UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 25-1448

SECOND GREEN MOUNTAIN TOWNHOUSE CORPORATION,

Plaintiff-Appellant,

v.

MESA UNDERWRITERS SPECIALTY INSURANCE COMPANY

Defendant-Appellee.

On appeal from the United States District Court for the District of Colorado
The Honorable S. Kato Crews, Civil Action No. 1:23-cv-00727-SKC-NRN

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT SECOND GREEN MOUNTAIN TOWNHOUSE CORPORATION

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March 9, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each *amicus* party represents that it does not have any parent entities and does not issue stock.

I. INTEREST OF *AMICI CURIAE*[1]

United Policyholders ("UP") is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

Unlike insurance companies, the individual policyholders represented by UP are not repeat players on insurance coverage issues. UP works to provide a consistent intellectual counterweight to the insurance industry's claims to ensure the evenhanded development of insurance law, including through monitoring legal and marketplace developments affecting the interests of all policyholders and lines of insurance, testifying at legislative hearings, and participating in regulatory proceedings on rate and policy issues. UP also advances policyholders' interests in courts across the United States by filing *amicus curiae* briefs in cases involving important insurance principles.

In this brief, UP seeks to assist the Court on an issue of immense public importance – the validity and enforcement of agreements made pursuant to *Nunn v. Mid-Century Ins. Co.*, 244 P.3d 116 (Colo. 2010) ("*Nunn* Agreements"), and the

[1] Plaintiff-Appellant consents to the filing of this brief. Defendant-Appellee opposes. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No person other than *amici curiae*, or their counsel contributed money to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

survival of subsequent bad faith litigation by a third party assignee against an insurer – by identifying arguments and authorities that have not previously been addressed in the parties' briefing. *See* Fed. R. App. P. 29(a)(4)(D). UP seeks to appear as *amicus curiae* in the instant case for the limited purpose of providing the historical and analytical framework in which *Nunn* Agreements developed, highlighting the novel nature of the district court's order (the "Order") imposing an untethered standard for collusion in *Nunn* Agreements, and articulating the pervasive effects of the Order on insureds, third parties, and counsel who represent them.

Colorado Trial Lawyers Association ("CTLA") is comprised of trial attorneys who represent citizens throughout the State of Colorado. CTLA works to preserve and improve the American judicial system through the advancement of trial advocacy skills, high ethical standards, and professionalism, and to advance the cause of those who are damaged in person or property and must seek redress at law. CTLA through its advocacy in both state and federal courts promotes constitutional, statutory, and rule-based rights and protections for injured parties, including the right to trial by jury, which is threatened in this case by the district court's resolution, as a matter of law, of the disputed key factual issue of collusion.

CTLA seeks this Court's permission to appear as *amicus curiae* and to join in UP's amicus brief, filed on behalf of Plaintiff-Appellant Second Green Mountain Townhouse Corporation.

Build Our Homes Right ("BOHR") is a grassroots organization comprised of homeowners and homeowner-aligned entities such as homeowner associations ("HOAs"). BOHR advocates for public policies that support the development of Colorado homes at all price points that comply with applicable building codes and industry standards. BOHR works with the Colorado legislature and local municipalities to promote laws that protect homeowners' rights and to oppose efforts that make it harder for homeowners to recover the reasonable cost to repair construction defects in their homes and communities. When an insurer unreasonably fails to settle construction defect claims asserted by homeowners against its insured, *Nunn* Agreements provide a critically important avenue for homeowners' recovery, the viability of which is jeopardized by the district court's Order.

BOHR seeks this Court's permission to appear as *amicus curiae* and to join in UP's amicus brief, filed on behalf of Plaintiff-Appellant Second Green Mountain Townhouse Corporation.

II. PRELIMINARY STATEMENT

This appeal presents a question of critical importance that will impact almost every policyholder in Colorado: the ability of insureds and third parties to protect themselves when an insurer fails to settle within policy limits before trial in litigation brought by a third party against an insured. The issue is whether a district court may summarily determine the existence of collusion as a matter of law in *Nunn*

Agreements, and therefore dismiss a subsequent bad faith lawsuit brought by a third party against an insurer as an assignee of the insured.

Based on long-standing Colorado law, the district court should have answered this question in the negative. The Colorado Supreme Court has expressly authorized *Nunn* Agreements, and moreover, has recognized that "the mere specter of fraud or collusion need not render all stipulated judgments unenforceable against an insurer, because the existence of fraud or collusion can be determined at trial like any other issue of fact." *Nunn*, 244 P.3d at 123. Further, the court recognized that the stipulated judgment attendant to *Nunn* Agreements is not binding on an insurer until the insurer has had an opportunity to defend itself at trial, and that the jury may award any amount of damages it deems reasonable, even if those damages do not rise to the amount of the stipulated damages set forth in the *Nunn* Agreement. *Id*.

Despite this guidance affirming that an insured may protect itself through a *Nunn* Agreement – even though there is a risk of fraud, collusion, or inflated damages – the district court granted summary judgment to Defendant-Appellee Mesa Underwriters Specialty Insurance Company ("MUSIC"). In rendering its determination, the district court found the existence of collusion as a matter of Colorado law and dismissed Plaintiff-Appellant Second Green Mountain Townhouse Corporation's ("SGM") bad faith lawsuit against MUSIC. By its decision, the district court ignored long-standing case law regarding the purpose of

Nunn Agreements, formed novel substantive state law, and created massive practical problems for insureds, third parties suing insureds, and legal practitioners.

If this Court permits the district court's decision to stand, *Nunn* Agreements will inherently be suspect, and their enforceability in subsequent bad faith litigation against an insurer will be undermined solely because of the mere specter of fraud or collusion. As a result, risk-shifting in insurance coverage disputes will be significantly eroded, insureds may lose a valuable tool to hold insurers accountable for bad faith conduct, and insurers will be provided with a pathway to act in bad faith without consequences. Further, insureds and third parties will be compelled to consider the interests of a non-participating insurer when conducting negotiations and settlement. This is not what the Colorado Supreme Court intended.

III. ARGUMENT

1. Colorado's Bad Faith Jurisprudence Was Developed to Protect Insureds from Insurers' Bad Faith Conduct in Underlying Litigation.

The Colorado Supreme Court has long recognized that insurance contracts are unlike ordinary contracts in several respects: insureds enter into them to obtain financial security from unforeseen calamities and for peace of mind, insureds are inherently disadvantaged due to a lack of bargaining power between insureds and insurers in obtaining such contracts, and insureds must wholly rely on their insurers to fulfill the insurers' obligations to provide a defense and indemnity when a loss occurs. *Farmers Grp., Inc. v. Trimble*, 691 P.2d 1138, 1141 (Colo. 1984) (en banc);

Goodson v. Am. Standard Ins. Co., 89 P.3d 409, 414 (Colo. 2004); *Huizar v. Allstate Ins. Co.*, 952 P.2d 342, 344 (Colo. 1998).

"By virtue of the insurance contract, the insurer retains the absolute right to control the defense … and the insured is therefore precluded from interfering with the investigation and negotiation for settlement." *Trimble*, 691 P.3d at 1141. As such, Colorado recognizes the existence of a special relationship between insurers and insureds. *Id*. Due to the existence of this special relationship, if an insurer acts unreasonably towards its insured with respect to a claim or lawsuit brought against its insured, Colorado law provides an additional remedy in tort, separate and apart from a regular breach of contract. *Id*.; *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1272 (Colo. 1985).

An insurer's unreasonable conduct includes its improper failure to settle a claim brought by a third party against its insured within policy before trial. *Nunn*, 244 P.3d at 119 ("[T]hird-party bad faith arises when an insurance company acts unreasonably in investigating, defending, or settling a claim brought by a third person against its insured…"); *Trimble*, 691 P.2d at 1141 ("The refusal of the insurer to pay valid claims without justification … defeats the expectations of the insured and the purpose of the insurance contract."); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo. 2004) (explaining an insurer's duty to defend).

When an insurer unreasonably refuses a settlement offer within policy limits before trial, it abandons the insured at the moment protection is most critical, leaving the insured with few, if any, meaningful options to protect itself. The insured may proceed to trial and hope for a favorable verdict, despite the risk of a judgment far exceeding the policy limits. If judgment exceeding policy limits is entered, the insured is exposed to catastrophic liability and collection efforts while it waits to vindicate its rights against its insurer.

Recognizing the impracticality of this framework, in *Northland Ins. Co. v. Bashor*, 494 P.2d 1292 (Colo. 1972), the Colorado Supreme Court explicitly endorsed assignment of bad faith lawsuits by insureds to third parties to protect the insured from the risks inherent in an insurer's failure to settle. In *Bashor*, after the insurer failed to settle within policy limits when it had the opportunity, the plaintiff obtained a judgment in excess of policy limits. 494 P.2d at 1293. After judgment, the insurer paid only the policy limits, and the plaintiff undertook to obtain collection of the excess judgment from the defendant-insured. *Id*. The parties then entered into an agreement by which the insured agreed to pursue claims against its insurance company and share recovery with the plaintiff, in exchange for the plaintiff's agreement to refrain from further efforts to collect the judgment from the insured's assets. *Id*. The Colorado Supreme Court found that these types of agreements

("*Bashor* Agreements") are enforceable, and not "champertous, illegal, void, or contrary to public policy." *Id*. at 1294.

Subsequent to *Bashor*, *Bashor* Agreements have also been used to describe agreements whereby the insured assigns its claims against its insurer to the third party plaintiff in exchange for a covenant not to execute the judgment on the insured's assets. *Old Republic Co. v. Ross*, 180 P.3d 427, 431 (Colo. 2008) (citing, as examples, *Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 570 (Colo. App. 2003); *Pike v. Am. States Preferred Ins. Co.*, 55 P.3d 212, 213 (Colo. App. 2002); *Rodriguez v. Safeco Ins. Co.*, 821 P.2d 849 (Colo. App. 1991)).

So, following *Bashor*, Colorado law permitted an insured to enter into a post-judgment settlement agreement with a third party, assign bad faith claims against the insurer to the third party, and obtain a covenant from the third party not to execute on the judgment in the underlying litigation. However, *Bashor* did not concern the validity of a pre-trial agreement to mitigate potential harm caused by an insurer's failure to settle within policy limits before trial.

In *Nunn*, the Colorado Supreme Court addressed this problem, and found that entering into a pre-trial settlement is a legitimate, reasonable way to respond to an insurer's bad faith conduct. In *Nunn*, the parties were involved in an automobile accident, and the insured was sued for substantial personal injuries. 244 P.3d at 118. While the insurer defended the insured in litigation, it failed to accept the plaintiff's

settlement offer within the limits of the insurance policy. *Id*. Facing excess exposure, prior to trial the insured entered into a protective settlement agreement, including a stipulated judgment and assignment of claims against the insurer to the plaintiff, while the plaintiff executed a covenant not to execute on the judgment in exchange for holding the rights to bad faith claims against the insurer. *Id*.

The Colorado Supreme Court endorsed the validity of such a pre-trial agreement, and found that when an insurer unreasonably breaches its duty to settle in underlying litigation, the insured may enter into a pre-trial settlement with the third party, assign its bad faith claims against the insurer to the third party, and agree to a stipulated judgment which satisfies damages for bad faith claims against an insurer. *See id*. at 123-24.

2. *Nunn* Agreements are Lawful Risk-Reallocation Mechanisms That Preserve an Insurer's Rights in Bad Faith Lawsuits While Allowing Insureds and Third Parties to Protect Against Bad Faith Conduct.

A. *Nunn* Agreements Permit Insureds to Reallocate Risk Created by an Insurer's Litigation Choices.

Colorado law makes clear that *Nunn* Agreements are risk-shifting devices in response to an insurer's own litigation choices, not as an end-run around the insurance industry. *See State Farm Mut. Auto. Ins. Co. v. Goddard*, 484 P.3d 765, 774 (Colo. App. 2021) ("Based on the language in *Nunn*, an insured is justified in entering into a stipulated judgment and assignment agreement without breaching the insurance contract when it *appears* that the insurer has acted unreasonably.")

The purpose of *Nunn* Agreements is straightforward: once the insurer's conduct places the insured at risk of an uninsured or excess judgment, the insured has the right to transfer that risk back to the party best positioned to control it (the insurer) while preserving the third party's ability to obtain a meaningful recovery through the assignment of litigation rights against the insurer.

Importantly, assignment of rights in the *Nunn* context does not create a guaranteed recovery of the stipulated judgment. When a third party accepts an assignment in exchange for a covenant not to execute, it is not receiving a right to payment in the amount of the stipulated judgment, but is rather receiving the same right to litigate that the insured originally held. In other words, *Nunn* Agreements do not expand an insurer's original exposure, but simply act as a mechanism for the insured and third party to rectify an insurer's deliberate choice to abandon its obligations to its insured.

B. Colorado Law Provides Safeguards Protecting Insurers from Inflated Settlements.

In signing a *Nunn* Agreement, the third party bears the risk that it may never collect any damages at all, let alone damages that rise to the amount of the stipulated judgment. Indeed, *Nunn* Agreements do not allow a third party to collect its stipulated damages from an insurer without checks and balances. Importantly, an insurer does not bear any risk unless a jury finds it is liable for bad faith with respect

to its conduct in the underlying litigation. *Old Republic*, 180 P.3d at 434; *Nunn*, 244 P.3d at 123.

Moreover, an insurer may assert fraud or collusion as an affirmative defense, and if the jury finds the *Nunn* Agreement was the product of fraud or collusion, it the *Nunn* Agreement will not be binding on the insurer. *Nunn*, 244 P.3d at 123. Critically, *Nunn* assigns the determination of fraud and collusion to a jury, and does not authorize a court to resolve that factual issue in advance and dismiss the action as a matter of law. Such an approach contradicts the summary judgment standard, which requires that palpable, material issues of fact, including a party's intent, be decided by a jury at trial and not by a court on summary judgment. *Dominguez Reservoir Corp. v. Feil*, 854 P.2d at 795-96 (Colo. 1993) (en banc).

Nunn further provides that where the jury finds that the amount of the stipulated judgment is unreasonable, it may award whatever damages it does find reasonable. *Id*. Thus, there are a multitude of protections in place that afford an insurer an opportunity to challenge the stipulated judgment portion of the *Nunn* Agreement. *Id*. at 124. ("[T]he particular amount of the stipulated judgment … does not represent the presumptive value of the actual damages in the bad faith case.")

The Colorado Supreme Court has permitted the use of *Nunn* Agreements even though there is a nontrivial risk of inflated settlements. *Id.* at 120. Colorado law does not pretend that the incentives around *Nunn* Agreements are perfect, and has

regulated these incentives by requiring meaningful safeguards to the determination of the damages an insurer ultimately owes, rather than categorically banning or invalidating such agreements and subsequent bad faith lawsuits. *Old Republic*, 180 P.3d at 433.

In *Auto-Owners Ins. Co. v. Bolt Factory Lofts Owners Ass'n Inc.*, 487 P.3d 276 (Colo. 2021), the Colorado Supreme Court recognized the power of these safeguards when it declined to provide insurers with an automatic right of intervention in underlying litigation where a *Nunn* Agreement has been executed. 487 P.3d at 284. In *Auto-Owners*, the court recognized that intervention by an insurer to determine damages is not necessary because the insurer's interests are sufficiently protected by a jury's determination of damages in subsequent bad faith litigation. *Id.* at 283.

C. *Nunn* Agreements Promote Settlement and Conserve Judicial Resources.

Nunn Agreements also accomplish the important public policy goals of promoting settlement and conserving judicial resources. Before *Nunn*, the parties had to proceed through costly and protracted litigation, and the insured had to face the risk of an excess judgment due to its insurer's failure to settle within policy limits. When the insurer declined a reasonable opportunity to settle, it ensured that litigation would continue rather than end. The result is that the dispute is not resolved but is prolonged, first through a full trial on liability and damages between the insured and

third party, and second through subsequent litigation over the insurer's failure to settle.

Thus, the ability of insureds to mitigate these risks through *Nunn* Agreements is clear. First, a *Nunn* Agreement resolves the underlying dispute without requiring a full trial on liability and damages, allowing the plaintiff in the underlying lawsuit to essentially trade one lawsuit for another. Second, an insurer's refusal to settle can place an insured on the brink of financial collapse. If a substantial judgment is entered against an insured who has been abandoned by its insurer, it follows that the insured may have no realistic means of satisfying it. Bankruptcy proceedings may follow, introducing an entirely new layer of litigation and dedication of judicial resources. Third, without a *Nunn* Agreement, the judiciary must oversee, through a trial on the merits, underlying litigation as well as subsequent bad faith litigation. In the absence of a *Nunn* Agreement, what began as a single case can metastasize into multiple lawsuits involving significant judicial resources. A *Nunn* Agreement avoids this domino effect by sharpening litigation to the true controversy: whether the insurer honored its obligations to settle the claim within policy limits when it had the opportunity to do so in the underlying litigation.

3. The District Court's Order Improperly Expanded the Meaning and Application of the Collusion Affirmative Defense in the Context of *Nunn* Agreements.

In finding collusion as a matter of law, the Order did not simply apply the framework of *Nunn*; it materially expanded the meaning of "collusion" beyond what the Colorado Supreme Court has authorized. In doing so, it transformed articulated, limited safeguards into a broad review of the fairness of *Nunn* Agreements.

Nunn provides that pretrial stipulated judgments between an insured and third party are permissible, despite that such agreements "raise concerns" because they involve a pretrial stipulation rather than an adversarial proceeding. 244 P.3d at 119-120. The Colorado Supreme Court has declared that this "risk of collusion" is tolerable in light of the relative positions of the parties, *i.e.*, the insurer's abandonment when its participation is most necessary. *See id*. at 120. Thus, the alignment of interests between an insured and a third party in entering into a *Nunn* Agreement is not suspicious, but is the very reason *Nunn* authorizes parties to enter into agreements without the participation of the insurer. *See Corsentino v. Hub Int'l Ins. Servs., Inc.*, 2018 WL 6597231, at *6 (D. Colo. Mar. 12, 2018) (in the *Nunn* context, it is "unsurprising" that the insured and third party would encourage settlement by exchanging information about the potential strength of a bad faith claim; those communications "do not necessarily imply any collusion").

The district court, however, treated that alignment as suspect, by holding that collusion may be found, as a matter of law, where there is "an absence of conflicting interests—the lack of opposition between a plaintiff and an insured that otherwise

would assure that the settlement itself is the result of hard bargaining." (11/AA/15). The absence of "hard bargaining" between a third party and an insured is not proof of collusion under *Nunn*, however, but is rather the foreseeable consequence of an insurer's bad faith refusal to participate in underlying litigation.

The Order collapses "collusion" into a reasonableness inquiry, even though *Nunn* makes clear that "the particular amount of the stipulated judgment merely serves as evidence of the value of [the claims] as bargained for and does not represent the presumptive value of the actual damages in the bad faith case." 244 P.3d at 124.

By treating the amount of the stipulated judgment and the absence of negotiation as dispositive proof of collusion, the district court effectively imposed a reasonableness requirement which no Colorado appellate court has prescribed. The district court acknowledged that Colorado appellate courts have provided "little guidance" regarding the elements of collusion and fraud as affirmative defenses in the context of Nunn Agreements. (11/AA/15). The district court nevertheless adopted a broad formulation drawn from federal and out-of-state authorities, including the proposition that collusion may be found in *Nunn* Agreements without misrepresentation or concealment. (11/AA/16-17).

For example, the district court cited to *Sargent v. Johnson*, F.2d 221 (8th Cir. 1977), which applied Minnesota law. Minnesota's approach to the reasonableness of *Nunn*-like agreements is in direct conflict with Colorado's framework: in *Alton M.*

Johnson Co. v. M.A.I. Co., 463 N.W. 2d 277 (Minn. 1990), the Minnesota Supreme Court declared that the reasonableness of a stipulated judgment was a question for the court, not the jury. 463 N.W. 2d at 279. Moreover, the Minnesota Supreme Court held that if a *Nunn*-like agreement is found unreasonable, courts must "reinstate for trial the plaintiff's tort claim against the defendant insured." *Id*. at 280. It follows that the concerns underlying the *Sargent* Court's reasoning do not exist in Colorado, where reasonableness is a question of fact for the jury, and where upon a finding of unreasonableness, a jury may award whatever damages it deems appropriate. *Nunn*, 244 P.3d at 123.

As another example, the district court cited to *Bond Safeguard Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh PA*, 2014 WL 5325728 (M.D. Fla. Oct. 20, 2014), *aff'd*, 628 F. App'x 658 (11th Cir. 2015), which applied Florida law. That state's law expressly permits a court to refuse to enforce a settlement agreement against an insurer "if it is unreasonable in amount or tainted by bad faith." *Steil v. Fla. Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. Dist. Ct. App. 1984).

The district court exercised diversity jurisdiction, and as such, was required to apply substantive law as articulated by the state's highest court. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Blanke v. Alexander*, 152 F.3d 1224, 1228 (10th Cir. 1998). Where the Colorado Supreme Court has not spoken, the district court may not expand substantive law. *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 416

(1996) ("Federal diversity jurisdiction … does not carry with it generation of rules of substantive law"). Nevertheless, the district court expanded Colorado substantive law by finding collusion based upon disputed material facts which the Colorado Supreme Court has never articulated constitute the same.

4. The District Court's Order Creates Unworkable Uncertainty for Insureds, Third Parties, and Legal Practitioners.

Beyond doctrinal error, the district court's redefining of "collusion" and the consequences of such perceived "collusion" carries significant consequences for insureds, third parties, and legal practitioners across Colorado. *Nunn* recognizes that the risk of an excess judgment should not be borne by an insured who has specifically contracted to guard against such financial and reputational harm, but the Order dismantles that protection, chills risk-shifting authorized by the Colorado Supreme Court, and reallocates settlement leverage in a manner that Colorado law forbids.

Perhaps most importantly, the Order does not articulate a coherent standard for what constitutes fraud or collusion in the *Nunn* context. It identifies a collection of features, including perceived absence of negotiation, inclusion of attorneys' fees, disparity between prior demands and stipulated amounts, and advocacy-driven recitals, as sufficient to establish collusion as a matter of law. (11/AA/17-21). The Order, however, does not explain which of these features is dispositive, which is evidentiary, or how parties can structure *Nunn* Agreements to avoid dismissal of the subsequent bad faith action against the insurer. Indeed, the Order expands

"collusion" but does not define it. It rejects "hard bargaining" as absent but does not specify how much bargaining is sufficient. It criticizes the absence of negotiated damages but does not explain whether the insured must, as a matter of law, attempt to reduce a judgment it will never pay.

The result is chaos for insureds, third parties, and legal practitioners alike. The Order creates uncertainty for counsel advising insureds facing excess exposure, and brings to the fore more questions than answers. Must the insured insist on adversarial negotiation despite having secured a covenant not to execute, thereby acting on behalf of the insurer's best interests? Must parties avoid recitals referencing an insurer's bad faith conduct? Must stipulated judgments mirror prior settlement demands? The Order provides no such guidance, but rather provides a list of cautionary features untethered to any defined threshold.

Moreover, the Order produces a doctrinal paradox by treating the insured's failure to negotiate down the amount of the stipulated judgment as evidence of collusion. This ignores the key premise: because a covenant not to execute is issued as part of the agreement, the insured has no economic incentive to reduce the judgment. Under the district court's logic, an insured and third party entering into a *Nunn* Agreement must nevertheless bargain aggressively to minimize damages to protect the entire bad faith lawsuit from invalidation. The effect, then, is that an

insured and third party must act in the best interests of the absent insurer when reallocating risk caused by the insurer in the first place. [2]

Colorado law has never imposed such a requirement on insureds. To the contrary, once an insurer abandons its duty to settle, the insured may protect its own interests, even if doing so disadvantages the insurer. *Nunn*, 244 P.3d at 120 (acknowledging that the "risk of collusion may be tolerable in light of the relative positions of the parties"). The Colorado Supreme Court's tolerance of this dynamic reflects a fundamental principle: when the insurer creates the risk of excess liability by refusing settlement or disputing coverage, the insured is not obligated to continue prioritizing the insurer's financial interests.

The Order also injects significant uncertainty into drafting the terms of such agreements. The Order treated advocacy-driven recitals criticizing the insurer as evidence of collusion, but if the inclusion of such language can later be characterized as an "attempt to influence coverage" and deemed collusive, and allow a bad faith lawsuit to be dismissed before ever reaching a jury, counsel are faced with undertaking to craft an agreement that describes the factual and legal

[2] *See Miller v. Shugart*, 316 N.W.2d 729, 734-35 (Minn. 1982) (cited to in *Nunn*, 244 P.3d at 123) ("If, as here, the insureds are offered a settlement that effectively relieves them of any personal liability, at a time when their insurance coverage is in doubt, surely it cannot be said that it is not in their best interest to accept the offer. Nor, do we think, can the insurer who is disputing coverage compel the insureds to forego a settlement which is in their best interests.")

characterizations central to the assigned claims, without characterizing the insurer's conduct *too* harshly at risk of invalidating the entire agreement and voiding the bad faith lawsuit.

For insureds and third parties, the uncertainty created by the district court is equally destabilizing. *Nunn* was designed to provide a predictable mechanism for risk reallocation when insurers refuse to settle within policy limits. *Id*. If parties cannot know what constitutes collusion as a matter of law, they cannot structure agreements with confidence that those agreements will survive summary judgment. Put simply, the Order lacks definitional boundaries and invites post hoc judicial invalidation, thereby discouraging reliance on settlement mechanisms and undermining Colorado's public policy favoring settlement. *See Davis v. Flatiron Materials, Co.*, 511 P.3d 28, 32 (Colo. 1973) (recognizing Colorado's policy encouraging compromise and settlement).

In sum, the Order does not only impermissibly expand articulated safeguards and instructions by the Colorado Supreme Court regarding the consequences of a finding of collusion in the *Nunn* context, but also creates harsh consequences for reasonable, legitimate conduct in the face of an insurer's bad faith conduct. Without a clearly articulated standard, counsel cannot reliably advise clients, and insureds and third parties alike will be compelled to act in the best interests of the insurer in contravention of Colorado law.

IV. CONCLUSION

The district court erred in finding that the *Nunn* Agreement at issue was a product of collusion as a matter of law and dismissing all of SGM's claims against MUSIC. Left standing, the Order departs from the structure established by *Nunn* and its progeny, undermines risk re-allocation, injects uncertainty into settlement practices, and erodes the protections Colorado law affords to insureds when insurers unreasonably fail to settle claims brought by third parties. The Court should restore the framework articulated by the Colorado Supreme Court and reverse the district court's Order so that the disputed material facts may be resolved by a jury.

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s/ Annika Adams
Annika Adams

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANT SECOND GREEN MOUNTAIN TOWNHOUSE CORPORATION** was filed through the Court's CM/ECF system this 9th day of March 2026 which provides notice to all parties of record.

Nicole R. Peterson
Nicole R. Peterson