District Court of Jefferson County, Colorado 100 Jefferson County Parkway Golden, CO 80401	DATE FILED September 16, 2024 6:36 PM FILING ID: 15F44C416EEDA CASE NUMBER: 2019CV30887
Plaintiff: BIG SKY METROPOLITAN DISTRICT NO. 1, a quasimunicipal 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. **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. **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.	▲ COURT USE ONLY ▲

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DEFENDANT GREEN MOUNTAIN WATER AND SANITATION DISTRICT'S TRIAL BRIEF

Green Mountain Water and Sanitation District ("Green Mountain") submits the following Trial Brief:

INTRODUCTION

In pertinent part, this case revolves around the enforceability of an intergovernmental agreement (the "IGA") between Green Mountain and Big Sky Metropolitan District No. 1 ("Big Sky") related to the provision of wastewater services. What the two quasi-governmental entities may or may not contract to do is governed by statutory, common law, and entity documents. This trial brief addresses certain of those statutory, common law, and entity-imposed schemes that impact the presentation of evidence and the Court's consideration of such evidence.

1. A District may only exercise the authority properly granted to it.

At issue in this case is whether Big Sky and/or Green Mountain had the authority to properly enter into the IGA, including whether Big Sky ever had the appropriate Board to authorize any action, let alone entry into the IGA.

Special districts are creatures of statute and possess only those powers expressly conferred on them. *Bill Barrett Corp. v. Sand Hills Metropolitan District*, 2016 COA 144, ¶ 15. Once established, a special district is limited by, and must conform to, its service plan as was approved by the district court. C.R.S. § 32-1-207(1). Any material modification to the service plan must be made by petition to, and approval of, the governing authority. C.R.S. § 32-1-207(2)(a).

"[T]he inclusion of property that is located in a county or municipality with no other territory within the special district may constitute a material modification of the service plan or the statement of purposes of the special district." *Id.* "In the event that a special district changes its boundaries to include territory located in a county or municipality with no other territory within the special district, the special district shall notify the board of county commissioners of such county or the governing body of the municipality of such inclusion." *Id.* A special district shall not furnish domestic water or sanitary sewer service directly to residents and property owners in unincorporated territory located in a county that has not approved the special district's service plan unless the special district notifies the board of county commissioners of the county of its plan to furnish domestic water or sanitary sewer service directly to residents and property owners in the county and receives approval from the board to do so. C.R.S. §32-1-207(2)(b).

Where a district shifts its purpose from a localized district providing for residential and commercial development located entirely within a city to a regional district reaching beyond the city and providing regional benefits to the county, such shift constitutes a change to the basic and essential nature of the service plan. *Bill Barrett Corp. v. Sand Hills Metro. Dist.*, 2016 COA 144, ¶ 23.

Bill Barrett Corporation v. Lembke, 2018 COA 134, also supports that an expansion from local to regional services constitutes a material modification. In *Lembke*, the South Beebe metro

district had revised its service plan previously with the appropriate governing body to specifically allow for provision of regional services, which revision the court had determined was a material modification to the original service plan. *Bill Barrett Corporation v. Lembke*, 2018 COA 134, ¶ 57-58. Specifically, the court had determined that although the expanded services the metro district contemplated providing were of a type for which the district had been originally formed, the shift in purpose from providing services to the property within the city of Brighton to property located in Weld County constituted a change to the basic and essential nature of the original service plan. *Id*. So, when the South Beebe metro district later included the 70 Ranch property located in Weld County for provision of services, the court determined such inclusion did not constitute a material modification as South Beebe had already revised its service plan to allow for regional services. *Id.* at ¶ 96. Importantly, the *Lembke* court distinguished between material modifications based on boundaries and material modifications based on the basic and essential nature of services, and here, found that South Bebee properly sought approval to revise its service plan to change the basic and essential nature of its services from local to regional.

Moreover, C.R.S. § 32-1-103(5) requires that an "eligible elector" be registered to vote and either be a resident of the special district, be someone who owns taxable real or personal property situated within the boundaries of the district, or be obligated to pay taxes under a contract to purchase taxable property situated within the boundaries of the special district. Option contracts where parties give up nothing of value and that do not create any obligation are sham, illusory contracts and do not establish eligible electors. *cf. Landmark Towers Ass'n, Inc. v. UMB Bank, N.A.*, 2016 COA 61, ¶¶ 59-64, rev'd on other grounds, 2017 CO 107. The purpose of requiring approval from persons who own property within the district is to protect citizens from unwarranted tax burdens, and deeming such illusory contracts to create eligible electors legal "would render the

requirement of a vote by individuals with assets and funds at risk a meaningless exercise." *Id*. Additionally, where a special district is formed, "voters ***shall vote*** … for five electors of the district who shall constitute the board of the special district, if organized." C.R.S. § 32-1-305(5).

2. <u>The IGA must comply with the Taxpayer's Bill of Rights Act, Colo. Const. Art. X, § 20(4)(b).</u>

Districts must have voter approval in advance for "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." Colo. Const. Art. X, § 20(4)(b). The Taxpayer's Bill of Rights Act ("TABOR") took effect in 1992. Colo. Const. Art. X, § 20(1). The principal purpose of TABOR is to limit growth of government in general and the growth in public expenditures in particular. *Bd. of Cnty. Comm'rs of Cnty. of Boulder v. Dougherty, Dawkins, Strand & Bigelow Inc.*, 890 P.2d 199, 205 (Colo. App. 1994), overruled on other grounds by *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549 (Colo. 1999). "The term 'multiple-fiscal year,' which modifies both 'debt' and 'financial obligation,' refers to the binding of future legislative bodies to pay the 'debt' or 'other financial obligation' out of future revenues." *Id.* at 207. Looking to standard definitions of 'obligation,' it includes any legal liability. *Id.*

To avoid the mandatory language of TABOR and suggest there is a carve out for intergovernmental agreements, Plaintiffs point to the language of Article XIV of the Colorado Constitution that states, "Nothing 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 authorized to each…." Colo. Const. Art. XIV, § (2)(a). Article XIV is inapposite. First, "a court's duty in interpreting a constitutional amendment is to give effect to the will of the people in adopting such amendment." *See, e.g., In re Interrogatories Relating to the*

Great Outdoors Colo. Trust Fund, 913 P.2d 533, 538 (Colo.1996). TABOR was intended to limit any multiple-fiscal year public expenditure absent voter approval or present cash reserves pledged irrevocably and held for payments in all future fiscal years. To interpret such language and intent to exclude all contracts into which a political subdivision enters would render TABOR meaningless. Second, such article was enacted in 1972, well before TABOR and voter-imposed requirements to limit governmental liabilities, and under rules of statutory construction, later enacted statutes control. *See, e.g., People v. Wiedemer*, 852 P.2d 424, 432 (Colo. 1993). Third, even where a contract comports with Article X and XIV, they still require that the subject matter of the contract be "authorized to each." Importantly, Green Mountain does not argue that the parties cannot contract with one another; rather, any such contracts have to comport with the law, including but not limited to TABOR.

3. <u>The IGA must comply with the Local Government Budget Law, C.R.S. § 29-1-110.</u>

C.R.S. § 29-1-110 of the Local Government Budget Law ("LGBL") states:

> (1) During the fiscal year, no officer, employee, or other spending agency shall expend or contract to expend any money, or incur any liability, or enter into any contract which, by its terms, involves the expenditures of money in excess of the amounts appropriated. Any contract, verbal or written, made in violation of this section shall be void, and no moneys belonging to a local government shall be paid on such contract.
>
> (2) Multiple-year contracts may be entered into where allowed by law or if subject to annual appropriation.

"Appropriation" is defined as "the authorization by ordinance or resolution of a spending limit for expenditures and obligations for specific purposes." C.R.S. § 29-1-102(1). Further, "expenditure" is defined as "any use of financial resources of the local government consistent with its basis of accounting for budget purposes for the provision or acquisition of goods and services for operations, debt service, capital outlay, transfers, or other financial uses." C.R.S. § 29-1-102(8)(a).

As the Court of Appeals determined, "any Green Mountain payments required by the IGA

– even those that are later reimbursed, dollar-for-dollar, by Big Sky – are nonetheless 'expenditures' within the meaning of the LGBL." COA Opinion, ¶ 31 (citing to C.R.S. § 29-1-102(2), (8)(a); *cf. Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 40 & n. 12); *see also People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983) ("The pronouncement of an appellate court on an issue in a case presented to it becomes the law of the case.")

Moreover, when a word is not defined by statute, we construe it in accordance with its ordinary meaning. *Veith v. People*, 2017 CO 19, ¶ 15. To do so, a court consults definitions in recognized dictionaries, including Black's Law Dictionary. *Id*. at ¶¶ 15-16. In addition to expenditures, the LGBL prohibits the districts from incurring liability that, by their terms, involve the expenditures of money in excess of the amounts appropriated in any given fiscal year. "Incur" is defined as "to suffer or bring on oneself (a liability or expense)." Black's Law Dictionary (11th ed. 2019). "Liability" is defined as "the quality, state, or condition of being legally obligated," "legal responsibility to another," or "a financial or pecuniary obligation." *Id*.

The purpose of the LGBL is "to protect the taxpayer against improvident use of tax revenue, to encourage citizen participation and debate prior to the institution of public projects, to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct expenditure of public funds." *Shannon Water & Sanitation Dist. v. Norris & Sons Drilling Co.*, 29 Colo. App. 48, 52, 477 P.2d 476, 478 (1970). These purposes are served by requiring advance appropriations for the entire term of a contract. *Falcon Broadband, Inc.*, *supra* at ¶ 36. The LGBL "conditions contractual validity on prior appropriation of funds for the year in which the contract was entered into and any subsequent years." *Id.* at ¶ 34. "Even where a contract

does not require a District to pay anything during the fiscal year in which it was signed, annual appropriations are necessary for expenditures in any following fiscal year." *Id.* at ¶ 40.

Pursuant to C.R.S. § 38-1-103(2), "No budget adopted pursuant to this section shall provide for expenditures in excess of available revenues and beginning fund balances." Thus, a district cannot appropriate funds that it does not have.

4. <u>C.R.S. § 29-1-203 does not negate requirements of TABOR or the LGBL, nor otherwise render the IGA valid.</u>

Plaintiffs seek to overcome the requirements of TABOR and the LGBL by pointing to C.R.S. § 29-1-203, which states in pertinent part:

> (1) 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. Any 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.
>
> (2) Any such contract shall set forth fully the purposes, powers, rights, obligations, and the responsibilities, financial and otherwise, of the contracting parties.

While the permissive language of C.R.S. § 29-1-203 states that "governments may cooperate or contract with one another," it contains three requirements in order to do so: (1) each party must be "legally authorized" to provide the function, service, or facility contemplated in the contract; (2) the contract must be authorized by "approval of its legislative body or other authority having the power to so approve"; and (3) any such contract must "set forth fully" the obligations and responsibilities, "financial and otherwise," of the contracting parties.

Even setting aside the LGBL for a moment, C.R.S. § 29-1-203 has to comply with TABOR, which requires voter approval for the "creation of any multiple-fiscal year direct or indirect district

debt or other financial obligation whatsoever without adequate present cash reserves pledged irrevocably and held for payments in all future fiscal years." Colo. Const. Art. X, §20(4)(b); *see also Zaner v. City of Brighton*, 917 P.2d 280, 286 (Colo. 1996)(holding that legislation which directly or indirectly impairs, limits or destroys rights granted by self-executing constitutional provisions is not permissible; however, a statute is presumed to be constitutional); Colo. Const. Art. X, §20(1) ("All provisions are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions.). It is the duty of the General Assembly to obey a constitutional mandate, and where a statute and the constitution are in conflict, the constitution is paramount law. *Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987). Rights provided by TABOR cannot be impaired by statute. *Landmark Towers Ass'n, Inc. v. UMB Bank, N.A.*, 2016 COA 61, ¶ 50, rev'd on other grounds, 2017 CO 107, ¶ 50.

First, because the IGA does not comport with C.R.S. § 29-1-203, it is inapplicable, and the IGA otherwise violates TABOR and the LGBL. Even assuming *arguendo* C.R.S. § 29-1-203 applies, it does not exempt the IGA from TABOR or the LGBL.

TABOR supersedes C.R.S. § 29-1-203, which cannot impair, limit, or destroy that requirement. Colo. Const. Art. X, §20(1); *Zaner*, *supra*. And because statutes are presumed constitutional, the legislature cannot have meant for C.R.S. § 29-1-203(1) to undermine the checks on elector's power and the imposition of taxing and spending burdens. *Zaner*, *supra*.

Moreover, C.R.S. § 29-1-203(1) does not render the LGBL inapplicable. C.R.S. § 29-1-203(1) states that an otherwise valid intergovernmental agreement "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 only pertains to the time period of the contract. The LGBL does not purport to limit the length of

contracts; it addresses the necessary appropriations tied to any contract. Thus, C.R.S. § 29-1-203(1) does not exempt intergovernmental agreements from the LGBL prohibition on districts entering into contracts that "involve[] the expenditures of money in excess of the amounts appropriated."

Additionally, C.R.S. § 29-1-203(1) permits contracts of any duration; it says nothing about allowing contracts of any duration without the need for appropriations. Thus, C.R.S. § 29-1-203(1) also does not overcome the language in the LGBL stating "multiple-year contracts may be entered into where allowed by law or if subject to annual appropriations." The subject matter of the LGBL language pertains to fiscal year appropriations; thus, any implicit or explicit argument by Big Sky that "multiple-year contracts may be entered into where allowed by law" is to be interpreted without consideration for appropriations at all is meritless.

Importantly, Big Sky implicitly suggests that C.R.S. § 29-1-203(1) gives governments carte blanche to contract, spend, and tax with unfettered discretion. Such interpretation would conflict with the LGBL (and TABOR). Where statutes appear to conflict, a court must construe them in harmony in order to give effect to each. *DeCordova v. State*, 878 P.2d 73, 75 (Colo. App. 1994). The purpose of the LGBL, similar to TABOR, is "to protect the taxpayer against improvident use of tax revenue, to encourage citizen participation and debate prior to the institution of public projects, to insure public disclosure of proposed spending, and to encourage prudence and thrift by those elected to direct expenditure of public funds." *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 36 (internal citations omitted). "These purposes are served by requiring advance appropriations for the entire term of a contract." *Id.* C.R.S. § 29-1-203(1) merely permits otherwise proper intergovernmental agreements to be of any length of time. Giving the statutes' words and phrases their plain and ordinary meaning and

reading statutory words and phrases in context, C.R.S. § 29-1-203(1) was not and could not be intended to exempt intergovernmental agreements from TABOR or the LGBL. *Plemmons v. People*, 517 P.3d 1210, 1217 (Colo. 2022).

5. <u>CDN and Cardel have no standing to pursue claims based on the IGA.</u>

Generally, only parties to a contract may seek to enforce its terms. *S Bewley v. Semler*, 2018 CO 79, ¶ 16 (citing *Forest City Stapleton Inc. v. Rogers*, 2017 CO 23, ¶ 11, 393 P.3d 487, 490). Although courts sometimes allow a "person not a party to an express contract [to] bring an action on such contract," this is limited to those situations where "the parties to the agreement intended to benefit the non-party," provided that such benefit is "direct and not merely…incidental…." *E.B. Roberts Const. Co. v. Concrete Contractors, Inc.*, 704 P.2d 859, 865 (Colo. 1985). It is not enough that some benefit incidental to the performance of the contract may accrue to the third party. *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo. App. 1996).

Intent is "determined primarily from the contract language itself." *Harwig v. Downey*, 56 P.3d 1220, 1221-22 (Colo. App. 2002); *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1238 (10th Cir. 2014) (emphasis added) ("Under Colorado law, the parties to a contract must intend to create third-party beneficiaries, and the best evidence of their intent is the contract itself…." (citing *Concrete Contractors, Inc. v. E.B. Roberts Const. Co.*, 664 P.2d 722, 725 (Colo.App.1982) ("The key question is the intent of the parties to the actual contract to confer a benefit on a third party. That intent must appear from the contract itself or be shown by necessary implication.")); *see also Ad Two, Inc. v. City & Cnty. of Denver ex rel. Manager of Aviation*, 9 P.3d 373, 376 (Colo. 2000) (en banc) ("The intent of the parties to a contract is to be determined primarily from the language of the instrument itself."). Moreover, the mere fact that

a project benefits an owner does not make the owner a third-party beneficiary to a contract to which it is not a party. *See Town of Mancos v. Aqua Eng'g, Inc.*, 23CA0140, 2024 WL 4034064, at *7 (Colo. App. Mar. 28, 2024); *Everett v. Dickinson & Co., Inc.*, 929 P.2d 10, 12 (Colo. App. 1996) ("[I]t is not enough that some benefit incidental to the performance of the contract may accrue to the third party."); *see also* 9 Corbin on Contracts § 45.3 (2023) (explaining that owner's receipt of performance from subcontractor is an incidental benefit). In *Town of Mancos*, the court determined there was no third-party beneficiary where a subconsultant agreement explicitly stated as much; rather, the subconsultant owed its performance to the contractor, who in turn owed its performance to the Town. *Town of Mancos*, at ¶ 39. Similarly here, the IGA expressly disclaimed any third-party beneficiary, and to the extent Green Mountain owed any purported obligations, those were owed to Big Sky. To the extent Big Sky thereafter owed duties to third-parties, those parties are not third-party beneficiaries to the IGA.

On multiple occasions, federal courts applying Colorado law have also determined that so-called "no third-party beneficiaries" ("NTPB") provisions offer strong proof of the parties' intent to preclude recognition of third-party beneficiaries. *See, e.g., The Arc of The Pikes Peak Region v. Nat'l Mentor Holdings*, No. 10–cv–01144, 2011 WL 1047081, at *5 (D. Colo. Mar. 18, 2011) (considering NTPB provisions in two contracts, determining "the contracting parties' intent is expressed clearly in the contracts," and concluding the alleged third-party beneficiaries did not state a claim on which relief could be granted); *accord Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d at 1238.

6. <u>A contract must be sufficiently definite.</u>

The Court of Appeals has already determined that the IGA is ambiguous, but it is further unenforceable where the terms are not sufficiently definite.

There must be certainty in the language of a contract, as it is a fundamental contractual requirement. *Univ. of Denver v. Doe*, 2024 CO 27, ¶ 49. Parties must agree on all material terms to create a valid agreement. *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001). An agreement cannot be enforced unless the terms are sufficiently definite to allow a court to determine whether the parties have complied with them. *Id*. While parties may definitely agree on some issues, the absence of agreement on other material issues prevents the formation of a binding contract. *Id*.

The minds of the parties must have met. *Stice v. Peterson*, 355 P.2d 948, 952 (Colo. 1960). Meeting of the minds is evidenced by "acts, conduct and words, taken in connection with the attendant circumstances," and is not evidenced by any subjective, unexpressed intent by either party. *Avemco Ins. Co. v. N. Colorado Air Charter, Inc.*, 38 P.3d 555, 559 (Colo. 2002). A contract needs to be both complete in terms, as well as sufficiently definite for a court to know what the parties intended in order to determine the rights and obligations of the parties. *Stice, supra*.

Moreover, C.R.S. § 29-1-203 requires that the purposes, powers, rights, obligations, and the responsibilities, financial and otherwise, of the contracting parties be fully set forth.

In interpreting a contract, the court's goal is to "determine and give effect to the intent of the parties," which it "determines primarily from the language of the instrument itself." *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000). "In ascertaining whether certain provisions of an agreement are ambiguous, the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words employed." *Id*. Contract provisions are ambiguous, though, "when they are susceptible to more than one reasonable interpretation." *Id*.

Absent allegations of fraud, accident, or mistake in the formation of the contract, parol evidence is inadmissible to add to, subtract from, vary, contradict, change, or modify an unambiguous integrated contract. *Tripp v. Cotter Corp.*, 701 P.2d 124, 126 (Colo. App. 1985). However, for purposes of interpreting, explaining, or applying contractual terms, parol evidence may be admissible. *Id*. A court should consider the conduct and acts of the parties in performance of a contract in eliminating any ambiguity and in ascertaining the mutual meaning of the parties at the time of the contracting. *Nahring v. City & Cnty. of Denver By & Through Bd. of Water Comm'rs*, 484 P.2d 1235, 1237 (Colo. 1971))("if, [after signing the contract], the parties themselves have, by their conduct, construed the writing, that construction is the best possible guide in ascertaining their meaning at the time of the execution of the document."); *see also Pepcol Mfg. Co. v. Denver Union Corp.*, 687 P.2d 1310, 1314 (Colo. 1984).

7. <u>The Court cannot order specific performance.</u>

Orders of specific performance, that is a court order actually requiring a party to perform as specified in the contract, are particularly disfavored in the context of construction disputes, as performance of construction contracts would require the court to supervise and establish standards by which to evaluate the contractual performance. "Contracts which by their terms stipulate for a succession of acts, whose performance cannot be consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill, or judgment in such oversight, are not, as a rule, specifically enforced." *Antero & Lost Park Reservoir Co. v. Lowe*, 69 Colo. 409, 436, 194 P. 945, 956 (1921); *accord Himrod-Kimball Mines*, 235 P.2d 804, 808 (Colo. 1951). One Colorado District Court similarly noted that "numerous courts have held that a party cannot be compelled to perform construction services on behalf of another because courts are ill-equipped to supervise

the breaching party's performance." *St. Sophia Partners, LLP v. Tetra Tech, Inc*., 2012 Colo. Dist. LEXIS 2983, *11-12 (citing, e.g., *Edward Kraemer & Sons, Inc. v. City of Overland Park*, 19 Kan. App. 2d 1087, 1092, 880 P.2d 789, 793 (1994); *Yonan v. Oak Park Federal Sav.& Loan Ass'n*, 27 Ill. App. 3d 967, 972, 326 N.E.2d 773, 778 (1975); *Ryan v. Ocean Twelve, Inc*., 316 A.2d 573, 575 (Del. Ch. 1973); *Stern v. Freeport Acres*, 107 N.Y.S.2d 810, 811 (N.Y. Sup. 1951)).

In addition, the Colorado Supreme Court has held that courts cannot order specific performance against governmental entities,

> Apart from any implied waiver of sovereign immunity, or consent to be sued in court, the question of equitable relief for breach of contract, or specific performance, implicates an additional concern for separation of government powers. As recognized by the Supreme Court, there are 'strong reasons of public policy' for the rule that specific performance cannot be had against the sovereign.

Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C., 176 P.3d 737, 745 (Colo. 2007) (quoting *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 704 (1949)).

To be enforced, a "contract must…be reasonably certain *in order to justify a degree of specific performance*…." *Shull v. Sexton*, 390 P.2d 313, 316 (Colo. 1964) (emphasis added) (citations omitted). In other words, "[c]ourts cannot make contracts for parties…." *Id.* "[W]hen the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it." *Newton Oil Co. v. Bockhold*, 176 P.2d 904 (Colo. 1946); *see also Applebaugh v. Hohl*, 535 P.2d 222, 224 (Colo. App. 1975) ("To have an enforceable contract…it must appear that further negotiations are not required to work out important and essential terms.").

8. <u>No party is entitled to relief based on promissory estoppel</u>

All Plaintiffs have asserted claims for promissory estoppel. The law prohibits promissory estoppel claims against governmental entities where there is no enforceable contract.

Where a contract is void because it is not within a municipal corporation's power to make, the municipal corporation "cannot be estopped to deny the validity of the contract." *Rocky Mountain Nat. Gas, LLC v. Colo. Mountain Junior Coll. Dist.*, 2014 COA 118, ¶ 31. A party contracting with a governmental entity has the duty to ascertain whether the contract complies with the statutes, charters, and other rules that are applicable. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, ¶ 41. The party contracting with a governmental entity bears the risk that "all recovery, including quantum meruit, [will be] denied" if the contract isn't valid. *Id*. (internal citations omitted). "This rule can produce 'harsh results,' but it protects the taxpayers against improper expenditures." *Id*. Moreover, the narrow exceptions to this general rule (i.e. in circumstances where real property is conveyed) do not apply to the facts of this case. *See id*. at ¶ 42-43; see also COA Opinion at ¶ 45. "Big Sky's promissory estoppel claim is not premised on any property that it furnished to Green Mountain under the IGA, but rather on Green Mountain's alleged promises that induced Big Sky into financial losses. This exception therefore does not apply." (COA Opinion at ¶ 45.)

The Colorado Appellate Court agreed with this trial court's prior ruling that "if the IGA is void, … Big Sky is foreclosed under the applicable case law from asserting a promissory estoppel claim against Green Mountain." (*See* COA Opinion at ¶ 42 (citing *Pinnacol Assurance v. Hoff*, 2016 CO 53, ¶ 32)). Additionally, the Court noted that a promissory estoppel claim based on documents that made any purported obligation necessarily contingent on successful negotiation of a future agreement did not form the basis for a promissory estoppel claim. (Id. at ¶ 43.) Where, as here, there was no promise independent of the IGA or any purported promise is reliant on other conditions precedent, including but not limited to successful negotiation of some other agreement, there is no promissory estoppel claim.

Additionally, to be the basis for promissory estoppel, a promise must be "sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms." *Hoyt v. Target Stores*, 981 P.2d 188, 194 (Colo. App. 1998) (citing *Sunderlun v. Public Service Co.*, 944 P.2d 616 (Colo. App. 1997)). This requirement for the imposition of the doctrine of promissory estoppel mirrors the requirement of sufficient specificity for enforcing express contracts. *See id.* ("Whether an alleged promise is claimed to be part of an express contract or is asserted as the basis for the application of promissory estoppel, it must be sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms." (citation omitted)).

9. <u>The Court should not allow CDN or any other Plaintiff lost reinvestment proceeds as damages</u>.

As reflected in Plaintiffs' disclosures, they intend to seek lost reinvestment damages, but such damages are not recoverable as a matter of law and are, therefore, inadmissible under C.R.E. 401 and 403, as this evidence is irrelevant and would substantially waste time at trial.

It is well-settled that "[p]rofits lost as a consequence of a breach of contract may not be recovered if the profits are <u>too uncertain or unforeseeable</u> at the time that the parties entered into a contract." *Denny Const., Inc. v. City & Cnty. of Denver ex rel. Bd. of Water Comm'rs*, 199 P.3d 742, 746 (Colo. 2009) (emphasis added) (quoting *Colorado Nat. Bank of Denver v. Friedman*, 846 P.2d 159, 174 (Colo. 1993)). Put another way, to be recoverable, lost profits must not be "open to the objection of uncertainty." *Friedman*, 846 P.2d at 174. In addition, the damages awarded must be traceable to and the direct result of the wrong to be redressed. *Graphic Directions, Inc. v. Bush*, 862 P.2d 1020 (Colo.App.1993).

Not only are these "reinvestment" losses impermissibly speculative, but they are also duplicative of prejudgment interest, which is intended to make a party whole for the lost use of

money from the time a breach of contract claim accrues until judgment is entered. *See, e.g., Goodyear Tire & Rubber Co. v. Holmes,* 193 P.3d 821, 826 (Colo. 2008) ("[T]he purpose of prejudgment interest is to reimburse the plaintiff for inflation and lost return."). In addition to reinvestment income being speculative, Courts have previously cited the duplicity of the recovery of such damages in addition to statutory prejudgment interest as an additional reason to preclude experts from testifying as to reinvestment income. *See, e.g., Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.,* 770 N.E.2d 177, 200-201 (Ill. 2002) ("[W]e agree with defendants that Ostlund's alternative damage awards based on his reinvestment theory was prejudgment interest in another guise and should not have been submitted to the jury.") (citing similar holdings).

10. <u>The expert opinions of Plaintiff's experts are relevant, helpful to the Court, and should be considered at trial.</u>

As discussed in the COA Opinion, the IGA is "silent" on whether costs of designing and constructing the infrastructure necessary to service the Big Sky service area (1) will be paid directly by Big Sky, or (2) will be fronted by Green Mountain and be reimbursed later. (COA Opinion at ¶ 31.) This distinction is critical because Big Sky has, effectively, conceded that "any Green Mountain payments required by the IGA – even those that are later reimbursed, dollar-for-dollar, by Big Sky – are nonetheless 'expenditures' within the meaning of the LGBL." (*See id.*)

While the IGA is silent on whether costs of *design and construction* will be fronted by Green Mountain, it explicitly contemplates that, to the extent costs for "monitoring and measuring" the Big Sky system are necessary, these costs will be initially incurred by Green Mountain.

The COA Opinion held that Subsection 3.2(E), addressing monitoring and measuring, "does not *unambiguously* require Green Mountain" to incur—*i.e.,* front—these costs because

Section 3.2(E) merely establishes a *right* for Green Mountain to recover these costs; in other words, on its face, it imposes "no [explicit] obligation" on Green Mountain to incur these costs in the first instance. (*See* COA Opinion ¶ 29.) The expert opinions proffered by Defendant's experts are critical to understanding whether Green Mountain would, in fact, incur such costs. As discussed previously, the COA Opinion contemplates that these costs would be 'expenditures' for purposes of the LGBL to the extent Green Mountain would, indeed, be forced to incur these costs. (COA Opinion, ¶ 31.)

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Colo. R. Evid. 702. Additionally, because the Court of Appeals held that Subsection 3.2(E) is ambiguous as to whether Green Mountain would need to incur any "monitoring and measuring" costs that would later need to be recovered through additional fees, review of parol evidence is necessary and proper towards resolving this ambiguity. *See Southgate Water Dist., Arapahoe & Douglas Ctys. v. City & Cnty. of Denver By & Through Bd. of Water C'mm'rs*, 862 P.2d 949 (Colo. App. 1992) ("Parol evidence is admissible to explain or clarify the meaning of a contract or the effect of its provisions when an ambiguity has been determined to exist in its terms." (emphasis added)). Likewise, the Court of Appeals also held that whether any costs "would be incurred over multiple years is a factual issue." (COA Opinion, ¶ 34.)

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2024, I served the foregoing via Colorado Courts E-Filing System on all parties who have entered their appearance.

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