

<p>DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue Hot Sulphur Springs, CO 80451</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<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>	
<p><i>Attorneys for Headwaters Metropolitan District and GR Terra LLC:</i> Jamie H. Steiner, #49304 JoAnn T. Sandifer (<i>Admitted Pro Hac Vice</i>) Husch Blackwell LLP 1801 Wewatta St., Suite 1000 Denver, CO 80202 Phone: 303-749-7200 Fax: 303-749-7272 E-mail: jamie.steiner@huschblackwell.com joann.sandifer@huschblackwell.com</p>	
<p>MOTION TO COMPEL DEPOSITION OF NATASCHA O’FLAHERTY, FOR PRODUCTION OF REQUESTED DOCUMENTS, AND FOR ATTORNEYS’ FEES AND COSTS</p>	

Defendants Headwaters Metropolitan District (“Headwaters”) and GR Terra LLC (“GR Terra”), by and through undersigned counsel moves this Court to compel Natascha O’Flaherty to appear for a deposition and to produce documents responsive to Defendants’ requests.

Defendants also seek the costs and fees associated with this dispute. In support thereof,

Headwaters and GR Terra state as follows:

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

Counsel for Headwaters and GR Terra conferred with Plaintiff’s Counsel, who represent Ms. O’Flaherty in connection with her deposition. Counsel states that they are unable to reach their client to provide us with their position on this motion because she is out of the country, regardless of the fact that the deposition was to take place on the agreed upon date of **January 25, 2023**.

I. Introduction

Ms. Natasha O’Flaherty has been an active member of the Granby Ranch community since she moved to the area in 2006. She has regularly attended municipal meetings over the years, including meetings of Headwaters and GRMD. She served on the GRMD board for a time, and she also served as the Town of Granby representative to the Headwaters board for a time. Over the years, she has on numerous occasions expressed her views with respect to the operation of the Granby Ranch amenities.

Counsel for Headwaters and GR Terra has gone to great length to try to obtain a fact witness deposition and relevant documents from Ms. Natascha O’Flaherty. Ms. O’Flaherty, an attorney herself, has gone to great lengths to obstruct the effort. Whether acting on her own or through her new counsel, Burg Simpson, she continues to obstruct efforts to depose her, despite the undersigned counsel’s efforts to work with her to schedule the deposition well in advance on a date selected by Ms. O’Flaherty. The negotiations and antics are outlined at length in the section below. Given the egregious behavior and bad faith associated, counsel seeks not only a

motion to compel Ms. O’Flaherty’s deposition and production of documents, but also the fees and costs associated with this effort.

II. Summary of Discussions Surrounding Requested Deposition and Requests for Production

Despite undersigned counsel’s intensive efforts to schedule this deposition and confer in good faith first with the deponent herself, Ms. O’Flaherty, and later with her counsel once she decided she was going to accept representation, Ms. O’Flaherty continues to try to evade her obligations under the Colorado Rules of Civil Procedure. Plaintiff’s counsel who is now representing Ms. O’Flaherty has failed to rectify the situation. As a result, this exercise has diverted significant and unnecessary resources and time from the merits of this action, which is proceeding to trial in April 2023. The chronology of discussions surrounding this deposition and these requests for production is summarized as follows, and the key communications are attached as exhibits:

1. In early November 2022 undersigned counsel requested dates for Natascha O’Flaherty’s deposition.
2. On November 4, 2022, Burg Simpson responded by email that Ms. O’Flaherty was available on Nov 29, 2022 for her deposition.
3. Undersigned counsel followed up by email on November 6, 2022, asking if Burg Simpson represented Natascha O’Flaherty with respect to a deposition in this litigation. Husch Blackwell also indicated that we would agree to withdraw the request for the deposition if GRMD agreed that they would not call her at trial (either live or through affidavits). GRMD was not willing to make that agreement.

4. Husch Blackwell responded that it would proceed with the deposition on Nov 29th – the date that Ms. O’Flaherty requested.

5. However, Husch Blackwell asked Burg Simpson to accept service on Ms. O’Flaherty’s behalf counsel indicated in an email, for the first time, that Burg Simpson in fact did not represent Ms. O’Flaherty with regard to this deposition.

6. Accordingly, Husch Blackwell proceeded to attempt to serve on Ms. O’Flaherty on November 15, 2022, with the subpoena for her to appear and produce documents in her possession related to issues in the lawsuit. She was out of town and her husband answered the door.

7. On November 17, 2022, undersigned counsel received an email from Ms. O’Flaherty. She emphatically stated: “*Had you reached out prior to attempting service as the rules require*, I would have been able to let you know that I was scheduled to be in Phoenix this week.” She repeated multiple times in that email that we “failed to reach out” to her to coordinate. She asked undersigned counsel to please contact her to coordinate dates and location.

8. Per her request, undersigned counsel talked to Ms. O’Flaherty on November 22, 2022. She confirmed in an email that day that **she agreed to a deposition on January 25th in her office** and subject to an agreement as to the scope of the requests for production, she “would be willing to waive service.” That date worked for Burg Simpson as well.

9. On December 1, 2022, Ms. O’Flaherty asked undersigned counsel to define the scope of the proposed deposition. She said she would be willing to accept service if we could agree to the scope of the deposition, but otherwise would file a motion to quash.

10. On December 5, 2022, undersigned counsel responded that since she would be a fact witness, and GRMD indicated she may have relevant knowledge for trial, there is no way we can limit the scope other than to indicate that we are seeking to determine what if any knowledge she may have related to the claims and defenses in the lawsuit. **We asked Ms. O’Flaherty if that was acceptable and told her that otherwise we would serve her.**

11. **On December 7, 2022, she responded “Thank you for clarifying the scope. And as in the interim my morning has booked up and to make it easier for you and others who are commuting up to Granby can we please schedule for 2:00 at my office. If that is amenable, I am happy to waive service.”** Thus, she effectively accepted service of the subpoena that day.

12. On December 21, 2022, undersigned counsel responded with a deposition notice for Ms. O’Flaherty’s requested time of 2 pm at her office and a waiver for her to sign.

13. On the same day, Ms. O’Flaherty responded that we had the wrong address in the subpoena and asked us to update that.

14. We updated the location and sent the subpoena and waiver back to Ms. O’Flaherty on December 22, 2022.

15. On the same day, Ms. O’Flaherty responded that she would need to start the deposition at 12pm rather than 2pm. *See* Email Chain containing this entire email chain, attached as **Exhibit 1**. Although she mentioned that she thought the requests for production were overbroad, she insisted that “instead of objecting” we should just narrow them. Notably, however, she did not condition her waiver of the subpoena or appearance at her deposition on agreement as to the scope of the requests for production.

16. Again, we updated the Notice of Deposition and served it by email on Ms. O’Flaherty as agreed upon.

17. **On January 4, 2023, after Ms. O’Flaherty had already agreed to waive service and to the date/time/location, Burg Simpson emailed us that they would be representing Ms. O’Flaherty with regard to her deposition.**

18. Accordingly, we promptly asked for the completed waiver from Burg Simpson.

19. On January 6, 2023, Burg Simpson emailed undersigned counsel the signed waiver of service. Signed waiver, attached hereto as **Exhibit 2**.

20. On January 9, 2023, undersigned counsel received a call from Burg Simpson stating that Ms. O’Flaherty now wanted her to “claw back” the subpoena waiver because of the requests for production objections that their client has. Burg Simpson counsel indicated on the call that they would get us specific objections to the requests for production and work with us to keep the date of the deposition on January 25. We again, in good faith, relied on their commitment.

21. On January 16, 2023, undersigned counsel emailed Burg Simpson because we still had not received objections or any effort to confer on the request for production.

22. **Incredibly, on January 17, 2023, less than two weeks before this highly negotiated deposition was to proceed, Burg Simpson indicated with no further explanation that if we want to depose Ms. O’Flaherty, we will have to serve her in person (despite the fact that she is out of the country); and therefore, we should cancel the deposition. Burg Simpson further states that they do not have time to lodge written objections to the requests for production.**

23. In an effort to meet and confer about the actual objections and try to maintain the January 25 deposition date, undersigned counsel set up a call with Burg Simpson counsel to hear the objections over the phone, since they did not have time to put them in writing. In good faith we discussed the objections and immediately sent an updated set of narrowed requests for production, addressing the objections relayed by Burg Simpson by phone. Husch Blackwell asked for agreement to produce the documents, and we even agreed to move the deposition to February 20, 2023, at Ms. O'Flaherty's request, because we were told that she decided to extend her time in Austria beyond January 25, 2023, and therefore would not even be in the country for the deposition date she selected back in November. See Conferral discussions, attached hereto as **Exhibit 3**. We never heard back. Apparently, Ms. O'Flaherty is not reachable any longer.

III. Argument

Husch Blackwell has offered to forgo this deposition if Burg Simpson would consent not to call her as a witness at trial. Because it has not been willing to do so, these defendants are entitled to depose her to determine what, if any, relevant information she may have and what potential testimony she may provide.

From the beginning, Ms. O'Flaherty asked us to work with her to schedule the deposition rather than send a process server to her home. After conferring, Ms. O'Flaherty agreed, in writing, with an email signature to accept service of the subpoena (Exhibit 1). Notably, even after receiving that written, signed waiver from Ms. O'Flaherty, counsel sought a signed waiver from Ms. O'Flaherty's new counsel, which was sent on January 6, 2023 (Exhibit 2). Under Rule 45(b)(2), a party (or party's counsel) may waive service of a subpoena by a signed written acknowledgment or waiver of service. Ms. O'Flaherty did that here. Burg Simpson's later

attempt to “claw back” the waiver indicating that they did not have their client’s authority to send it should be viewed by the Court as ineffective, because of Ms. O’Flaherty’s bad faith associated with the entire process. She has been using the conferral rules and most recently representation by Burg Simpson as a shield to obstruct discovery which the moving parties are entitled to.

Defendants have devoted significant resources to obtain a simple deposition of a potential fact witness. Now, a few days before the planned deposition, Husch Blackwell has learned that Ms. O’Flaherty is not even in the Country on the planned deposition date. Defendants have indicated that they will again move the deposition date to her requested date if she would agree to produce the requested documents. She has not responded, and Defendants have no reason to believe (based upon her prior conduct) that Ms. O’Flaherty will actually appear, on the proposed date with the requested documents. As of yet, she has not given her commitment to do so. Accordingly, Defendants seek an order from this Court compelling Ms. O’Flaherty to appear on February 20 (the new dates she has proposed) with all documents responsive to the original subpoena.

Ms. O’Flaherty should not get to object at all to the requests for production given the history of this dispute. Pursuant to C.R.C.P. 45(c)(2)(C), Ms. O’Flaherty had a duty to provide written objections to the requests for production 14 days after waiver of service was provided or by the compliance date of January 18 (whichever was earlier). To date, no written objections to the requests have been served. Defendants should not be afforded the opportunity to object at this late stage to any pending requests. *See Kellar v. U.S. Dep’t of Veteran Affairs*, 2008 WL 4716893, at *1 (D. Colo. Oct. 22, 2008) (“failure to timely ... raise any objection he may have to

Defendant’s discovery requests waives all such objections, other than those based on applicable privileges or inadvertent destruction.”).

Finally, Headwaters and GR Terra are entitled to an award of attorneys’ fees under C.R.C.P. 121 Section 1-15(7) and C.R.C.P. 37(a)(4) against Ms. O’Flaherty to recover the time their attorneys at Husch Blackwell have devoted to this effort, including filing this motion and numerous conferences with Ms. O’Flaherty and her counsel. Pursuant to C.R.C.P. 37, sanctions are warranted where a deponent fails to sit for a deposition.

IV. Conclusion

Defendants Headwaters Metropolitan District and GR Terra LLC respectfully requests that this Court compel Natascha O’Flaherty to appear for a deposition on her requested date of February 20, 2023, at 9 a.m. MT, at her law office; compel her to produce documents responsive to Defendants’ original document requests in the subpoena on or before February 10, 2023; and order Ms. O’Flaherty to pay the costs and fees associated with this dispute, which will be submitted in detail to the Court for approval if necessary after an award is entered.

Dated: January 20, 2023

HUSCH BLACKWELL LLP

/s/ Jamie H. Steiner

Jamie H. Steiner, #49304

JoAnn T. Sandifer (Admitted Pro Hac Vice)

*Attorneys for Defendants Headwaters Metropolitan
District and GR Terra LLC*

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2023 a true and correct copy of the foregoing MOTION TO COMPEL DEPOSITION OF NATASCHA O’FLAHERTY, FOR PRODUCTION OF REQUESTED DOCUMENTS, AND FOR ATTORNEYS’ FEES AND COSTS was filed and served via the Colorado Courts e-filing system addressed to the following:

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