

DISTRICT COURT, JEFFERSON COUNTY,
COLORADO
100 Jefferson County Parkway
Golden, CO 80401

DATE FILED: December 5, 2019 12:50 PM
FILING ID: BFA7005AB7266
CASE NUMBER: 2019CV30905

Plaintiff: R.E. MONKS CONSTRUCTION COMPANY,
LLC, an Arizona Limited Liability Company,
v.
Defendant: SOLTERRA LLC, a Colorado Limited
Liability Company;

and

Plaintiff: CESARE, INC., a Colorado Corporation;
v.
Defendants: SOLTERRA LLC, a Colorado Limited
Liability Company; *et al.*;

and

Third-Party Plaintiff: HUDICK EXCAVATING, INC.
d/b/a HEI CIVIL, a Colorado corporation,
v.
Third-Party Defendants: FOSSIL RIDGE
METROPOLITAN DISTRICT NO. 1; *et al.*

*Attorneys for Third-Defendant and Cross-Claimant Fossil
Ridge Metropolitan District No. 1:*

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Consolidated Case No.:
2019CV30905

Division: 11 Courtroom: 1E

**THIRD-PARTY DEFENDANT FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S
ANSWER TO THIRD-PARTY COMPLAINT AND CROSSCLAIMS**

Third-Party Defendant Fossil Ridge Metropolitan District No. 1 ("Service District" or "Fossil Ridge") by and through its undersigned counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, hereby answers the Third-Party Complaint of Hudick Excavating, Inc. d/b/a HEI ("HEI") (hereinafter "Third-Party Complaint") and asserts crossclaims against Defendants Solterra LLC, Brookfield Residential (Colorado) LLC, Brookfield Residential (Colorado) Management, LLC d/b/a Brookfield Residential Properties, and Brookfield Residential Services, LLC, (collectively, the "Brookfield Defendants") as follows:

ANSWER TO HEI'S THIRD-PARTY COMPLAINT

GENERAL ALLEGATIONS

1. Paragraph 1 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.
2. Paragraph 2 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.
3. Paragraph 3 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.
4. In response to paragraph 4 of the Third-Party Complaint, Fossil Ridge admits that Solterra LLC is the owner or reputed owner of property that is generally known as Filing 17 within the Solterra Subdivision within the City of Lakewood, Colorado. Fossil Ridge is without sufficient knowledge or information upon which to form a belief as to the accuracy of the legal description in paragraph 4 of the Third-Party Complaint and therefore denies the allegations.
5. Fossil Ridge admits the allegations in paragraph 5 of the Third-Party Complaint.

6. Fossil Ridge lacks information sufficient to either admit or deny the allegations of paragraph 6 of the Third-Party Complaint and therefore denies same.

7. Paragraph 7 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.

8. Paragraph 8 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.

9. Paragraph 9 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.

10. Fossil Ridge lacks information sufficient to either admit or deny the allegations of paragraph 10 of the Third-Party Complaint and therefore denies same.

11. Fossil Ridge admits the allegations in paragraph 11 of the Third-Party Complaint.

12. Paragraph 12 of the Third-Party Complaint is not directed at Fossil Ridge; no response is required.

13. Fossil Ridge admits the allegations in paragraph 13 of the Third-Party Complaint.

14. In response to paragraph 14 of the Third-Party Complaint, Fossil Ridge admits that the entity that entered into the agreement with HEI was Fossil Ridge, but that at the time it entered into the agreement it was under the complete direction and control of the Brookfield Defendants; Fossil Ridge denies the remaining allegations in paragraph 14 of the Third-Party Complaint.

15. Fossil Ridge admits the allegations in paragraph 15 of the Third-Party Complaint.

16. In response to paragraph 16 of the Third-Party Complaint, Fossil Ridge asserts the document speaks for itself.

17. Fossil Ridge lacks information sufficient to either admit or deny the allegations in paragraph 17 of the Third-Party Complaint and therefore denies same.

18. Fossil Ridge lacks information sufficient to either admit or deny the allegations in paragraph 18 of the Third-Party Complaint and therefore denies same.

19. Fossil Ridge admits the allegations in paragraph 19 of the Third-Party Complaint.

ANSWER TO HEI'S FIRST CLAIM FOR RELIEF
(Foreclosure of Mechanic's Lien – all Cross-Defendants, Brookfield and Plaintiff Cesare)

20 – 33. The allegations contained in paragraphs 20 through 33 of the Third-Party Complaint are not directed to Fossil Ridge and do not require a response from Fossil Ridge. To the extent a response is required, Fossil Ridge denies all such allegations.

ANSWER TO HEI'S SECOND CLAIM FOR RELIEF
(Breach of Contract – Third-Party Defendant Fossil Ridge)

34. Fossil Ridge incorporates by reference its responses to paragraphs 1 through 33 of the Third-Party Complaint as if set forth fully herein.

35. In response to paragraph 35 of the Third-Party Complaint, Fossil Ridge states that the Brookfield Defendants, while controlling the Board of Directors for Fossil Ridge, caused Fossil Ridge to enter into the Contractor Agreement. Fossil Ridge states that the Brookfield Defendants, not Fossil Ridge, are solely responsible for payment of any amounts owed under the agreement with HEI. Fossil Ridge denies all other allegations of paragraph 35 of the Third-Party Complaint.

36. Fossil Ridge denies the allegations set forth in paragraph 36 of the Third-Party Complaint.

37. Fossil Ridge admits that HEI requested payment but denies that the amount requested is for outstanding sums due and denies the remaining allegations of paragraph 37 of the Third-Party Complaint.

38. Fossil Ridge denies the allegations of paragraph 38 of the Third-Party Complaint.

39. Fossil Ridge denies the allegations of paragraph 39 of the Third-Party Complaint.

ANSWER TO HEI'S THIRD CLAIM FOR RELIEF
(Unjust Enrichment – Third-Party Defendant Fossil Ridge)

40. Fossil Ridge incorporates by reference its responses to paragraphs 1 through 39 of the Third-Party Complaint as if set forth fully herein.

41. Fossil Ridge denies the allegations set forth in paragraph 41 of the Third-Party Complaint.

42. In response to paragraph 42 of the Third-Party Complaint, Fossil Ridge is without sufficient information as to whether the labor, materials, supplies and goods furnished by HEI benefited the Subject Real Property and therefore denies same. Fossil Ridge denies the remaining allegations in paragraph 42 of the Third-Party Complaint.

43. Fossil Ridge is without information sufficient to admit or deny the allegations set forth in paragraph 43 of the Third-Party Complaint and therefore denies same.

44. Fossil Ridge denies the allegations set forth in paragraph 44 of the Third-Party Complaint.

45. Fossil Ridge denies the allegations set forth in paragraph 45 of the Third-Party Complaint.

ANSWER TO HEI'S [FOURTH] CLAIM FOR RELIEF
(Unjust Enrichment – Cross-Defendants Solterra)

46 – 54. The allegations contained in paragraphs 46 through 54 of the Third-Party Complaint are not directed to Fossil Ridge and do not require a response from Fossil Ridge. To the extent a response is required, Fossil Ridge denies all such allegations.

GENERAL DENIAL

To the extent there are any allegations or conclusions in the Third-Party Complaint that Fossil Ridge has not specifically answered above, Fossil Ridge denies each and all of them.

ANSWER TO REQUESTED RELIEF

Fossil Ridge denies that HEI is entitled to any of its requested relief.

AFFIRMATIVE DEFENSES

Discovery and investigation may reveal one or more additional defenses available to Fossil Ridge in this matter, and Fossil Ridge reserves its rights to supplement its defenses. Notwithstanding the foregoing, Fossil Ridge asserts the following affirmative and additional defenses to HEI's Third-Party Complaint but does not assume the burden of proof with regard to any such defense, except as required by law.

1. HEI's claims fail to state a claim for relief against Fossil Ridge upon which any relief may be granted, and therefore, should be dismissed with prejudice.
2. HEI's claims are barred and/or limited by the doctrines of waiver, unclean hands, estoppel, accord and satisfaction, laches, and payment and release.
3. HEI's claims are barred and/or limited by the applicable statutes of limitation.
4. Fossil Ridge did not consent to the labor, materials, supplies and goods HEI allegedly provided to the Subject Property.

5. The labor, materials, supplies and goods HEI allegedly provided did not benefit property owned by Fossil Ridge.

6. HEI's claims against Fossil Ridge are subject to setoff.

7. HEI has failed to take reasonable steps to minimize, avoid, and/or mitigate its alleged damages.

8. HEI's claims are barred by a failure of a condition precedent.

9. HEI's claims are barred, in whole or in part, by HEI's prior material breach or failure to substantially perform its obligations under the Contractor Agreement.

10. HEI's claims are barred, in whole or in part, because any alleged damages were caused by the acts or omissions of HEI.

11. The relief demanded by HEI will result in unjust enrichment of HEI at Fossil Ridge's expense.

12. HEI's Third-Party Complaint against Fossil Ridge is barred, in whole or in part, by the doctrine of equitable estoppel.

13. HEI's damages, if any, were caused by superseding, intervening or other causes not attributable to Fossil Ridge.

14. To the extent any amount is deemed owed HEI under the Contractor Agreement, or for the labor, materials, supplies or goods it provided, the Brookfield Defendants are solely liable for such amounts.

FOSSIL RIDGE'S CROSSCLAIMS

PARTIES, JURISDICTION, AND VENUE

1. Cross-Claimant and Third-Party Defendant Fossil Ridge Metropolitan District No. 1 ("Service District") is a Colorado Metropolitan District with its principal place of business located at 7995 E. Prentice Avenue, Suite 103E, Greenwood Village, Colorado 80111.

2. Upon information and belief, Cross-Claimant, Counterclaimant and Third-Party Defendant Solterra, LLC ("Solterra") is a Colorado limited liability company with a principal business address of 6465 S. Greenwood Plaza Boulevard, Suite 700, Centennial, Colorado 80111.

3. Upon information and belief, Cross-Claimant, Counterclaimant and Third-Party Defendant Brookfield Residential (Colorado), LLC is a Nevada Foreign limited liability company authorized to do business in Colorado, with a principal business address of 6465 S. Greenwood Plaza Boulevard, Suite 700, Centennial, Colorado 80111.

4. Upon information and belief, Cross-Claimant, Counterclaimant and Third-Party Defendant Brookfield (Colorado) Management, LLC a/d/b/a Brookfield Residential Properties is a Colorado limited liability company with a principal business address of 6465 S. Greenwood Plaza Boulevard, Suite 700, Centennial, Colorado 80111.

5. Upon information and belief, Third-Party Defendant and Cross-Claimant Brookfield Residential Services is a Delaware Foreign limited liability company authorized to do business in Colorado, with a principal business address of 6465 S. Greenwood Plaza Boulevard, Suite 700, Centennial, Colorado 80111.

6. This Court has jurisdiction over the parties pursuant to C.R.S. §32-1-303(1)(a) and venue is proper in this Court pursuant to C.R.C.P. 98(a).

FACTUAL ALLEGATIONS

7. In 2006, Brookfield Residential (Colorado) LLC, Brookfield Residential (Colorado) Management, LLC d/b/a Brookfield Residential Properties, Brookfield Residential Services, LLC, and Solterra, LLC (collectively, the "Brookfield Defendants"), through their predecessors, including Carma Lakewood, LLC, obtained approval from the City of Lakewood ("City") for development of the community known as "Solterra".

8. As one of numerous conditions to granting the Brookfield Defendants the ability to develop Solterra, the City required the Brookfield Defendants, through their predecessor Carma Lakewood LLC, to enter into a Development Agreement with the City for the Springfield Green Official Development Plan Modification No. 1 (Alternative) on September 11, 2006, which Development Agreement was amended on September 13, 2007 and July 22, 2008 (collectively, the "Development Agreement"). A copy of the Development Agreement is attached as **Exhibit 1**.

9. The Development Agreement required the Brookfield Defendants to construct certain public improvements to support the Solterra development, including but not limited to, the portions of McIntyre Street and West Alameda Parkway that are the subject of the claims and mechanic's lien asserted by Hudick Excavating, Inc. d/b/a HEI ("HEI") in this litigation.

10. In order to facilitate its financing of the construction of the public improvements, including portions of McIntyre Street and West Alameda Parkway, the Brookfield Defendants organized the Service District, a political subdivision of the State of Colorado, through an order of organization issued by this Court on October 6, 2006. Contemporaneously with organizing the Service District, the Brookfield Defendants also organized Fossil Ridge Metropolitan District No.

2 and Fossil Ridge Metropolitan District No. 3, political subdivisions of the State of Colorado, through orders of organization issued by this Court on September 27 and October 6, 2006 (collectively, the "Financing Districts").

11. As stated in the August 27, 2007 Second Amended and Restated Service Plan for the Service District and Financing Districts (the "Service Plan"), which the Brookfield Defendants prepared and submitted to the City for approval as part of the organization of the three districts, the creation of the three local governments "...places the risk of development with the [Brookfield Defendants] until such time as assessed valuation has been developed at a level necessary to reasonably issue General Obligation Debt through the Financing Districts. At that time, the Financing Districts may issue General Obligation Debt...to allow the Service District to pay off its obligations to the [Brookfield Defendants]" A copy of the Service Plan is attached as **Exhibit 2**.

12. Although the Financing Districts and the Service District were organized as separate political subdivisions of the State of Colorado, the Brookfield Defendants had complete and total control over all three local governments through the Brookfield Defendants' owners, employees or representatives who served on, and had majority control of, the Boards of Directors for all three local governments.

13. In fact, at the time the Brookfield Defendants caused the Service District to enter into the Contractor Agreement with HEI on June 29, 2016 for construction of portions of McIntyre Street and West Alameda Parkway ("Contractor Agreement"), the jurisdictional boundaries of the Service District were only ten square feet, ensuring that only the Brookfield Defendants' hand-picked owners, employees and representatives could and would serve on the Service District's

Board of Directors.

14. From June 29, 2016 through June 30, 2017, the Brookfield Defendants had complete and total control over the Contractor Agreement and the construction performed by HEI pursuant to the Contractor Agreement, and the Service District Board, which was controlled by the Brookfield Defendants, simply "rubber-stamped" pay applications that were approved and submitted to it by the Brookfield Defendants.

15. On June 30, 2017, the Brookfield Defendants caused all their owners, employees and representatives to resign *en masse* from the Boards of the Service District and the Financing Districts, *leaving the Service District with no Board members*, and only three residents remaining on the Boards for the Financing Districts.

16. The Brookfield Defendants then sought to have this Court appoint a receiver to control the Service District in perpetuity (Case No. 05CV3044). For Court tracking purposes, all actions affecting the Service District were filed under the original case number by which the Service District was organized, Case No. 05CV3044.

17. The Financing Districts opposed the Brookfield Defendants' self-serving maneuver to appoint a receiver and instead asked this Court to appoint three qualified residents of Solterra to serve on the Service District Board until Board member elections could be held in May 2018 to seat five eligible residents on the Service District Board. On November 13, 2017, Jefferson County District Court Judge Lily Oeffler issued an *Order re: Appointment Motions*, which denied the Brookfield Defendants' request for a receiver and granted the Financing Districts' request to appoint three Solterra residents to serve on the Service District Board.

18. In accordance with Judge Oeffler's November 13, 2017 Order, on January 30, 2018

the Service District Board petitioned this Court for an Order to expand the boundaries of the Service District by including 54 residences, which would create a pool of eligible electors who could be elected to serve on the Service District Board and individuals who were qualified to elect such individuals in a duly held election in May 2018. Predictably, the Brookfield Defendants vigorously opposed the Petition. On February 21, 2018, Judge Oeffler issued an *Order GRANTING Petition for Including Real Property into Fossil Ridge Metropolitan District No. 1*.

19. From the time the Brookfield Defendants caused their owners, employees and representatives to resign *en masse* from the three local governments on June 30, 2017 through February 2018, the Brookfield Defendants dropped all pretense that the Service District was a party to the Contractor Agreement with HEI. Instead, the Brookfield Defendants made all day-to-day decisions related to the construction being performed by HEI pursuant to the contract, administered all aspects of the contract, and directly paid HEI's periodic pay applications.

20. Specifically, upon information and belief, the Brookfield Defendants caused the Service District to pay HEI's pay apps 1 thru 10 (with pay app 10 being for May 2017), during the period they had complete and total control of the Service District Board. Upon information and belief, HEI's pay apps 11 thru 26 were paid directly by the Brookfield Defendants, with pay apps 27 and 28 remaining unpaid by the Brookfield Defendants.

21. As a practical matter, the Service District could have no control over or participation in the Contractor Agreement and HEI's performance of the agreement once the Brookfield Defendants' owners, employees and representatives deliberately resigned *en masse* from the Service District Board because the Service District was left without a governing body to perform any of its governmental functions or purposes.

22. Upon information and belief, the Brookfield Defendants posted the letter of credit with the City required for the HEI construction project.

23. After Judge Oeffler issued the February 21, 2018 Order including the 54 residences into the Service District's boundaries, the Brookfield Defendants' Construction Manager for the Solterra development began allowing the Service District's representatives to attend the routine construction meetings with HEI and other contractors; however, the Brookfield Defendants remained in complete control of the Solterra construction projects, including the HEI Contractor Agreement.

24. When the Brookfield Defendants' Construction Manager resigned on April 22, 2019, the Brookfield Defendants' new Construction Manager and other representatives terminated the prior Construction Manager's minimal efforts to involve the Service District in the HEI construction project. Instead, the Brookfield Defendants stated that they would "take over" the HEI contract (and several other construction contracts the Brookfield Defendants had caused the Service District to sign), and would complete the project with no involvement by the Service District.

25. In fact, beginning in May 2019, the Brookfield Defendants began meeting with HEI and the City without the Service District and expressly directed the Service District's representatives not to discuss the project with the City.

26. Notwithstanding the Brookfield Defendants' assertion that they would take over the HEI Contractor Agreement, the Brookfield Defendants subsequently refused to accept assignment of the Contractor Agreement. The Service District subsequently learned the obvious reason for the Brookfield Defendants' reversing their prior position, when the Service District

discovered that the Brookfield Defendants had already been sued in this litigation.

FIRST CROSSCLAIM FOR RELIEF
(Request for Declaratory Judgement)

27. The Service District incorporates by reference the allegations set forth in paragraphs 1 through 26 as if set forth fully herein.

28. The Brookfield Defendants are required by their Development Agreement with the City to construct the portions of McIntyre Street and West Alameda Parkway covered by the HEI Contractor Agreement.

29. The Service District is only obligated to reimburse the Brookfield Defendants for the constructions costs they incur under the HEI Contractor Agreement in accordance with the Service Plan and the May 13, 2008 Reimbursement of Developer Loan and Public Infrastructure Acquisition Agreement the Brookfield Defendants caused the Service District to enter into with the Brookfield Defendants and their predecessor, Carma Lakewood LLC (the "Reimbursement Agreement"). A copy of the Reimbursement Agreement is attached as **Exhibit 3**.

30. Under the Service Plan, construction of the relevant portions of McIntyre Street and West Alameda Parkway constitute "Regional Improvements" that may be paid for by the issuance of "Revenue Debt" in an amount not to exceed \$21,000,000. Under no circumstances shall property taxes be used for payment of Revenue Debt.

31. Because the Service District is a metropolitan district organized and acting as an administrative entity for the Financing Districts, it does not possess funds, other than property tax proceeds collected by the Financing Districts from Solterra residents or retainage designated for other specified costs, to pay any amounts owed under the HEI Contractor Agreement.

32. Requiring the Service District to directly pay amounts owed under the HEI Contractor Agreement would violate the Development Agreement, the Reimbursement Agreement, and the Service Plan, all of which were prepared by the Brookfield Defendants.

33. Therefore, the Service District respectfully requests that the Court enter a declaration as follows:

- a. The labor, materials, services and goods HEI allegedly provided under the Contractor Agreement constitute Regional Improvements as defined in the Service Plan;
- b. Property taxes imposed on and collected by the Financing Districts from Solterra residents cannot be used for payment of Regional Improvements;
- c. The Service District is not required to directly pay amounts owed under the HEI Contractor Agreement because doing so would violate the Development Agreement, the Reimbursement Agreement, and the Service Plan;
- d. The Brookfield Defendants are directly liable for amounts owed under the HEI Contractor Agreement; and,
- e. The Service District may reimburse the Brookfield Defendants for the amounts owed, only to the extent required and in the manner provided, under the Reimbursement Agreement and the Service Plan.

SECOND CROSSCLAIM FOR RELIEF
(Alter Ego – In the Alternative)

34. The Service District incorporates by reference the allegations set forth in paragraphs 1 through 33 as if set forth fully herein.

35. In causing the Service District to enter into the Contractor Agreement with HEI and in carrying it out, the Brookfield Defendants disregarded the formalities of the Service District and Financing Districts and their governmental functions and purposes, and made them a mere instrumentality for the transaction of the Brookfield Defendants' own affairs, including, but not limited to, causing the Service District to enter into the HEI Contractor Agreement to construct certain public improvements to support the Solterra development in order to meet the Brookfield Defendants' obligations under the Development Agreement.

36. At all relevant times, the Brookfield Defendants maintained complete and total control over the Service District and Financing Districts through the Brookfield Defendants' owners, employees or representatives serving on, and having majority control of, the Boards of Directors for all three local governments, by making all day-to-day decisions related to the construction being performed by HEI pursuant to the Contractor Agreement, by administering all aspects of the Contractor Agreement, and by directly paying HEI's periodic pay applications, such that there was a unity of interest and ownership between the Brookfield Defendants and the Service District that the separate personalities no longer existed as to the Contractor Agreement.

37. To adhere to the fiction of the Service District as a separate and distinct entity from the Brookfield Defendants under the Contractor Agreement would promote injustice or protect fraud.

38. The Brookfield Defendants are liable for the HEI Contractor Agreement under the alter ego doctrine.

THIRD CROSSCLAIM FOR RELIEF
(Unjust Enrichment – In the Alternative)

39. The Service District incorporates by reference the allegations set forth in paragraphs 1 through 38 as if set forth fully herein.

40. The Brookfield Defendants received a benefit, namely the construction of certain public improvements to support the Solterra development, including but not limited to, the portions of McIntyre Street and West Alameda Parkway, which the Brookfield Defendants were required to construct under their Development Agreement.

41. The Brookfield Defendants received these benefits at the expense of the Financing Districts and Service District, since the Brookfield Defendants caused the Service District to enter into the Contractor Agreement with HEI.

42. Under the circumstances, it would be unjust for the Brookfield Defendants to retain the benefit without commensurate compensation.

DEMAND FOR JUDGMENT

WHEREFORE, Fossil Ridge respectfully requests that the Court enter judgment and other orders in its favor and against the Brookfield Defendants on each of the foregoing claims for relief, and award Fossil Ridge the following:

- A. An order providing the following declarations:
 - i. The labor, materials, services, and goods HEI allegedly provided under the Contractor Agreement constitute Regional Improvements as defined in the Service Plan;
 - ii. Property taxes imposed on and collected by the Financing Districts from Solterra residents cannot be used for payment of Regional Improvements;

- iii. The Service District is not required to directly pay amounts owed under the HEI Contractor Agreement because doing so would violate the Development Agreement, the Reimbursement Agreement, and the Service Plan;
 - iv. The Brookfield Defendants are directly liable for amounts owed under the HEI Contractor Agreement; and,
 - v. The Service District may reimburse the Brookfield Defendants for the amounts owed, only to the extent required and in the manner provided, under the Reimbursement Agreement and the Service Plan.
- B. Actual, compensatory, and consequential damages as show to have been directly and proximately caused by the acts of the Brookfield Defendants complained of herein;
 - C. Prejudgment, moratory, and post-judgment interest on any monetary award, according to the maximum allowable legal rate;
 - D. Such other and further relief as the Court deems just and proper.

DATED: December 5, 2019

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Kelley B. Duke

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Kobi A. Webb, #49988

Attorneys for Third-Party Defendant and Cross-Claimant Fossil Ridge Metropolitan District No. 1

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2019, a true and correct copy of the foregoing **THIRD-PARTY DEFENDANT FOSSIL RIDGE METROPOLITAN DISTRICT NO. 1'S ANSWER TO THIRD-PARTY COMPLAINT AND CROSSCLAIMS** was served via CCEF on the following:

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