DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway, Golden, CO 80401	DATE FILED September 16, 2024 6:54 PM FILING ID: 9D3CC0546A978 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 **▲COURT USE ONLY▲**
Attorneys for Plaintiff CDN Red Rocks, LP: Marsha M. Piccone, #15268; mpiccone@foxrothschild.com Caleb Durling, #39253; cdurling@foxrothschild.com Katelyn Cramp, #60116; kcramp@foxrothschild.com FOX ROTHSCHILD LLP 1225 17th Street, Suite 2200 Denver, CO 80202 Telephone: (303) 292-1200	Consolidated Case No.: 2019CV30887 Division: 2
CDN'S TRIAL BRIEF	

INTRODUCTION

The Court is well aware of this case, which has been pending for over five years. In its trial brief, CDN will address issues set forth in this Court's order of May 17, 2024 denying the parties' summary judgment motions. Some questions will be combined where the answers substantially overlap. As a resource for the Court, CDN will also cite to where each question was addressed by Plaintiffs in their summary judgment briefing or Rule 37 briefing.[1]

ARGUMENT

#1 CDN's status as a potential intended 3rd party beneficiary with privity or standing.

As has previously been found by this Court, courts look at the entire contract and the parties' course of conduct to determine whether an entity was an intended third-party beneficiary and thus have standing. Oct. 26, 2020 3d Party Beneficiary Order at 2. Here, both confirm CDN's status as an intended third-party beneficiary of the Big Sky IGA. The facts in support are overwhelming. Big Sky was formed by CDN as a vehicle to finance and construct public improvements for the future development of CDN's property. Stipulated Facts ¶ 3 (Ex. A to Trial Mgmt. Order). In short, GM looked to CDN to fund the 2015 and 2017 Memoranda of Understanding ("MOUs"), the Fossil Ridge Litigation, Fossil Ridge/Big Sky/CDN IGA, the Green Mountain/Big Sky/CDN Joint Interest Agreement, and the Green Mountain/Big Sky IGA. The evidence confirmed this, as Green Mountain's accounting showed that all but one deposits made

[1] CDN incorporates by reference the trial briefs filed by Big Sky and Cardel, as well as the summary judgment and Rule 37 spoliation briefing filed by CDN, Big Sky, and Cardel in this matter. This brief uses the common shorthand terms for parties and key events which have been used throughout the years of briefing in this case.

to fund the MOU account came from CDN directly and Green Mountain *addressed these invoices to CDN, not Big Sky*.

This Court already found that the Big Sky IGA specifically identifies CDN's status as a signatory of the Fossil Ridge/Big Sky/CDN IGA and that this agreement satisfied a condition precedent for GM to accept wastewater from the Future Development Area. 3d Party Beneficiary Order at 4; *see also* Stipulated Facts ¶ 21. The Court noted the "Big Sky IGA expressly states that CDN is the beneficiary of the cost recovery provision" within the IGA. 3d Party Beneficiary Order at 4-5 (quoting Big Sky IGA §2.7). The Court concluded that "[b]y the terms of this provision, *[GM] agrees to benefit Big Sky and CDN* by refusing acceptance of Wastewater from property owners unless those owners enter into an agreement with Big Sky that will reimburse CDN." *Id.* at 5.

Green Mountain representatives referred to CDN as a third-party beneficiary to the Big Sky IGA. Green Mountain Board President Adrienne Hanagan sent a letter on September 4, 2018 to "notify all stakeholders of the Big Sky Intergovernmental Agreement, including any 3rd party beneficiaries of the Agreement" regarding the Big Sky IGA. CDN was a recipient of the letter. Additionally, witnesses involved in the negotiation and drafting of the Big Sky IGA will testify that they understood that the Big Sky IGA benefitted property owners and developers.

The Court's conclusions were correct. CDN is identified approximately 24 times in the IGA. Green Mountain will argue again that a boilerplate no third-party provision ("NTBP") in the IGA is relevant. It is not. Boilerplate provisions do not serve to preclude a third-party claim, as

courts will instead look at the entire contract and the parties' course of conduct to determine intent. Here that intent is overwhelmingly clear.[2]

#2 Whether Defendant Green Mountain W and S District (GM)'s willingness to serve letter was a promise or contract.

#17 Whether promissory estoppel applies and how C.R.S. § 29-1-203 and the common law apply to promissory estoppel and the LGBL.

The history between CDN, Big Sky, and Green Mountain confirm that Green Mountain should be held to account for its promises to provide sewer service which induced CDN (and Big Sky) to spend money. CDN's promissory estoppel claim is based on numerous promises Green Mountain made over the years, including in the Big Sky will-serve letter (on which CDN was cc'd and which includes CDN's property),[3] the two MOUs, the Big Sky/CDN/Green Mountain Joint Interest Agreement, the Fossil Ridge Litigation filings (in which Green Mountain stated its desire to provide sewer service to the Future Development Area, which includes CDN's property), the resulting Big Sky/Fossil Ridge/CDN IGA, as well as the Big Sky IGA.[4] Each of these is sufficient basis for CDN's promissory estoppel claim. Green Mountain represented that it would provide service repeatedly, in contracts and court filings, and CDN kept doing its part by writing checks

[2] **Summary Judgment References:** CDN MSJ at 4-9; CDN Resp. to GM MSJ at 4-8; CDN Reply ISO MSJ at 3-6.

[3] CDN is not pursuing its breach-of-contract claim as to the will-serve letter.

[4] CDN signed the Big Sky/Fossil Ridge/CDN IGA because Fossil Ridge like Green Mountain knew that CDN was the party actually paying for things. CDN is no longer pursuing its breach-of-contract claim for the contracts besides the Big Sky IGA.

to pay Green Mountain's expenses. It would be a manifest injustice to now allow Green Mountain to renege on its representations and promises.[5]

#3 The validity of the May 5, 2018 Intergovernmental Agreement (IGA) between GM and Big Sky.

#4 Whether the common law, C.R.S. §§ 29-1-110(2), or §§ 29-1-203(1) exempts the IGA from the Local Government Budget Law (LGBL).

#11 The validity and applicability of LGBL and Taxpayer Bill of Rights Act (TABOR) to the IGA.

Green Mountain's arguments why the IGA is void have constantly shifted since its April 2019 termination resolution. CDN is unclear which theories will be offered at trial or abandoned as so many others were previously.

In brief, the IGA is valid and neither the LGBL or TABOR apply. Article XIV § 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 for the purpose of *encouraging* (not barring) governments from cooperating and contracting with each other. As provided in the LGBL (specifically C.R.S. § 29-1-110(2) and -§ 29-1-203(1)), IGAs aren't subject to the annual appropriation/multi-year requirement and restriction. The Court of Appeals similarly stated in its opinion that sections 29-1-110(2) and 29-1-203(1) permit multi-year

[5] **Summary Judgment References:** CDN MSJ at 13-16; CDN Resp. to GM MSJ at 12-13; CDN Reply ISO MSJ at 13-14.

intergovernmental agreements between government entities and exempts them from the LGBL's restrictions. 2021CA1505 ¶¶ 21, 23. This makes sense, as otherwise the thousands of IGAs that knit together public services in this state would be subject to the whims of boards of directors, like Green Mountain, that could terminate on a moment's notice the provision of water, sewer, and emergency services upon which citizens rely. If this Court adopts Green Mountain's extreme position to allow them to avoid their contractual obligations, all of these basic services provided by IGAs are in jeopardy and subject to termination by a new board.

TABOR similarly doesn't apply to contracts entered into between governmental entities and when governments act in their proprietary capacity. *Nicholl v. E-470 Pub. Hwy. Auth.*, 896 P.2d 859, 862 (Colo. 1995); *Colowyo Coal Co. v. City of Colorado Springs*, 879 P.2d 438, 442-43 (Colo. App. 1994). Even if TABOR did apply (which it doesn't), then it was satisfied because Big Sky appropriated the money to pay for the construction of the system—and Green Mountain for its part also appropriated funds.

The common law holds that contracts entered into by the government in its proprietary capacity are not subject to the LGBL and TABOR. Moreover, the related MOUs did include an annual appropriations provision and they were the account under which the parties had operated. The evidence will show that the parties' course of conduct and intent confirmed the contract was valid. Green Mountain submitted an application to CDPHE stating the project would take less than a year, consistent with Preliminary Engineering Reports. Plaintiffs will offer the testimony of the witnesses who were involved at the time on *both sides* of the transaction (Plaintiffs and Green Mountain) who will confirm that this IGA was valid and being implemented until Green Mountain stopped all work and terminated it after spending months before termination and years

since litigation commenced conjuring up myriad excuses to justify the IGA's termination. The testimony will show what Green Mountain's new board heard at the time and is undisputed ever since. The Big Sky IGA will make Green Mountain millions, as they charge Big Sky residents a premium to receive sewer service. As the Court of Appeals repeatedly held Big Sky will pay for everything. 2021CA1507 ¶¶ 25-34. The question here is not about validity but simply about Green Mountain's anti-growth position.[6]

#5 The applicability of the Memorandums of Understanding to the IGA.

Green Mountain and Big Sky entered into two MOUs on August 31, 2015 and April 18, 2017. Stipulated Facts ¶¶ 9, 14. The MOUs are relevant for several reasons. The MOUs are relevant because they show parties' course of conduct of how the payments were made and are also relevant to the Court of Appeals' question as to how Big Sky would pay Green Mountain for the design and construction costs related to the lift station, force main and flow equalization. 2021CA1507 ¶¶ 32-35. The evidence will show the specific process for paying for the costs—Green Mountain billed Big Sky/CDN for deposits and used those deposits to pay invoices as they came due. Green Mountain sent the requests for deposits to CDN, to replenish the accounts tied to the MOUs, and that CDN paid those deposits with cheques and wires sent from Canada. Again, that's conduct demonstrating CDN's third-party beneficiary status under the IGA. Second, they form part of CDN's promissory estoppel claim. CDN deposited with Green Mountain tens of thousands of dollars under the MOUs as advance deposits to pay for the legal and engineering expenses required by Green Mountain to work toward the final sewer system. The language of

[6] **Summary Judgment References:** Big Sky Resp. to GM MSJ at 3-16; Cardel Resp. to GM MSJ at 17-18; CDN Resp. to GM MSJ at 5-6; CDN Reply ISO MSJ at 8-11.

the MOUs and the conduct of the parties involved demonstrate the justified reliance CDN had that it was paying all this money toward receiving the promised sewer service from Green Mountain.

To the extent the Court accepts Green Mountain's position that this IGA needs a "annual appropriations" clause when other similar IGAs don't, the MOUs did have an annual appropriations clause and were the demonstrated vehicle by which Big Sky and CDN paid the deposits requested by Green Mountain.[7]

#6 Whether or not the IGA is for multiple fiscal years and whether there are multiyear funds and appropriations.

#7 How the conduct of the parties indicates whether the IGA stipulates multiyear or annual funds and appropriations and the presence of cash reserves.

#25 Whether there have been violations of the LGBL.

Even assuming the LGBL and TABOR apply to the IGA (they do not), the IGA did not create multiyear financial obligations. First, the construction that was contemplated would be completed in a year, as the evidence will show from the former Green Mountain officials (Cudahy and Kenyon) involved with construction and engineering and there was no multi-year fiscal obligation and no violation of LGBL or TABOR Second, the IGA itself is unambiguous that Big Sky pays for everything, and thus there is no financial responsibility on Green Mountain, a finding confirmed by the Court of Appeals in its opinion. 2021CA1507 ¶¶ 25-34. Third, the annual budgets of Green Mountain and Big Sky demonstrated that both had appropriated necessary funds in 2018 and 2019 to pay for anticipated costs.

[7] **Summary Judgment References:** Big Sky MSJ at 20-23; Big Sky Resp. to GM MSJ at 2-8, 12-14, CDN Reply ISO MSJ at 10.

Finally, the Court should not lose sight of the role of IGAs in Colorado. IGAs govern the provision of sewer, water, or other critical government services for decades to come. Without this assurance, how could anyone buy a home in Colorado and rely on the continued provision of sewer and water? Plaintiffs' witnesses will testify that the use of IGAs just like this one are used across the state and Green Mountain's argument that the Big Sky IGA is unconstitutional and illegal is inconsistent with the law, including C.R.S. § 29-1-203(1).[8]

#8 The relevance of the Fossil Ridge IGA.

Plaintiffs will show that the Green Mountain/Fossil Ridge IGA is substantially identical to the Green Mountain/Big Sky IGA, including in its cost allocation and its lack of an "annual appropriations" provision, and Green Mountain has happily performed under this contract and received millions of dollars in tap fees from Fossil Ridge for over a decade

Both Green Mountain and Big Sky witnesses will testify that Green Mountain insisted that the Big Sky IGA track the Fossil Ridge IGA. And it did. The material provisions are the same except for the substitution of the term "Fossil Ridge" for "Big Sky," including the provision which the Court of Appeals cited as to the reimbursement payment structure. See Ex. 1 (chart comparing Fossil Ridge IGA and Big Sky IGA). Green Mountain has operated under the Fossil Ridge IGA for more than a decade and has never claimed the Fossil Ridge IGA violated the LGBL or TABOR or that it was void. Green Mountain has continued to provide sewer service to Fossil Ridge (the Solterra neighborhood where John Henderson once lived). The fact that the material provisions in

[8] **Summary Judgment References:** Big Sky MSJ at 20-23; Big Sky Resp. to GM MSJ at 2-19; Big Sky Reply ISO MSJ at 5-8, 11-12; CDN Resp. to GM MSJ at 5-6; CDN Reply ISO MSJ at 10-11.

the Fossil Ridge IGA and the Big Sky IGA are identical seems highly relevant when Green Mountain is claiming the Big Sky IGA is void but has never suggested that the Fossil Ridge IGA is void or voidable. This demonstrates Green Mountain's argument that the IGA violates the LGBL and TABOR is a pretext to claim the IGA is void. This supports the breach of contract claim, the promissory estoppel claim, and CDN's § 1983 due process claim, among others.[9]

#9 Whether or not GM breached the IGA and the applicability of the IGA's default provisions.

#10 The effect of the GM Termination Resolution.

GM admitted that the IGA's section 10.2 contains three events of default and includes a notice-and-cure period for any claimed breaches. Stipulated Facts ¶¶ 17-18. Green Mountain admitted that it never triggered section 10.2, that it never advised Big Sky (and CDN) that Green Mountain claimed there was a breach, and never gave Big Sky or CDN a chance to cure. *Id.* ¶ 24. Indeed, in a complaint Green Mountain filed against its former lawyer Jennifer Ivey, it stated that it "repudiated" the IGA.

In response to CDN's Motion for Partial Summary Judgment, Green Mountain admitted that it terminated the IGA when it passed the April 2019 Termination Resolution. GM Resp. to CDN SUMF ¶ 6; Stipulated Facts ¶ 34. As another basic principle of contract law, if Green Mountain announced that it terminated or repudiated a contract, then unless it can show Big Sky was already in breach (which it cannot), then Green Mountain necessarily breached the contract and the counterparties Big Sky, CDN, and Cardel are entitled to relief in the form of specific

[9] **Summary Judgment References:** CDN Resp. to GM MSJ at 10-11; CDN Reply ISO MSJ at 11.

performance and damages. Green Mountain's admissions in summary judgment bind them at trial. *Walter v. Hall*, 940 P.2d 991, 996 (Colo. App. 1996). Thus, Big Sky is not in breach and Green Mountain *is* in breach as an application of basic contract law. The Court should apply and enforce the IGA, a contract, including its default provisions.[10]

#12 Big Sky's authority under the IGA and Special District Act.

#13 The applicability of the Big Sky Service Plan and whether the IGA was within the scope.

Big Sky has previously addressed this question in the summary judgment and will address further at trial. CDN states that Big Sky had the authority under the IGA to build and maintain the Big Sky Sewer System and Green Mountain Improvements (as those terms are defined in the IGA) and, as importantly, would have paid for all the expenses incurred.

Green Mountain's argument that the service plan contained a material modification is wrong. The service plan for Big Sky was approved by resolution 2014-36 of the Lakewood City Council on September 22, 2014. Stipulated Facts ¶ 2. The service plan defined the Big Sky Service Area and included the CDN and Cardel properties.

Even if the Court considers Big Sky's proposed extraterritorial service of the Three Dinos property (which is no longer relevant), in January 2019, Lakewood City Attorney Tim Cox found that Big Sky's extraterritorial service was likely not a material modification of the service plan and thus valid. Green Mountain's then-attorney Brian Matise wrote a letter to Cox and stated that Cox's reasoning was "a reasonable analysis" and that he did "not disagree with opinions expressed

[10] **Summary Judgment References:** CDN MSJ at 9-13; CDN Reply ISO MSJ at 6-8.

in that document." Jan. 25, 2019 Matise letter. Green Mountain then fired Matise and ordered him to retract the letter.

The *Bill Barrett v. Sand Hills Metro. District* case supports this conclusion that Big Sky's actions were valid. A material modification is when there's a "complete geographic shift," including the exclusion of all the original land. 411 P.3d 1086, 1091-93 (Colo. App. 2016). None of that happened here, as City Attorney Cox correctly concluded by applying basic Colorado law.[11]

#14 What amount has or has not been paid.

Pursuant to the MOUs, Big Sky and CDN paid six invoices Green Mountain sent to Big Sky and CDN for deposits to be used to pay for legal and engineering work. Of the six invoices, only one was a request by Green Mountain for Big Sky/CDN to pay a bill sent to Green Mountain (and this invoice occurred years before the IGA was signed) and the other five were requests for a deposit to replenish Green Mountain's deposit account which it was using to pay bills as they were incurred. Thomas Morton, along with CDN witnesses, will describe the chronology of those payments, largely sent by Green Mountain to CDN and then paid by CDN—confirming CDN's third-party beneficiary status and its promissory estoppel claim.

Green Mountain disclosed in its summary judgment brief for the first time an Invoice #007. By the time this deposit request was sent to Big Sky, Green Mountain had stopped all work on the project and was in breach of the IGA. Green Mountain never demanded payment of this invoice, as required under the IGA.[12]

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[11] **Summary Judgment References:** Big Sky MSJ at 14-20; Big Sky Reply ISO MSJ at 12-15; CDN Reply ISO MSJ at 11-13.

[12] **Summary Judgment References:** Big Sky Resp. to GM MSJ at 2-8; Big Sky Reply ISO MSJ at 5-8.

#15 Whether specific performance and damages apply.

They both do. The IGA has the stated remedy of specific performance. Green Mountain admitted that section 10.1 provides that the Court may order specific performance of the IGA. GM Resp. to CDN SUMF ¶ 27. The Court should also award CDN (and the other plaintiffs) their delay damages. CDN's damages expert Greg Weiss has opined that CDN's delay damages total $15,812,783. Green Mountain never endorsed a damages expert or offered any contrary evidence (or deposed any of Plaintiffs' experts).

If this Court grants specific performance, Plaintiffs further request that the Court enter a consent decree or similar device to ensure Green Mountain actually comply. Green Mountain's conduct in terminating the IGA shows that it will not follow the law. Otherwise, it will be the same story as before where Green Mountain claims its self-appointed right to refuse to comply and Plaintiffs are deprived further use of their properties.

If the Court declines to order specific performance, then the Court should award CDN its full damages for the lost value of its property and lost investment income, which Weiss has calculated as totaling $58,118,503 as of September 2023.[13] CDN also is entitled to money damages for its other claims in this matter beyond the breach-of-contract and promissory estoppel claims.

#16 Whether there was a Vested Right Property Act violation and the applicability of the Contract Clause.

There was a VRA violation (Claim 3). Lakewood granted CDN a VRA in 2009 and amended it in 2020, confirming that CDN has a vested right to build 950 residential units on the

[13] **Summary Judgment References:** CDN MSJ at 12-13; CDN Reply ISO MSJ at 7-8.

property. Stipulated Facts ¶¶ 37-38. Green Mountain admitted that the vested right is enforceable not just against Lakewood "but shall be effective against any other local government which may subsequently obtain or assert jurisdiction over such property." GM's MTD at 16-17.

A vested property right precludes any zoning or land use action by a local government which impairs or delays development of the property. That's exactly what has happened here. Since 2019, Green Mountain's termination of the IGA has meant that CDN cannot develop its land because it cannot secure sewer service from Green Mountain and it cannot reasonably secure sewer service from Morrison, Metro Wastewater, or any other source.

Lakewood's VRA includes the remedy—first pursuing specific performance, and then monetary damages. This is another basis for the Court to award specific performance. If Green Mountain claims that the Court cannot require it to perform, then the next remedy is monetary damages. CDN's damages expert Greg Weiss has calculated that amount as $58,118,503. Green Mountain's anti-growth board appears willing to bankrupt its district rather than serve Big Sky, CDN, and Cardel. (The Contract Clause question is addressed below in question #22).[14]

#18 Whether Big Sky is governed by an elected, qualified board.

This is not a defense to Green Mountain's breach of the IGA. Regardless, Big Sky has addressed this question (and will address it again at trial), and the answer is yes, it is.[15]

[14] **Summary Judgment References:** CDN MSJ at 16-18; CDN Resp. to GM MSJ at 18-19; CDN Reply ISO MSJ at 14-15.

[15] **Summary Judgment References:** Big Sky Reply ISO MSJ at 15.

#20 Whether there has been a regulatory taking as contemplated in the 5th Amendment of the U.S. Constitution and Article II Section 15 of the Colorado Constitution and whether there is a procedural due process claim or violation pursuant to 42 U.S.C. § 1983.

These are CDN's claims 1, 5, 6. As for claim 1 (regulatory taking), CDN's termination of the IGA and refusal to serve CDN denies CDN its economically viable use of its land and thus is a *per se* taking. *Animas Valley Sand & Gravel v. BOCC*, 38 P.3d 59, 64 (Colo. 2001). CDN cannot build any houses on its property without sewer—GM's precise intent in terminating the IGA. This interfered with CDN's reasonable investment-backed expectations that it could exercise its VRA and build up to 950 houses. Green Mountain's intent is to create *de facto* open space with CDN's property without just compensation. CDN's land is worth $53,700,000 with sewer and $3,000,000 without it—a reduction of over 94%. CDN should be awarded just compensation for this taking.

Claim 6 is a parallel § 1983 Taking claim under the U.S. Constitution. The additional elements require Green Mountain to be deemed a person acting under the color of law (which it is) when it terminated the IGA and refused to provide sewer services. *Seamons v. Snow*, 206 F.3d 1021, 1029 (10th Cir. 2000). In addition to damages, this claim allows CDN to recover its attorney's fees and costs from Green Mountain.

Claim 5 is a § 1983 procedural due process claim. *Eason v. Bd. of Cnty. Comm'rs*, 70 P.3d 600, 604 (Colo. App. 2003). CDN has a vested right (the VRA) and CDN is a person acting under the color of law which deprived CDN of its vested right. The evidence will show that Green Mountain's action was without due process of law and was arbitrary and capricious. Green Mountain's termination was pretextual. It was driven by an anti-growth animus which has meant

Green Mountain has reneged on its contracts and been willing to break state laws like the Open Meetings Law and Open Records Act.[16]

#21 Whether there is relief for failure to serve CDN a public utility.

This is CDN's claim 2 and the Court should find for CDN on it. Any person injured by a utility's improper refusal to provide service can sue the utility. The Colorado Supreme Court in *Robinson v. City of Boulder*, 547 P.2d. 228, 232 (Colo. 1976), held that Boulder was acting as a utility when it was providing exclusive extraterritorial utility service outside the city boundaries in the Gunbarrel neighborhood and then refused to serve people within this extraterritorial area. That's what happening here. Green Mountain is the sole provider to this area. It serves Fossil Ridge (Solterra) extraterritorially and is now reneging on its commitment to serve Big Sky. Under Colorado law, Green Mountain is liable for its improper refusal to serve.[17]

#22 Whether CDN is entitled to relief for impairment of contract and retroactive legislation.

CDN's Claim 7 alleges Green Mountain violated the Colorado Constitution's bar on retrospective governmental action. The IGA's termination impaired CDN's vested rights in its VRA to develop its property. The termination wasn't in the public interest because Green Mountain had repeatedly represented that it wanted to serve CDN and receive the resulting tap fee revenue, which is in the best interest of the district. CDN had a bona fide expectation that Green Mountain would follow through on its promises to serve. Green Mountain's reneging on the IGA after years of promises to the contrary (and taking CDN's money) surprised CDN. The Court

[16] **Summary Judgment References:** CDN MSJ at 18-21; CDN Resp. to GM MSJ at 14-16, 20-21; CDN Reply ISO MSJ at 15-16.

[17] **Summary Judgment Reference:** CDN Resp. to GM MSJ at 16-18.

should thus void the Termination Resolution as unconstitutional. CDN is not pursuing its claim for impairment of contract.[18]

#24 Whether GM lacks standing based on the applicability of LGBL to the IGA.

CDN believes the Court is inquiring whether Green Mountain lacks standing to challenge Big Sky's ability to enter into the IGA. Big Sky will fully address that question at trial and has addressed it in the summary judgment briefing that Green Mountain cannot challenge Big Sky's ability to enter into the LGBL.[19]

#26 Whether GM's or Big Sky's obligations were approved by voters and exempt from the LGBL.

Voter approval is not relevant to the LGBL but is relevant to TABOR analysis. Big Sky has already presented evidence (of which the Court can take judicial notice), and will present that same evidence at trial, showing that its voters on November 4, 2014, approved numerous ballot questions authorizing indebtedness and tax increases, which meant Big Sky voters have already voted to take on all the necessary debt to pay for the construction of the sewer system contemplated by the Big Sky IGA. Green Mountain voters did not need to vote to approve incurring any debt because Big Sky will pay all the costs under the Big Sky IGA and Green Mountain will not pay for anything.[20]

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[18] **Summary Judgment References:** CDN MSJ at 23-25; CDN Resp. to GM MSJ at 23-24; CDN Reply ISO MSJ at 17-18.

[19] **Summary Judgment Reference:** Big Sky Resp. to GM MSJ at 17-18.

[20] **Summary Judgment References:** Big Sky Resp. to GM MSJ at 19-22; Big Sky Reply ISO MSJ at 15; CDN Reply ISO MSJ at 10-11.

#19 Potential spoliation and whether it is a red herring.

Spoliation is not a red herring. Rule 26 discovery obligations are rules that are meant to be followed to ensure that parties don't destroy or withhold evidence, particularly evidence damaging to their case. Plaintiffs uncovered some of the spoliation, but the breathtaking scope of the spoliation already documented suggests that Green Mountain directors throughout this five-year litigation improperly withheld responsive communications and deleted them.

Green Mountain does not deny that emails and documents were deleted but tries to defend this by saying that it wasn't intentional and that it stopped before trial began. Adrienne Hanagan's disclosure to Plaintiffs of emails during litigation, between the directors, concerning this case, which were never disclosed shows this is false. Plaintiffs attached the eight emails located to date in their reply in support of the Rule 37 motion. Green Mountain's directors thus continued an improper dialogue about this case on their separate Green Mountain email addresses during this case and hid these communications. This violated Rule 26, the Open Meetings Law, and the Open Records Act. The Court still has time to act as it should to sanction this improper conduct and issue appropriate sanctions.[21]

CONCLUSION

CDN requests that the Court rule on the Rule 37 motion before trial and grant the Plaintiffs their requested relief. CDN further requests that the Court issue any legal rulings which it deems appropriate in advance of trial to give the parties more clarity on how to proceed.

[21] **References:** Plaintiffs' Rule 37 Mot; Plaintiffs' Reply ISO Rule 37 Mot.

Respectfully submitted this 16th day of September, 2024.

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