DISTRICT COURT, GRAND COUNTY, COLORADO 307 Moffat Avenue/P.O. Box 192 Hot Sulphur Springs, CO 80451 970-725-3357 **Plaintiff:** GRANBY RANCH METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado, vs. **Defendants:** HEADWATERS METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado; GRAY JAY VENTURES, LLC.; REDWOOD CAPITAL FINANCE CO., LLC; GRANBY PRENTICE, LLC.; GR TERRA, LLC.	DATE FILED: October 7, 2022 4:10 PM CASE NUMBER: 2021CV30008 **COURT USE ONLY**
	Case No: 2021CV30008
ORDER GRANTING THE PLAINTIFF GRANBY RANCH METROPOLITAN DISTRICT'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT	

This matter comes before the Court on the Motion for Leave to File a Third Amended Complaint filed by Granby Ranch Metropolitan District ("GRMD") on June 17, 2022. GR Terra LLC ("GR Terra"), Headwaters Metropolitan District ("Headwaters"), Gray Jay Ventures, LLC ("Gray Jay"), Granby Prentice, LLC ("Granby Prentice") (collectively, the "Defendants"), filed a response on July 7, 2022. GRMD filed its Reply on July 15, 2022. Upon being fully apprised of the facts and law, the Court finds and rules as follows:

FACTS

The Court thoroughly addressed the facts of this case this Court's Orders issued January 28, 2022, so the Court does not need to repeat the facts again here.

In those Orders issued on January 28, 2022, the Court dismissed the following claims found in the Plaintiff's Second Amended Complaint:

- GRMD's breach of contract claim against Headwaters for breach of the 2008 Granby IGA (but the Court did not dismiss the breach of contract claims against Headwaters for breach of the 2003 Master IGA and the 2016 IGA) (Claim II);
- Dismissed GRMD's claim of breach of covenant of good faith and fair dealing against Headwaters and Gray Jay (Claim VII);
- Dismissed GRMD's tortious interference with contract claim against Gray Jay and Granby Prentice (Claim VI);
- Dismissed GRMD's breach of contract claim (Claim III) and tortious interference with contract claim against Redwood Capital (Claim VI).

This case has progressed since January 28, 2022. In February of 2022, Gray Jay, Headwaters, Granby Prentice, and GR Terra each filed answers and affirmative defenses to the Plaintiff's Second Amended Complaint. Headwaters and GR Terra each filed four counterclaims against GRMD. GRMD responded to those counterclaims on March 4, 2022. The Court entered its Case Management Order on May 5, 2022, and set this case for a ten-day trial beginning on February 6, 2023.

On June 17, 2022, GRMD filed the present motion seeking to amend its Second Amended Complaint to "include additions to the Breach of Contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra to include specific allegations that each of these entities had actual and constructive knowledge that the LPA existed and that it was bound by its provisions as a covenant running with the land … GRMD wishes to formally amend its complaint to include a separate claim for declaratory and injunctive relief to enforce the covenant." (Motion, page 2). Additionally, the motion seeks to conform the Complaint to this court's January 2022 Orders by: (1) removing Redwood Capital as a party and removing the breach of contract claims against it; (2) removing the tortious interference with contract claim against Gray Jay, Granby Prentice, and Redwood Capital; and (3) removing the breach of the covenant of good faith and fair dealing against Headwaters and Gray Jay.

STANDARD OF REVIEW

Pursuant to C.R.C.P. 15(a), after a responsive pleading has been filed, a party may amend his complaint only by asking for leave of the court or by written consent of the adverse party. Varner v. District Court for Fourth Judicial Dist., 618 P.2d 1388, 1390 (Colo. 1980). The court shall grant leave freely, "when justice so requires." Id. Colorado has a liberal policy towards amendments and the purpose of that policy is "'to secure the just, speedy, and inexpensive determination of every action'" and to ensure "that substantive rights will not be sacrificed for mere form." Id; Civil Service Com'n v. Carney, 97 P.3d 961, 966 (Colo. 2004). "Trial courts

may permit amendments to pleadings at any stage of the litigation process . . ." Ajay Sports, Inc. v. Casazza, 1 P.3d 267, 273 (Colo. App. 2000).

On the other hand, because leave to amend depends upon the facts and circumstances of each case, Benton v. Adams, 56 P.3d 81, 86 (Colo. 2002), a court may deny the motion when the plaintiff repeatedly fails to cure deficiencies by amendments that were previously allowed, or when the request is made in bad faith, is unduly prejudicial, is untimely, made with a dilatory motive, or is futile. See Francis v. Aspen Mountain Condominium Association, 401 P.3d 125, 130 (Colo. App. 2017); Polk v. Denver Dist. Court, 849 P.2d 23, 2 (Colo. 1993). A trial court "must assess the motion to amend in light of the totality of the circumstances." Polk, 849 P.2d at 26. This requires "balanc[ing] the policy favoring the amendments of pleadings against the burdens which granting the amendment may impose on the other parties." Id. The party seeking to amend its pleadings bears the burden to demonstrate that the amendment sought should be granted. Id. at 27. The granting of leave to amend is within the discretion of the trial court. Benton, 56 P.3d at 85.

RULING

The Court grants GRMD's Motion for Leave to File a Third Amended Complaint.

The Court has compared the Second Amended Complaint with the proposed third amended complaint and highlights the following:

- The Breach of Contract claims: In the Second Amendment, GRMD alleged breach of contract claims against Gray Jay, Headwaters, Granby Prentice, and GR Terra. All of these were based on breaches of the LPA, other than the claim against Headwaters which was based on breaches of the Intergovernmental Government Agreements. (Claims I-V). In the proposed third amendment, GRMD alleges breach of contract claims against the same parties and based on the same bases, but adds (1) breaches of the LPA and the Service Plans against Headwaters; and (2) new allegations that each defendant had actual and constructive knowledge that the LPA existed and was bound by its provisions as a covenant running with the land;

- The Declaratory Judgment Claim: In the Second Amendment, GRMD requested a declaratory judgment against Gray Jay Ventures and GR Terra that as successors in interest, they are bound by the terms of the LPA or, alternatively, that the LPA survived foreclosure because it is an installment land contract (Claim VIII). In the proposed third amendment, this claim is pled again to preserve GRMD's right to appeal (Claim V in the proposed amendment). GRMD also moves to add an additional declaratory judgment claim against Headwaters, GR Terra, Gray Jay, and Granby Prentice, that the LPA is a covenant running with the land that was not extinguished by foreclosure. (Claim VI in the proposed amendment);[1] and

[1] GRMD also moves to delete the following claims based on this Court's January 28, 2022 Orders: (1) Claim III (breach of contract against Redwood): Claim VI (tortious interference with contract against Gray Jay Ventures, Granby Prentice, and Redwood Capital): and Claim VII (breach of the covenant of good faith and fair dealing against Headwaters and Gray Jay, as Landlord under the LPA). The Court does not believe this is entirely necessary

- The addition of Special Damages.

The Defendants argue the proposed amendments are futile, will cause undue prejudice, and should have been alleged earlier because the proposed allegations arise from the same facts and documents referenced and attached to GRMD's prior pleadings.

The Court disagrees.

(1) Futility.

The amendments GRMD seeks are not futile.

The Defendants maintain the following amendments are futile: (1) the addition of the breach of the LPA and the breach of the Service Plans as bases for breach of contract against Headwaters; and (2) the addition of a new claim for declaratory judgment that the LPA is a covenant running with the land, not extinguished by foreclosure, alleged against all the Defendants.

An amendment is futile, if "'it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss.'" Benton, 56 P.3d at 87 (quoting 3 Moore's Federal Practice ¶15.15[3]).

(a) Breach of the LPA as a Basis for the Breach of Contract Claim Against Headwaters.[2]

GRMD's proposed claim for breach of the LPA as a basis for a breach of contact claim against Headwaters suffer is not futile.

GRMD originally alleged a breach of contract against Headwaters based on the 2003 Master IGA, the 2008 Granby Ranch IGA, and the 2016 Second Granby Ranch IGA, but not the LPA.

As mentioned, the Court previously dismissed the breach of contract claim based on the 2008 Granby IGA but the Court did not dismiss the breach of contract claims based on the 2003 Master IGA or the 2016 Second Granby Ranch IGA.

GRMD now moves for leave to amend to add the LPA and the Service Plans as bases for its breach of contract claim, in addition to the 2003 Master IGA (2003) and the 2016 Second Granby Ranch IGA. GRMD alleges, under these documents, Headwaters was obligated to acquire the Amenities on behalf of GRMD.

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because the Court removed these claims from the case by way of dismissal. The Court, however, appreciates GRMD's efforts in attempting to make this case and its pleadings more concise and efficient.

[2] The breach of the LPA claims was previously alleged against Gray Jay, Redwood, Granby Prentice, and GR Terra, but not Headwaters.

The Defendants argue these proposed allegations are futile because they are merely an attempt to resuscitate GRMD's dismissed claim for breach of covenant of good faith and fair dealing against Headwaters and Gray Jay, citing Bristol Co., L.P. v. Osman, 190 P.3d 752, 758 (Colo App. 2008). The Defendants argue the Court dismissed the claim of breach of covenant of good faith and fair dealing because Headwaters did not have any mandatory obligations under the LPA to purchase the Amenities or to continuously operate those Amenities.

The Court, however, did not dismiss GRMD's claim based a lack of mandatory obligations under the LPA. Rather, the Court dismissed the breach of covenant of good faith and fair dealing claim because GRMD failed to allege that Headwaters or Granby Realty Holdings had "the power to control or determine the terms of performance" regarding Headwater's option to purchase the Amenities."[3] (Order Granting in part the Defendant Headwater Metropolitan District's Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P.12(b)(1) & (5), issued January 28, 2022, page 20, citing McDonald v. Zions First National Bank, N.A., 348 P.3d 957, 967 (Colo. App. 2015)).

While violation of a breach of good faith and fair dealing may give rise to a breach of contract claim, City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006), the Defendants have not cited any legal authority that dismissal of a claim for breach of covenant of good faith and fair dealing necessitates dismissal of a claim for breach of contract.

Additionally, the Court finds no evidence that the proposed allegations are an attempt to resuscitate the claim for breach of covenant of good faith and fair dealing. The breach of contract claim was alleged in all prior amendments and has not been dismissed (other than based on 2008 Granby Ranch IPA). These proposed allegations merely add a new basis that involves a document that has been, and continues to be, a necessary piece to the Granby Ranch Development puzzle.

The Court finds the Defendants have not demonstrated, as a matter of law, that GRMD's proposed claim for breach of the LPA as a basis for a breach of contact claim against Headwaters suffers from futility.

(b) Breach of the Service Plans as Basis for Breach of Contract Against Headwaters.

GRMD's proposed claim for breach of the service plans as a basis for breach of contract against Headwaters suffer is not futile.

GRMD also moves to amend the breach of contract claim against Headwaters to include the service plans[4] as a basis for the breach. GRMD seeks to allege, pursuant to the service plans,

[3] The covenant of good faith and fair dealing only applies where one party has the discretion to determine the manner of performance of certain contractual terms, such as "quantity, price, or time." Amoco Oil Co. v. Ervin, 908 P.2d 493, 498 (Colo. 1995); ADT Security Services, Inc. v. Premier Home Protection, Inc., 181 P.3d 288, 293 (Colo. App. 2007). Thus, the covenant of good faith and fair dealing "may be relied upon only when the manner of performance under a specific contract term allows for discretion on the part of either party." Amoco Oil, 908 P.2d at 498.

[4] These are the 2003 Service Plans entered into by and between Granby Realty Holdings LLC and Headwaters and by and between Granby Realty Holdings LLC and GRMD.

that Headwater had a duty to acquire the Amenities on behalf of GRMD and failed to do so, amounting to a breach of contract.

The Defendants argue the proposed amendment fails because GRMD did not allege what part of the service plans imposed such a duty on Headwaters, Headwaters is not a party to GRMD's service plan, and GRMD is not a party to Headwaters' Service Plan.

The Court finds the Defendants have not demonstrated these alleged flaws in the pleadings constitute futility as a matter of law. The Court discussed the following on page nine of the Court's Order Granting in part the Defendant Headwater (sic) Metropolitan District's Motion to Dismiss the Second Amended Complaint Pursuant to C.R.C.P. 12(b)(1) & 5, issued on January 28, 2022, at part of the Court's January 2022, Orders:

> The Court notes the LPA does not contain language either expressly creating or disavowing the existence of any third-party beneficiaries. The Court, therefore, examines the contract as a whole and the surrounding circumstances to determine the parties' intent. Jefferson County School Dist. No. R-1 v. Shorey, 826 P.2d 830, 843 (Colo. 1992); Vallagio at Inverness Residential Condo. Ass'n, Inc. v. Metro. Homes, Inc., 412 P.3d 709, 718 (Colo. App. 2015); (parties' intent to confer benefit on third party may be evidenced by the circumstances surrounding the contract); Villa Sierra Condominium Ass'n, 878 P.2d at 166.
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> The Court finds "surrounding circumstances" to include the Service District Agreements for Headwaters and the Plaintiff, the 2003 Master Agreement, the 2005 Fee Resolution, the 2005 Fee Agreement, and the 2008 Granby IGA. These documents were in force when Headwaters and GRH executed the LPA. These documents also reflect the complex and interrelated relationship between Headwaters and the Plaintiff, as well as the purposes of the dual-district structure.

The Court then specifically addressed the Service Plans and GRMD's relationship to those plans:

> The Districts' service plans provide the why and how each district was to function. The plans are directly related to one another and essentially provide for the financing and operation of "community-wide infrastructure and public facilities and services that will service the [Granby Ranch] Development." The plans describe the dual district structure and detail the "consolidated financial management and operation of the Districts."
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> As previously discussed, the Plaintiff was authorized to impose a mill levy and collect fees to provide services and facilities to the Districts. (Sec. Amend. Compl. Ex. 2 Part 4, 2003 Master IGA ¶ 5.1, 5.2.) Said services and facilities included "ski areas and/or ski lifts, golf courses … and other recreational facilities, together with all necessary, incidental and appurtenant facilities, land and easements…" (Sec. Amend. Compl., Ex. 2, Part 1, Taxing District Service Plan, ¶ III.C.)

> The Service Plan Agreements reflect a symbiotic relationship between the Districts. (See Sec. Amend. Compl., Ex. 1, Sol Vista Metro District No. 1 Service Plan, ¶ IV.A.; Ex. 2, Part 1, Sol Vista Metro District No. 2 Service Plan, ¶ IV.A.). The Taxing District taxed and financed the services and infrastructure that the Service District acquired, constructed, and operated. There isn't any indication in these plans that the two districts were meant to operate independently from one another.

Id. at page 11.

The Court finds the Defendants have not demonstrated that certain flaws in the proposed pleadings amount to futility. In light of the court's January 2022 findings, it is apparent that the service plans are integral to the overall framework for Granby Ranch Development and the Headwaters Service District and the GRMD Service District were meant to work together in the continuing operations of that development. As such, a violation of those service plans could constitute a breach of contract. The Defendants, however, have not provided the court with any evidence or legal argument that the proposed allegations fail as a matter of law simply because a specific section is not referenced or because GRMD and Headwaters are not parties to the other's service plan. Compare Liscio v. Pinson, 83 P.3d 1149, 1153 (Colo. App. 2003) (amendment properly denied as futile when the claim could not withstand a motion to dismiss).

(c) Declaratory Judgment Against All Defendants that the LPA is a Covenant Running with the Land.

GRMD's proposed claim for a declaratory judgment against the Defendants that the LPA is a covenant running with the land is not futile.

GRMD moves to add a new claim for declaratory judgment against Headwaters, GR Terra, Gray Jay and Granby Prentice. GRMD specifically seeks a declaration that the LPA is a covenant that runs with the land, enforceable against all the Defendants, that was not terminated by foreclosure.

The Defendants argue that this claim fails as a matter of law because the foreclosure extinguished the LPA as a junior encumbrance, regardless of whether it is a covenant running with the land.

The Court finds this claim does not suffer from futility for the same reasons discussed in the January 2022, Orders. In the Court's Order Granting in part Gray Jay Ventures, LLC, Granby Prentice, LLC, And GR Terra LLC's Motion To Dismiss Second Amended Complaint, the Court denied the Defendants' argument that the LPA was extinguished by foreclosure as a matter of law, stating:

> The Private Defendants, however, have not cited any cases involving foreclosure under Section 501 and the extinguishment of covenant that runs with the land.

> Absent legal authority to the contrary, a covenant running with the land is not necessarily extinguished by foreclosure and thus, the Plaintiff properly states a claim for relief. Top Rail Ranch Estates, LLC v. Walker, 2014 COA 9, ¶ 21 (covenants in deed of trust were not extinguished by foreclosure); Schwab v. Martin, 441 P.2d 17, 19 (Colo. 1968) (despite foreclosure, the right to appoint a receiver under the deed of trust remained an operative as a contract between the parties).

The Defendants again cite to First Interstate Bank v. Tanktech, Inc., 864 P.2d 116, 119 (Colo. 1993) and Town of Grand Lake v. Lanzi, 937 P.2d 785 (Colo. App. 1997) (Response, page 7), but neither of these cases involve foreclosure of a property subject to a covenant running with the land. Absent such authority, the Court finds the Defendants have not demonstrated the proposed allegations fail as a matter of law and they are not futile.

(2) Special Damages.

The Plaintiff properly pled special damages.

GRMD originally sought "general damages, in the monetary amount to be determined at trial, which will allow GRMD to recover any equity paid into the LPA by GRMD since 2006." (Complaint filed February 23, 2021, page 5.) GRMD now moves to add "general and special damages, in the monetary amount to be determined at trial." (Proposed Third Amended Complaint, page 10.) According to the Defendants, "[t]his is a significant alteration in GRMD's damages theory – eliminating the allegation that damages should be measured by the 'equity' paid by GRMD and replacing it with some concept of consequential damages." (Response, page 8.) The Defendants also object because they believe those damages could have been alleged in a prior amendment. The Defendants have not provided any legal authority as to why special damages must be excluded in a case such as this.

Special damages, or consequential damages, are those which are not the usual and natural consequence of the wrongful act. Ed Hackstaff Concrete, Inc. v. Powder Ridge Condominium "A" Owners' Ass'n, Inc., 679 P.2d 1112, 1114 (Colo. App. 1984); Johnson Nathan Strohe, P.C. v. MEP Engineering, Inc., 2021 COA 125, ¶ 16 ("consequential damages is a legal term of art that describes '[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.'"). "Special damages must be temporal, material, pecuniary, or economic in character." Bueno v. Denver Pub. Co., 32 P.3d 491, 496, 28 Media L. Rep. 2455 2455 (Colo. App. 2000), rev'd on other grounds and remanded, 54 P.3d 893 (Colo. 2002). A party must also specifically plead special damages pursuant to Colorado Rule of Civil Procedure 9(g). First Citizens Bank & Trust Company v. Stewart Title Guaranty Company, 2014 COA 1, ¶ 46.

The Defendants have not cited any legal authority regarding special damages nor have the Defendants challenged the specificity in which the Plaintiff pleaded special damages. It is not the Court's role to perform legal research for the parties nor to craft arguments on the parties' behalf.

As such, the Court finds no error in the proposed pleading to add special damages to each claim.

(3) Undue Prejudice.

The Defendants have not proven to this Court that the Plaintiff's requested amendments to the current complaint will case the Defendants undue prejudice.

In addition to the objections discussed above, the Defendants also argue they will suffer undue prejudice because they have already invested substantial time and resources "investigating and analyzing the factual and legal grounds for the claims against them." (Response, page 4.). The Defendants explain counterclaims have been filed, the parties have exchanged initial disclosures, and the Defendants are in the midst of preparing additional discovery requests based upon the current scope of the pleadings. If the motion is granted herein, the Defendants assert that they will have to evaluate new defenses and potential counterclaims which creates "uncertainty as to the claims at issue and impacts the discovery that has been done and the discovery that needs to be completed." (Response, p. 5.) The Defendants also insist the proposed amendments should have and could have been raised in a prior pleading because the proposed amendments are based on documents in GRMD's possession from the inception of the case.

GRMD explains it did not have possession of those documents when it filed the Second Amended Complaint. "[I]t was not until the Plaintiff responded to the Defendants' motions to dismiss that it had all the necessary documentation and understanding of Defendants' theory of the case to formulate the claim that the LPA is a covenant running with the land." (Reply, page 2). GRMD also maintains the proposed breach of contract claims are essential to GRMD's complaint, as demonstrated by this Court's January 2022, Orders.

The Court finds the proposed third amendment to the GRMD's complaint does not substantially change the theory on which this case has been proceeding. The breach of contract claim, as well as the declaratory judgment claim, have been part of the case from the beginning, as has the existence of the LPA and the service plans. The argument that the LPA is a covenant running with the land is also not new to this litigation. The Court recognized the significance of that argument in the Court's January 2022, Orders and the Court, therefore, finds the proposed amendment to be a logical next step. Thus, the issues raised by the amendment are not significantly remote from the other issues in the case.

The third amendment is also proposed early enough so the Defendants would not be required to engage in significant new preparation, despite their protestations to the contrary. GRMD submitted its request to amend eight months before trial. GRMD filed this case less than two years ago. Considering the complexity of the case, this is not lengthy period of time. GRMD has amended the complaint two times, both times within the first six months of the case's inception. Although the parties may choose otherwise, trial should not be delayed because it is still over five months away.

There are no allegations of bad faith or excusable neglect.

The Court also is not persuaded by the Defendants' arguments regarding the evaluation of new defenses, potential counterclaims, uncertainty, and the impacts on performed discovery. While the Court acknowledges that reassessments will be required, the Court does not believe this will be as detrimental as the Defendants portray. The Defendants are already well-versed in the contents of the LPA and the Service Plans. The proposed amendments regarding covenants running with the land are similar to those raised by GRMD in its Response to Gray Jay, Granby Prentice and GR Terra's Motion to Dismiss the Seconded Amended Complaint. The Defendants have also not stated why additional discovery will be necessary when there are no new documents or parties.

Considering the totality of the circumstances, the Court finds that the Defendants have not made a sufficient showing of prejudice justifying denial of the proposed amendment when weighed against the liberal policy of promoting amendments.

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave should, as the rules require, be freely given.

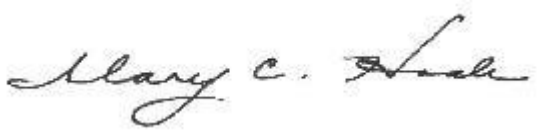
Benton, 56 P.3d at 86.

As the Court sees it, GRMD's proposed third amendment synthesizes the claims it brings before this Court. This, in turn, aids in the efficiency and expediency of the proceedings.

CONCLUSION

WHEREFORE, the Court hereby **GRANTS** GRMD's Motion for Leave to File a Third Amended Complaint. The Court extends the Case Management Order deadline to amend, for good cause, to the date of this order.[5] The Court orders the Plaintiff to file its Third Amended Complaint and serve it upon the Defendants through the Court's e-filing system on or before October 14, 2022. The Defendants shall have twenty-one days from the date of service to file an answer to the Plaintiff's Third Amended Complaint.

SO ORDERED this 7th day of October, 2022.



Mary C. Hoak, District Court Judge

[5] While the Defendants objected to the Plaintiff filing a Third Amended Complaint, the Defendants did not specifically object to the Court extending the deadline for the Plaintiff to do so.