DISTRICT COURT, PITKIN COUNTY, COLORADO 506 East Main Street Aspen, CO 81611 (970) 925-7635	▲ **COURT USE ONLY** ▲
Plaintiff: **BASE VILLAGE METROPOLITAN DISTRICT NO. 2** vs. Defendants: **THE RELATED COMPANIES, LP, *et al.***	Case Number: 2017 CV 030137 Div.: 5
Attorneys for Plaintiff: Michael J. Reiser, Esq. **REISER LAW, P.C.** 1475 N. Broadway, Suite 300 Walnut Creek, California 94596 Telephone: (925) 256-0400 Facsimile: (925) 476-0304 michael@reiserlaw.com Matthew C. Ferguson, Esq. **THE MATTHEW C FERGUSON LAW FIRM, P.C.** 119 South Spring, Suite 201 Aspen, Colorado 81611 Telephone: (970) 925-6288 Facsimile: (970) 925-2273 matt@matthewfergusonlaw.com Tyler Meade, Esq. Sam Ferguson, Esq. **THE MEADE FIRM P.C.** 12 Funston Ave., Suite A San Francisco, CA 94129 New York Office: 111 Broadway, Suite 2002 New York, NY 10006 Telephone: (415) 724-9600 Facsimile: (415) 510-2544	

tyler@meadefirm.com
sam@meadefirm.com

Michael L. Schrag, Esq.
GIBBS LAW GROUP, LLC
One Kaiser Plaza, Ste. 1125
Oakland, CA 94612
Telephone: (510) 350-9701
Facsimile: (510) 350-9701
mls@classlawgroup.com

DECLARATION OF MATTHEW C. FERGUSON IN SUPPORT OF PLAINTIFF'S OPPOSITION TO WBA'S MOTION TO COMPEL ARBITRATION

I, **Matthew C. Ferguson,** declare and state:

1. I am an attorney and the shareholder of The Matthew C. Ferguson Law Firm, P.C., co-counsel for the Plaintiff in the above-captioned action. I am a competent witness to give testimony to the facts set forth herein. I am a member of the Colorado bar and of this Court. Furthermore, as a bar-licensed attorney in good standing in Colorado, I am an officer of Colorado state and federal courts.

2. I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

A. PURPOSES OF THIS DECLARATION

3. I respectfully submit this Declaration in support of Plaintiff's opposition to the portion of Defendant White Bear Ankele Tanaka & Waldron's ("WBA," also called the Ankele

law firm in the Amended Complaint) Motion to Dismiss Complaint that constitutes a motion to compel arbitration of certain claims against WBA ("Motion to Compel").

4. Plaintiff here solely addresses WBA's the Motion to Compel as that portion is imbedded in the motions to dismiss. Plaintiff is filing a separate opposition to the motion to dismiss on the grounds separate from WBA's arbitration arguments.

5. The Motion to Compel seeks to complicate an already complex case. WBA would like the court to extract for arbitration (in two arbitration forums, no less) those portions of the claims that Plaintiff has brought against WBA relating to WBA's representation of the Base Village Metropolitan Districts Nos. 1 and 2 ("the Districts") from November 2013 to 2015, as distinct from those claims arising from any engagement agreements entered into before 2013 or, potentially, depending on what discovery shows, in 2016.

6. The purposes of this declaration are (1) to set forth my relevant testimony, including about allegations of conflicts of interest held by board members who signed these agreements on behalf of the Districts' boards, and (2) to introduce relevant evidence, including evidence that engagement letters between WBA and the Districts' boards entered into before 2013 did not contain arbitration provisions.

B. THE DISTRICTS ENGAGED DEFENDANT WBA FOR MORE THAN A DECADE BEFORE AN ARBITRATION PROVISION WAS INSERTED

7. Every year for more than a decade, WBA held itself out as general counsel for the Districts. Plaintiff is only in possession of joint engagement letters dated 2005, 2013, 2014, and 2015.

8. According to WBA, it was not until November 2013 that the engagement letters between the Districts and WBA had inserted into them an arbitration provision. A true and correct

copy of the July 3, 2018, email exchange between WBA's counsel and Sam Ferguson, co-counsel for Plaintiff, in which WBA's counsel concedes this point, is attached as **EXHIBIT "1".**

9. WBA also provided Plaintiff as an attachment to that email exchange with a copy of a 2005 engagement letter that did not include an arbitration provision, stating that it could not find any other engagement letters at that point. A true and correct copy of the 2005 engagement letter between the Districts and WBA is attached as **EXHIBIT "2"**. *See also* **Ex. 1** (describing the attachment).

10. WBA provided the court and Plaintiff with engagement letters between WBA and the Districts entered into in 2013, 2014, and 2015. See Exhibits A, B, and C to Motion to Compel,

11. In 2017, Plaintiff had an independent board who retained new counsel; thus, for the first time since it was created, District 2 was represented by counsel distinct and independent from District 1's – still WBA.

12. Given that District 1 and 2 regularly entered into contracts with each other, serving as general counsel for both Districts for more than a decade was a surprising decision for WBA to make.

13. On December 19, 2017, Thomas Kosich, the new and independent President of District 2, wrote to WBA requesting the District 2 file. He noted that the district has "repeatedly requested this file," and noted that the file was essential to District 2's functioning, in addition to being required by rules of professional conduct, including Colorado Rule of Professional Responsibility 1.16(d). A true and correct copy of this December 19, 2017 letter is attached as **EXHIBIT "3".**

14. WBA refused to turn over District 2's complete case file to the Plaintiff. When the Plaintiff filed its First Amended Complaint, it was relying on WBA's incomplete productions for its understanding of what provisions the engagement letters contained over the years. *See, e.g.*, **Ex. 1** (counsel for Plaintiff requesting documents). Therefore, Plaintiff did not even know if, for example, each letter contained an arbitration provision. Plaintiff relies on WBA's assertion that the agreement(s) did not contain an arbitration provision before 2013.

15. On July 13, 2018, WBA litigation counsel detailed the significant hurdles it would put in the path of Plaintiff obtaining its own files if Plaintiff did not dismiss WBA. A true and correct copy of the July 13, 2018, email is attached as **EXHIBIT "4"**.

16. On November 19, 2018, almost a full year after District 2 asked for its client file back from WBA as required under Colorado law, and a day before the initial deadline for District 2's opposition to the motion to dismiss and the motion to compel arbitration, counsel for WBA emailed my co-counsel and I links to our client's documents that were supposed to constitute a complete client file; although documents pertaining solely to District 1 were withheld. It took several follow up emails and corrections for the scope of the client files released to be (mostly) clarified. A true and correct copy of the November 19-27, 2018, email chain is attached as **EXHIBIT "5"**. A true and correct copy of the letter that WBA's counsel attached to the November 19, 2018, email is attached as **EXHIBIT "6"**.

17. Counsel for WBA included in the November 2018 release of client files the minutes from the November 13, 2013 joint district meeting that approved the WBA engagement. The minutes for the engagement approval on page 5 are boilerplate, repeated in the preceding and

subsequent entries. A true and correct copy of the minutes produced in November 2018, is attached as **EXHIBIT "7"**.

18. District 2 (as presently constituted) has no record or knowledge of any discussion of the arbitration provisions inserted 8 years into the engagement included in the November 2013 engagement letter or in the letters in 2014 and 2015.

C. EVIDENCE SUGGESTS THAT THE ENGAGEMENT AGREEMENTS BETWEEN THE DISTRICTS AND WBA CONTAINING ARBITRATION PROVISIONS LIKELY WILL PROVE VOIDABLE AND UNENFORCEABLE

19. Former district board member Dwayne Romero signed the 2013 and 2014 letter engaging WBA on behalf of the Districts, and former district board member John Varghese signed the 2015 letter. *See* Motion to Compel, Exhibits A, B, and C. At the time they respectively signed these agreements, Romero and Varghese disclosed conflicts of interest in filings with the State of Colorado. Copies of Romero's conflict of interest forms from November 2013 and November 2014 and Varghese's form from November 2015 are attached as **EXHIBITS "8", "9",** and **"10"**.

20. The court faces the question whether valid arbitration agreements exist between WBA and the Districts or whether, instead, the arbitration provisions are voidable as to District 2. This question requires further discovery, as District 2 has been denied access to its complete file by WBA, which seeks to compel arbitration.

21. District 2 asserts that the arbitration provisions from 2013 to 2015 are voidable by District 2 and therefore unenforceable, given the extensive conflicts of interests held by District 1 and 2's former board members. Plaintiff believes that evidence will show that the board members entered into these engagement letters on behalf of the developers of the Base Village project, as opposed to in service of District 2 and its taxpayers. WBA enabled abuse of District 2 by Related

and its accomplices. Related's hand-picked directors, including Romero and Varghese, would have little incentive to question the wisdom of WBA inserting an arbitration provision into its engagement letter midway through the engagement. If these agreements prove voidable and unenforceable, Plaintiff would not be subject to their arbitration provisions.

22. Snowmass Acquisition Company signed its own signature block on a Bond Fee Agreement entered into by WBA and District 2 in October 2016, directly before the 2016 refinancing that further compromised District 2. A true and correct copy of this bond fee agreement is attached as **EXHIBIT "11".** That Bond Fee Agreement mentions WBA's service on behalf of the District and then notes that Snowmass Acquisition Company "agrees to pay the fees and expenses of WBA as described above." What the bond fee agreement describes "above" is that Snowmass Acquisition Company guarantees WBA's fees to the tune of $95,000 if certain conditions were met; in other words, if District 2 did not pay, Snowmass Acquisition Company would. It is strong evidence that WBA was serving another master while ostensibly acting for District 2.

23. Plaintiff's Opposition to the Motion to Compel makes additional arguments for why arbitration would be improper in this case.

Executed on November 30, 2018, in Aspen, Colorado.

/s/ Matthew C. Ferguson
Matthew C. Ferguson