obligations under the GRMD 2016 Service Agreement and the 2012 LPA are entirely unrelated. (GRMD's resp., p. 21).

The GRMD 2016 Service Agreement amended the 2003 Service Plan and the 2006 First Amendment to the Service Plan. (Headwaters and GR Terra's Mot., Ex. E, p. 2). The purpose of the GRMD 2016 Service Agreement was to clarify and to the extent necessary amend both the 2003 and 2006 service agreements and

to note that the District IGA between GRMD and Headwaters Metropolitan District ... will be terminated and replaced with a road maintenance and snow removal agreement, and to clarify that the relationship between GRMD and [Headwaters] as otherwise set forth in the [2003 and 2006 service plans] is terminated and rendered null and void.

(Id.). The parties then amended the 2003 Service Plan to reflect that

- “The District IGA between GRMD and [Headwaters] will be terminated, GRMD will provide all of its own operation and maintenance functions, including debt issuance and repayment, and that GRMD will enter into an agreement with [Headwaters] regarding the funding of road maintenance and snow removal for the roads located within GRMD.”
- “. . . [A]ny obligation of GRMD, other than as set forth in the road maintenance and snow removal agreement, to provide funds to [Headwaters], or any delegation of power or delegation of approval or disapproval authority to [Headwaters] of any acts of the District, are repealed and rendered null and void with the intent that any role or relationship of GRMD as a ‘Tax District’ and [Headwaters] as a ‘Service District’ is terminated.”

(Id. at p. 3).

According to the Counterclaimants, GRMD breached these sections when it “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.” (Headwaters and GR Terra's Mot., p. 24). The Counterclaimants contend the GRMD 2016 Service Agreement gives GRMD no right to impose those obligations on Headwaters, that GRMD's efforts to do so were an attempt to alter the GRMD 2016 Service Agreement, and any obligations the districts previously had to one another under their respective service plans, or the Master IGA, had terminated. (Id. at pp. 24-25).

GRMD contends the “Counterclaimants purposefully conflate GRMD's assertion that they are responsible for obligations under the LPA with the fact that the dual-district structure was eliminated” and that “[w]hether the LPA continued in force, whether GRMD was a third-party beneficiary of the LPA, whether Headwaters had continuing obligations under the LPA, simply

has nothing to do with the fact that GRMD would now operate independently from Headwaters.” (GRMD’s resp., pp. 21-22).

The Counterclaimants have not sufficiently “connected the dots” to demonstrate how the 2012 LPA and GRMD’s 2016 Service Agreement are interrelated or how GRMD’s 2016 Service Agreement would be altered if Headwaters was forced to own and operate the Amenities under the 2012 LPA, which, perhaps, is why the Court is confused by the Counterclaimants’ argument. The GRMD 2016 Service Agreement does not reference the 2012 LPA and the 2012 LPA does not reference any service agreement, much less GRMD as a “Tax District” or Headwaters as a “Service District.” It might very well be that the 2012 LPA cannot operate without Headwaters acting as the Service District and GRMD acting as the Taxing District, but the Counterclaimants have not explained why that is the case.

Without more guidance from the parties, which the parties have not provided, the Court is not in a position to grant summary judgment to Headwaters and GR Terra. The Counterclaimants also do not describe or articulate how termination of the dual-district structure would alter Headwater’s obligations in relation to the Amenities. It appears to the Court that each district’s roles in relation to the other were terminated, but that doesn’t necessarily mean each district could not operate independently or that owning and operating the Amenities required a dual-district structure.

Importantly, the Counterclaimants do not cite any section of the GRMD 2016 Service Plan that the Counterclaimants allege GRMD breached. Instead, the Counterclaimants argue that because the GRMD 2016 Service Plan terminated the districts’ respective roles to one another, any effort to impose LPA duties on Headwaters was a breach of that service agreement. (Headwaters and GR Terra’s Mot., pp. 24-25). Again, the Counterclaimants have not provided any legal authority supporting its theory, which is insufficient for summary judgment purposes.

Lastly, the Counterclaimants have not demonstrated, as a matter of law or fact, that GRMD sought to amend the GRMD 2016 Service Agreement when GRMD filed the present suit. “Upon final approval by the court for the organization of the special district, the facilities, services, and financial arrangements of the special district shall conform so far as practicable to the approved service plan.” C.R.S. § 32-1-207(1). Here, GRMD sought to impose additional duties on Headwaters, not on itself. There is no indication GRMD’s facilities, services, and financial arrangements would change if it had been successful in its claims; Headwaters only alleges its facilities, services, and financial arrangements would be altered, and Headwaters does not allege a breach of its own service agreement or that GRMD sought to amend its service agreement by adding or decreasing its own services.

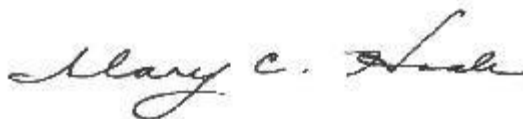
Based on the court’s findings above, the Court does not reach the issue of whether the Counterclaimants are entitled to injunctive relief. See C.R.S. § 32-1-207(3)(a).¹²

¹² “Any material departure from the service plan as originally approved or, if the same has been modified, from the service plan as modified, which constitutes a material modification thereof as set forth in subsection (2) of this section, may be enjoined by the court approving the organization of such special district upon its own motion, upon

CONCLUSION

WHEREFORE, the Court hereby **DENIES IN PART** the summary judgment motion of Headwaters Metropolitan District (on Counts I and IV of Headwaters' Counterclaims) and **DENIES** the summary motion of GR Terra LLC (on Count IV of GR Terra's Counterclaims). The Court **GRANTS** summary judgment in favor of Headwaters and against GRMD on Headwaters' claim that GRMD breached Section 6.3 of the Exclusion Agreement. The Court **DENIES** the remainder of Headwaters' summary judgment motion. The Court **DENIES** Granby Ranch Metropolitan District's partial summary judgment motion regarding Headwaters' claim for damages on Headwaters' first counterclaim.

SO ORDERED this 3rd day of March, 2025.



Mary C. Hoak, District Court Judge

the motion of the board of county commissioners or governing body of a municipality from which a resolution of approval is required by this part 2, or upon the motion of any interested party as defined in section 32-1-204(1).” C.R.S. § 32-1-207(3)(a).