DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway, Golden, CO 80401	DATE FILED September 16, 2024 5:22 PM FILING ID: FDE8AF074A82E CASE NUMBER: 2019CV30887
Plaintiff: BIG SKY METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado, v. **Defendant:** GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.	Case No. 2019cv30887
Plaintiff: CDN RED ROCKS, LP, a Colorado limited partnership, v. **Defendant**: GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.	Case No. 2019cv31158
Plaintiff: CARDEL HOMES U.S. LIMITED PARTNERSHIP, a Florida limited partnership, v. **Defendant**: GREEN MOUNTAIN WATER AND SANITATION DISTRICT, a quasi-municipal corporation and subdivision of the State of Colorado.	Case No. 2019cv31250
Attorneys for Plaintiff Cardel Homes U.S. Limited Partnership: Stanley L. Garnett, # 12282 stan.garnett@garnettlegalgroup.com Andrew P. Garnett, # 45220 andrew.garnett@garnettlegalgroup.com sara R. Bodner, # 56930 Sara.bodner@garnettlegalgroup.com GARNETT POWELL MAXIMON BARLOW 1125 17th Street, Suite 220 Denver, CO 80202 Telephone: 303.991.3344	▲ COURT USE ONLY ▲ Consolidated Case No. 2019cv30887 Division: 2

CARDEL HOMES U.S. LIMITED PARTNERSHIP'S TRIAL BRIEF

Plaintiff Cardel Homes U.S. Limited Partnership ("Cardel"), through undersigned counsel, hereby submits its Trial Brief.

INTRODUCTION

To aid the Court as fact finder in this trial, Cardel seeks to do two things in its Trial Brief—first, lay out an unembellished, chronological timeline of events with citations to corresponding exhibits it anticipates will be important for the Court to reference throughout trial. And second, address some of the issues and arguments that are relevant to Cardel's two claims for breach of contract and promissory estoppel.

TIMELINE

1. **March 5, 2010** — Green Mountain Water and Sanitation District ("Green Mountain") sent a will-serve letter to Jack Reutzel for the property known as the "Lightner Property." *See* Trial Ex. P-427.[1]

2. **Feb. 2012** — Felsburg Holt & Ullevig prepared a "Rooney Valley Infrastructure Cost Allocation" for Fossil Ridge Metropolitan District #1 ("Fossil Ridge"). *See* Ex P-168.

3. **Sept. 10, 2014** — White Bear Ankele Tanaka & Waldron submitted a Service Plan for Big Sky Metropolitan District Nos. 1-7 ("Big Sky"). *See* Ex. P-1.

4. **Sept. 22, 2014** — The Service Plan for Big Sky was approved by the Lakewood City Council. *See* Ex. .P-1.

5. **Nov. 4, 2014** — Pursuant to the Jefferson County District Court's order calling Election on Organization, entered October 23, 2014, the organization of Big Sky was approved by a vote of the electors of the district. *See* Ex. P-26.

6. **Nov. 11, 2014** — Green Mountain entered into an Amended and Restated Intergovernmental Agreement for Extra-Territorial Sewer Service with Fossil Ridge ("the Fossil Ridge IGA"). *See* Ex. P-2.

7. **April 28, 2015** — Green Mountain sent Invoice #1 to Norton & Smith, P.C., in the amount of $4,687.82 for costs to complete Sewer Trunk Capacity Analysis Extraterritorial Service IGA. *See* Ex. P-43.

8. **June 2, 2015** — CDN Red Rocks LP, on behalf of Big Sky, wrote Check #68 to Green Mountain for $4,687.82 to cover costs related to the provision of sewer service. *See* Ex. P-47

[1] The Cardel Property is referred to in various documents and communications as the "Lightner Property" or the "Indigo Property." All such references refer to the same parcel of land owned by Cardel Homes.

9. **June 12, 2015** Green Mountain deposited Check #68 for $4,687.82 into its bank account. *See* Ex. P-432

10. **August 10, 2015** Forte Initiatives LLC, on behalf of Big Sky, wrote Check #1084 to Green Mountain for $10,132.18 pursuant to the August 31, 2015 Memorandum of Understanding for Green Mountain to deposit in its account to draw from to pay for costs related to the provision of sewer service. *See* Ex. P-48.

11. **August 10, 2015** Green Mountain deposited Check #1084 for $10,132.18 into its bank account. .*See* Ex. P-432.

12. **Aug. 31, 2015** Green Mountain and Big Sky entered into the first Memorandum of Understanding Regarding Costs Associated Extra-Territorial Sewer Service.. *See* Ex. P-429.

13. **Sept. 8, 2015** Green Mountain sent a will-serve letter to Big Sky. *See* Ex. P-4

14. **Nov. 1, 2016** Cardel entered a Purchase and Sale Agreement for purchase of the Lightner Property, which then became known as the "Indigo Property". *See* Ex. P-243.

15. **Nov. 28, 2016** Jennifer Ivey, Green Mountain's attorney, asked Dave Hartkopf, District Manager for Green Mountain, for "an update on the balance of the Big Sky deposit with" Green Mountain. Mr. Hartkopf responds with the "current balance". *See* Ex. P-430.

16. **January 24, 2017** Green Mountain sent Invoice #2 to CDN Red Rocks in the amount of $5,000 for "Big Sky Metro District ***Deposit***" for the purpose of drawing from the funds to pay for Engineering & Legal Services Regarding Extraterritorial Service IGA. *See* P-51.

17. **January 25, 2017** CDN Red Rocks LP wrote Check #143 to Green Mountain for $5,000 to deposit in its accounts to cover Invoice #2 to be drawn from to cover costs related to the provision of sewer service. *See* P-Ex. 53.

18. **January 31, 2017** Green Mountain deposited Check #143 for $5,000 into its bank account. *See* P-Ex. 432.

19. **March 28, 2017** Green Mountain issued a will-serve letter to Cardel. *See* Ex. P-431.

20. **April 2017** Big Sky and CDN entered into a Funding and Reimbursement Agreement. *See* Ex. J-4

21. **April 18, 2017** Green Mountain and Big Sky entered into the Amended and Restated Memorandum of Understanding Regarding Costs Associated with Extra-Territorial Sewer Service Request. *See* Ex. P-32.

22. **April 18, 2017** Green Mountain sent Invoice #3 to CDN Red Rocks in the amount of $20,000 for "Big Sky Metro District ***Deposit***" for purpose of drawing from to pay for Engineering & Legal Services Regarding Extraterritorial Service IGA. *See* Ex. P-54.

23. **April 20, 2017** CDN Red Rocks LP wired $20,000 directly to Green Mountain's account to cover Invoice #3 to be drawn from to cover costs related to the provision of sewer service. *See* Ex. P-55.

24. **July 11, 2017** Green Mountain sent Invoice #4 to CDN Red Rocks in the amount of $20,000 for "Big Sky Metro District ***Deposit***" for purpose of drawing from to pay for Engineering & Legal Services Regarding Extraterritorial Service IGA. *See* Ex. P-57.

25. **July 19, 2017** CDN Red Rocks LP wrote Check #163 to Green Mountain for $20,000 to deposit in its accounts to cover Invoice #4 to be drawn from to cover costs related to the provision of sewer service. See Ex. P. 59

26. **July 31, 2017** Green Mountain deposited Check #163 for $20,000 into its bank account. *See* Ex. P-432.

27. **Aug. 8, 2017** Big Sky, CDN, and Green Mountain entered into the Joint Interest Agreement dated. *See* Ex. P-5.

28. **August 2017** Green Mountain's engineer, Terry Kenyon of Merrick & Company, worked with developers, including Cardel, to determine the location of the lift station of the Big Sky Sewer System on the Carel Property. *See* Exs. P-137 and P-138.

29. **Sept. 1, 2017** Big Sky and Green Mountain sued Fossil Ridge Metro District in Jefferson County, Case No. 2017CV31368 (the "Fossil Ridge Litigation"). *See* Ex. P-212.

30. **Feb. 13, 2018** Doug Pavlich on behalf of Green Mountain emailed Tom Morton of Big Sky attaching "the most recent invoices for Big Sky IGA and Big Sky Litigation deposits." *See* Ex. P-432.

31. **Feb. 13, 2018** Green Mountain sent Invoice #5 to CDN Red Rocks in the amount of $20,000 for "Big Sky Metro District ***Deposit***" for purpose of drawing from to pay for Engineering & Legal Services Regarding Extraterritorial Service IGA. *See* Ex. P-60.

32. **March 3, 2018** CDN Red Rocks LP wrote Check #413 to Green Mountain for $29,007.28 to deposit in its accounts to cover Invoice #5 ($20,000) to be drawn from to cover costs related to the provision of sewer service and to cover costs incurred by Green Mountain related to the Fossil Ridge Litigation ($9,007.28). *See* Ex. P-61.

33. **March 20, 2018** Big Sky, Green Mountain and Fossil Ridge submitted a Joint Motion for Entry of Judgment of Stipulated Facts in the Fossil Ridge litigation. *See* Ex. P-113.

34. **March 23, 2018** As part of the resolution of the Fossil Ridge Litigation, Big Sky, Fossil Ridge, and CDN entered into an "Intergovernmental Agreement Regarding Reimbursement for Rooney Valley Sanitary Sewer System Improvements" (the "Fossil Ridge Reimbursement Agreement."). *See* Ex. P-35.

35. **April 5, 2018** To resolve the Fossil Ridge Litigation, Green Mountain, Big Sky, and Fossil Ridge stipulated to the entry of a Declaratory Judgment and Decree by the Jefferson County District Court. *See* Ex.P-6.

36. **April 30, 2018** Green Mountain deposited Check #413 for $29,007.28 into its bank account. *See* Ex. P-432.

37. **May 8, 2018** Green Mountain and Big Sky entered into the Intergovernmental Agreement for Extra-Territorial Sewer Service (the "Big Sky IGA"). *See* Ex. J-1.

38. **May 22, 2018** Green Mountain's engineer, Terry Kenyon of Merrick & Company, sent a Site Application for a new lift station for the Big Sky Sewer System with an Engineering Report identifying the Big Sky Service Area to include a lift station on the Cardel Property. *See* Ex. P-19.

39. **June 11, 2018** Spencer Fane LLP prepared a Service Plan for Indigo at Red Rocks Metropolitan District. *See* Ex. P-435.

40. **June 19, 2018** Green Mountain sends Invoice #6 to CDN Red Rocks in the amount of $20,000 for "Big Sky Metro District ***Deposit***" for purpose of drawing from to pay for Engineering & Legal Services Regarding Extraterritorial Service IGA. See Ex. P-63.

41. **June 25, 2018** Terry Kenyon sends a memorandum with a subject line of "Sanitary Sewer Service to the Rooney Valley" to the Board of Directors of Green Mountain stating that Green Mountain has not incurred costs related to the provision of sewer service to Big Sky. *See* Ex. P-437.

42. **June 27, 2018** CDN Red Rocks LP wrote Check #551 to Green Mountain for $20,000 to deposit in its accounts to cover Invoice #6 to be drawn from to cover costs related to the provision of sewer service. *See* Ex. P-64.

43. **July 9, 2018** Green Mountain deposited Check #551 for $20,000 into its bank account. *See* Ex. P-65.

44. **Aug. 14, 2018** The Green Mountain Board discussed the Big Sky IGA at its board meeting. *See* Ex. P-438.

45. **Aug. 27, 2018** Big Sky issued a will-serve letter to Cardel, with a draft agreement for extra-territorial service attached. *See* Ex. J-20.

46. **Sept. 4, 2018** Green Mountain Board President Adrienne Hanagan sent a letter to fifteen recipients regarding Green Mountain's position regarding the IGA. *See* Ex. J-2.

47. **Oct. 15, 2018** Green Mountain Board ordered their engineer, Terry Kenyon of Merrick & Company, to stop work related to the Big Sky IGA. See Ex. P-165.

48. **Oct. 15, 2018** White Bear Ankele Tanaka & Waldron, on behalf of Big Sky, sent a memorandum dated, regarding the Big Sky Service Plan and the Big Sky IGA to Tim Cox, City Attorney for the City of Lakewood. *See* Ex. P-440.

49. **Jan. 8, 2019** Tim Cox, City Attorney for Lakewood, opines that the Big Sky IGA is not a material modification of the Big Sky Service Plan in an Executive Summary of Findings Regarding Intergovernmental Agreement for Extra-Territorial Sewer Service Between Green Mountain and Big Sky. *See* Ex. P-12.

50. **Jan. 8, 2019** Brian Matise, attorney for Green Mountain, sent a memorandum regarding analysis of issues raised by various letters and postings of John Henderson and others to the Green Mountain Board. *See* Ex. P-328.

51. **Jan. 25, 2019** Brian Matise, attorney for Green Mountain, sent a letter to Tim Cox, City Attorney for Lakewood, and Lakewood City Council. *See* Ex. P-13.

52. **Feb. 4, 2019** Brian Matise, attorney for Green Mountain, sent a letter to Tim Cox, City Attorney for Lakewood, and Lakewood City Council. *See* Ex. P-128.

53. **April 9, 2019** Green Mountain passed a resolution purporting to terminate the Big Sky IGA. *See* Ex.J-3.

54. **July 25, 2019** Tim Cox, City Attorney for Lakewood, sends City Council and the City Manager a Summary of Opinion of Attorney Tom Mullans. *See* Ex. P-443.

CARDEL'S BREACH OF CONTRACT CLAIM

The Big Sky IGA is a valid contract.[2] The evidence will demonstrate it was thoroughly negotiated over several years by highly sophisticated parties represented by counsel and all parties

[2] Cardel brings a breach of contract claim based on Green Mountain's breach of the Big Sky IGA. As indicated in the Proposed Trial Management Order, Cardel has dropped its breach of contract claims based on Green Mountain's will-serve letter.

agreed to its terms based on advice from counsel. It contains key terms expressed with reasonable certainty given the parties and subject matter involved. Green Mountain has entered into similar IGAs in the past such as the Fossil Ridge IGA. *See* Ex. P-169. Green Mountain's conduct following execution of the Big Sky IGA further confirms that it is an enforceable contract.

It has long been established in Colorado that Contracts are presumed valid, particularly those entered into after lengthy negotiations and on the advice of skilled counsel. As the court stated in *Great W. Producers Co-op. v. Great W. United Corp.,* "In the absence of evidence justifying a contrary inference, it will be presumed that the parties to a contract intended to form a lawful and enforceable agreement." *Great W. Producers Co-op. v. Great W. United Corp.*, 613 P.2d 873, 878 (Colo. 1980).

A. Cardel is an intended 3rd party beneficiary.

Cardel is an intended third-party beneficiary to the Big Sky IGA. Green Mountain's argues, solely, that the boilerplate provision in the Big Sky IGA disclaiming any third-party beneficiaries carries the day. It does not. Contrary to Green Mountain's assertions, as previously found by this Court, rather than rely on boilerplate provisions, courts look at the entire contract and the parties' course of conduct to determine whether an entity was an intended third-party beneficiary. Here, both confirm Cardel's status as an intended third-party beneficiary of the Big Sky IGA.

In terms of the contract, the primary purpose of the Big Sky IGA was for Green Mountain and Big Sky to determine the relationship between the two special districts so Green Mountain would provide sewer service to the Big Sky Sewer Area which includes the Cardel Property. *See* Ex. J-1. Cardel is identified by name in the IGA as the owner of property in the Big Sky Service Area. See Ex. J-1. Cardel is mentioned by name in the Big Sky IGA as the company owning the land that is part of the Big Sky Service Area. In addition, the lift station contemplated in the Big Sky Sewer System

will be located on Cardel's property. *See* Ex.P-206. In short, there is no Big Sky Sewer System to serve the Big Sky Service Area without the Cardel Property.

In terms of conduct, Green Mountain has repeatedly referred to Cardel as a third-party beneficiary to the Big Sky IGA. On September 4, 2018, then Green Mountain Board President Adrienne Hanagan sent a letter "to notify all stakeholders of the Big Sky Intergovernmental Agreement, *including any 3rd party beneficiaries of this Agreement*" as to Green Mountain's position regarding the Big Sky IGA. *See* Ex. J-2. Cardel was one of the recipients. Cardel also expects several witnesses who were involved in the negotiation and drafting of the Big Sky IGA before it was adopted will testify (either live or through deposition designations) that they understood the IGA would have benefited property owners and developers.

Because Cardel is a third-party beneficiary of the Big Sky IGA, it is entitled to seek enforcement of the Big Sky IGA as it does in this lawsuit.

1. The LGBL and TABOR do not apply to the Big Sky IGA.

The LGBL and TABOR *do not* apply to the Big Sky IGA. Article XIV, section 18(2)(a) of the Colorado Constitution provides that "[n]othing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another . . . to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt." This constitutional power is implemented in C.R.S. §§ 29-1-201, *et seq*. *See Nash v. Mikesell*, 2024 COA 68, ¶ 27; *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 861 n.1 (Colo. 1995); C.R.S. § 29-1-201. The purpose of the implementation of this constitutional power is to "permit[] and encourage[] governments to make the most efficient and effective use of their powers and responsibilities by cooperating and contracting with other governments." C.R.S. § 29-1-201; *see also Durango Transp.*,

Inc. v. City of Durango, 824 P.2d 48, 50 (Colo. App. 1991). The legislative declaration further states that this section (Section 2) is to be "liberally construed."

C.R.S. § 29-1-203(1) provides that "Governments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt, only if such cooperation or contracts are authorized by each party thereto with the approval of its legislative body or other authority having the power to so approve." *See also* S. *Fork Water & Sanitation Dist. v. Town of S. Fork*, 252 P.3d 465, 474 n.4 (Colo. 2011). Importantly, C.R.S. § 29-1-203 also provides that "[a]ny such contract providing for the sharing of costs or the imposition of taxes may be entered into for any period, notwithstanding any provision of law limiting the length of any financial contracts or obligations of governments." This sentence was added in 2005, after TABOR was implemented.

Therefore, C.R.S. §§ 29-1-201, *et seq*., the statutory codification of a specific section of the Colorado constitution, exempts the exact type of contract that is the Big Sky IGA from the LGBL and TABOR. Notably, the Court of Appeals opinion directed the parties and this Court to this specific section to resolve this issue. ("Big Sky asserted that multi-year contracts are permitted by law for special districts, taking them outside the restrictions of the LGBL. That may be so, *see, e.g.*, C.R.S. §§ 29-1-203(1), C.R.S. 2022 . . . [A]ssuming that the LGBL *even applies* to these parties under these circumstances.) 21CA1507 Op. at 19.[3]

2. Even if the LGBL and TABOR applied to the Big Sky IGA, the facts will demonstrate that the Big Sky IGA does not violate the LGBL or TABOR

[3] The common law also makes clear that governments are authorized to enter the type of contract at issue here. *See, e.g., Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 442-43 (Colo. App. 1994); *Perl-Mack Enterprises Co. v. City and County of Denver*, 568 P.2d 468 (1977); *National Food Stores, Inc. v. North Washington Street Water and Sanitation District*, 429 P.2d 283 (1967); *City of Fort Collins v. Park View Pipe Line*, 336 P.2d 716 (Colo. 1959).

Even if this Court finds that LGBL and TABOR are applicable to this type of contract pursuant to C.R.S. §§ 29-1-201, *et seq.*, the Big Sky IGA is valid pursuant to both because it does not create any expenditure for Green Mountain, let along a multi-year fiscal obligation or commit Green Mountain to multiple years of expenditures.

a. Green Mountain is not obligated to make any expenditure

Importantly, the Court of Appeals found that Green Mountain is not obligated to pay anything related to the Big Sky IGA—Big Sky has the obligation. 2021 CA 1507 ¶ 25. However, the Court of Appeals stated factual evidence was needed to determine *how* Big Sky would pay Green Mountain for the design and construction costs related to the lift stations, force mains, and flow equalization. 2021 CA 1507 Op. ¶ 25.

The Memorandums of Understanding between Big Sky and Green Mountain, first in 2015 and again in 2017, establish the specific process for paying for the costs to design and construct the lift stations, flow equalization tanks, and force mains for the Big Sky Sewer System. Specifically, Big Sky advanced deposits to Green Mountain to draw from to pay costs related to the project—Green Mountain did not front any money. Ledgers and bank statements, as well as emails, will demonstrate this was the course and practice of the parties. *See, e.g.*, Exs. P-47, P-53, P-55, P-56, P-59, P-61, P-64. As a result, Green Mountain was not incurring any expenditure subject to the LGBL or TABOR related to the Big Sky IGA.

Additionally, the Court of Appeals found that the maintenance, repair, and replacement costs that Green Mountain would incur did not create a multi-year fiscal obligation because Green Mountain would have incurred those costs anyways. 2021 CA 1507 ¶ 39.

b. Even if Green Mountain's drawdowns from the deposits from Big Sky to pay for the design and construction costs for the lift station, force main, and flow equalization tank were considered expenditures these costs would all be completed within one year and therefore would not constitute a multi-year fiscal obligation.

The potential for these costs to create a multi-year fiscal obligation will be foreclosed by testimony from Terry Kenyon, Green Mountain's engineer. He will testify that all of the work associated with the design and construction of the lift station, force main, and flow equalization tank would be completed in less than twelve months. Because the only costs of the Project that Green Mountain was responsible for would have been completed in a single year, there was no multi-year fiscal obligation, and therefore no need for funds to be appropriated. As such, the Big Sky IGA does not violate the LGBL or TABOR.

iii. Whether the Big Sky IGA was a material modification of the Big Sky Service Plan?

First, this argument is irrelevant to this lawsuit. Whether or not the Big Sky IGA is a material modification of the Big Sky Service Plan is not a defense to any breach of contract or promissory estoppel claim brought in this case.

In raising this defense, Green Mountain is arguing that the Big Sky IGA *is* valid. Green Mountain claims that the valid Big Sky IGA invalidates the Big Sky Service Plan and somehow renders Big Sky an invalid special district or quasi-governmental entity. However, even if this argument were true, Green Mountain does not have standing to argue that Big Sky's incorporation as a special district is invalid in any way. Further, this issue is not before this Court. This litigation concerns whether the Big Sky IGA is a valid and enforceable contract that Green Mountain breached and whether Green Mountain's repeated promises to provide service, which Cardel relied upon, constitute promissory estoppel.

The only thing that Green Mountain accomplishes with this argument is demonstrating that the Big Sky IGA is a valid and enforceable contract, which it is. The City of Lakewood, not a party to this litigation, would have to seek to invalidate the Big Sky Service Plan based on Big Sky's 2014

application to become a special district. The City of Lakewood would never do this because the argument that the Big Sky IGA is a material modification of the Big Sky Service Plan has no merit.

Regardless, the Big Sky IGA is not a material modification of the Big Sky Service Plan. The Big Sky Service Plan submitted to the City of Lakewood in 2014 defined the Big Sky Service Area as, "the property within the Initial District Boundary and the Inclusion Area Boundary Map." [Ex. P-1]. The Inclusion Area Boundary Map was defined as, "the map attached hereto as Exhibit C-2 . . ." [Ex. P-1]. Exhibit C-2, the map showing the Inclusion Area, clearly shows that area as the Cardel Property (formerly the Lightner Property). [Ex.P-1] For ease of reference, this Map is attached to this brief as Ex. A. The Cardel Property was clearly included in the originally defined Big Sky Service Area in the Big Sky Service Plan submitted to the City of Lakewood in 2014.

The Big Sky IGA defined the Big Sky Service Area as "that area depicted on the map attached hereto as Exhibit A . . ." [Ex. J-1 page 30887-010337]. Exhibit A to the Big Sky IGA again clearly shows the Cardel Property as included in the Big Sky Service Area as defined in the Big Sky Service Plan. [Ex. J-1]. For ease of refence, this map is attached to this brief as Ex. B. Thus, the Big Sky Service Area has always included the Cardel Property. The Big Sky Service Plan included the Cardel Property in 2014, and the Big Sky IGA included the Cardel Property in 2018. The Big Sky IGA was not a material modification of the Big Sky Service Plan.

Green Mountain and Lakewood's attorneys agree. They analyzed this issue and provided legal opinions directly to Green Mountain, and the City of Lakewood, concluding that the Big Sky IGA is ***not*** a material modification of the Big Sky Service Plan. In January, 2019, Lakewood City Attorney Tim Cox issued a memorandum stating: "[T]he additional service areas are local to the original Big Sky boundaries and within the Rooney Valley, as pointed out by a letter from legal counsel to Big Sky dated December 31, 2018, so Big Sky is not seeking to become a regional service provider

through the Green Mountain IGA. There is no hard line as to what constitutes a material modification, but it is unlikely that the Green Mountain IGA rises to the level.". *See* Ex. P-12. Green Mountain's own attorney Brian Matise wrote a memo stating that he did not disagree with Mr. Cox's opinion that the Big Sky IGA is not a material modification of the Big Sky Service Plan. *See* Ex. P-328. A few months later, Lakewood City Attorney Cox authored another memo summarizing the opinion of another experienced attorney about the matter, who also concluded that the Big Sky IGA was not material modification to the Big Sky Service Plan. "Mr. Mullans' [Lakewood's outside counsel retained to analyze this issue] conclusion that a commitment to serve land outside the boundaries of a special district is not a change of a "basic or essential nature" so as to require approval of a material modification by the appropriate governing body." *See* Ex. P-443_.

In summation, this argument is not a defense to any breach of contract or promissory estoppel claim and it is not brought before this Court through the proper parties. However, disregarding these threshold fatalities to the argument, the facts demonstrate that the Big Sky IGA is not a material modification to the Big Sky Service Plan. Thus, the argument, even if properly before this Court, has no merit and is not a defense to any of Cardel's claims in this litigation.

iv. Specific performance and damages apply to Cardel's breach of contract claim

Both specific performance and damages apply to Cardel's breach of contract claim. The Big Sky IGA identifies specific performance as a remedy in the event of a breach of any of the provisions of the IGA. Specific performance can be ordered against a government when the government agreed to that remedy in the contract. This Court should therefore enforce the Big Sky IGA as written and award specific performance. In addition to specific performance, the Court should award Cardel approximately $17 million in damages that represent the amount that Cardel has invested in the project as of October 4, 2023, that could have been invested elsewhere and realized a return. This is

because specific performance will not afford complete relief. *See, e.g.*, *Chandler Trailer Convoy, Inc. v. Rocky Mountain Mobile Home Towing Servs., Inc.*, 552 P.2d 522, 524 (1976).

If the Court determines not to award specific performance, then Cardel seeks approximately $80.5 million in lost gross profits.

CARDEL'S PROMISSORY ESTOPPEL CLAIM

Promissory estoppel has four elements: (1) a promise; (2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party; (3) on which the promisee or third party reasonably and detrimentally relied; and (4) that must be enforced in order to prevent injustice.

i. Cardel's promissory estoppel claim is based on several promises, including but not limited to, the Big Sky IGA.

The Court of Appeals specifically found that Cardel's promissory estoppel claim did not turn on the validity of the Big Sky IGA because Cardel's promissory estoppel claim is not premised only on the Big Sky IGA. 2021 CA 1507 ¶¶57-58.

Cardel's promissory estoppel claim is based on the numerous promises Green Mountain made over many years to provide sewer service to the Cardel Property. Importantly, promissory estoppel does not require that Cardel be the recipient of the promise. In addition to the Big Sky IGA, Green Mountain promised to provide sewer service in the following written documents:

1. The 2010 will serve letter for the Cardel Property from Green Mountain, Ex. P-427;
2. The 2012 Rooney Valley Infrastructure Cost Allocation, Ex. P-168;
3. The 2014 Fossil Ridge IGA, Ex. P-2;
4. Green Mountain's 2015 will serve letter to Big Sky promising to serve the Big Sky Service Area, which includes the Cardel Property, Ex. P-4;
5. The 2017 will serve letter for the Cardel Property from Green Mountain, Ex. P-431;

6. March 20, 2018 Joint Motion for Entry of Judgment On Stipulated Facts in Fossil Ridge Litigation where Green Mountain stated "Green Mountain desires to provide sewer service to Big Sky within the Future Development Area . . ." Ex. P-6, p. 30; and

7. Declaratory Judgment and Decree in Fossil Ridge Litigation where the Jefferson County District Court found "Green Mountain desires to provide sewer service to the Future Development Area . . ." Ex. P-6 p. 37.

8. The 2018 Big Sky IGA; Ex. J-1

Moreover, Cardel can pursue a promissory estoppel claim based on the IGA even if the IGA is found to be invalid. "Recovery in Colorado on a theory of promissory estoppel is permissible when there is no enforceable contract." *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008); *see also Wheat Ridge Urb. Renewal Auth. v. Cornerstone Grp. XXII*, L.L.C., 176 P.3d 737, 741 (Colo. 2007) ("Recovery on a theory of promissory estoppel is incompatible with the existence of an enforceable contract."). Promissory estoppel can be asserted against a public entity to prevent injustice. *See Dep't of Transp. v. First Place, LLC*, 148 P.3d 261, 266 (Colo. App. 2006).

Neither *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231 (Colo. App. 2018), nor *Normandy Ests. Metro. Recreation Dist. v. Normandy Ests., Ltd.*, 553 P.2d 386 (Colo. 1976) foreclose relief. The rationale of those cases is essentially that "a party dealing with a municipal corporation is bound to see to it that all mandatory provisions of the law are complied with, and if he neglects such precaution he becomes a mere volunteer, and must suffer the consequences." *Normandy*, 553 P.2d at 389. Here, there is no indication that Big Sky, itself a metropolitan district, neglected precaution when negotiating the Big Sky IGA. In fact, special attention was made to payment provisions given the disputes related to the Fossil Ridge IGA. Further, those cases do not stand for the proposition that a governmental entity cannot be bound by promissory estoppel. Cardel's argument is that the Big Sky IGA is a valid and enforceable contract. However, in the event the Court concludes otherwise, the promises and representations made by Green Mountain

in that document, are still binding on Green Mountain and may be considered as part of Cardel's promissory estoppel claim.

ii. Specific performance and damages apply to Cardel's promissory estoppel claim

Both specific performance and damages apply to Cardel's promissory estoppel claim. Specific performance can be awarded as a remedy for promissory estoppel. *See Marquardt,* 200 P.3d 1126 (Colo. App. 2008) (affirming trial court's grant of specific performance as remedy for promissory estoppel claim); Restatement (second) of Contracts § 90 (June 2024) ("A promise binding under this [promissory estoppel] section is a contract, and full-scale enforcement by normal remedies is often appropriate. But the same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy."); *Nelson v. Elway*, 908 P.2d 102, 121 (Colo. 1995) (Colorado had adopted the Restatement's articulation of promissory estoppel).

CONCLUSION

In conclusion, Cardel intends for its timeline to provide a useful roadmap for the trial. The facts and the law will demonstrate that Cardel should succeed on its breach of contract and promissory estoppel claims.

Dated: September 16, 2024

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CERTIFICATE OF SERVICE

I certify that on the 16th day of September, 2024, a true and correct copy of the foregoing was filed and served electronically via the Colorado Courts E-Filing System to the following:

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