No. 22-

IN THE

Supreme Court of the United States

MURPHY CREEK, LLC AND MURPHY CREEK DEVELOPMENT COMPANY, INC.,

Petitioners,

v.

MURPHY CREEK METROPOLITAN DISTRICT NO. 3,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Colorado Courts ignored the intent of Congress set forth in 42 U.S.C.A. § 1988 and binding precedents of this Court, and erred in holding that the Petitioners were not "prevailing parties" on their 42 U.S.C.A. § 1983 claim after judicial relief concerning the claim changed the legal relationship between the parties to the Petitioners' benefit without a ruling on the merits, and whether such claim was "substantial" to support an award of reasonable attorneys' fees and costs pursuant to 42 U.S.C.A. § 1988?

2. Whether the Colorado Courts ignored the intent of Congress set forth in 42 U.S.C.A. § 1988 and binding precedents of this Court, and erred in holding that Petitioners are not entitled to an award of attorneys' fees and costs under 42 U.S.C.A. § 1988 on a mooted 42 U.S.C.A. § 1983 claim by holding that: (a) they are not "prevailing parties" for purposes of § 1988; (b) their 42 U.S.C.A. § 1983 claim was not "substantial"; and (c) the prevailing state law claims and 42 U.S.C.A. § 1983 claim did not arise from a "common nucleus of operative fact"?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Murphy Creek, LLC, is a Wyoming limited liability company in good standing in the state of origin. There is no parent or publicly held company that owns more than 10% of the company.

Petitioner, Murphy Creek Development Company, Inc., is a Colorado corporation in good standing in the state of origin. There is no parent corporation or publicly held corporation that owns more than 10% of the corporation.

LIST OF ALL RELATED PROCEEDINGS

- *Murphy Creek Development, Inc. and Murphy Creek, LLC v. Murphy Creek Metropolitan District No. 3*, No. 19-cv-30497, Arapahoe County District Court. Judgment entered September 23, 2020.

- *Murphy Creek Development, Inc. and Murphy Creek, LLC v. Murphy Creek Metropolitan District No. 3*, No. 20-ca-2106, Colorado Court of Appeals. Opinion entered April 28, 2022.

- *Murphy Creek Development, Inc. and Murphy Creek, LLC v. Murphy Creek Metropolitan District No. 3*, No. 21-ca-366, Colorado Court of Appeals. Opinion entered April 28, 2022.

- *Murphy Creek Metropolitan District No. 3 v. Murphy Creek Development Company Inc.*, No. 22-sc-410, Colorado Supreme Court. Opinion entered December 12, 2022.

- *Murphy Creek Development, Inc. and Murphy Creek, LLC v. Murphy Creek Metropolitan District No. 3*, No. 22-sc-464, Colorado Supreme Court. Opinion entered December 12, 2022.

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The unpublished opinion of the Colorado Court of Appeals is available at *Murphy Creek Dev., Inc. v. Murphy Creek Metro. Dist. No. 3*, 21CA0366 (Colo. App. Apr. 28, 2022), reh'g denied (May 26, 2022), cert. denied, 22SC464, 2022 WL 17586336 (Colo. Dec. 12, 2022). *Appendix B*, pp 3a-13a. In the opinion, the Court of Appeals affirmed the Trial Court's denial of the Petitioners' motion for attorneys' fees and costs pursuant to 42 U.S.C.A. § 1988.

The order of the Arapahoe County District Court is available at *Murphy Creek LLC et al. v. Murphy Creek Metro. Dist. No. 3*, 19-cv-30497, Doc. Id. FAB2891947CA7, Order Den. Mot. for Atty. Fees (Dist. Ct. Dec. 18, 2020). *Appendix C*, pp 14a-25a; CF, pp 2058-67. In the order, the Arapahoe County District Court denied the Petitioners' motion for attorneys' fees and costs pursuant to 42 U.S.C.A. § 1988.

STATEMENT OF JURISDICTION

The Colorado Supreme Court denied *certiorari* on December 12, 2022. *Appendix A*, pp 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1257(1) by a petition of parties in a case where final judgments and decrees are rendered by the highest court of the State in which a decision could be had, and a title, right, privilege or immunity is specially claimed under the Constitution and statutes of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. 42 U.S.C.A. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. 42 U.S.C.A. § 1988(b):

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 12361 of Title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's

judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

3. U.S. Const. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Preliminary Statement

The Petitioners were faced with limited choices. They could (a) pay a Colorado local government's compulsory statutory "service fees" that were exorbitant in amount and violated constitutional and statutory norms, (b) forego paying the "service fees" and face foreclosure of their property interests by the local government, or (c) seek judicial relief by challenging the fees' validity under state and federal law.

The Petitioners chose a combination of options (b) and (c) above and obtained a judgment after trial that defeated all fees that the local government had imposed, invoiced and counterclaimed against them. The judgment was affirmed by the Colorado Court of Appeals and is now a final judgment. However, the Colorado Courts failed to apply the standards of review established by this Court concerning an award of reasonable attorneys' fees under 42 U.S.C.A. § 1988.

Ultimately, the Colorado Courts elevated the American Rule over the express legislative intent of the United States Congress and the enforcement authority Congress conferred on the Petitioners through its adoption of 42 U.S.C.A. § 1988. But for the Colorado Courts' errors, Petitioners would have been awarded their reasonable attorneys' fees under § 1988.

2. Summary of Case

Respondent, Murphy Creek Metropolitan District No. 3 ("District"), is a Colorado special district and quasi-governmental entity, formed under Title 32, Colorado Revised Statutes (the "Special District Act"). *Appendix E*, p 66a; CF, p 1497 ¶ II.3. The District furnishes certain public services and facilities to a portion of a master planned golf course community known as "Murphy Creek" located in the eastern plains of the City of Aurora, Colorado ("City"). *Appendix D,* p 28a; CF, pp 1749, 1751.

The Special District Act authorizes special districts to impose "service fees" to fund public services and facilities, provided the amount charged is reasonably related to the cost to provide the service and facility. § 32-1-1001 (1)(j)

(I), C.R.S.; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 693–94 (Colo. 2001).

As of November 2018, the District contained approximately 1,200 homes and 75 acres of unimproved vacant land (the "75 Acres"). CF, p 1744. The Petitioners owned and leased almost all the 75 Acres (73.83 acres) to a rancher for cattle grazing and crop growing. *Appendix D*, pp 42a-43a; CF, p 1753. Cattle grazing and crop growing were permitted agricultural uses under the City of Aurora's municipal zoning ordinances, and the Development Agreement between Petitioners and the City contemplated and protected these uses. *Appendix D,* p 34a; Ex. Trial p 1748.

In November 2018, the District's board of directors imposed, under the color of state law, two purported "service fees" on the 75 Acres pursuant to a District resolution known as the "O&M Fee Resolution."[1] *Appendix D*, pp 30a-31a; *Appendix F*; CF, p 1747. The first fee charged $300 per-month per-acre of non-agricultural vacant land and the second charged $600 per-month per-acre of agricultural vacant land. *Id.*; *Appendix F*, pp 75a-76a. The $600 charge was titled the "Agricultural Land Fair Share and Abuse Prevention Fee." *Id.* The District invoiced the monthly $300 charge against 1.34 acres and the $600 charge against each of the 73.83 acres of the 75 Acres. CF, pp 11-15. In addition, the District booked the charges as revenue on its official financial statements and audits. CF, pp 781 and 1345; Ex. Trial, pp 237-306. The O&M Fee Resolution purported to impose the $600 charge

1. The O&M Fee Resolution also imposed a charge of $60 per month on each residence in the District.

against "undeveloped land held within the boundaries of the District" that is "used for agricultural purposes," which was identified as property "*zoned* agricultural (including any class of grazing land)." *Appendix F*, p 76a (emphasis added). However, Petitioners' property was in fact *classified* as agricultural under a grazing class but *zoned* "planned development" instead of "agricultural." [2] *Appendix D*, pp 31a FN1, 34a; *Appendix E*, pp 68a-69a.

The Petitioners challenged both fees under state law claiming that the fees were invalid because the amounts charged were not reasonably related to service and facility costs. *Appendix E*, pp 57a-59a. The Petitioners also claimed that the $600 fee violated 42 U.S.C.A. § 1983, because the charge violated due process rights implicated in the Fifth and Fourteenth Amendment and rights under the Eighth Amendment of the United States Constitution. *Id.*; CF, pp 492-93. Specifically, the Petitioners claimed the District used the statutory "service fee" as a cover to impose an illegal regulatory civil penalty intended to penalize agricultural use and incentivize residential development. *Id.*

For nearly two years before the August 2020 trial, the District steadfastly defended the $300 fee as the vacant land's "fair share" for services and facilities provided to the community, and the $600 fee as combination of the "fair share" of $300 plus an additional $300 for "unfair burdens and expenses" caused by the presence of Petitioners'

2. There is no such thing as property "zoned agricultural" under the City of Aurora's zoning code. https://aurora.municipal.codes/UDO/146

agricultural grazing land.[3] *Appendix D*, pp 75a-76a; See CF, pp 1021-35 (Response brief defending the charge as a "service fee" that is reasonably related to service costs); CF, p 1371 (Order denying Petitioners' motion for summary judgment based on the disputed fact that the charge was reasonably related to additional service costs purportedly caused by agricultural land).

At the August 2020 trial, the District's President boldly testified that it was necessary to impose a higher "nuisance or penalty fee" for agricultural use "because of the nuisance factor of having cattle right next to the residential community," yet admitted that "there was no service associated with the penalty." TR 8/24/20, pp 192:11-15 and 193 11-15; TR 8/25/20, p 25:21-23; *Appendix D,* 35a-36a (Trial Court's findings regarding District President Schriner's testimony on the agricultural charge). After acknowledging that the "cost is the same" to maintain District improvements adjacent to vacant property and vacant-agricultural property, the President testified that:

> It was our determination at the Board to provide a financial incentive to the developer to sell the property and get it developed. And we deemed the agricultural use as not conducive to the community. And we were desirous of the developer to sell the property as quickly as possible.

TR 8/25/20, p 22:6-19.

3. The District claimed the "unfair burdens and expenses" came in the form of "tax abuse," additional landscape and security service costs and nuisance damages purportedly caused by agricultural use within and south of the District.

After trial, the District's written closing argument offered to concede the $600 "nuisance" charge it invoiced and booked against 73.83 acres in favor of the $300 charge. *Appendix D*, pp 31a, 31a FN1, 54a FN4; CF, pp 1698-1700. As an explanation for conceding the fee after its two-year steadfast defense of the fee, the District stated it had mistakenly used the term "zoned" instead of "classified" in the O&M Fee Resolution referring to the Petitioners' agricultural grazing land, and thus, the Court *could* rule that the charge does not apply since there is no property "zoned agricultural." *Id*.

Notably, the District's offer to concede the $600 charge was made notwithstanding (a) the District stipulating that the District imposed the charge on property "classified agricultural," (b) the evidence in the record demonstrating the District's intent to charge Petitioners' agricultural property, and (c) the District's unequivocal knowledge that the property was not "zoned agricultural" long before the August 2020 Trial.[4] *Appendix E*, pp 60a-63a, 68a-69a; CF, p 1498, ¶ 15; See CF, pp 1022-23 and 1182-83 (demonstrating District's knowledge that the property was not "zoned agricultural" as early as February 2020).

Moreover, in addition to its offer to concede the $600 charge in favor of the $300 charge, the District's closing argument also posited that if the Trial Court did

4. The District claimed in its closing argument that it was unaware of the fact that the property was zoned "planned development," but the District produced the City of Aurora Zoning Map demonstrating the property was zoned "planned development" and argued (incorrectly) six months prior to trial that Petitioners had no right to agricultural use under the "planned development" zoning. CF, pp 1022-23 and 1182-83

not accept the District's concession, the additional $300 imposed under the $600 charge was a proper "nuisance fee." CF, pp 1698-1700.

The Petitioners filed their closing argument one-day prior to the District's closing argument (the District was granted a *post facto* extension after missing the closing argument deadline), arguing that the O&M Fee Resolution's operative language was vague because it erroneously referenced a non-existent type of zoning to describe a class of grazing land, and that the District used the color of a statutory service fee to impose an impermissible regulatory civil penalty that was unrelated to service costs, thus infringing the Petitioners' due process and 8th Amendment rights in violation of § 1983. CF, pp 1660,1665-69, 1677.

In its judgment after trial, the Trial Court accepted the District's concession by declaring that the $600 charge did not apply given the errant reference to "zoned" and then mooted the § 1983 claim. *Appendix D*, pp 31a FN1 and 54a FN4. The Trial Court then found that the base $300 "fair share" charge was unreasonable in amount, and thus, invalid under state law. *Appendix D*, pp 54a-55a. In doing so, the Trial Court observed that even a portion of the invalidated $300 base fee "was not associated with the costs of services provided, but rather as a 'penalty' or a means to "incentivize" the Plaintiffs to more quickly develop the property….". *Id.* The Trial Court also found in Petitioners' favor on all of the District's counterclaims, including counterclaims for nuisance and unjust enrichment. *Id.* In the end, Petitioners did not owe the District any of the invoiced fees. *Id.*[5]

5. The Trial Court's judgment invalidating the $300 charge was affirmed by the Colorado Court of Appeals in *Murphy Creek*

Trouble arose, however, when the Petitioners moved for attorneys' fees as "prevailing parties" under 42 U.S.C.A. § 1988. In response to this motion, the Colorado Courts held that Petitioners were not "prevailing parties" under § 1988 and declined to award Petitioners their reasonable attorneys' fees. *Appendix B*; *Appendix C*.

Certiorari review is necessary in this case to (i) enforce the United States Congress' intent that state courts award reasonable attorneys' fees under 42 U.S.C.A. § 1988 to "prevailing parties," and (ii) ensure that state courts follow the "prevailing party" award precedent under § 1988 established by this Court and the federal circuits.

REASONS FOR GRANTING THE PETITION

The Petitioners seek *certiorari* review because they are undeniably "prevailing parties" entitled to a reasonable fee. As acknowledged in *Maher v. Gagne*, 448 U.S. 122, 132 (1980),

> "Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication."

Dev., Inc. v. Murphy Creek Metro. Dist. No. 3, 20CA2106, 2022 WL 1416357 (Colo. App. Apr. 28, 2022), cert. denied *sub nom.*

There is no disputing that the Trial Court's judgment after trial materially benefited the Petitioners by conferring judicial relief that eliminated every single fee invoiced and booked by the District on Petitioners' 75 Acres. Therefore, the availability of the fee award *vel non* should not be in question (just the amount). *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). However, the Colorado Courts overlooked or misapprehended this Court's binding precedent by (i) failing to confer "prevailing party" status regarding the § 1983 claim and (ii) failing to apply the requisite standard of review for a "prevailing party" on a non-fee claim for purposes of § 1988. Some of the cases establishing the binding precedent are described below.

1. Legal Standard

"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n*, 489 U.S. at 792-93. "Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award… not to the availability of a fee award *vel non*." *Id.* at 793 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)).

Further, "prevailing party" status is not limited to a § 1983 claim and can apply to non-fee claims.

> "To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim,

> is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales v. Haines*, 486 F.2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. *Hagans v. Lavine*, 415 U.S. 528, 94 S.Ct. 1342, 39 L.Ed.2d 577 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, see *Hagans v. Lavine*, supra; *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Workers v. Gibbs*, supra, at 725, 86 S.Ct., at 1138." H.R.Rep. No. 94–1558, p. 4, n.7 (1976).

Maher, 448 U.S. at 133 and n.15.

The standard applied under § 1988 establishes that the prevailing party "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust." *Phelps v. Hamilton*, 120 F.3d 1126, 1131 (10th Cir. 1997). In *Hamilton*, the 10th Circuit Court of Appeals reversed a district court's denial of § 1988 attorney fees noting that fee awards are an essential remedy, that only a few cases have denied such attorney fees, and such discretion to deny fee awards is "quite narrow." *Id.*; see also *Farrar v. Hobby*, 506 U.S. 103, 119 (1992) (holding attorneys' fees should only be denied when a victory is pyrrhic, technical, or de minimis in nature).

2. The Petitioners Prevailed On Their § 1983 Claim.

Although the Trial Court declined to rule on the merits, the Petitioners are prevailing parties on their § 1983 claim because the Trial Court's disposition of the claim changed the legal relationship between the parties to the Petitioners' benefit. Indeed, when the Trial Court accepted the District's concession and declared the $600 charge inapplicable, the Petitioners' rights were vindicated and they achieved the primary relief sought in the entire case – i.e. elimination of the $600 per-month per-acre charge that the District had invoiced against the 73.83 acres of property every month for nearly two years.

In this way, the Petitioners are no different from the prevailing-party plaintiff in *Maher*. The *Maher* plaintiff sought enforcement of federal rights, and the case was settled via a consent decree affording the relief sought but stating that no party admits fault. 448 U.S. at 122. Despite no admission of fault, this Court affirmed "prevailing party" status under § 1988 quoting a Senate Report stating: "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id*. at 129.

In this case, the District invoiced, defended, and counterclaimed the $600 charge as a valid "service fee" for nearly two years until it acknowledged the mistaken reference to "zoned" and offered to concede the charge in its closing argument. Importantly, the District did not repeal the charge or offer to dismiss its counterclaim seeking to collect the charge, plus interest and late fees,

via a personal judgment against the Petitioners. Rather, the District argued that the charge was a proper "nuisance fee" instead of a "service fee," while also conceding that the Court *could* declare it inapplicable (just as the Petitioners' closing argument had requested). CF, pp 1698-1700. Naturally, the Petitioners did not object to the District's offer to concede roughly 99% of the amount the District had invoiced to date and the corresponding statutory government lien that had been automatically imposed against the property.[6] The Trial Court's judgment declaring the $600 charge inapplicable vindicated Petitioners' rights and changed the legal relationship between the parties because it: (a) relieved Petitioners of two years of the District's invoices and the automatic, statutory lien for the $600 charge on 73.83 acres of grazing land, (b) voided the corresponding fee revenue booked on the District's official financial statements and audits, and (c) defeated District counterclaims seeking payment of the $600 charge from the Petitioners. *Appendix D.*

In denying "prevailing party" status on the § 1983 claim, the Colorado Courts relied primarily on published opinions of the Colorado Court of Appeals and only considered the lack of a ruling on the merits, as opposed to the touchstone inquiry of whether the Trial Court's judgment altered the legal relationship between the parties. *Appendix B*, pp 4a-9a*; Appendix C*, pp 22a-23a. For example, instead of focusing on the material change to the legal relationship between the parties, which left the Petitioners owing the District none of the millions in

6. As stated above, the District invoiced 73.83 acres the $600 charge and 1.34 acres the $300 charge through the August 2020 trial.

fees it invoiced, the Court of Appeals cited to *Deighton v. City Council of City of Colorado Springs*, 3 P3d 488 (Colo. App. 2011) to state the following standard of review: "[t]o be considered a prevailing party for purposes of section 1988, the party must (1) receive monetary damages, (2) obtain an injunction, or (3) obtain a declaratory judgment from which it directly benefits." *Appendix B*, p 7a. The Court of Appeals then relied on the (i) lack of a ruling on the merits regarding the "Agricultural Fee" and (ii) the Trial Court's judgment accepting the District's concession to conclude the Petitioners were not "prevailing parties," because they "did not obtain a judgment on their federal claims concerning the Agricultural Fee." *Appendix B*, pp 8a-9a. Similarly, the Trial Court cited to *Deighton* to hold that Petitioners were not "prevailing parties," because "a plaintiff must obtain a declaratory judgment before the actions of either party render the case moot" in reference to the District's offer to concede the $600 agricultural charge in its closing argument and the Court's judgment accepting the offer. *Appendix D*, 23a. As such, the Colorado Courts overlooked the "touchstone inquiry" for "prevailing party" status required by this Court and failed to apply the requisite standard of review. *Texas State,* 489 U.S. at 792-93.

Further, although they did not cite to it, the Colorado Courts seemingly agreed with the District's argument that the Petitioners' claim to attorneys' fees fell under the "catalyst theory" that this Court rejected in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001) (requiring some form of judicial relief to confer prevailing party status). CF, p 1906. However, *Buckhannon* only applies where there is (i) a voluntary action rendering

a claim moot and (ii) no relief is granted in the case. *Buckhannon*, 532 U.S. at 598, 605, and 610. Here, the "catalyst theory" is inapplicable because Petitioners obtained a judgment in their favor invalidating the $300 charge and otherwise obtained relief from the Trial Court declaring the invoiced $600 charge inapplicable.

Accordingly, the Colorado Courts overlooked and/or misinterpreted *Maher* and other opinions of this Court conferring "prevailing party" status in a circumstance where a court's judgment alters the legal relationship of the parties to the plaintiff's benefit but the court does not rule on the § 1983 claim's merits. Just as in *Maher*, although the Trial Court did not find a violation of the United States Constitution, the constitutional issues remained in the case until the dispute was settled by the entry of a judgment accepting the District's undisputed concession regarding the $600 charge's inapplicability. See *Maher*, 448 U.S. at 131 ("Although petitioner is correct that the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by the entry of a consent decree.").

The Petitioners are prevailing parties on their § 1983 claim under the standard of review established by this Court. The Trial Court entered judicial relief declaring the $600 charge inapplicable, which vindicated the Petitioners' rights and materially altered their legal relationship with the District to the Petitioners' benefit. *Id*. at 129.

3. The Petitioners Prevailed On A Non-Fee Claim, The § 1983 Claim Was Substantial, and the Non-Fee Claim and § 1983 Claim Arose From A Common Nucleus of Operative Fact.

In addition to prevailing on a § 1983 claim, a party is entitled to reasonable attorneys' fees where a court does not reach a plaintiff's § 1983 claim but the plaintiff prevails on a non-fee generating claim, provided the § 1983 claim was "substantial" and arose from a common nucleus of operative fact as the prevailing non-fee claim. *Maher*, 448 U.S. at 133 and n.15. In this case, the Colorado Courts failed to apply the requisite standard of review.

The "substantiality" test applies the same standard of review used for pendent jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536–39 (1974). A claim lacks "substantiality" only if it is so obviously without merit or frivolous that it would not confer pendent jurisdiction. *Plott v. Griffiths*, 938 F.2d 164, 167 (10th Cir. 1991).

The "common nucleus of operative fact" test is satisfied if the subject claims are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725.

a. Prevailing Party

The Trial Court entered judgment in Petitioners' favor that the $300 base charge was invalid for being unreasonable in amount under state law. Therefore, the Petitioners were clearly "prevailing parties" on a non-fee generating claim for purposes of § 1988.

b. Substantiality

The Petitioners' § 1983 claim easily satisfies the Court's "substantiality test," which applies the same test used to consider pendent jurisdiction. *Hagans*, 415 U.S. at 536–39. The Petitioners' pleading alleges a deprivation – under the color of a "service fee" imposed pursuant to state law – of their constitutional right to due process (5th and 14th Amendment) and to be free of excessive and impermissible regulatory civil penalties (8th Amendment). These allegations are neither frivolous nor so insubstantial as to be beyond pendent jurisdiction. *Id.*

Specifically, the Petitioners alleged that the District used the cover of a statutory "service fee" under state law to impose a charge that was unrelated to service costs and was instead imposed to regulate a matter outside the District's jurisdiction (i.e. land use and a perceived but not an actual case of nuisance and tax abuse), and thus, did not serve a legitimate special district objective. CF, p 492-93. In fact, the District eventually adopted this position after trial and on appeal to argue its "nuisance fee" sought to discourage a purported nuisance and was thus unrelated to services and did not share a common nucleus of operative fact with the invalidated $300 base charge for services. CF, 1698-1700.

The Trial Court did not mention "substantiality" in its order denying attorneys' fees[7], and the Colorado Court of Appeals misapplied the standard of review for "substantiality" to conclude the § 1983 claim was not substantial. *Appendix C*, pp 22a-23a; *Appendix B*, p 9a.

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7. It bears mentioning that the Trial Court denied the District's mid-trial motion for judgment as a matter of law on the § 1983 claim. TR 8/26/20, pp 34:19-24

Specifically, the Court of Appeals incorrectly relied on the Trial Court's finding – that Petitioners were not deprived of actual agricultural use given the Petitioners continued to graze their property throughout the litigation – to conclude there was no deprivation, and thus, the § 1983 claim was not "substantial." *Appendix B*, p 9a.

However, the Petitioners never alleged a deprivation of agricultural use. Instead, they alleged and argued a deprivation of due process and a deprivation of the right to legally use their property without being subjected to an unconstitutional penalty designed to discourage their legal, agricultural use. CF, pp 1665-68. Moreover, the Trial Court's finding was inconsequential under the standard of review, as the standard concerns whether the claim is so obviously without merit or frivolous that it would not confer pendent jurisdiction – not whether the Trial Court eventually found a deprivation. *Plott*, 938 F.2d at 167.

As demonstrated by the District President's testimony and the District's post-trial and appellate arguments that the $600 charge was a "penalty" or "nuisance fee" instead of a "service fee," the Petitioners' § 1983 claim was obviously "substantial." *Appendix D*, pp 34a-38a.

c. Common Nucleus of Operative Fact

Both the Trial Court and Court of Appeals failed to apply the standard of review for determining whether a non-fee claim and a § 1983 claim arise from a common nucleus of operative fact. The applicable standard is whether the subject claims are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Gibbs*, 383 U.S. at 725.

The Trial Court concluded that the prevailing non-fee state law claims that successfully invalidated $300 base charge did not share a common nucleus of operative fact with the § 1983 claim challenging the $600 charge. *Appendix C*, p 23a.[8] However, both charges were adopted under the same resolution purporting to fund service costs, and the prevailing non-fee claim challenged both the $300 and $600 charges. CF, pp 1492-93. Surely one would ordinarily expect the Petitioners to try all claims concerning the validity of the O&M Fee Resolution's various "service fees" in a single proceeding. *Gibbs,* 383 U.S. at 715.

Similarly, the Court of Appeals erroneously concluded that the claims shared no common nucleus of operative fact, because the District conceded the issue and the Trial Court did not make findings on the federal issues that Petitioners raised in the § 1983 claim. *Appendix B*, p 8a.

In this case, all claims arose out of the District's adoption of the O&M Fee Resolution purporting to impose statutory "service fees" to fund the District's services, and the common thread among all claims was the District's "Agricultural Land Fair Share and Abuse Prevention Fee" imposed and invoiced against 73.83 acres of Petitioners' agricultural grazing class land. Thus, the prevailing non-fee state-law claims arose from a common nucleus of operative fact with the § 1983 claim.

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8. Note that the Trial Court's finding mistakenly referenced the $300 charge (i.e. the "operation and maintenance fees") as opposed to the $600 charge in its finding that the claims on which the Petitioners prevailed did not share a common nucleus of operative fact with the prevailing state law claims.

As prevailing parties that alleged a substantial § 1983 claim in a case where all claims arose from a common nucleus of operative fact, the Petitioners are entitled to reasonable attorneys' fees under § 1988. However, the Colorado Courts misapplied the standards of review established by this Court and elevated the American Rule over Congress' legislative intent concerning § 1988 to deny Petitioners an award of any attorneys' fee whatsoever.

CONCLUSION

Petitioners respectfully request that the Supreme Court grant review of this matter to ensure that (i) Congress' intent regarding "prevailing parties" for purposes of 42 U.S.C.A. § 1988 is enforced in state courts, and (ii) state courts follow and prioritize the precedent established by this Court regarding § 1983 and § 1988 over their own published opinions.

Respectfully submitted this 13th day of March 2023.

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APPENDIX

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APPENDIX A — ORDER OF THE SUPREME COURT OF COLORADO DENYING PETITION, DATED DECEMBER 12, 2022

Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Certiorari to the Court of Appeals, 2020CA2106
Arapahoe County District Court, 2019CV30497

Supreme Court Case No:
2022SC410

MURPHY CREEK METROPOLITAN DISTRICT NO 3,

Petitioner,

v.

MURPHY CREEK DEVELOPMENT COMPANY, INC., A COLORADO CORPORATION AND MURPHY CREEK, LLC A WYOMING LIMITED LIABILITY COMPANY,

Respondents.

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 12, 2022.

APPENDIX B — OPINION OF THE COLORADO COURT OF APPEALS, DATED APRIL 28, 2022

COLORADO COURT OF APPEALS

CASE NUMBER: 2021CA366

Court of Appeals No. 21CA0366
Arapahoe County District Court No. 19CV30497

MURPHY CREEK DEVELOPMENT, INC., A COLORADO CORPORATION, AND MURPHY CREEK, LLC, A WYOMING LIMITED LIABILITY COMPANY,

Plaintiffs-Appellants,

v.

MURPHY CREEK METROPOLITAN DISTRICT NO. 3, A QUASI-MUNICIPAL CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF COLORADO,

Defendant-Appellee.

DATE FILED: April 28, 2022

Honorable Elizabeth Beebe Volz, Judge

ORDER AFFIRMED

Division VII
Opinion by JUSTICE MARTINEZ*
Berger and Taubman*, JJ., concur

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

Appendix B

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 28, 2022

This is a companion case to *Murphy Creek Development, Inc. v. Murphy Creek Metropolitan District No. 3*, (Colo. App. No. 21CA2106, April 28, 2022) (not published pursuant to C.A.R. 35(e)) (*Murphy Creek I*).

In this attorney fees and costs dispute between Murphy Creek Development, Inc., and Murphy Creek, LLC (collectively, Developers) and Murphy Creek Metropolitan District No. 3 (the District), Developers appeal the trial court's order denying an award of attorney fees and costs under 42 U.S.C. section 1988 and section 13-17-102, C.R.S. 2021. Because we conclude that the trial court did not err by denying Developers' request for attorney fees and costs pursuant to section 1988 and section 13-17-102, we affirm. Because we affirm, we grant the District's request for appellate costs.

I. Background

The facts and procedural history of the case are described in detail in *Murphy Creek I*. For purposes of this appeal, we need only summarize the background briefly.

In November 2018, the District approved a resolution concerning the imposition of operations, recreation, and landscape maintenance fees (the O&M Fee). The O&M Fee imposed a $600 per acre monthly fee on agricultural land (the Agricultural Fee), as well as a $300 per acre monthly fee for unplatted land, and a $60 monthly fee for residential

platted units. Developers sued to challenge the O&M Fee, which the District applied to their approximately seventy-five acres of vacant land.

In response to Developers' challenge to the O&M Fee, the District adopted a backup fee resolution (the Backup Fee) to replace the O&M Fee that instead imposed a $220 per acre monthly Agricultural Fee, as well as a $315 per acre monthly fee for unplatted land, and a $60 monthly fee for residential platted units.

Developers filed an amended complaint to address the Backup Fee and added claims challenging the Agricultural Fee under the Eighth Amendment to the United States Constitution and under 42 U.S.C. section 1983, arguing that the Agricultural Fee was "an excessive and punitive economic sanction" against Developers' lawful use of the land, which deprived them of their constitutional rights.

At trial, the District conceded that any Agricultural Fee could not be assessed against Developers because all of Developers' land was zoned for planned development and not for agricultural use. As a result, the trial court found that "it need not address the constitutionality of such agricultural penalties" because the claim became moot and the Developers were not deprived of their right to continue using the land for grazing purposes.

The trial court also found that Developers prevailed on their state claim that the O&M Fee and the Backup Fee were unreasonable because they were not "rationally calculated to cover the cost of services provided to

[Developers]," but Developers did not prevail on their state constitutional claims that the fees constituted a tax.

In October 2020, Developers submitted a motion for reasonable attorney fees and costs. Developers requested $5,318.02 in costs incurred after a statutory offer of settlement, as well as $302,844 in attorney fees and $14,041.44 in costs pursuant to section 1988 or section 13-17-102.

In December 2020, the trial court issued an order awarding Developers $5,318.02 in costs incurred after a statutory offer of settlement. The trial court denied Developers' motion for an award of attorney fees and costs pursuant to section 1988 because it found that Developers' federal claims became moot when the District conceded that Developers' property was not zoned for agricultural use and Developers were not deprived of their right to continue using the land for grazing purposes. Further, the trial court denied Developers' motion for an award of attorney fees and costs under section 13-17-102 because it found that the District successfully challenged Developers' claims that the subject fees were not fees, but taxes, which demonstrated a reasonable basis for part of their defense.

II. Analysis

A. Section 1988 Attorney Fees and Costs

Developers first contend that the trial court erred by not awarding them attorney fees and costs under section 1988 because they were the prevailing party, pleaded a

substantial claim, and their constitutional and state law claims arose from a common nucleus of operative fact. We disagree.

1. Standard of Review and Applicable Law

We review a trial court's decision to deny a plaintiff attorney fees under an abuse of discretion standard. *Deighton v. City Council*, 3 P.3d 488, 490 (Colo. App. 2000). We review any statutory interpretations or legal conclusions that provide a basis for the award de novo. *Id.*

Under section 1988, "a prevailing party is eligible to recover attorney fees under that section if it pled a 'substantial' section 1983 or constitutional claim." *Beaver Creek Prop. Owners Ass'n v. Bachelor Gulch Metro. Dist.*, 271 P.3d 578, 585 (Colo. App. 2011) (citation omitted). To state a claim for relief under section 1983, a party must allege that the defendant acted under color of state law and deprived the defendant of a right, privilege, or immunity secured by the Federal Constitution and laws. *Id.* at 586. Further, the state law and constitutional claims "must arise out of a common nucleus of operative facts." *Deighton*, 3 P.3d at 490 (quoting *Plott v. Griffiths*, 938 F.2d 164, 168 (10th Cir. 1991)).

To be considered a prevailing party for purposes of section 1988, the party must (1) receive monetary damages, (2) obtain an injunction, or (3) obtain a declaratory judgment from which it directly benefits. *Id.*

Appendix B

2. The Trial Court Did Not Err by Denying Developers' Section 1988 Claim

Developers contend that because they obtained a declaratory judgment when the court found the O&M Fee and Backup Fee unreasonable, they are considered a prevailing party under section 1988. While the trial court issued a judgment finding that the methodology for determining the amount of fees was unreasonable in making calculations regarding security, snow removal, and landscaping services, it did not issue a judgment as to the separate Agricultural Fee. Instead, the court found that Developers were not deprived of their right to use the land for grazing purposes and the Agricultural Fee could never apply because the land was zoned for planned development, which rendered the claim moot. Thus, Developers did not obtain a judgment on their federal claims concerning the Agricultural Fee.

In addition, Developers prevailed because the court found that the O&M Fee and Backup Fee were not imposed based on a reasonable methodology and did not make any findings or conclusion related to the claims that the Agricultural Fee violated their rights under the Eighth Amendment and section 1983. The resolution adopting the Agricultural Fee specified that it applied to property zoned agricultural and did not apply to Developer property, which was not zoned agricultural. Developers claims did not include the defense that the Agricultural Fee did not apply to their property. Rather, the court noticed that the District conceded this issue. Accordingly, the claims did not arise from a common nucleus of operative fact.

Therefore, because Developers were not deprived of their right to continue using the land for grazing purposes, they did not have a substantial section 1983 claim. We agree with the trial court that for purposes of section 1988, Developers are not the prevailing party. Because Developers are not the prevailing party, we conclude that Developers' constitutional claims do not warrant an award of attorney fees and costs under section 1988.

B. Section 13-17-102 Attorney Fees and Costs

Developers next contend that the trial court abused its discretion when it alternatively denied Developers attorney fees and costs under section 13-17-102 because it concluded the District did not act vexatiously, groundlessly, and frivolously. We disagree.

1. Standard of Review and Applicable Law

Whether an award of attorney fees is warranted under section 13-17-102 is a matter left to the discretion of the trial court, and we will not reverse the court's decision absent a showing of an abuse of that discretion. *Brown v. Faatz*, 197 P.3d 245, 253 (Colo. App. 2008). A trial court abuses its discretion only if its decision is manifestly arbitrary, unreasonable, or unfair. *Churchill v. Univ. of Colo.*, 2012 CO 54, ¶ 74. Therefore, we will not disturb a trial court's denial of attorney fees as long as the record supports the trial court's finding that the claim did not lack substantial justification. § 13-17-102(4); *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 300 (Colo. App. 2009).

Appendix B

Section 13-17-102 provides that in civil actions the court may award costs and reasonable attorney fees against any party who has brought or defended a civil action that the court finds lacked substantial justification. An action lacks substantial justification when it is "substantially frivolous, substantially groundless, or substantially vexatious." § 13-107-102(4).

"A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *W. United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). A claim or defense is groundless if it is unsupported by any credible evidence. *E-470 Pub. Highway Auth. v. Jagow*, 30 P.3d 798, 805 (Colo. App. 2001), *aff'd*, 49 P.3d 1151 (Colo. 2002). A claim or defense is vexatious if it is "brought or maintained in bad faith." *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 511 (Colo. App. 2009).

2. The Trial Court Did Not Err by Denying Developers' Section 13-17-102 Claim

In its motion for attorney fees and costs, Developers argued that "at least a significant portion of the . . . Fees were imposed as a 'penalty' to discourage 'tax abuse' and 'incentivize' residential development." Developers also argued that they "incurred substantial attorney fees litigating the validity of the agricultural fee for nearly two years, only for the District to withdraw the fee in its closing argument."

In making its finding, the trial court stated that the District

> successfully challenged [Developers'] claims that the subject fees were not fees but taxes . . . [and] while the District did not prevail on its assertion that the amount of fees assessed against [Developers] were supported in fact, this does not mean that their defense of [Developers'] claims had no basis in law or fact or [were] alleged for improper purposes.

Further, a trial court need not set forth with specificity its reasons for denying a fee request. *Munoz v. Measner*, 247 P.3d 1031, 1035 (Colo. 2011). Rather, a trial court need only "set forth findings that are sufficient to allow, under an abuse of discretion standard, appellate review of the trial court's decision to deny a fee request." *Id.* (citing *Stearns Mgmt. Co. v. Mo. River Servs., Inc.*, 70 P.3d 629, 634 (Colo. App. 2003)).

As to the Agricultural Fee, while it is true that the District did not concede that the fee was not applicable to Developers until the close of trial, the record supports the trial court's conclusion that there is no evidence that this late concession was frivolous, groundless, or vexatious.

Developers initially argued that the Agricultural Fee was an "unreasonable fine in violation of the Eighth Amendment of the United States Constitution." The District initially argued that the Agricultural Fee applied "to defray the additional burden placed on the District and the costs of the services provided by the

[D]istrict to agricultural properties." Moreover, in the trial management order, both parties stipulated that the resolution imposed a fee on "unplatted land that is *classified* as agricultural (including any class of grazing land)." (Emphasis added.) However, neither party mentioned until the close of trial that the Agricultural Fee never applied based on the plain language of the District's resolution that it only applied to "unplatted land that is *zoned* Agricultural (including any class of grazing land)." (Emphasis added.)

On this record, we conclude that the court's decision to deny attorney fees to Developers was not manifestly arbitrary, unreasonable, or unfair.

C. Appellate Attorney Fees and Costs

Developers request appellate attorney fees under C.A.R. 39.1, which provides us with the discretion to "determine entitlement to and the amount of an award of attorney fees for the appeal, or [to] remand those determinations to the lower court or tribunal."

The District requests its appellate costs under C.A.R. 39(a)(2), which provides that if a judgment is affirmed, costs are taxed against the appellant. A party who wants costs to be taxed in the appellate court must file an itemized and verified bill of costs with the clerk of the trial court. *See* C.A.R. 39(c)(2).

Given our disposition, we grant the District's request for appellate costs and deny Developers' request for appellate attorney fees.

Appendix B

III. Conclusion

The order is affirmed.

JUDGE BERGER and JUDGE TAUBMAN concur.

APPENDIX C — OPINION OF THE DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO, FILED DECEMBER 18, 2020

DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO
7325 South Potomac Street
Centennial, Colorado 80112

Case Number: 2019CV30497
Div. 202

MURPHY CREEK DEVELOPMENT, INC.
and MURPHY CREEK, LLC,

Plaintiffs,

v.

MURPHY CREEK METROPOLITAN
DISTRICT NO.3,

Defendants.

ORDER RE: PLAINTIFFS' MOTION FOR REASONABLE ATTORNEY'S FEES AND COSTS

THIS MATTER comes before the Court on Plaintiffs Murphy Creek Development, Inc. and Murphy Creek, LLC ("Plaintiffs" or "Murphy Creek")'s motion for award of attorneys' fees and costs.[1] The Court having considered

1. Defendant filed a Notice of Appeal on December 18, 2020. Such notice does not divest the trial court of jurisdiction to determine fees and costs during the pendency of appeal. *Koontz v. Rosener*, 787 P2d 192, 198 (Colo. App. 1989)

the evidence, arguments, pleadings and applicable law finds that the motion is GRANTED IN PART and DENIED IN PART.

I. LITIGATION HISTORY

1. Plaintiffs sought a declaratory judgment related to certain operation and maintenance fees imposed by Defendant Murphy Creek Metropolitan District ("Defendant" or the "District"). Plaintiffs asserted that the fees were improper taxes based on arguments that they were: (a) intended to fund the Districts operating budget; (b) did not reasonably relate to service costs; (c) violated TABOR election requirements; and (d) were not *ad valorem* or uniform. (First – Eighth Claims for Relief). Plaintiffs also asserted claims for relief under the Eighth Amendment of the United States Constitution contending that a special assessment on agriculture property was an unconstitutional excess penalty (Ninth and Tenth Claims for Relief) TMO, Pltfs Claims.

2. In response to the lawsuit the District sought a declaratory judgment that the fees imposed by the District on Plaintiffs as property owners were "rationally related to the costs of services … provided," and that the District was entitled to "impose higher fees, rates, or fines to discourage abuses that impose additional costs on the District." TMO Def claims. The District asserted that it "found that it incurred significant costs while providing services to agricultural and vacant property … include[ing[snow removal, landscape maintenance and improvements, weed and pest control, security and

similar services. Defs Tr. Brief, p.2. The District denied that it sought to impose a tax to raise revenue arguing that "the District imposed fees in order to defray the costs of specific services…" Defs. Tr. Brief, p.13.

3. The matter proceeded to trial before the Court on August 25, 2020.

4. The Court issued its Findings of Fact, Conclusions of Law & Judgment on September 23, 2020. On the issue of whether the charges imposed by the District were "taxes" or "fees" the Court concluded that "the primary purpose of the assessment was to pay for … services." Jdgmt, 15. The Court stated that even where "the purpose of assessing service fees is permitted … such fees, as applied, must be rationally related to the cost of the services provided." Jdgmt, 15. The Court then went on to find that based on the factual evidence presented at trial, the fees "were not rationally calculated to cover the cost of services provided to Plaintiffs." Jdgmt, 15. Again, based on the factual findings of the Court, "the evidence support[ed] a finding that the cost of these services [was] almost half what the District assert[ed]." Jdgmt, 17. The Court also found that "there was insufficient evidence to support the argument that the Plaintiffs' unplatted and undeveloped land increase[d] the cost of … services [related to such property.]" Jdgmt, 17. Finally, the Court stated that "This ruling does not mean that Plaintiffs cannot be assessed service fees at all, rather, the fees must relate to the services provided." Jdgmt, 18 fn5.

5. As to the constitutional claims, the Court determined that "since [the District] concede[d] that any agricultural

fee [could] not be assessed against Plaintiffs, the Court finds that it need not address the constitutionality of such agricultural penalties." Jdgmt, 18 fn4. The District, at the conclusion of the trial, and in its closing brief acknowledged that "the $300/month agricultural fee [was] only applicable to property that is 'zoned' agricultural … [and that] … [a]t trial it was determined that all of Plaintiffs' unplatted land is zoned 'PD' for planned development and none is zoned agricultural and therefore the so-called 'agricultural fee' is not applicable." Jdgmt, 4, fn1/Defs Closing Brief, p.5.

MOTION FOR ATTORNEYS FEES & COSTS

6. Following entry of judgment in favor of Plaintiffs, Murphy Creek filed the within motion seeking an award of attorneys' fees and costs under several theories. First, Plaintiffs assert that they entitled to an award of costs based on a statutory offer of settlement. Mtn for Fees, 2; C.R.S. §13-17-202. Plaintiffs seek $5,318.02 in costs incurred after a statutory offer of settlement was made to Defendants on August 6, 2020. Next, Plaintiffs argue they are entitled to an award of attorneys' fees pursuant to 42 U.S.C.A. §1988 based on their constitutional claims, i.e. that the agricultural fee assessed by the District was an improper Eighth Amendment penalty. Mtn for Fees, 3. Plaintiffs argue that they were prevailing parties on their constitutional claims because they "obtained declaratory relief invalidating fees charged against their property." Mtn for Fees, 5. Separately, Plaintiffs assert that they are entitled to an award of attorneys' fees and costs claiming that the District's defense of their fees was "substantially frivolous, substantially groundless, or substantially vexatious." Mtn for Fees, 9; citing C.R.S.

§13-17-101. Plaintiffs request an award of $302,844 in fees and $14,041.44 in costs in addition to the post-settlement offer costs. Mtn for Fees, 15.

7. The District disputes that Plaintiffs are entitled to an award of costs under C.R.S. §13-17-202 arguing that the statutory settlement offer was invalid because it contained "nonmonetary claims" described as "(a) the District's waiver of all fees, penalties and late charges currently imposed, (b) … permanent repeal of vacant land charges, (c) dismissal with prejudice of all claims of each party, and (d) … [was] subject to the parties negotiating and executing an agreement memorializing the terms of the settlement." Rsp Mtn for Fees, 3.

8. The District also disputes that Plaintiffs are entitled to an award of attorneys fees or costs based on their §1983 claims arguing that such claims only challenged the District's Agricultural Fees "which only applied to property that was zoned agricultural … [and that] … testimony at trial revealed … that Plaintiffs' property was *not* zoned agricultural, [and] the District conceded in their closing argument the Agricultural Fee did not apply to the Plaintiffs' property." (Emphasis in original) Rsp Mtn for Fees, 4. Additionally, the District asserts that Plaintiffs' pleadings with regard to the constitutional claim was based on an argument that Plaintiffs had been deprived of the use of their property for cattle-grazing purposes, but that the testimony at trial established that the Plaintiffs had continued such grazing throughout the litigation. Rsp Mtn for Fees, 4.

9. Finally, the District disputes that Plaintiffs are entitled to an award of attorneys' fees or costs pursuant to C.R.S. §13-17-102 because "the District's defenses and counterclaims did not lack substantial justification, were not interposed for delay or harassment, and were not substantially frivolous, groundless, nor vexatious." Rsp Mtn for Fees, 13. The District argues that it "exercised its legislative function and adopted the fees at issue in an effort to have the Plaintiffs pay their share of the cost of the services provided to the Plaintiffs." Rsp Mtn for Fees, 13-14.

LEGAL ANALYSIS

A. Statutory Offer of Settlement

Colorado provides for an award of costs to a party who serves a statutory offer of settlement prior to trial which is rejected by the opposing party and that opposing party does not recover a judgment in excess of the offer. *C.R.S. §13-17-202.*

> The purpose of section 13-17-202 is to encourage the settlement of litigation by encouraging reasonable settlement offers by all parties. The statute imposes a sanction on a party who rejects a reasonable offer of settlement and obtains a final judgment worth less than the amount offered. *Strunk v. Goldberg*, 258 P3d 334, 336 (Colo. App. 2011)

"[Section] 13-17-202 does not require that an offer of settlement be in any particular form." *Dillen v.*

HealthOne, LLC 108 P3d 297, 301 (Colo. App. 2004). "However, divisions of [the court of appeals] have held that 'imposition of nonmonetary conditions on acceptance of a settlement offer may remove the offer' from the statute's reach." *Strunk, Id.* at 336; quoting *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P3d 380, 392 (Colo. App. 2008). Conditions that require the "release of future claims" or "release [of] claims in addition to those at issue" have been held to be nonmonetary conditions which preclude application of the statute. *Strunk, Id.* at 336. "[P]rovisions included in an offer of settlement that 'extend the scope of the offer beyond the claims at issue' are contrary to the purpose of section 13-17-202, because such provisions inject terms more generally associated with contracts into a statutory process." *Strunk, Id.* at 336, quoting *Martin v. Minnard*, 862 P2d 1014, 1019 (Colo. App. 1993).

The statutory settlement offer made in this case contained the following language:

> In exchange for the District's dismissal with prejudice of all claims against Plaintiffs, waiver of all fees, penalties and late charges currently imposed against vacant land and permanent repeal of the vacant land charges, the Plaintiffs will dismiss their claims against the District with prejudice and pay the District a one-time payment of $40,000 to fund a more appropriate shar of District services to Plaintiffs' vacant property. Each party will pay its own costs and fees, upon dismissal with prejudice of all claims of each party.

> Further, Plaintiffs propose an agreement whereby the District may contact Plaintiffs' rancher to respond to any reasonable week or pest complaints regarding Plaintiffs' agricultural land within the District.
>
> … Final settlement is subject to the parties negotiating and executing an agreement memorializing the terms of the settlement Rply Mtn for Fees, Ex. A, Settlement Offer

The District asserts that the above language contains nonmonetary conditions "would require the District to adopt a new resolution" and "included a proposed agreement whereby the District may contact Plaintiffs' rancher to respond to any reasonable weed or pest complaints." Rsp Mtn for Fees, 3. Plaintiffs respond that the "offer concerned only the claims and counterclaims at issue." Rply, 2. Plaintiffs point out that "[m]emorializing terms in an agreement is a customary way to effectuate a settlement." Rply, 3. Plaintiffs emphasis that they "have consistently acknowledged the District's authority to impose 'reasonable' fees and have never argued the District is barred from doing so. Plaintiffs' settlement offer was not predicated on the District never imposing valid fees in the future. Rather, Plaintiffs proposed that the District repeal the illegal charges at issue in this case." Rply, 3. Finally, Plaintiffs contend that the reference to contacting Plaintiffs' agent to resolve future issues was not a condition of the settlement but rather a "suggest[ion] [as to how] the parties may consider how to administer District/homeowner complaints." Rply, 3.

The Court finds that a reasonable reading of the proposed settlement offer did not contain nonmonetary conditions precluding application of §13-17-202. The Court finds that the reference to contacting Plaintiff's rancher agent for future complains was not a "condition" of the settlement but rather a separate statement of proposed future action to resolve complaints. The dismissal of all assessed fees against Plaintiff related to the claims at issue in this litigation. Similarly, Plaintiffs made a claim that the District was prohibited from imposing a special vacate land/agricultural fee on Plaintiff's property and therefore a proposal that the District would withdraw application of any such fee was also a part of the pending case. Thus, the Court concludes that Plaintiffs made a statutory offer of settlement in the amount of $40,000 to resolve all pending claims, which offer was rejected by the District and the District did not recover a judgment in excess of that amount. Therefore, Plaintiffs are entitled to their costs post-settlement in the amount of $5,318.02

B. §1983 Claims

"[42 U.S.C.] §1983 and its companion statute §1988, provide for the award of attorney fees to a plaintiff where an action under §1983 is joined with a state claim based on the same nucleus of facts, even though the plaintiff prevails only on the asserted state claim." *Brown v. Davidson*, 192 P3d 415, 418 (Colo. App. 2006). It is undisputed in this case the Plaintiffs filed a lawsuit which contained both state and §1983 claims. Plaintiffs prevailed on their state claims, in so far as the Court concluded that the service fees assessed by the District were excessive in light of

the evidence as to the costs of the services. The Court did not find that the fees constituted taxes. Additionally, the Court noted that the agricultural fee, which was the basis for Plaintiffs' constitutional claims was moot because Defendant withdrew its claim for any fee since it was conceded that the Plaintiff's property was not zoned agriculture and therefore even if such fee were proper it would not apply to Plaintiff.

"However, obtaining a favorable judgment, without more, does not entitle a plaintiff to prevailing party status within the meaning of 42 U.S.C. §1988. A plaintiff must actually benefit from the judgment. … In addition, a plaintiff must obtain the declaratory judgment before the actions of either party render the case moot." *Deighton v. City Council of City of Colorado Springs*, 3 P3d 488, 491 (Colo. App. 2000). In this case, the disputed agricultural fee never applied to Plaintiffs. Further, the Court found that the other assessed fees were invalid because there was insufficient factual basis for the *amount* of the fee not that fees can never be assessed. The Court finds that Plaintiffs are not entitled to an award of attorneys fees and costs pursuant to §1988 as the claims on which they prevailed did not share a "common nucleus of operative facts" with the operation and maintenance fees assessed by the District. *Maher v. Gagne*, 448 U.S. 122, 132 & n.15, 100 S.Ct. 1372, 39 L.Ed2d 577 (1974).

C. §13-17-102 fees

"Under §13-17-102, a trial court is required to award attorney fees if an action, or any part thereof, is found

to be without substantial justification, i.e. substantially frivolous, substantially groundless, or substantially vexatious." *Artes-Roy v. Lyman*, 833 P2d 62, 63 (Colo. App. 1992). "Whether a claim lacked substantial justification is a question of fact for the trial court." *Mitchell v. Ryder,* 104 P3d 315, 321 (Colo. App. 2014)

> A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *Western Union Realty, Inc. v. Isaacs,* 679 P2d 1063, 1067 (Colo. 1984). A claim is not frivolous simply because the action proves unsuccessful where the action represents "good faith efforts to extend, modify or reverse existing law." *Western Union, Id.* at 1067.
>
> A claim is groundless if the allegations in the complaint, while sufficient to survive a motion to dismiss for failure to state a claim are not supported by any credible evidence at trial. … A losing position is not necessarily groundless for purposes of awarding attorney fees, nor is a claim groundless solely because the plaintiff failed to establish a prima facie case if there is some credible evidence to support the claim." *Coffman v. Robert J. Hopp & Assoc.,* 422 P3d 617,624 (Colo. App. 2018).
>
> A vexatious claim is one brought or maintained in bad faith. Bad faith may include conduct that is arbitrary, vexatious, abusive, stubbornly

> litigious, aimed at unwarranted delay, or disrespectful of truth and accuracy." *Ryder, Id.* at 321.

The Court finds that the District successfully challenged Plaintiffs claims that the subject fees were not fees but taxes, demonstrating a reasonable basis for at least part of their defense. Further, while the District did not prevail on its assertion that the amount of the fees assessed against Plaintiffs were sufficiently supported in fact, this does not mean that their defense of Plaintiff's claims had no basis in law or fact or alleged for improper purposes. The Court finds that Plaintiffs are not entitled to an award of attorneys' fees or costs pursuant to §13-17-102.

CONCLUSION

As explained more fully above, the Court finds that Plaintiffs are entitled to an award of post-statutory offer of settlement costs in the amount of $5,318.02. Plaintiffs are not entitled to an award of attorneys' fees or costs based on their §1983 claims or pursuant to C.R.S. §13-17-102. Plaintiffs motion is GRANTED IN PART and DENIED IN PART.

SO ORDERED THIS December 18, 2020.

BY THE COURT:

/s/ Elizabeth Beebe Volz
Elizabeth Beebe Volz
District Court Judge

APPENDIX D — OPINION OF THE DISTRICT COURT OF COLORADO, ARAPAHOE COUNTY, DATED SEPTEMBER 23, 2020

DISTRICT COURT, ARAPAHOE COUNTY,
STATE OF COLORADO
7325 South Potomac Street
Centennial, Colorado 80112

Case Number:
2019CV30497 Div. 202

MURPHY CREEK DEVELOPMENT, INC.
AND MURPHY CREEK, LLC,

Plaintiff,

v.

MURPHY CREEK METROPOLITAN
DISTRICT NO.3,

Defendants.

September 23, 2020, Decided;
September 23, 2020, Filed

FINDINGS OF FACT, CONCLUSIONS OF LAW & JUDGMENT

THIS MATTER follows a four-day trial to the Court from August 24 through 27, 2020. The Court having considered the evidence, arguments, pleadings

and applicable law makes the following FINDINGS & JUDGMENT:

I. PARTIES, CLAIMS & ISSUES

1. Plaintiffs Murphy Creek Development, Inc. ("MCD") and Murphy Creek, LLC (the "LLC") own vacant, unplatted property, within the boundaries of Defendant Murphy Creek Metropolitan District No. 3 (the "District"). Trial Management Order ("TMO") Stip. Facts ¶4 .

2. MCD and the LLC initiated this litigation seeking declaratory judgment that certain Operations, Recreation and Landscape Maintenance Fees ("O&M Fees") as well as Backup Fees for Recreation, Security, Clubhouse, Snow Removal, Landscape Maintenance and Pest Abatement ("Backup Fees") are: taxes rather than fees because they were intended to fund the Districts operating budget; do not reasonably relate to service costs; are unconstitutional as taxes because they violate TABOR election requirements and because they are not *ad valorem* or uniform. (First - Eighth Claims for Relief). Plaintiffs also assert claims for relief under the Eighth Amendment of the United States Constitution contending that a special assessment on agriculture property is an excess penalty (Ninth and Tenth Claims for Relief) TMO, Pltfs Claims.

3. The District seeks judgment that the fees imposed by the District on Plaintiffs as property owners are "rationally related to the costs of services ... provided."

TMO Defs claims. Further the District asserts that it is entitled to "impose higher fees, rates, or fines to discourage abuses that impose additional costs on the District." TMO Def claims. The District states that "it is a special district ... limited by its service plan to provide only certain discrete services to the residents and property owners within its boundaries ... [such as]

- common area landscaping services,
- weed and pest control,
- recreation services,
- entrance monuments and median maintenance,
- snow removal from public sidewalks,
- clubhouse, and
- security services. Defs Tr. Brief, p.2

To justify the fees charged to Plaintiffs, the District states that it "found that it incurred significant costs while providing services to agricultural and vacant property. The services provided to owners of agricultural and vacant property include snow removal, landscape maintenance and improvements, weed and pest control, security and similar services. Defs Tr. Brief, p.2 "Additionally, the District's Board found that the presence of agricultural property within the District creates a range of problems ... include[ing] the spread of pests and weeds, prairie

dogs damaging the root systems of trees, grazing cows damaging District assets, snow accumulating on sidewalks, and juveniles setting bonfires in unattended lots." Defs Tr. Brief, p.3. The District states that it "provides no general services, such as fire and police services. Therefore, there are no general services for which the District would be imposing a tax to raise revenue to fund. Instead, the District imposed fees in order to defray the costs of specific services..." Defs. Tr. Brief, p. 13.

4. The matter proceeded to trial before the Court on August 25, 2020. The presentation of evidence concluded on August 27, 2020. The parties submitted written closing arguments on September 3, 2020 (Plaintiff) and September 4, 2020 (Defendant). The parties submitted responses to opposing arguments on September 10 and 11, 2020.

II. FINDINGS OF FACT

5. The parties stipulated to the following relevant undisputed facts;

a. The District was formed in 1998 to implement the Consolidated Service Plan for Murphy Creek Metropolitan District Nos. 1, 2, 3 and 4 (the "Service Plan"). TMO, Stip. Facts ¶8.

b. The District's voters approved the imposition of an annual tax mill levy to collect revenue to pay operations, maintenance, and other general or administrative expenses for the

years 1999 through 2019 at the November 1998 election. TMO, Stip. Facts ¶9

c. The District Board certified a debt service mill levy of 53.953 and a mill levy for general operating expenses of 0.00 for collection in 2019 at its November 28, 2018 meeting. TMO, Stip. Facts ¶10

d. The District Board approved [the O&M Fees] at its November 28, 2018 meeting. TMO, Stip. Facts ¶11

e. The Fee Resolution states that 'C.R.S. §32-1-1001(1)0 authorizes the District 'to fix and impose fees, rates, tolls, charges, and penalties for services or facilities provided by the District which, until paid, shall constitute a perpetual lien on and against the property served." TMO, Stip. Facts ¶12

f. The [O&M Fee] imposes a fee of $60.00 per month, for each platted single-family residence lot and each residential unit on a multi-family platted lot. TMO, Stip. Facts ¶13

g. The [O&M Fee] imposes a fee of $300.00 per month per acre of unplatted land, or land under construction. TMO, Stip. Facts ¶14

h. The [O&M Fee] imposes a fee of $600.00 per month per acre of unplatted land that

is zoned agricultural. TMO, Stip. Facts ¶15, Closing Arguments.[1]

i. On May 15, 2019 the District adopted the Backup fees "to replace the O&M Fee in the event the O&M Fee is invalidated by the Court. TMO, Stip. Facts, ¶s 16 and 17.

j. The Backup Fee of $60 per residential unit is the same as the O&M Fee. TMO, Stip. Facts, ¶18.

k. The Backup Fee for unplatted or vacant land is $315 per acre per month. TMO, Stip. Facts, ¶19.

l. The Backup Fee included an additional $220 per acre per month for agricultural property. TMO, Stip. Facts ¶20; (But see Defendant's Closing Argument conceding that none of the Plaintiff's property is zoned agricultural and therefore is not subject to such fee or fine.)

m. The District's collection policy allows for a monthly late fee of 5% up to 25% of the

1. The District, in its closing argument concedes that the $300/month agricultural fee is only applicable to property that is "zoned" agricultural. At trial it was determined that all of Plaintiffs' unplatted land is zoned "PD" for planned development and none is zoned agricultural and therefore the so-called "agricultural fee" is not applicable. Defs Closing Brief, p. 5

outstanding exactions. TMO, Stip. Facts, ¶21.

n. The District's collection policy authorizes interest on outstanding fees at 18%. TMO, Stip. Facts, ¶22.

o. The District's collection policy authorizes the District to foreclose on the statutory lien created by outstanding fees on Taxable Property. TMO, Stip. Facts, ¶23.

6. The Court heard testimony from several witnesses and makes the following findings of fact based on that testimony:

a. ***Harvey Alpert.*** Mr. Alpert is the President of MCD and Manager of the LLC which entities both own property in the District. The District is approximately 640 acres in size and there is a golf course owned and maintained by the City of Aurora within the boundaries of the District. The MCD and LLC properties lie generally along the southern portion of the District with the southern boundary along the north side of Jewel Street. Tr. Ex. 10, Google Map. Several parcels of unplatted property are surrounded by the golf course. Tr. Ex. 12, Google Map. One parcel of land is bordered by Jewell Street on the South and Louisiana on the East. Residential property of the District borders this parcel to the North. Tr. Ex. 13,

Google Map. The total acreage for MCD and the LLC within in the District is approximately 50 – 75 acres, which represents approximately 20% of the total acreage for the District.

Mr. Albert acknowledges that the unplatted lots owned by MCD and the LLC are contained in the development plan for the District and that the plan called for a density of approximately 700 - 800 homes to be built within this presently undeveloped land. Mr. Alpert also testified that both the City of Aurora and the residents would have to approve any specific plan for development.

A 1998 Service Plan references Murphy Creek Districts 1, 2, 3 and 4. District No. 1 was the "Operating District"[2] and was generally in charge of providing services for the other Districts. During this time, District No. 1 did not charge a service fee to MCD or the LLC, it charged $50 per month for homes that were occupied or had a Certificate of Occupancy.

Mr. Albert acknowledged that he never specifically challenged the District's designation of certain parcels owned by either MCD or the

2. The Court's use of quotation marks ("") around certain words or phrases is not meant to refer to any official transcript, rather it denotes the Court's memory of words or phrases used by the witnesses during their testimony based on the Court's notes taken during the trial.

LLC as "vacant" or "agricultural." He stated that he immediately turned over the invoices to his attorneys to challenge the O&M fees assessed. As to the zoning character of the properties, they are all zoned "PD" which stands for "Planned Development." Tr.Ex.8, Zoning Map. Pursuant to the Development Plan for Murphy Creek the owner has the right to continue existing agricultural uses on the property until such time as a site plan or subdivision plat is approved. Tr. Ex. JJ, Section 11.0 of General Notes, ¶4 .

b. ***Douglas Schriner.*** Mr. Schriner is the District Board President. He was first elected in 2018. He had previously been appointed to the Board in 2014/2015 and served for approximately 9 months at that time. He confirmed that services for the District had previously been provided by District No. 1. These services included: property management, accounting, contracts, pool, snow removal, obtaining insurance, landscaping and maintenance. In or around 2016 the District began "separating" itself from District No. 1. In 1998 the District adopted Ballot L, which imposed a mill levy to pay for operations and maintenance through 2019. Tr. Ex.3. There was an election in May 2018 which included Ballot Issue 5A, which if passed would have extended the mill levy beyond 2019. Tr. Ex.6. This ballot item did not pass. The Board then tried to calculate a service fee roughly approximating

the *ad valorem* tax that had been assessed for each property. That tax ranged from $30 to $120, depending on the value of the home. The Board decided to impose a service fee of between $50 - $60 per household, regardless of the value of the home. The Board knew that a $50 fee per residence would not be sufficient to pay for all of the services provided by the District. Mr. Schriner agreed that the service fee should be based on "usage."

In considering how to calculate the service fee for the undeveloped land the Board made an "assumption" that each acre of land could be divided into 8.5 residential lots per acre. The Board then calculated a $40 per lot fee which resulted in a service fee of $300 per acre of unplatted land. The Board assessed a $600 per acre for agricultural land as a "nuisance" fee due to "flies, manure, cows, weed seed and prairie dogs." He asserts that the undeveloped land receives a benefit from the services provided by the District, such as a clubhouse, parks and monuments which make the property more valuable for sale and MCD and the LLC should pay for those services. Additionally, he contends that the undeveloped land has higher costs for snow removal, security and landscaping due to prairie dogs and weeds, and the owners of these lots should pay for these increased costs.

In further explaining the basis for the service fee assigned to unplatted and agricultural

property, Mr. Schriner stated that the Board "wanted to get the developer's attention, " and wanted to "incentivize" the owner to develop the property, stating that agricultural land is "incompatible" to a golf course community.

He went on to explain that the homeowners have been "saddled" with a bond debt and that the developer is only paying about $150 per year in taxes while the homeowners are paying that much per month. He opined that the debt structure is based on a much bigger development and the District needs the remaining portion of the property to be developed. He stated that the Board "wants to address the debt but can't do it without more homes being built." He confirmed that the extra $300 per acre fee assessed against agricultural land is a "penalty."

c. ***Margaret Iko Rash.*** Ms. Rash is a resident of the District and Vice President of the District Board. She is also a member of the Murphy Creek Home Owners' Association ("HOA") Board. She explained that the HOA generally addresses covenant issues, social activities and is responsible for trash collection. The District Board is generally responsible for common assets and providing other services. She agreed with other testimony that prior to 2017 District No. 1 provided services for the District. Initially, fees for such services were approximately $35

per month and they increased over time to $50 per month. It was anticipated that such fees would rise to between $75- $80 per month in 2016. However, in 2016 the District went to a tax basis to pay for O&M services.

Ms. Rash was elected to the board in 2018. The community twice turned down paying for O&M services through taxes. The Board accepted that the residents preferred to pay for services through fees rather than taxes. She stated that the Board looked at previous budgets to determine the cost for services previously provided. In her opinion, the intent of the Board was to replace taxes with the O&M Fee. The Board also had a goal of maintaining fees at the $50 per month level. However, she acknowledged that $50 per lot would not generate enough funds to pay for all of the services, particularly with the amount of work needed on the clubhouse.

For vacant property, the Board "assumed" that the property could be developed with 7.5 homes per acre and assigned a $40 per home fee to determine the $300 per acre O&M Fee for undeveloped land. The Board then added an additional $300 per acre for agricultural property. When asked why agricultural land should be charged twice as much as other vacant land Ms. Rash replied that such property is "not conducive to our development."

Ms. Rash stated that she believes that property owners should pay their fair share to maintain common areas and pay for services they receive. When asked to compare the 2019 budget with actual revenue based on the $300/acre and $600/acre fees assessed to the unplatted property, she acknowledged that if MCD and the LLC actually paid these assessed amounts they would have provided funds to cover the entire budget with an additional $625,038.62 over the budgeted amount. Tr. Ex.29 Ms. Rash stated that vacant lots should bear a higher percentage of costs related to *snow removal* and *security* due to "increased burden placed on the District by those lots for those services," while the vacant lots should bear a lower percentage of costs associated with the clubhouse and recreation services.

d. ***Robert Colwell.*** Mr. Colwell provides accounting and tax services for the District. His work involves handling taxes for the District and is not involved in developing the District's budget or determination of service fees. He provides monthly financial statements and updates for the Auditor. He explained that the County collects property taxes from property owners along with other fees, such as automobile license fees and then forwards a portion of those taxes or fees to the District. These taxes and fees are used to pay the debt fund for the District.

e. ***David Prieto*** Mr. Prieto is the CEO of Cherry Creek HOA Professionals and provides management services to the District. He provides similar services to approximately 79 other HOA and District communities. As part of his duties he provides accounting and budgeting advice to the District. His company handles all accounting matters for the District, except for those associated with taxes. Mr. Prieto testified about the costs to support the Backup Fees resolution. Tr. Ex. 18. The following costs were set out in that resolution.

Recreation:	$93,000	Admin. Overhead	$22,650
Security:	$170,000	Admin. Overhead	$35,900
Clubhouse:	$226,000	Admin. Overhead	$47,740
Snow Removal:	$50,000	Admin. Overhead	$10,500
Landscape:	$438,380	Admin. Overhead	$92,600
TOTAL:	$977,380	TOTAL:	$209,400

Specifically, with regard to the costs associated with "security" Mr. Prieto stated that approximately $60,000 of such costs were for security patrol and another $20,000 for the security system at the clubhouse. He did not know what services made up the remainder of this item. Although he opined that perhaps the additional amount related to internet service for the clubhouse.

He testified that in budget meetings there was a desire to not charge residents more in service

fees then they had been paying in taxes for these services. The budget committee decided to assess fees on the undeveloped land based on an "equivalent number of units" that could have been developed on the property.

f. ***Jacob Willett.*** Mr. Willett has been in the landscape maintenance business for approximately 8 years through Coloradoscapes, Inc. and began providing such services to the District in 2018. Tr. Ex. 54 Contract.

The contract with the District calls for payment of $259,740 over twenty-six (26) months at the rate of $9,990 per month. A contract addendum called for additional work related to mitigation of prairie dog problems at a cost of $41,680. Tr. Ex.53. Mr. Willett testified that total billings from Coloradscapes to the District for 2019 was $202,208.59.

Coloradoscapes has a separate contract for snow removal. Tr. Ex.55. Mr. Willett testified that his company was paid $28,407.58 for snow removal in 2019. He testified that he removes snow from the sidewalk along Jewell Street and because the City often pushes snow back onto the sidewalk when it plows the street, he has to shovel the sidewalk two or three times.

g. **Don Scadden.** Mr. Scadden testified as an animal and pest control specialist. He provides

a monthly service to the District clubhouse. He also provided prairie dog extermination and fumigation in 2007, 2010 and 2015. Presently he only provides services related to the clubhouse at $135 per month. Tr. Ex. 43

h. **Andrew Carroll.** Mr. Carroll is the Security Manager for the District. His company's contract with the District calls for $500 per month "base cost" and then $30 per hour for services. Tr. Ex. 52. Mr. Carroll testified that he invoices the District monthly with a flat rate of $1,475 for patrol and $3,250 "additional coverage." Tr. Ex. 48. Mr. Carroll testified that his service costs are approximately $50,000 - $60,000 per year. He was asked about a budget item for security in the amount of $170, 000. He opined that perhaps this included the camera system for the clubhouse. There is no camera surveillance set up on the undeveloped property.

Mr. Carroll was asked to opine on the amount of time he spends dealing with issues related to the undeveloped land as opposed to the residential property. He estimated that perhaps 15%-20% of his time is spent related to the developer's property, less in the winter. He was also asked about efforts to respond to bonfires or intentionally set fires in the District. He explained that occasionally there are fires in the fields "south of Jewell, " and sometimes

fires caused by fireworks or people throwing cigarettes. He has also occasionally had to deal with homeless people found on the golf course or under a bridge. The biggest problems are on the property south of Jewell and along the Xcel easement. He has not found any homeless people living on the District property. He agreed that the homeless might "pass through" the vacant land but does not consider it a "staging area" for homeless people. He also stated that he is not aware of any problems associated with "parties" on any property within the District, those are again, on property south of Jewell.

i. Tom King. Mr. King leases property owned by MCD and or the LLC within the District. He presently grazes ten (10) head of cattle on some of the property. He previously had twenty (20) head but the grass could not sustain that amount of cattle. Mr. King testified that he has a Masters Degree in Forestry and Horticulture and has been farming and ranching for approximately thirty-six (36) years. He has attempted to grow hay on some of the property but was not very successful. He acknowledges that prairie dogs can be a problem and that he takes steps to mitigate their destruction because they also interfere with the ability to graze cattle on the property. He testified about his efforts at weed control, with mowing and spot spraying. He stated that he has an incentive to maintain the properties because

of the cattle and his investment in growing hay and wheat.

Mr. King states that he is on the property almost daily and recently has been present as a result of the recent theft of 13 head of cattle. He states that he has never been contacted by the District to address any issues concerning weed control. He was questioned about whether he was aware of bonfires being set on the vacant property and he responded that he was aware of bonfires on the adjoining Xcel property. His greatest concern is with people using 4-wheelers on the property, knowing down fences and chasing the cows. He takes efforts to maintain the property. He considers it his responsibility to mow a strip of native grass around the property.

III. APPLICABLE LAW

There is no dispute that the District is a properly constituted special metropolitan district with the power to "fix ... fees, rates, tolls, penalties, or charges for services, programs, or facilities furnished by the special district." C.R.S. §32-1-1001 (1)(j)(l). TMO, Stip. Facts ¶12. Colorado courts have interpreted this statutory provision "authorizing special districts to charge fees for services furnished by the special district as implicitly requiring that those fees be reasonable in light of the services actually furnished by the special district. A contrary interpretation would permit a special district to charge

excessive fees, or fees for improper purposes, that might violate due process or other constitutional norms ..." *Krupp v. Breckenridge Sanitation Dist., 1 P3d 178, 183 (Colo. App. 1999).*

A fee can be sustained "if it has some rational basis in fact and bears a rational relationship to legitimate governmental objectives." *Zelinger v. City and County of Denver, 724 P2d 1356, 1359 (Colo. 1986).* A valid fee must be for services furnished. *Bloom v. City of Fort Collins, 784 P2d 304 (Colo. 1989).* Such fee is "not designed to raise revenues ... but rather is a charge imposed ... for the purpose of defraying the cost of a particular governmental service. The amount of a special fee must be reasonably related to the overall cost of the service." *Bloom, Id. at 308.*

> A special fee, however, might be subject to invalidation as a tax when the principal purpose of the fee is to raise revenues for general municipal purposes rather than to defray the expenses of the particular service for which the fee is imposed. ... At least one court has invalidated a special fee – an 'augmented fire service fee' imposed on owners of certain buildings based on the size and type of construction, and other characteristics of the building – on the basis that the service was not sufficiently particularized to justify the distribution of costs among the limited group of persons liable for the fee, rather than among the general public. Bloom, Id. at 308, citing

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Emerson College v. City of Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984).

In *Emerson,* cited by the Colorado Supreme Court above, Plaintiff Emerson College challenged an "augmented fire service" fee, imposed by the City of Boston purportedly related to costs associated with maintaining additional firefighters and equipment needed for certain building structures. The trial court found that the fee was invalid as applied to the plaintiff because it was not related to the services actually provided, with the trial court finding that the "tax was not proportional and reasonable." *Emerson, Id. at 418, 1101.* In upholding the trial court's ruling, the Supreme Judicial Court of Massachusetts explained that:

> Fees imposed by a governmental entity tend to fall into one of two principal categories: user fees, based on the rights of the entity as proprietor of the instrumentalities used, or regulatory fees (including licensing and inspection fees), founded on the police power to regulate particular businesses or activities. Such fees share common traits that distinguish them from taxes: they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner not shared by other members of society ... and the charges are collected not to raise revenues but to compensate the governmental entity providing the services for its expenses. *Emerson, Id. at 424-25, 1105.*

The reviewing court in *Emerson* found that the augmented fire service fee failed because it did not "comply with another essential characteristic of a fee. Fees are legitimate to the extent that the services for which they are imposed are sufficiently particularized as to justify distribution of the costs among a limited group (the 'user' or beneficiaries of the services), rather than the general public." *Emerson, Id. at 425, 1105.* Specifically, the court found that while there might be some basis to find that the fire buildings, those building owners are not the only persons to benefit from the presence of the additional personnel and equipment. Additionally, the court noted that the revenue obtained from the augmented fire service fee was not targeted at the eight and one-half fire companies attributed to the fee but to meet the expenses of providing a broader range of services. *Emerson, Id. at 427, 1106. See also: Heckendorf v. Town of Littleton, 132 Colo. 108, 113-14, 286 P2d 615 (Colo. 1955) (*Fee charged to business based on ingress and egress based on "curb cut" considered a tax not a fee).

Comparing the holding in *Emerson* to that of the Colorado Supreme Court in *Zelinger v. City and County of Denver, 724 P2d 1356 (Colo. 1986),* makes clear that there must be a rational basis for the calculation and application of the fee in order to comply with the statutory authority. In *Zelinger,* residential and commercial property owners challenged a city ordinance imposing a service charge on property owners for the purpose of operation, maintenance, improvement and replacement of storm drainage facilities. *Zelinger, Id at 1358.* The amount of the fee was based on the "ratio of impervious to pervious

surface." *Zelinger, Id. at 1358.* First, plaintiffs argued that the charge was an impermissible tax which was not applied uniformly. The court responded that "Special assessments are not included within the coverage of the uniformity clause of article X, section 3." *Zelinger, Id at 1358.* However, the court stated that

> Special assessments are charges imposed for the purpose of financing local improvement. To qualify as a special assessment, a charge must be directed against the users of an improvement, and the revenue derived from the charge must be applied only to the maintenance, operation, or development of the improvement. *Zelinger, Id. at 1358.*

A fee can be sustained "if it has some rational basis in fact and bears a rational relationship to legitimate governmental objectives." *Zelinger, Id. at 1359.* In *Zelinger* the court concluded that although a different fee might be imposed on different land owners the court found that the "differential charges" were based on a ratio supported by expert opinion.[3]

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3. "[T]he differential charges are the intended result of a fee schedule premised on the recognition by experts that while total impervious surface area is a good indicator of the amount of water that can be expected to reach the storm drain system after a storm, because of the capacity of pervious land surface to absorb water, the ratio of impervious to pervious surface is a more accurate indicator of storm drainage costs associated with a particular parcel of land." Zelinger, Id. at 1360.

Similarly, in *Westrac, Inc. v. Walker Field, Colo., Public Airport Authority, 812 P2d 714 (Colo. App. 1991)* the Court of Appeals concluded that a ten-percent fee based on revenue derived from customers picked up at the airport charged to off-airport rental car companies was a permissible fee and not a tax. The court in *Westrac,* while rejecting a general "reasonableness" standard for judging whether the fee was permissible, held that "[a]rbitrary or confiscatory fees are still subject to constitutional restraints." *Westrac, Id. at 718.*

In addition to arguing that the O&M and Backup Fees are not rationally related to the cost of the services provided, Plaintiffs contend that the Fees are in realty a tax imposed to raise revenue to pay down the bond debt of the District.

> To determine whether a government mandated financial imposition is a 'fee' or a 'tax,' the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed. This inquiry requires examination of several factors:
>
> First, we review he language of the enabling statute ... The fact that a fee incidentally or indirectly raises revenue does not alter its essential character as a fee, transforming it into a tax.

> Second, we look to the primary or principal purpose for which the money is raised, not the manner in which it is ultimately spent....
>
> Third, we look to see if the primary purpose of the charge is to finance or defray the cost of services provided to those who must pay it.
>
> Any fee amount must be reasonably related to the overall cost of the service; however, mathematical exactitude is not required. *Tabor Foundation v. Colorado Bridge Enterprise, 353 P3d 896, 901 (Colo. App. 2014)*

IV. APPLICATION OF LAW TO THE FACTS

A. Fees or Taxes

As to Plaintiffs argument that the Fees are in realty taxes, the Court agrees that the facts establish that the revenue that might be generated by the O&M and Backup Fees assessed against Plaintiffs property exceeds the budgeted amount for services. However, it also appears that the primary purpose of the assessment was to pay for such services. There was testimony before the Court that revenue raised by these Fees was meant to cover the costs of services as well as long-term maintenance and improvements. There was also evidence that the District maintains separate accounts and procedures related to revenue to pay-down the bond debt and revenue raised related to services. While the Court finds that the purpose of assessing service fees is permitted, the Court also finds

that such fees, as applied, must be rationally related to the cost of the services provided. While "mathematical exactitude" is not necessary the amount of the fee must bear some relationship to the actual cost of the services.

B. Rational Basis for Fees

Plaintiffs argue that even if the Fees are not taxes, they are not reasonably or rationally calculated to cover the cost of services provided to Plaintiffs. The Court finds ample evidence to support Plaintiffs argument. The Court agrees that even undeveloped property receives some benefit from being within the District for resale or development purposes. Potential buyers know that if they develop the property, residents will be able to enjoy a clubhouse, pool and other services. However, this benefit does not support the calculation of an O&M or Backup Fee based on the assumption that there will be a development in the future. Defendant concedes that Plaintiffs do not presently benefit from the clubhouse, pool, or many of the other amenities provided to the residents by the District, or at least does not benefit more than any other lot owner.

The District, in order to support the disproportionate application of Fees on Plaintiffs' property instead asserts that the fees represent the ***additional*** costs of security, snow removal and weed and pest control caused by the properties. However, the evidence before the Court does not support this assertion on the part of the District. A comparison of the "costs" for the various categories of services as set out in the Backup Fees resolution was not supported by the evidence presented at trial. *Tr.Ex.18*, Backup Fee Resolution

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Service	Costs	Testimony
Recreation	$93,000	No testimony as to these costs, but the District concedes that Plaintiffs do not generally benefit from these services
Security	$170,000	Mr. Carroll testified that his costs for security patrol are approximately $60,000/year. The remaining amount under this category is for security cameras for the clubhouse ($20,00) and possibly internet, with the remaining amount unknown.
Clubhouse	$226,000	No testimony as to these costs, again the District concedes that Plaintiffs generally do not benefit.
Snow Removal	$50,000	Mr. Willett testified that he invoiced $28,407 for snow removal in 2019. He also testified that additional sidewalk snow removal along Jewell is caused by the City pushing snow onto the sidewalk, not Plaintiffs actions.

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Service	Costs	Testimony
Landscape	$438,380	Mr. Willett testified that his yearly contract for landscaping services calls for payment in the amount of $259,740 per year. In 2019 he invoiced $202,208.59. There was a separate contract in the amount of $41,680 for prairie dog mitigation. There was no other testimony to support the cost for this service as set out in the Resolution.

Based on the evidence produced at trial, the costs for Security ($60,000), Snow Removal ($28,407) and Landscaping ($259,740) results in a substantially reduced overall budget for these three services ($348,147 v. $658, 380). Even assuming that there should be some additional amounts budgeted for these categories of services, the evidence supports a finding that the cost of these services is almost half what the District asserts.

Further, there was insufficient evidence to support the argument that the Plaintiffs' unplatted and undeveloped land increases the cost for these referenced services. Mr. Carroll, the head of security, testified that he attributes between 15% - 20% of his time is spent dealing with matters associated with the Plaintiffs property, this represents a cost of approximately $9,000 - $12,000. The

District's argument that bonfires and parties occur on the Plaintiffs' property was disputed by Mr. Carroll's testimony. The argument that "similar" type of property to the south of the District warrants the assumption that "similar" activity could occur on the subject unplatted lots is too speculative to warrant assessing Plaintiffs a fee based on such supposition.

While it appears that prairie dogs and weed seed from the vacant property are problems that must be addressed, it also appears that Plaintiffs have as much incentive to mitigate those problems as the District. Further, there was insufficient evidence as to the costs of such mitigation efforts to support a finding that the Plaintiffs cause a substantial increase in those costs. Mr. Scadden testified that although he did some prairie dog mitigation in the past (2007, 2010 and 2015) his work regarding pest control presently is limited to the clubhouse.

The argument that there are increased costs associated with snow removal, especially along the sidewalks on Jewell Street, is disputed by the testimony of Mr. Willett, who explained that although he does have to remove snow from these sidewalks multiple times, the reason for this is the fact that the City of Aurora push snow from Jewell Street onto the sidewalks. The Plaintiffs are not the cause of the need for additional snow removal.

Finally, the testimony of Mr. Schriner and Ms. Rash demonstrate that at least a portion of the service fees charged to Plaintiffs was not associated with the costs of services provided, but rather as a "penalty" or a means

to "incentivize" the Plaintiffs to more quickly develop the property so that the District would have more lot owners contributing to both the cost of services provided and paying down the debt with which the District is "saddled."

For all of these reasons the Court must conclude that the both the O&M Fees and the Backup Fees are not in fact service fees as applied to the Plaintiffs and therefore must be invalidated.[4]

C. Counterclaims

The Court's conclusion that the O&M and Backup Fees are invalidated necessarily addresses Defendants Counterclaim for judgment in the amount of the unpaid fees. Additionally, the Court finds, based on the reasons set out above concerning the services provided to the Plaintiffs and the costs for those services, that there has been no unjust enrichment on the part of Plaintiffs.[5] As to the District's nuisance claim, the Court finds that the District has failed to establish that the vacant, unplatted property, even when used for the grazing of cows, has "has

4. Because the Court finds that the Fees are invalid the Court determines that it need not address Plaintiffs' remaining claims that the Fees are invalid taxes. Further, since Defendant concedes that any agricultural fee cannot be assessed against Plaintiffs, the Court finds that it need not address the constitutionality of such agriculture penalties.

5. This ruling does not mean that Plaintiffs cannot be assessed service fees at all, rather, the fees must relate to the services provided. The District, for example, could assess the same $50 per owner fee to Plaintiffs that it assesses to residents.

unreasonably interfered with the use and enjoyment of [its] property." *Public Service Co. of Colorado v. Van Wyk, 27 P3d 377, 391 (Colo. 2001).* Thus, the nuisance claim fails.

CONCLUSION & JUDGMENT

For the reasons set forth more fully above, the Court enters judgment in favor of Plaintiffs on their Second and Sixth Claims for Relief, invalidating the O&M and Backup Fees as they are not reasonably related to the District's service costs. This judgment renders moot Plaintiffs remaining claims for relief that the fees are improper taxes or that the fees are unconstitutional.

The Court also enters judgment in favor of Plaintiffs and against Defendant on Defendant's counterclaims for payment of the fees, unjust enrichment and nuisance.

SO ORDERED THIS September 23, 2020.

BY THE COURT:

/s/ Elizabeth Beebe Volz
Elizabeth Beebe Volz
District Court Judge

APPENDIX E — TRIAL MANAGEMENT ORDER OF THE DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO, FILED JULY 27, 2020

DISTRICT COURT, COUNTY OF ARAPAHOE,
STATE OF COLORADO

7325 South Potomac Street, #100
Centennial, CO 80112

DATE FILED: July 27, 2020

Case No.: 2019CV30497

MURPHY CREEK DEVELOPMENT, INC.,
A COLORADO CORPORATION; AND,
MURPHY CREEK, LLC, A WYOMING
LIMITED LIABILITY COMPANY,

Plaintiffs,

v.

MURPHY CREEK METROPOLITAN
DISTRICT NO. 3, A QUASI-MUNICIPAL
CORPORATION AND POLITICAL SUBDIVISION
OF THE STATE OF COLORADO,

Defendant.

Appendix E

TRIAL MANAGEMENT ORDER

Plaintiffs, Murphy Creek, LLC and Murphy Creek Development, Inc. ("Plaintiffs"), and Defendant, Murphy Creek Metropolitan District No. 3 ("District"), hereby submit the following Trial Management Order ("TMO").

I. STATEMENT OF CLAIMS AND DEFENSES

A. PLAINTIFFS' STATEMENT OF CLAIMS

Plaintiffs' claims concern charges imposed by a resolution "Concerning the Imposition of Operations, Recreation and Landscape Maintenance Fees" dated November 28, 2018 (the "O&M Fee") and by a resolution "Imposing Backup Fees for Recreation, Security, Clubhouse, Snow Removal, Landscape Maintenance, and Pest Abatement" dated May 15, 2019 (the "Backup Fee").

i. Plaintiffs' First Claim for Relief requests a declaration that charges imposed by the O&M Fee operate as a tax under Colorado law, because the charges imposed were intended to fund the District's entire operating budget, including general, day-to-day expenses.

ii. Plaintiffs' Second Claim for Relief requests a declaration that charges imposed by the O&M Fee amount to an invalid fee under Colorado law, because the charges are not reasonably related to the District's service costs in their entirety and as applied against Plaintiffs' vacant property in the District.

iii. Plaintiffs' Third Claim for Relief requests a declaration that as a tax under Colorado law, the O&M Fee is unconstitutional because it violates TABOR's election requirement. Art. X, § 20 (4).

iv. Plaintiffs' Fourth Claim for Relief requests a declaration that as a tax under Colorado law, the O&M Fee is unconstitutional because it is neither *ad valorem* nor uniform in violation of Art. X, § 3 of the Colorado Constitution.

v. Plaintiffs' Fifth Claim for Relief requests a declaration that charges imposed by the Backup Fee operate as a tax under Colorado law, because the charges imposed are the District's only source of general revenue and fund the District's entire operating budget, rather than fund the costs of the services provided.

vi. Plaintiffs' Sixth Claim for Relief requests a declaration that charges imposed by the Backup Fee are an invalid fee under Colorado law, because the charges are not reasonably related to District service costs in their entirety and as applied against Plaintiffs' vacant property in the District.

vii. Plaintiffs' Seventh Claim for Relief requests a declaration that as a tax under Colorado law, the Backup Fee is unconstitutional because it violates TABOR's election requirement. Art. X, § 20 (4).

viii. Plaintiffs' Eighth Claim for Relief requests a declaration that as a tax under Colorado law, the Backup Fee is unconstitutional because it is neither *ad valorem* nor uniform in violation of Art. X, § 3 of the Colorado Constitution.

ix. Plaintiffs' Ninth Claim for Relief requests a declaration that the O&M Fee and Backup Fee charges imposed specifically against agricultural property within the District are *ultra vires* and excessive regulatory and civil penalties that violate the Eighth Amendment of the United States Constitution.

x. Plaintiffs' Tenth Claim for Relief requests relief under 42 U.S.C.A. § 1983 because the District has violated Plaintiffs' rights protected by the Eighth Amendment of the United States Constitution under the color of a special district fee imposed via § 32-1-1001(1)(j)(I), C.R.S.

The District has alleged three counterclaims, and Plaintiffs have made the following affirmative defenses:

i. The counterclaims fail to state a claim for which relief may be granted.

ii. The District lacks standing to make some or all of its counterclaims.

iii. Some or all of the counterclaims may be barred by the doctrine of ripeness.

iv. Some or all of the counterclaims may be barred by the doctrine of mootness.

v. The District's counterclaims are barred by the doctrines of waiver, estoppel, and/or unclean hands.

Plaintiffs also assert that some or all of the counterclaims are barred by the applicable statute of limitations.

B. DEFENDANT'S STATEMENT OF CLAIMS AND DEFENSES

The District denies that its November 2018 fee resolution is a tax or is otherwise in violation of Colorado law. The District is a special district that provides services and facilities to property owners and residents of the District, and is entitled to charge fees for those services and facilities.

As a Title 32 special district, the District is not a municipality and does not provide general government services. Accordingly, it may fund its services for operations out of fees instead of taxes.

The District's current service plan, approved by the City of Aurora and entered by the District Court for Arapahoe County in the District's file (No. 1998CV3382, In re: Murphy Creek Metropolitan District 1-4, dated August 24, 2016) expressly authorizes the District to impose and collect fees for operations and maintenance. The City of Aurora, which approved the Service Plan, also authorized

the District to collect and impose fees for operations and maintenance. In fact, when the District was controlled by directors appointed by and affiliated with the developers – the plaintiffs in this matter – the District collected nearly identical fees of $50 per home per month.

The District's fees are rationally related to the costs of services of provided and are imposed on properties that benefit from its services. A subcommittee of the District's Board met with professional staff in October 2018 to set a budget for 2019. The subcommittee reviewed in detail the costs of the specific services that the District provided, which lots benefitted from those services, and how to allocate fees. The vacant developer-owned lots such as those owned by the Plaintiffs benefit significantly from the District's services, including snow removal, landscape maintenance and improvements, weed and pest control, and similar services. The Board set a fee schedule that closely approximated the costs of services and allocated fees to properties in a rational manner.

The District may impose higher fees, rates, or fines to discourage abuses that impose additional costs on the District. The District's Board determined that maintaining agricultural property in the District (although within the city limits and zoned/master planned as residential property in a golf course community) unfairly burdened the District and imposed added costs, such as damaging landscaping and District property, and requiring additional security to protect District property. Based on all of the facts, the subcommittee proposed a budget to the Board for fees for the services the District provides of $60

per residential lot, an equivalent of $40 per lot- equivalent ($300 per acre) for vacant land, and $600 per acre for agricultural property due to the higher costs imposed on the District due to such property. The District's budget fairly allocates the costs of the service to those properties that benefit from the services based on the fee structure between built-out and vacant lots ($856,800 to the built-out lots and $240,000 to the vacant developer lots).

To the extent that the District's original fee resolution did not sufficiently explain the breakdown of the fees for particular services, the District enacted a backup fee resolution that specifically allocated the fees to individual services (landscape maintenance, snow removal, security services, clubhouse maintenance, etc.)

Plaintiffs' claims fail because the fees imposed by the District are a lawful and reasonable exercise of the District's authority to impose fees for services such as maintenance of parks, recreation, common area landscaping of the street rights of way, snow removal on public sidewalks, and similar services that benefit property in the District. The District's enactment of these fees is a legislative decision that was adopted following a public hearing. There were no comments in opposition. The fee resolutions were rationally related to the costs of services, benefits, and to discourage abuses.

The District's backup fee resolution is also a valid legislative enactment as a fee and/or fine for the same reasons as the original fee resolution.

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The District denies that the agricultural fee is an unreasonable fine in violation of the Eighth Amendment. The fee is a small fraction of the value of the property and is intended to relate the additional costs of district services caused by agricultural use to the amount of the fee. The property is valued at tens of millions of dollars, and thus a $300 per acre surcharge for agricultural use is reasonable.

The District denies that the agricultural fee violates 28 U.S.C. Section 1983. The property is not being used for productive agricultural purposes and there is no loss of economic value. The Plaintiffs have previously submitted their land use application for developing the property as a golf course community. The Plaintiffs do not have a legitimate and productive agricultural use for the property, and do not have a right to that use under existing laws and site plans that they, themselves, submitted.

Affirmative Defenses:

1. Plaintiffs' claims are barred by the doctrine of unclean hands.

2. Plaintiffs' recovery, if any, is subject to set-off for the fair value of services that the District provided to Plaintiffs, for which Plaintiffs would be unjustly enriched if they refused to pay.

3. Plaintiffs' claims raise political questions regarding the legislative enactments of the District that are non-justiciable.

4. The Taxpayer's Bill of Rights violates the Constitution of the United States and therefore any claims based on it are unenforceable.

5. To the extent Plaintiffs are challenging the District's authority to set rates and fees, those actions are legislative or quasi-legislative in nature and therefore not subject to judicial review.

6. Plaintiffs' claims are untimely pursuant to C.R.C.P. Rule 106.

7. To the extent that Plaintiffs are seeking damages on their federal claims for due process or constitutional violations, Plaintiffs' claims are barred in part or in whole by the absolute and/or qualified immunity.

8. Plaintiffs' Ninth and Tenth Claims for Relief are barred by the existence of an adequate state law remedy.

9. Plaintiffs' Tenth Claim for Relief is barred because of the existence of zoning codes and land use ordinances of other jurisdictions that already limit or bar the agricultural use of property in the District, and thus the District's resolutions were not the cause of any deprivation.

Counterclaims:

The District has also brought counterclaims against Plaintiffs for money due and owing for unpaid fees, for nuisance, and unjust enrichment.

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1. The District seeks a judgment against Murphy Creek for unpaid fees in the amount of $5,373.00 per month plus interest at 18% per annum, late fees, and costs of collection.

2. The District's nuisance claims are based on damage to the District's property due to Plaintiffs maintaining "agricultural" conditions on their property (including farm animals, weeds, etc) solely so that it can avoid paying property taxes. Even though Plaintiffs' property is located in a platted golf-course community in the City of Aurora, plaintiffs graze cows on it from time to time, maintain crops and weeds, and harbor infestations of pests and animals that are incompatible with a city golf course community in close proximity to landscaped lots. This is not for any legitimate economic reason, but is solely to claim "agricultural" property tax designation despite being in a master planned residential community. This has caused thousands of dollars of damage to District property and landscaping, and increases the District's costs.

3. The District has also brought counterclaims for unjust enrichment. This is because the developer unjustly and unfairly has benefitted from improvements to its property that were paid for and installed by the District's bonds, but the developer (while in control of the District Board) excluded its property from paying taxes or development fees to fund those bonds. The District is entitled to recover the fair value of the benefit conferred on the Plaintiffs' property for which they are not paying the District. To the extent that the District's fees are

determined to be in technical violation of any statute, the District is entitled to recoup the fair value of services provided based on unjust enrichment.

II. STIPULATED FACTS

The Plaintiffs and District stipulate to the following facts:

1. **Murphy Creek Development, Inc**. ("**MCD**") is a Colorado corporation whose business address is 9335 E. Harvard Ave, Denver, CO 80231.

2. **Murphy Creek, LLC** ("**Murphy Creek**") is a Wyoming limited liability company whose business address is 9335 E. Harvard Ave, Denver, CO 80231.

3. **Murphy Creek Metropolitan District No. 3** (the "**District**") is a quasi-municipal corporation and political subdivision of the State of Colorado formed under Title 32 of the Colorado Revised Statutes in the City of Aurora, Arapahoe County, Colorado.

4. The District is governed by its Board of Directors which is delegated powers from the Colorado State legislature through the Special District Act, §§ 32-1-101 to -1401, C.R.S., which powers are further defined in its Service Plan (the **"Board"**).

5. The Plaintiffs own unplatted vacant land in the legal boundaries of the District that is subject to ad valorem taxes, and fees, rates, tolls and charges lawfully

assessed by the District Board (the **"Taxable Property" or "Taxable Properties"**).

6. Venue is proper under C.R.C.P. 98 because the Taxable Property is located in Arapahoe County and the Defendant is located in Arapahoe County.

7. The Arapahoe County District Court has jurisdiction over the parties and the subject matter.

8. The District was formed in 1998 to implement the Consolidated Service Plan for Murphy Creek Metropolitan District Nos. 1, 2, 3 and 4 ("**Service Plan**").

9. The District's voters approved the imposition of an annual tax mill levy to collect revenue to pay operations, maintenance, and other general or administrative expenses for the years 1999 through 2019 at the November 1998 election.

10. The District Board certified a debt service mill levy of 53.953 and a mill levy for general operating expenses of 0.00 for collection in 2019 at its November 28, 2018 meeting.

11. The District's Board approved a resolution "Concerning the Imposition of Operations, Recreation and Landscape Maintenance Fees" at its November 28, 2018 meeting.

12. The Fee Resolution states that "C.R.S. §32-1-1001(1)(j) authorizes the District "to fix and impose fees,

rates, tolls, charges, and penalties for services or facilities provided by the District which, until paid, shall constitute a perpetual lien on and against the property served."

13. The Fee Resolution imposes a fee of $60.00 per month, for each platted single-family residence lot and each residential unit on a multi-family platted lot.

14. The Fee Resolution imposes a fee of $300.00 per month per acre of unplatted land, or land under construction.

15. The Fee Resolution imposes a fee of $600.00 per month per acre of unplatted land that is classified as agricultural (including any class of grazing land).

16. On May 15, 2019, the District adopted a resolution "Imposing Backup Fees for Recreation, Security, Clubhouse, Snow Removal, Landscape Maintenance, and Pest Abatement" (the "**Backup Fee Resolution**" or "**Backup Fee**").

17. The Backup Fee Resolution was adopted to replace the O&M Fee in the event the O&M Fee is invalidated by this Court.

18. The Backup Fee for each platted lot or completed residential unit is $60 per month ("**Residential Backup Fee**"). The Residential Backup Fee against residential lots and units is the same as the O&M Fee.

19. The Backup Fee for each acre of unplatted or vacant land is $315 per month ("**Vacant Backup Fee**").

20. The Backup Fee Resolution imposes a "Backup Agricultural Land 'Fair Share' and Abuse Prevention Pest Abatement Fee" of $220 against each acre of unplatted or vacant land that is classified as agricultural property by the Arapahoe County Assessor (the "**Agricultural Fee**").

21. The District's collection policy authorizes the District to impose a monthly late fee of 5% of outstanding fees with such late fees being charged until they reach 25% of the outstanding exactions.

22. The District's collection policy authorizes the District to charge interest at 18% annually on outstanding fees.

23. The District's collection policy authorizes the District to foreclose on the statutory lien created by outstanding fees on Taxable Property.

III. PRETRIAL MOTIONS

The following motions are before the Court:

A. PLAINTIFFS' PENDING MOTIONS

a. None

B. DEFENDANT'S PENDING MOTIONS

a. None

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IV. TRIAL BRIEFS

The Plaintiffs and District may submit a trial brief no later than August 10, 2020.

V. ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT

A. PLAINTIFFS

i. Plaintiffs seek the declaratory relief requested in their first nine Claims for Relief; and

ii. Plaintiffs seek an order enjoining the District from imposing and collecting the O&M Fee and Backup Fee from Plaintiffs' property.

iii. Judgment in their favor on their 42 U.S.C.A. § 1983 claim;

iv. Plaintiffs seek attorney fees and costs pursuant rights afforded by Art. X, § 20 (1) of the Colorado Constitution and 42 U.S.C.A. § 1988, and, as this Court deems proper; and

v. Plaintiffs seek actual damages incurred due to the O&M Fee and Backup Fee's imposition against their property within the District; and

vi. Plaintiffs seek punitive damages on their 42 U.S.C.A. § 1983 claim; and

vii. Plaintiffs seek exemplary damages pursuant to § 13-21-102, C.R.S. (if applicable); and

viii. Additional relief the Court deems proper; and

ix. Judgment in their favor on the District's Counterclaims.

B. DISTRICT

The District seeks the following relief:

i. A declaration that the District's fees imposed by the District's Resolution Concerning the Imposition of Operations, Recreation and Landscape Maintenance Fees and the District's Resolution Imposing Backup Fees for Recreation, Security, Clubhouse, Snow Removal, Landscape Maintenance, and Pest Abatement are lawful;

ii. Judgment in favor of the District and against Murphy Creek, LLC for the amount of fees owed, in the principal amount of $39,329.10 per month from January 1, 2019 through the date of trial (15 months as of March 1, 2020) for a total principal amount of $589.936.50, plus prejudgment interest at 18% per annum, late fees, and costs of collection;

iii. Judgment in favor of the District and against Murphy Creek Development, Inc. for the amount of fees owed, in the principal amount of $5,373.00 per month from January 1, 2019 through the date of trial (15 months as of March 1, 2020) for a total principal amount of $80,595.00,

plus prejudgment interest at 18% per annum, late fees, and costs of collection;

iv. Judgment in favor of the District and against Plaintiffs for the District's cost of landscape improvements to Plaintiffs' property and damages incurred to District property as a result of nuisances on Plaintiffs' property, in an amount not less than $150,000.

v. Judgment in favor of the District and against Plaintiffs for the District's cost of additional security services provided due to Plaintiffs' property, in an amount not less than $50,000.

vi. Judgment in favor of the District and against Plaintiffs for the District's cost of snow removal services provided to Plaintiffs' property due to Plaintiffs' failure to remove snow, in an amount not less than $20,000.

vii. Judgment in favor of the District and against Plaintiffs for the value of improvements to Plaintiffs' property south of Jewell that were paid for by District 3 bonds, but were excluded from the District immediately prior to refinancing as part of Plaintiffs' scheme, and for which Plaintiffs were unjustly enriched, in an amount of approximately $2,000,000.

APPENDIX F — RESOLUTION OF THE BOARD OF DIRECTORS, MURPHY CREEK METROPOLITAN DISTRICT NO. 3, FILED AUGUST 18, 2020

RESOLUTION NO.:

RESOLUTION
BOARD OF DIRECTORS
MURPHY CREEK METROPOLITAN DISTRICT NO. 3

CONCERNING THE IMPOSITION OF OPERATIONS, RECREATION AND LANDSCAPE MAINTENANCE FEES

WHEREAS, pursuant to an Order of the District Court in and for Arapahoe County, Colorado, the Murphy Creek Metropolitan District No. 3 (the "District") was duly and validly organized and exists as a metropolitan district pursuant to C.R.S. §32-1-101, *et seq.* and other applicable Colorado law; and

WHEREAS, pursuant to §32-1-1001(1)(j), C.R.S., the District is authorized to fix and impose fees, rates, tolls, charges and penalties for services or facilities provided by the District which, until paid, shall constitute a perpetual lien on and against the property served; and

WHEREAS, the District is required to operate and maintain certain facilities and improvements throughout the District, including parks, recreational facilities, and landscape improvements (collectively the "Improvements"), which benefit all properties within the District and increase the value of those properties; and

WHEREAS, the District has ongoing operational expenses associated with operating and maintaining the District, which benefit all properties within the District and increase the value of those properties; and

WHEREAS, the District desires to establish a General Operations Fee, a Landscape Maintenance Fee, and a Recreation Fee (collectively, the "Fees" or "Fee") in order to finance the costs associated with the district's general operations and the District's operation and maintenance of Improvements; and

WHEREAS, the District finds that the Fees set forth herein are reasonably related to the Improvements and the District's general operations, and that imposition thereof is necessary to provide the services and facilities serving the property subject to such Fees.

NOW THEREFORE, IT IS RESOLVED by the District's Board of Directors that:

1. **General Operations, Recreation and Landscape Maintenance Fees for Platted Lots and Residential Units.** A combined General Operations, Recreation, and Landscape Maintenance Fee in the amount of Sixty Dollars ($60.00) per month per platted lot (for single family residence lots), or, for multi-family lots, per residential unit, is hereby established to pay costs associated with the day-to-day general operational requirements of the District ("General Operations Fee"), landscape maintenance of the property owned by the District ("Landscape Fee"), and operation and maintenance of the

District's recreation facilities ("Recreation Fee"). The General Operations, Recreation, and Landscape Maintenance Fee shall be due and owing upon the first day of each month and shall be paid to the District in accordance with this Resolution.

2. **General Operations Fee and Landscape Fee for Unplatted Lots.** A combined General Operations, Recreation, and Landscape Maintenance Fee in the amount of Three Hundred Dollars ($300.00) per month per acre of unplatted land, or, if under construction (such construction being deemed to commence with the issuance of a building permit), or if completed construction, per residential unit, within those filings or tracts of the District where the District has not yet accepted completed tangible infrastructure, is hereby established to pay costs associated with the day-to-day general operational requirements of the District ("General Operations Fee") and landscape maintenance of the property owned by the District ("Landscape Fee"). The General Operations, Recreation and Landscape Maintenance Fee shall be due and owing upon the first day of each month and shall be paid to the District in accordance with this Resolution.

3. **Agricultural Land "Fair Share" and Abuse Prevention.** The District finds that the District was organized by developer/property owners with the intention of creating an urban or suburban community without agricultural land contained within its boundaries. The undeveloped land

held within the boundaries of the District was always intended to be developed for residential or commercial real estate development purposes and not held or used for agricultural purposes. Nonetheless, certain land that is being held for real estate development within the boundaries of the District is purportedly being used for agricultural purposes not as a bona fide agricultural endeavor, but instead for abusive and tax avoidance purposes. The presence of agricultural land and ancillary cattle grazing and attendant weeds imposes unfair burdens and expenses on the District. The presence of agricultural land further discourages development of said land and increases the share of the District's costs allocated to remaining property owners. To prevent abuse, to properly allocate costs of the District's services, to impose costs and burdens of agricultural land fairly on the property owners, and to insure that owners who seek "agricultural" designation for their property pay their fair share, the District imposes a combined General Operations, Recreation, and Landscape Maintenance Fee in the amount of Six Hundred Dollars ($600.00) per month per acre of unplatted land that is zoned Agricultural (including any class of grazing land). The General Operations, Recreation, and Landscape Maintenance Fee shall be due and owing upon the first day of each month and shall be paid to the District in accordance with this Resolution.

4. **Late Fees and Penalty Interest.** Any Fee that is not paid in full within Fifteen (15) days after the

scheduled due date shall be assessed a late fee in the amount of Fifteen Dollars ($15.00) pursuant to §29-1-1102(3) C.R.S. Interest will also accrue on any outstanding Fee, exclusive of assessed late fees and interest, at the rate of 18% per annum, pursuant to §29-1-1102(7) C.R.S. Costs of collection and attorneys' fees shall also be added to any unpaid Fees pursuant to the District's collection policy as may be amended from time to time.

5. **Payment.** Payment for each Fee shall be made payable to: Murphy Creek Metropolitan District No. 3, c/o Cherry Creek HOA Professionals, 14901 E Hampden Ave. #320, Aurora, CO 80014.

6. **Fees Constitute Lien.** The Fees imposed hereunder each shall, until paid, constitute a perpetual lien on and against the property served, and any such lien may be foreclosed in the manner as provided by the laws of the State of Colorado for the foreclosure of mechanic's liens, pursuant to §32-1-1001(1)(j), C.R.S.

7. **Collection Procedures.** The District shall undertake collection efforts for any amounts outstanding, including late fees, interest, reasonable cost of collection and attorneys' fees, in accordance with applicable District resolutions, Colorado law and Federal law.

8. **The Property.** This Resolution shall apply to all property within the District's boundaries,

as set forth in Exhibit A, attached hereto and incorporated herein by this reference, and to any additional property included into the District after the date of this Resolution.

9. **Effect on Prior Resolutions.** This Resolution supersedes and replaces all prior resolutions related to Operations, Recreation, and Landscape Maintenance Fees. Nothing in this Resolution affects the Residential Development Fees and Commercial Development Fees imposed by the Amended and Restated Resolution of Murphy Creek Metropolitan District No. 3 Concerning Imposition of District Development, Working Capital, and Recreation Fees, which remain in effect. This Resolution shall continue in effect until repealed, subject to annual budget appropriation of the District.

RESOLVED this 28th day of November, 2018.

BOARD OF DIRECTORS
MURPHY CREEK METROPOLITAN
DISTRICT NO. 3

/s/_____
President

ATTEST:

By: /s/_____
Secretary