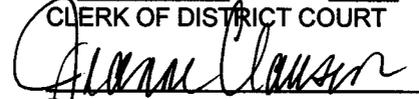


STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 1/31/2023

AT 12:45 O'Clock P. M

CLERK OF DISTRICT COURT


Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**COPPER BASIN CONSTRUCTION, INC., an
Idaho corporation,**

Plaintiff/Counterdefendant,

vs.

**BEYOND GREEN, INC., an Idaho
corporation,**

Defendant/Counterclaimant.

Case No. **CV28-21-4981**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION TO AMEND ANSWER AND
COUNTERCLAIM, AND GRANTING
IN PART AND DENYING IN PART
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on defendant Beyond Green, Inc.'s ("Beyond Green") Second Motion for Summary Judgment, filed on November 22, 2022, Beyond Green's Motion to Amend Answer and Counterclaim, filed on December 8, 2022, and the plaintiff Copper Basin Construction, Inc.'s ("Copper Basin") Motion for Summary Judgment filed on November 22, 2022.

A. Factual Background

A relevant summary of the facts has previously been set forth by this Court:

Both Copper Basin and Beyond Green are Idaho corporations. Ver. Compl. ¶¶ 1-2; Ans. and Counterclaim (Ans.) ¶¶ 3-4. Beyond Green owns approximately forty-four acres of real property in Post Falls, Idaho, for which it entered into a Purchase Agreement and Escrow Instructions (PSA) with Copper Basin on February 5, 2021. Ver. Compl. ¶¶ 4-5; Ans. ¶¶ 6-7. On February 5, 2021, Copper Basin deposited \$25,000 into escrow, and on May 4, 2021, Copper Basin deposited an additional \$75,000 for due diligence. Ver. Compl. ¶ 6; Ans. ¶ 8. The PSA contains a provision indicating that construction of Cecil Road may be a condition precedent to closing on the property pursuant to the PSA. Ver. Compl. ¶

7; Ans. ¶ 9. On July 8, 2021, “Copper Basin learned that Beyond Green had entered into an agreement to sell adjacent property to Harlan Douglass Properties, LLC Beyond Green [allegedly] requested that Copper Basin agree to modify the PSA to require that Copper Basin take responsibility for the construction of Cecil Road.” Ver. Compl. ¶ 9; Ans. ¶ 11. On July 26, 2021, at 2:19 p.m., Copper Basin sent an email to Beyond Green that Copper Basin intended to proceed with the purchase of the Property pursuant to the terms set forth in the PSA signed on February 5, 2021. Ver. Compl. ¶ 10; Ans. ¶ 11. A few hours later, on July 26, 2021, at 5:05 p.m., Beyond Green emailed Copper Basin, informing it that they were not moving forward with closing on the property. Ver. Compl. ¶ 10 [this is the second ¶ 10]; Ans. ¶ 12.

The next day, on July 27, 2021, Copper Basin filed a Complaint against Beyond Green for breach of contract. Copper Basin seeks an order of specific performance of the terms of the PSA against Beyond Green, as well as direct and consequential damages “estimated to exceed the sum of TEN MILLION DOLLARS (\$10,000,000,00)”, attorneys’ fees, and punitive damages pursuant to Idaho Code § 6-1604. Ver. Compl. 6, ¶¶ 1, 2.

On August 31, 2021, Beyond Green filed its Answer and Counterclaim. Beyond Green’s Counterclaim is for slander of title and abuse of process for filing a notice of lis pendens in the present action that contained property not subject to the PSA. Ans. 4-6, ¶¶ 27-36. Beyond Green demanded a jury trial. Ans. 6.

On September 23, 2021, Copper Basin filed its Answer to (Beyond Green’s) Counterclaim.

Mem. Decision and Order Den. Def.’s Mot. for Recons. and Pl.’s Mot. to Strike (“Order Den. Def.’s Mot. for Summ. J.”) 1-2. (quoting Mem. Decision and Order Den. Def.’s Mot. for Summ. J. (“Order Den. Def.’s Mot. for Summ. J.”), 1-2.)

B. Relevant Procedural Background

On February 8, 2022, Beyond Green filed a Release of Lis Pendens and amended Notice of Lis Pendens.

On July 16, 2022, Copper Basin filed its Motion for Summary Judgment, and Memorandum in Support of Defendant’s Motion for Summary Judgment and declarations of Chad Johnson, Chris Kronberg, and Gerald Dicker in support. On August 23, 2022, Copper Basin filed its Objection and Memorandum in Opposition to Defendant’s Motion for Summary Judgment and declarations of Greg Gervais, Paul W.

Daugherty, and Steve White in support thereof. On August 30, 2022, Beyond Green filed its Reply Memorandum in Support of Summary Judgment Motion. On September 7, 2022, this Court issued its Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment.

On October 24, 2022, Beyond Green filed a Motion for Reconsideration, Memorandum In Support of Motion for Reconsideration, and Declarations of Jeff Bornholdt and Chris Kronber in Support of their Motion for Reconsideration. On November 8, 2022, Copper Basin filed its Objection and Memorandum in Opposition to Defendant's Motion for Reconsideration. On November 8, 2022, Copper Basin also filed a Motion to Strike and Motion to Amend Pleadings, and a Motion to Shorten Time. On November 14, 2022, Beyond Green untimely filed its Reply Memorandum in Support of Motion for Reconsideration and in Opposition to Plaintiff's Motions to Amend and Strike. On November 15, 2022, this Court heard Beyond Green's Motion for Reconsideration and Copper Basin's Motion to Strike. On November 16, 2022, this Court filed its Memorandum Decision and Order Denying Defendant's Motion for Reconsideration and Plaintiff's Motion to Strike.

Beyond Green's First Motion for Summary Judgment argued that the PSA was unenforceable because it left critical terms to be negotiated in the future and was an agreement to agree, and that the lis pendens recorded on July 29, 2021, included property that was not the subject of the PSA. Order Den. Def.'s Mot. for Summ. J. 5, 7.

In relation to its first argument, Beyond Green contended "specifically" that the PSA did not specify which party would pay for and/or build Cecil Road, what it claimed was a condition precedent to the closing of the sale. Mem. in Supp. of Def.'s Mot. for Summ. J. 2. It further argued that there was no meeting of the minds because the

Agreement lacked “essential terms necessary for an enforceable contract,” leaving those “essential terms to be determined by future negotiations.” *Id.*

This Court denied these arguments by Beyond Green, holding that, as a matter of law, the plain language of the PSA did not create an unenforceable agreement to agree, nor did it create a condition precedent entitling Beyond Green to nonperformance. Order Den. Def.’s Mot. for Summ. J. 18.

This Court found that the PSA was complete on its face due to the merger clause, and after analyzing the sections of the PSA in question, specifically Paragraphs 6.1 and 6.2, found no ambiguity, either latent or patent, in those sections. *Id.* at 17.

Related to the specific sections in the PSA, this Court held, in part, that:

paragraph 6.2 states that if Copper Basin did not disapprove of the contingencies in writing within 120 days of the signing of the agreement, the contingency items would be deemed approved and the escrow would proceed to close. While ordinarily this may create an ambiguity, the language of paragraph 6.1.1(e) allows the agreement regarding the construction of Cecil Road to be either a condition precedent or subsequent to Copper Basin’s duty to close. Paragraph 6.2 makes it clear that the parties agreed to close on June 5, 2021—120 days after the parties signed the PSA on February 5, 2021.

Id. “[P]aragraph 6.2 indicates that the parties agree to close whether or not the condition is met.” *Id.* at 18. (emphasis added). This Court discussed that the language in the PSA was for the buyer’s (Copper Basin) benefit, as the contingency applied solely to the seller’s obligation to close, and thus only the buyer may disapprove of the contingency or even enforce the contingency as a means of rescinding the contract. *Id.* Moreover, this Court pointed out that there is no language in the PSA indicating that Beyond Green had any contingencies affecting its duty to close, rather, the contingencies apply solely to the buyer, Copper Basin. *Id.*

In response to Beyond Green’s second argument, regarding the *lis pendens*, this

Court pointed out an issue of material fact involving if the discrepancy merely included the future Cecil Road, which was part of the PSA, or included other property. *Id.* at 21. Summary Judgment was denied on this issue because it was not clear to this Court whether the additional property was subject to the PSA. *Id.* at 22. This Court did explain, however, that it disagreed with “Beyond Green’s evident assumption that Cecil Road is not subject to either the present litigation or the PSA.” *Id.*

The PSA clearly includes the future Cecil Road as being subject to the agreement, and it is reasonable for Copper Basin to include it in its notice of lis pendens because if someone else were to purchase that portion of the property, Copper Basin and Beyond Green would no longer have the legal right to construct Cecil Road on that property.

Moreover, the PSA explicitly mentions that the property will be subject to a reciprocal easement agreement, most likely pertaining to the future Cecil Road. The map attached to the July 29, 2021, clearly marks the additional property as “future Cecil Road”.

Id.

This Court denied Beyond Green’s Motion for Reconsideration as an improper motion to reconsider under I.R.C.P. 11.2(b)(1)¹, pointing out that the Motion for Reconsideration could have been called a Second Motion for Summary Judgment. Mem, *Id.* at 2, because it raised entirely new issues as compared to Beyond Green’s summary judgment motion. *Id.* at 3. As the motion for reconsideration was denied as an improper motion, this Court in turn denied Copper Basin’s Motion to Strike for Purposes of the Motion for Reconsideration.

On November 21, 2022, Copper Basin filed a Motion to Continue Trial, a Declaration of Paul Daugherty in Support of the Motion to Continue Trial, a Motion to Strike Jury Trial, a Memorandum in Support of Motion to Strike Jury Trial, a Motion to Amend Pleadings, and a Memorandum in Support of Motion to Amend Pleadings.

¹ Order Den. Def.’s Mot for Recons. 9.

On November 22, 2022, both Beyond Green and Copper Basin filed a Motion for Summary Judgment.

Along with its Motion for Summary Judgment, Copper Basin additionally filed a Declaration of Paul Daugharty in Support of Motion and a Memorandum in Support of their Motion for Summary Judgment. Copper Basin moved this Court to

grant the relief requested in the *Verified Complaint* entering judgment for specific performance of the PSA and dismissing the two counterclaims (slander of title and abuse of process) filed by Defendant, BEYOND GREEN, INC., an Idaho corporation . . .

Plf.'s Mem. In Supp. of Mot. for Summ. J. 2.

Along with its Second Motion for Summary Judgment, Beyond Green additionally filed a Memorandum and Declarations of Chris Kronberg and Jeff Bornholdt in Support of their Second Motion for Summary Judgment. Beyond Green moves this Court for an Order:

dismissing Plaintiff's *Verified Complaint* for the reason that the contract at issue, the "Purchase Agreement and Escrow Instructions" (PSA), is not enforceable because its material and essential terms are indefinite. Additionally, the conditions precedent in the PSA are not enforceable against BGI because they are not covenants or promises made by BGI. Further, the *Verified Complaint* does not allege a breach of a verbal contract requiring BGI to build Cecil Road, and any such alleged verbal contract fails for lack of consideration, violates the statute of frauds (I.C. §§ 9-503, 9- 505), and violates the parol evidence rule in attempting to modify the PSA. Finally, even if a verbal agreement requiring BGI to build Cecil Road existed, BGI has not breached the verbal agreement because it is in the process of building Cecil Road.

Def.'s 2nd Mot. for Summ. J. 1-2.

On November 25, 2022, Beyond Green filed a Memorandum in Opposition to Motion to Amend, and a Memorandum in Opposition to Strike Jury Demand.

A hearing was held on November 29, 2022, wherein this Court granted the Motion to Continue Trial and the Plaintiff's Motion to Amend. During that hearing, the

Court extended the deadlines for the parties to file or be heard on dispositive motions, including the Motions for Summary Judgment. This Court's Order provides, in part, that: "the Motion to Amend is granted and Plaintiff shall have until 5:00 PM (PST) on December 6, 2022, to file an *Amended Verified Complaint*, if so decided." Order Granting Mot. to Continue and Mot. to Amend. 1. Copper Basin did not file an Amended Verified Complaint on or before December 6, 2022.

On December 8, 2022, Beyond Green filed a Motion to Amend Answer and Counterclaim, and a Memorandum in Support of their Motion. On December 21, 2022, Copper Basin filed a Memorandum in Opposition to Amend Answer and Counterclaim. On December 28, 2022, Beyond Green filed a Reply Memorandum in Support of Motion to Amend Answer and Counterclaim.

On December 21, 2022, Beyond Green filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, and Declarations of Sam Johnson and Counsel in Opposition to Summary Judgment.

On December 21, 2022, Copper Basin filed an Objection and Memorandum in Opposition to Defendant's Second Motion for Summary Judgment, and Declaration of Paul Daugherty in Opposition. On December 28, 2022, Beyond Green filed a Reply Memorandum.

A hearing on the Motion to Amend Answer and Counterclaim, Defendant's Second Motion for Summary Judgment, and Plaintiff's Motion for Summary Judgment took place on January 4, 2022. From the bench, the Court granted the Defendant's Motion to Amend Answer and Counterclaim. The Court took the two parties' Motions for Summary Judgment under advisement.

/

II. STANDARD OF REVIEW

A. Motion to Amend

“After a responsive pleading has been filed a party may amend a pleading only by leave of court or by written consent of the other party.” *Elliott v. Murdock*, 161 Idaho 281, 286, 385 P.3d 459, 464 (2016) (quoting *Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004)). “The court should freely give leave when justice so requires.” I.R.C.P. 15(a)(2). A district court’s denial of a motion to amend is governed by an abuse of discretion standard of review. (citing *Thomas v. Med. Ctr. Physicians, P.A.*, 138 Idaho 200, 210, 61 P.3d 557, 567 (2002)).

In reviewing an exercise of discretion, this Court must consider: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018).

B. Motion for Summary Judgment

Idaho Rule of Civil Procedure 56 governs motions for summary judgment.

According to that Rule, summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact or a party asserting that a genuine dispute exists, must support that assertion by “citing to particular parts of materials in the record” or “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *Id.*

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
- (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994)). "A material fact is one upon which the outcome of the case may be different." *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998).

Once the moving party meets their burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a

genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence.” *Shea v. Kevic Corp.*, 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Bamson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep’t of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

III. ANALYSIS

A. Beyond Green’s Motion to Amend Answer and Counterclaim

Beyond Green has moved this Court for an order permitting it to amend its Answer and Counterclaim. Mem. In Supp of Mot. to Amend Ans. and Counterclaim (“Mem. In Supp. of Mot. to Amend”) 1. Beyond Green argues that:

By its Order Granting Motion to Continue and Motion to Amend, the Court recently allowed Plaintiff Copper Basin Construction, Inc. (“Copper Basin”) to amend its Verified Complaint by December 6, 2022, if Copper Basin chose to do so. Apparently, Copper Basin decided not to amend its Verified Complaint. By that same order, the Court granted Copper Basin’s motion to continue the trial until July 10, 2023, thereby resetting the deadlines set forth in the Court’s Scheduling Order, Notice of Trial Setting and Initial Pretrial Order.

Thus, Beyond Basin’s amendment of its Answer and Counterclaim will not delay the upcoming trial and is not being requested after any scheduling deadlines. To the extent any additional discovery may be necessary, there is more than adequate time to complete it before the trial. As a result, there is no prejudice to Copper Basin if the Court grants Beyond Green’s motion to amend.

Mem. In Supp. of Mot. to Amend. at 2. In response, Copper Basin argues that Beyond Green's original Answer and Counterclaim was based entirely upon an "indefinite of contract terms" defense and upon Copper Basin's recording a Lis Pendens. *Obj. and Mem. in Opp. to Def.'s Mot. to Amend Answer and Countercl. ("Obj. to Mot. to Amend.")* 2, 3.

[Beyond Green] now seeks to amend the original Answer and Counterclaim filed August 31, 2022. Copper Basin believes [Beyond Green's] motion should be denied. It is important to note that a review of the proposed amendment shows that the information was known to [Beyond Green] when the original answer and counterclaim was filed. Additionally, there has been no showing made in support of the conclusory statements made in paragraphs 26 through 43 of the proposed amendment. Regarding proposed paragraph 26, if in fact Mr. Bornholdt, Vice President and General Counsel of [Beyond Green] drafted the Amendment to Annexation Agreement to amend the Annexation Agreement dated June 2, 2017 and then failed to comply with the requirements of Idaho law (Idaho Code § 42-3218) why should [Beyond Green] be allowed to amend.

. . . it would appear that any alleged issue with Ross Point Water District would be temporary and that does not excuse performance. Again, any issue with Ross Point Water District were created entirely by [Beyond Green]. It should also be noted that thought the pendency of this entire case BGI's counsel has represented to the Court that BGI was working on the completion of Cecil Road and the utilities. Copper Basin believes [Beyond Green's] request to amend is both improper and disingenuous. . .

Id. Additionally claiming that "the damages resulting to Copper Basin from further delay would be substantial." *Id.*

Beyond Green's Reply argues that Copper Basin failed to provide a basis for this Court to deny the motion, (*Reply Mem. In Supp. of Mot. to Amend Answer and Counterclaim 1*), and that Amending its Answer and Counterclaim will not delay the upcoming trial and is not being requested after any scheduling deadlines. *Id.* at 5.

More specifically arguing that:

The criteria for denying a motion to amend pleadings involves "undue delay, bad faith or dilatory motive on the part of the movant, repeated

failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” . . . Otherwise, “the leave sought should, as the rules require, be ‘freely given.’” [*Id.*] In addition to timeliness, “[a]ppropriate factors to consider include whether the proposed amendment would delay upcoming hearings or trial, whether the motion to amend comes after court-imposed deadlines have passed, and whether substantial work has been completed.” . . . Those factors are not an issue in this case, particularly given the continuation of the trial at the request of Copper Basin. . . .

As stated in paragraph 31 of the proposed amended answer attached to the motion to amend, Beyond Green learned on December 2, 2022, that the Ross Point Water District (“RPWD”) believes that the Amendment to Annexation Agreement is void because RPWD did not follow the procedure outlined in I.C. § 42-3218. The RPWD therefore believes that the 44 acres that are the subject of the Purchase Agreement and Escrow Instructions (“PSA”) are not annexed into the RPWD and therefore not eligible to obtain water from RPWD. Six days after learning of this issue, Beyond Green filed its motion to amend its answer.

Contrary to the unsupported aspersions cast by Copper Basin, Beyond Green just learned that the property at issue in the PSA is considered by the Ross Point Water District to not be annexed due to a failure to follow the procedure set forth in I.C. § 42-3218. If and when that situation can be remedied is unknown at this point. Copper Basin certainly would not want to purchase property that could not be served by water.

As Beyond Green asserted in its opening memorandum, amendment of its Answer and Counterclaim will not delay the upcoming trial and is not being requested after any scheduling deadlines. To the extent any additional discovery may be necessary, there is more than adequate time to complete it before the trial. As a result, there is no prejudice to Copper Basin if the Court grants Beyond Green’s motion to amend.

Id. at 2-5.

Idaho Rule of Civil Procedure 15(a)(2) provides that: “a party may amend its pleading only with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.”

As the Court stated on the record during the January 5, 2023, hearing, this Court does not find any delay on the moving party that would qualify as bad faith, as Beyond Green claims it did not find about this issue until the beginning of December, and

Beyond Green's proposed amendment to the Answer and Counterclaim would not prejudice Copper Basin. This is a matter committed to the Court's discretion. As such, the Beyond Green's Motion to Amend Answer and Counterclaim is granted.

B. Beyond Green and Copper Basin's Cross-Motions for Summary Judgment.

Beyond Green and Copper Basin both seek summary judgment on Copper Basin's Breach of Contract claim.

Beyond Green's seeks a dismissal of Copper Basin's breach of contract claim, arguing that the PSA is not enforceable because its material and essential terms are indefinite (Def.'s 2nd Mot. for Summ. J. 1-2), that the PSA's condition precedents are not enforceable against Beyond Green because, "they are not covenants or promises made" by Beyond Green (*Id.*), and finally it argues various issued issues related to an alleged verbal contract between Copper Basin and Beyond Green. *Id.*

Copper Basin seeks an order for specific performance of the PSA and for dismissal of Beyond Green's two counter claims. Mem. in Supp. of Mot. for Summ. J. 12. Copper Basin contends each element of their breach of contract claim "[has] been established by the undisputed facts in this case," (*Id.* 2.), and that Beyond Green's counterclaims are based entirely upon Copper Basin's recording of the Lis Pendens pursuant to Idaho Code § 5-505, which Copper Basin states cannot be "violated". *Id.* at 2, 10.

1. Preliminary Matters.

To begin, the Court must address two preliminary matters: (1) whether to dismiss Copper Basin's claim regarding the breach of an oral agreement between the parties, and (2) whether to dismiss Beyond Green's Second Motion for Summary Judgment as untimely.

a. Copper Basin's claim for breach of an oral contract is ignored because Copper Basin did not amend its Verified Complaint to include this claim.

On November 30, 2022, the court issued an order that provided: "Plaintiff shall have until 5:00 PM (PST) on December 6, 2022, to file an *Amended Verified Complaint*, if so decided." Order Granting Mot. to Continue and Mot. to Amend. 1. However, Copper Basin did not file an Amended Verified Complaint on or before December 6, 2022.

Copper Basin's *Verified Complaint* contends that Beyond Green "has failed to perform and is in breach of the PSA," (Ver. Compl. 5, ¶ 16. (emphasis added)), and "has materially breached the PSA." *Id.* ¶ 17. (emphasis added). Stating that: "at a minimum, these breaches include, but are not otherwise limited to: (a.) the failure of Beyond Green to complete the Cecil Road improvements as required by the PSA and as a condition precedent to Copper Basin's duty to close; (b.) the failure of Beyond Green to prepare a Site Development Agreement and obtain the approval of Copper Basin; and (c.) the failure of Beyond Green to submit and obtain approval of the Preliminary Plat and Site Development Agreement by the City of Post Falls, Idaho." *Id.* None of these allegations reference a breach of an oral contract.

Despite the omission, Copper Basin contends on summary judgment that it "has also alleged that [Beyond Green] verbally agreed to both pay for and construct Cecil Road." Mem. In Supp. of Mot. for Summ J. 3. However, these allegations and those related to it were not made in the *Verified Complaint*. As a breach of an oral contract has not been alleged, any arguments premised on these allegations by Copper Basin are hereby ignored.

/

b. Copper Basin's Objection to Beyond Green's Second Motion for Summary Judgment is denied because the motion was timely brought and raises new arguments not addressed by this Court.

Copper Basin contends that this Court "should not consider the second motion for summary judgment filed by [Beyond Green] because the intent of the Court's waiving the deadline was so Copper Basin's previously asserted request for summary judgment could be noticed and heard prior to trial." Obj. and Mem. In Opp. to Def.'s 2nd Mot. for Summ. J. 5, ¶ a. Copper Basin states:

[T]he Court should strike and not consider BGI's second motion for summary judgment because the extension of deadline was intended to allow Copper Basin to bring its motion for summary judgment based upon this Court's oral pronouncement at the hearing held November 15, 2022 on BGI's motion for reconsideration. This Court said in pertinent part:

What I do not feel comfortable ruling on today is Mr. Daugharty's motion really for a cross-motion for summary judgment... Trial is looming, and its too later under the Court's scheduling order to consider a new summary judgment motion, **but if the plaintiff wishes to bring a summary judgment motion and bring it right away**, I am certainly willing to continue trial. (emphasis added).

Obj. and Mem. In Opp. to Def.'s 2nd Mot. for Summ. J. 2, ¶ a.

Beyond Green contends that the Court waived the deadline for filing of the Summary Judgment Motions for both the parties, not just for Copper Basin. Reply Mem. in Supp. of Mot for Summ. J. 2. More specifically:

At the hearing on November 15, 2022, the Court directed Beyond Green to draft an order . . . to waive the deadline for the filing of summary judgment motions in the Court's Scheduling Order . . . lodged December 2, 2021. Beyond Green drafted a proposed order, provided Copper Basin an opportunity to review it and then submitted it to the Court. Copper Basin made no complaint about the proposed order. On November 23, 2022, the Court signed and lodged the Order, which specifically states that the summary judgment deadline is waived. Obviously, the Order does not state that the deadline is waived only for Copper Basin, and nor could it reasonably do so.

The waiver of the summary judgment deadline follows almost fourteen months of inaction by Copper Basin - from the filing of the Verified Complaint on July 27, 2021, until September 12, 2022, the deadline for hearing summary judgment motions - during which time Copper Basin did nothing. With trial imminent, Copper Basin obtained an extension of time to file a summary judgment motion without having to provide any reason why it could not have complied with the Court's scheduling order. It is way beyond the pale for Copper Basin to now complain that the Court's waiver of the deadline for the filing of summary judgment motions applied only to Copper Basin.

Id. at 2-3. Beyond Green further stated:

Copper Basin cites no authority for its argument that Beyond Green cannot file another summary judgment motion. . . there is nothing in this Court's orders or the rules of civil procedure preventing Beyond Green from doing so. Beyond Green is complying with the Court's scheduling orders as it has consistently throughout the course of this litigation.

Id. at 7.

Copper Basin's argument is not persuasive. The Court changed the deadline for filing summary judgment motions that it previously established in the December 2, 2021, Scheduling Order. This change was for all parties, not just for Copper Basin. Further, the Court granted Copper Basin's motion to continue the trial set in this matter, which pushed back the timelines provided to bring dispositive motions for all parties. Because the deadlines to file dispositive motions was extended, Copper Basin's Objection is denied.

Continuing, Copper Basin additionally argues that this Court should not consider the "renewed" arguments in Beyond Green's Section Motion for Summary Judgment, because these issues "have already been addressed and decided by this Court" in Beyond Green's first Motion for Summary Judgment and Beyond Green's Motion for Reconsideration. Obj. and Mem. In Opp. to Def.'s 2nd Mot. for Summ. J. 2. Copper Basin claims that Beyond Green:

seems to think that posing the same argument repeatedly in different filings and approaching the same argument repeatedly from different

angles is proper and reasonable. It isn't and this Court should not allow [it] to proceed with the second motion for summary judgment . . .

Id. at 6. (See also “is at least the third time [Beyond Green] has asserted this argument about the PSA.” *Id.* at 3. “In deciding [Beyond Green’s] first motion for summary judgment the Court determined that the PSA was complete on its face and found no ambiguity in the PSA.” *Id.* at 4. “[Beyond Green’s] entire defense essentially remains the same that the PSA is an unenforceable agreement to agree, and this issue had already been decided by this Court.” *Id.* at 7.

Beyond Green contends that the Second Motion for Summary Judgment raises new arguments² that have not been previously addressed by the Court, including that “the entire PSA, not just paragraph 6.1.1(e), is too indefinite to enforce.” Reply Mem. In Supp. of Mot. for Summ. J. 7. Beyond Green further asserts that Copper Basin has not responded those arguments, “apparently conceding to all of them.” *Id.* at 2.

The Court agrees that the arguments raised in Beyond Green’s Second Motion for Summary Judgment have not previously been fully addressed. Beyond Green’s Second Motion for Summary Judgment alleges more broadly that multiple provisions of the PSA, and not just the sections related to the building of Cecil Road, are “are too indefinite and preliminary” to be enforced. To the extent that the arguments brought forward in Beyond Green’s Motion for Reconsideration overlap with their second Motion for Summary Judgment, this Court denied the Motion for Reconsideration pursuant to I.R.C.P. 11.2(b)(1), (Order Den. Def.’s Mot. for Recons. 9), as the Motion raised entirely new issues not previously raised on summary judgment. *Id.* at 3. Because this Court rejected the arguments as a matter of procedure, the Court did not analyze the merits

² The six new arguments referenced are listed on page 2 of the *Reply Memorandum in Support of Motion for Summary Judgment*. After dismissing any arguments related to an oral contract, the arguments left are: (1) “The

of the arguments brought forth in the Motion for Reconsideration. In short, the Court denies Copper Basin's Objection to Beyond Green's Second Motion for Summary Judgment, because it is timely and raises new arguments that have not been considered by the Court.

2. Beyond Green's request for summary judgment dismissing Copper Basin's *Verified Compliant* due to the PSA's material and essential terms being indefinite is denied because, as the court has previously held, the PSA is a fully integrated contract.

Beyond Green alleges that the PSA cannot be enforced because the terms are too indefinite and preliminary. Mem. in Supp. of Def.'s 2nd Mot. for Summ. J. 13, ¶ IV.

In support of this assertion, Beyond Green argues:

The PSA does not comply with . . . requisite legal standards because in reality it is a preliminary agreement. It leaves several necessary and material terms to be negotiated in the future. Without those negotiated terms the PSA cannot be enforced. A meeting of the minds on those terms was never achieved. Therefore, the PSA was not intended to be a complete agreement and is too indefinite as to critical terms to be an enforceable contract.

Mem. in Supp. of Def.'s 2nd Mot. for Summ. J. 13-14. The "necessary and material terms" that Beyond Green claims are left to be negotiated are:

1. A Reciprocal Easement Agreement (REA) to be prepared by Beyond Green and subject to the Copper Basin's approval. [PSA at 1, ¶ 1.]
2. The REA was to contain covenants, conditions, restrictions, and easements, to include, without limitation, "provide for the Residential Only development of the Property subject to the Preliminary Plat approved by the City of Post Falls, Idaho and Site Development Plan agreed to by the parties." [Id. at 4, ¶6.1.1(b)]
3. Site Development Agreement, "which shall include the construction of utilities and public improvements, as well as other matters necessary for the coordination and development of the Property and Seller's Property." [Id. at 1, ¶ 1.]
4. The good faith approval by Copper Basin and Beyond Green of URD (Urban Renewal District) agency documentation between the Agency, Beyond Green and Copper Basin for reimbursement of public

conditions precedent or contingencies in the [PSA] are not enforceable promises made by Beyond Green;" and (6) "The terms of the PSA are too indefinite and preliminary to enforce."

improvements constructed on the Property by Copper Basin. [*Id.* at 4, ¶ 6.1.1(d).]

5. An agreement on each of the following regarding the future Cecil Road:
 - a. The party or entity responsible for construction of Cecil Road;
 - b. The allocation of cost and expense; and
 - c. The Cecil Road development plan and schedule.

Id. at 14. Beyond Green claims that “[i]ndividually or cumulatively, the lack of agreement on those material and necessary terms as part of the PSA render it unenforceable.” *Id.*

As stated above, Copper Basin’s response to Beyond Green’s Second Motion for Summary Judgment focused on the alleged redundancy of the arguments brought forth. This Court above found that Beyond Green’s new argument, while overlapping, does allege different arguments. However, the additional “necessary and material terms” that Beyond Green now claims are left to be negotiated are located in Paragraph 6.1.1 of the PSA - the same paragraph previously analyzed by this Court in Beyond Green’s first Motion for Summary Judgment.

This Court previously analyzed Paragraphs 6.1.1, 6.1.1(e), and 6.2 of the PSA, and reviewed the PSA as a whole, to determine the enforceability of the PSA as it related to the alleged “agreement to agree” which Beyond Green claims was located in Paragraph 6.1.1. See Order Den. Def.’s Mot for Summ. J. After a review of the PSA this Court found that “as matter of law, the plain language of the PSA did not create an unenforceable agreement to agree, nor did it create condition precedent entitling Beyond Green to nonperformance.” *Id.* (See also “the language is not ‘so indefinite that it fails to show mutual intent to create an enforceable obligation’ such to create an unenforceable agreement to agree.” *Id.* at 17.) “Paragraph 6.2 [of the PSA] makes it clear that the parties agreed to close on June 5, 2021—120 days after the parties

signed the PSA on February 5, 2021,” and further “indicates that the parties agree to close whether or not the condition [in paragraph 6.1.1] is met.” *Id.* at 18.

Beyond Green’s arguments related to the conditions located in Paragraph 6.1.1 being indefinite are not dispositive to the enforcement of the PSA. Paragraph 6.2 of the PSA, along with the Merger Clause located in Paragraph 9.1, establishes that the parties agreed to go to closing on the PSA as the entire agreement between the Parties. This made the PSA separate from all contingencies provided for in Paragraph 6.1.1. It seems that Beyond Green additionally acknowledged this, as it points out, “[t]he parties to the PSA understood that all these elements of the purchase agreement were not only critical, but were to be negotiated separately from the PSA.” Mem. In Supp. of Def.’s 2nd Mot. for Summ. J. 16.

With such findings above, and the findings previously made by this Court regarding the same paragraph that Beyond Green currently claims contains provisions that are “preliminary and too indefinite to enforce,” Beyond Green’s request for summary judgment regarding this issue is denied.

3. Copper Basin is entitled to specific performance because Beyond Green breached the PSA by failing to sell the property.

Copper Basin’s Verified Complaint alleges that Beyond Green, though its conduct and omissions, “materially breached” the PSA:

At a minimum, these breaches include, but are not otherwise limited to: (a.) the failure of Beyond Green to complete the Cecil Road improvements as required by the PSA and as a condition precedent to Copper Basin’s duty to close; (b.) the failure of Beyond Green to prepare a Site Development Agreement and obtain the approval of Copper Basin; and (c.) the failure of Beyond Green to submit and obtain approval of the Preliminary Plat and Site Development Agreement by the City of Post Falls, Idaho.

Ver. Compl. 5, ¶ 17.

Beyond Green claims that these condition-precedents in the PSA are not enforceable against it because they are not covenants or promises made by Beyond Green. Obj. to Plf.'s Mot for Summ. J. 2. Instead, Beyond Green claims that these conditions were the responsibility of Copper Basin to satisfy and that the plain language of the PSA does not impose a duty on Beyond Green. *Id.* at 11.

Copper Basin seeks specific performance of the PSA, claiming that Beyond Green's breached because it refused to sell the subject property to Copper Basin. Obj. and Mem. in Opp. to Def.'s 2nd Mot. for Summ. J. 7. As an aside, it should be noted that Copper Basin has never listed out the elements of breach of contract that they are now claiming are established which would entitle them to specific performance. (See Ver. Compl. 5, ¶¶ 13 – 19). Throughout their briefing, Copper Basin argues that:

The *Verified Complaint* filed by Copper Basin alleges that [Beyond Green] is in breach of contract and the elements required for Copper Basin's breach of contract claim have been established by the undisputed facts in this case. Copper Basin is ready, willing, and able to perform but [Beyond Green] has refused to proceed with the sale. As a result, Copper Basin seeks specific performance of the PSA.

Mem. in Supp. of Mot. to Supp. at 6. (See also Obj. and Mem. In Opp. to Def.'s Mot.

For Reconsideration, containing the exact same phrase used above: "The *Verified Complaint* filed by Copper Basin alleges that Beyond Green is in breach of contract and the elements required for Copper Basin's breach of contract claim have been established by the undisputed facts in this case.")

a. The contingencies listed in Paragraph 6.1.1. of the PSA were approved by Copper Basin, therefore Beyond Green cannot be in breach of those contingencies.

Beyond Green claims that it "did not, and could not, breach any of the contingencies in the PSA, to include, without limitation, those identified in paragraph 17

of the Verified Complaint because they are not enforceable promises.” Mem. in Supp. of Def.’s 2nd Mot. for Summ. J. 8. Beyond Green states:

By its plain language, the PSA does not impose a duty on Beyond Green to construct or pay for Cecil Road. Nor does the PSA require Beyond Green to prepare a Site Development Plan or prepare and submit to the city of Post Falls a Preliminary Plat, all as alleged in paragraph 17 of the *Verified Complaint*. Those issues are conditions precedent or contingencies that were the responsibility of Copper Basin and do not, as a matter of law, create any duty on the part of Beyond Green.

Id. at 7. See also Mem. In Opp. to Plf.’s Mot. for Summ. J. 11. Beyond Green continues,

As noted by the Court in its *Memorandum Decision and Order Denying Defendant’s Motion for Summary Judgment* (Memorandum Decision), a condition precedent does not create a right or duty of performance in and of itself. . . Paragraph 6.1 the PSA expressly identifies conditions precedent or contingencies that are the burden of Copper Basin to complete within the 120-day approval period. Those conditions precedent include the specific allegations in paragraph 17 of the Verified Complaint on which Copper Basin bases its breach of contract claim. As a matter of law, those conditions precedent are not promises made by Beyond Green, and therefore cannot form the basis for a breach of contract claim.

Id. 8. See also Mem. In Opp. to Plf.’s Mot. for Summ. J. 11- 12.

Apart from the argument of redundancy, Copper Basin responds that that there is no dispute that the contingencies set forth in the PSA exist for the benefit of Copper Basin, and not Beyond Green (Obj. and Mem. In Opp. to Def.’s 2nd Mot. for Summ. J. 3), pointing to this Court’s previous holding that “there is no language in the PSA indicating that Beyond Green had any contingencies affecting the duty to close. Rather, the contingencies apply solely to the buyer, Copper Basin.” *Id.* at 4-5. (quoting Order Den. Def.’s Mot. for Summ. J. 17 – 18). Copper Basin continues,

As previously argued, there is no legitimate dispute that [Beyond Green] agreed to sell the Property to Copper Basin. There is also no dispute that the contingencies set forth in the PSA exist for the benefit of Copper Basin and not BGI. The PSA clearly and unequivocally proves that the conditions precedent and/or contingency items in paragraph 6.1 “are for

Buyer's benefit only and may be approved or disapproved, in whole or in part, by Buyer in writing.” (Emphasis Added). See paragraphs 6.1 and 6.2 of the PSA . . .

The Verified Complaint filed by Copper Basin alleges that [Beyond Green] is in breach of contract and the elements required for Copper Basin's breach of contract claim have been established by the undisputed facts in this case. Simply put, Copper Basin is ready, willing, and able to perform but [Beyond Green] has refused to proceed with the sale. As a result, Copper Basin seeks specific performance of the PSA. [Beyond Green's] entire defense essentially remains the same that the PSA is an unenforceable agreement to agree, and this issue had already been decided by this Court.

Id. at 7.

BGI's continued argument that it should be able to either rescind the PSA or have its nonperformance excused is entirely inconsistent with the facts and this Court's previous decision. Again, the Court has already determined that the contingencies do not afford BGI these options. . . As stated by the Court:

Nevertheless, Copper Basin is willing to proceed with the closing and is not the party seeking to use the existence of a condition precedent to avoid performance. **The Court finds, as a matter of law, the plain language of the PSA did not create an unenforceable agreement to agree, nor did it create a condition precedent entitling BGI to nonperformance.** (Emphasis Added).

See Memorandum Decision and Order Denying Defendants' Motion for Summary Judgment issued September 7, 2022 page 18.

Id. at 8.

While Beyond Green mischaracterizes the Court's previous determination on this issue, this Court agrees with the outcome that the contingencies were approved by Copper Basin and thus cannot be claimed by Copper Basin to have been breached by Beyond Green.

Paragraph 6.2 of the PSA provides that the contingency items in paragraph 6.1 “may be approved or disapproved, in whole or in part, by Buyer in writing,” and if they are “not disapproved in writing by Buyer before one hundred and twenty (120) days or the additional thirty (30) day extension, if requested, from the date of this Agreement,”

then “all contingency items shall be deemed approved by Buyer and this Agreement and the escrow created pursuant to this Agreement shall proceed to close.” *Id.*

Paragraph 6.1 provides similar guidelines, providing that “the Buyer shall have one hundred and twenty (120) days from the date of this Agreement to satisfy these contingency items in the order of priority determined by Buyer” and that “[i]f Buyer shall not deliver its written disapproval of the following contingency items within said one hundred and twenty ([1]20) days, the contingency items shall be deemed approved and the Deposit shall be nonrefundable but applicable against the Purchase Price.” *Id.* at 3.

The buyer, Copper Basin, did not disapprove any contingency items located in Paragraph 6.1 in writing to Beyond Green within 120 days after signing the PSA. Therefore, this Court finds that all contingencies located within Paragraph 6.1 were automatically deemed approved by Copper Basin 120 days after the signing of the PSA, or on June 5, 2021. As the contingency items were approved by Copper Basin, Beyond Green cannot be found to be in breach of these items.

While this Court finds that Beyond Green is not in breach of the PSA by not completing the contingencies listed in Paragraph 17 of the Verified Complaint, Copper Basin has also alleged that Beyond Green breached the PSA by not refusing to sell the subject property to Copper Basin. See Obj. and Mem. In Opp. to Def.’s 2nd Mot. for Summ. J. 7. To this claim, the Court agrees.

b. Beyond Green breached the PSA by refusing to sell the Property to Copper Basin, therefore specific performance is granted.

Copper Basin seeks specific performance of the PSA pursuant to Paragraph 5.2 of the PSA, specifically arguing that there is “simply no basis in the record to support any assertion” that by Beyond Green has performed. Mem. in Supp. of Mot. for Summ.

J. 6. "Copper Basin is seeking specific performance of the PSA because BGI has refused to sell the subject property to Copper Basin. It really is that simple. Copper Basin is entitled to enforcement of the PSA." Obj. and Mem. In Opp. to Def.'s 2nd Mot. for Summ. J. 7. The Court agrees with Copper Basin's argument:

In this case, there is no dispute that [Beyond Green] is in breach of the PSA and has refused to complete the sale to Copper Basin. [Beyond Green] has no basis to rescind the PSA and no basis to back out of the transaction. It is respectfully submitted that the Court should grant the motion for summary judgment and require [Beyond Green] to perform and sell the Property to Copper Basin in accordance with the terms of the PSA.

Memo in Supp. of Mot. for Summ J. 6-8.

As this Court has previously determined that the PSA is an integrated contract, and that Paragraph 6.2 of the PSA indicates that the parties agreed to proceed to closing 120 days after the signing of the PSA. Pursuant to the plain language of the PSA, with Copper Basin automatically approving the contingencies in paragraph 6.1 of the PSA, the parties were then to proceed to closing. It is undisputed that this did not occur.

A breach of contract is the "[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract." *Fox v. Mountain W. Elec., Inc.*, 137 Idaho 703, 711, 52 P.3d 848, 856 (2002) A material breach, on the other hand, is "more than incidental and touches the fundamental purpose of the contract, defeating the object of the parties entering into the agreement." *Borah*, 147 Idaho at 79, 205 P.3d at 1215; see also *Ervin Const. Co. v. Van Orden*, 125 Idaho 695, 699–700, 874 P.2d 506, 510–11 (1993).

City of Meridian v. Petra Inc., 154 Idaho 425, 443, 299 P.3d 232, 250 (2013).

The fundamental purpose of the contract is the selling of the property by Beyond Green and the buying of the property by Copper Basin. As Copper Basin states it is willing to go to closing, and Beyond Green refused to do so, Beyond Green is effectively defeating the objective of the contract.

The PSA provides that:

if Seller fails to complete the sale provided for in this Agreement or any of Seller's obligations under this Agreement, Buyer may, at its option, . . . enforce specific performance of Seller's obligations hereunder, including specifically the conveyance of the Property in the condition required hereby and the execution of the documents required hereunder. . .

Ver. Compl. 2, ¶ 5, Ex. C, 3, ¶¶ 5.2. As Beyond Green failed to complete the sale of the property to Copper Basin, Copper Basin was entitled to enforce specific performance of Beyond Green's conveyance of the Property. Copper Basin is entitled to specific performance by Beyond Green as a matter of law.

4. Copper Basin's is not entitled to dismissal of Beyond Green's Counterclaims as a matter of law.

Copper Basin claims that it is entitled to summary judgment dismissing Beyond Green's counterclaims for slander of title and abuse of process. Mem. in Supp. of Mot. for Summ J. 8, ¶ b. More specifically, Copper Basin argues that both claims are premised entirely on Copper Basin's recording of the Lis Pendens, which was done pursuant to Idaho Code § 5-505. *Id.* at 8. Copper Basin argues:

The Lis Pendens originally filed by CBC included both the 44 acres and the area identified as Cecil Road. There is no dispute, and the record before the Court establishes, that Cecil Road was to provide access and utilities to the Property being purchased by CBC and that pursuant to the agreements with the City of Post Falls, Idaho would be built and dedicated for public use. See Exhibit E attached to the Declaration of Steve White. . .

The Lis Pendens recorded by Copper Basin included both the Property and the future location of Cecil Road which was to provide access and utilities for the Property being purchased by Copper Basin. . . . As such, there is no credible argument or evidence in the record that the Lis Pendens recorded by Copper Basin contained property that was not subject to this litigation or the PSA. . . .

....

As previously stated by this Court:

"The purpose of I.C. § 5-505 is merely to give 'constructive notice of the pendency of the action.' I.C. § 5-505. "The filing of a Lis Pendens may highlight a possible legal problem affecting

the property, thereby inducing an extra measure of caution by potential purchasers or lenders until the litigation is concluded, but this does not mean that any underlying legal rights have been altered." I.C. Ann. § 5-505 (Supp. 2010) citing *Jerry J. Joseph C.L.U. Ins. Assocs. v. Vaught*, 117 Idaho 555, 789 P.2d 1146 (Ct. App. 1990).

A Lis Pendens does not create a lien: it's [sic] purpose is simply to give notice of the pendency of a lawsuit affecting the title or the right to possession of real property to subsequent purchasers or encumbrancers of the people who have not [sic] actual knowledge of the action or of the claim upon which it is based.

Id. (Supp. 2022) (citing *Benz v. D.L. Evans Bank*, 152 Idaho 215, 268 P.3d 1167 (2012)).

Thus, it follows that Idaho Code § 5-505 cannot be "violated," as alleged by Beyond Green. See Memorandum Decision and Order Denying Defendant's Motion for Summary Judgment at page 17.

Id. at 8-10.

In response, Beyond Green argues that there are issues of material facts related to the claims, and therefore summary Judgment should be denied. Mem. in Opp'n to Pl.'s Mot. for Summ. J. 36. Additionally, Beyond Green claims that misstates the law and facts related to Copper Basin's recording of the Notice of Lis Pendens, as the cases Copper Basin cites "do not involve a lis pendens that included property that was not the subject of the underlying litigation." See *Id.* at 29-30.

A lis pendens may only properly be used in relation to an "action affecting the title or the right of possession of real property." [I.C. § 5-505 (emphasis added).] Copper Basin's first lis pendens improperly included 3.928 acres, the title or right of possession to which would not be affected by the outcome of this litigation. Copper Basin does not argue that the first lis pendens only covers property whose title or right of possession will be affected by the outcome of this litigation.

The first lis pendens clearly violates the language in I.C. § 5-505 limiting proper use of a lis pendens to property whose title or right of possession will be affected by the underlying litigation. Copper Basin cites no case law supporting an argument that a lis pendens can include property, the title or right of possession to which will not be affected by the related litigation.

Id. at 30.

a. Slander of Title

In regard to Copper Basin's Motion for Summary Judgment on Beyond Green's Slander of Title Claim, Beyond Green argues that:

A jury could easily conclude that Copper Basin had a reckless disregard for the falsity of the first lis pendens. The improper inclusion of the 3.928 acres of the future right-of-way for Cecil Road in the first lis pendens is obvious. The jury could also conclude that Copper Basin acted maliciously in sending the first lis pendens to Kootenai Title to interfere with the sale of those 3.928 acres to Douglass. . . .

Contrary to the assertions of Copper Basin, the \$2 million dollar escrow agreement was necessitated by the wrongful first lis pendens recorded by Copper Basin. Before the wrongful recording of the first lis pendens, as of July 28, 2021, Beyond Green had already entered into a road construction agreement with Douglass for the construction of Cecil Road. . . The sale of the adjacent property, Tech Park, was about to close. However, because of the first lis pendens, Kootenai Title would not provide title insurance for the property to be sold to Douglass unless Beyond Green entered into a \$2 million escrow agreement with Kootenai Title. [8, *Declaration of Sam Johnson* at 2.] Kootenai Title also required Beyond Green to indemnify Kootenai Title for any claims made in relation to the first lis pendens or this litigation. [¶ 9, *Declaration of Sam Johnson* at 3.]

Mem. in Opp'n to Pl.'s Mot. for Summ J. 34- 35.

A claim for Slander of Title "requires proof of four elements: (1) publication of a slanderous statement; (2) its falsity; (3) malice; and (4) resulting special damages." *Porter v. Bassett*, 146 Idaho 399, 405 (2008) (quoting *McPheters v. Maile*, 138 Idaho 391, 395 (2003)). "Malice has been generally defined by Idaho courts as a reckless disregard for the truth or falsity of a statement. An action will not lie where a statement in slander of title, although false, was made in good faith with probable cause for believing it." *Weitz v. Green*, 148 Idaho 851, 862 (2010). Because a lis pendens simply informs the public that property is involved in litigation, Idaho courts have held that the recording of a lis pendens cannot form the basis for either a slander of title claim or a defamation action. *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 165 P.3d 261, 271

(2007). While not directly addressing this issue, the Idaho Supreme Court has found that the doctrine of lis pendens is wholly inapplicable when none of the property encumbered was involved in the actions against petitioners. See *Eismann v. Miller*, 101 Idaho 692, 697, 619 P.2d 1145, 1150 (1980).

Here, as in the first Motion for Summary Judgment regarding this matter, there is a material question of fact related to the falsity of the statement, and whether Copper Green was malicious in its publication. If the original property included in the lis pendens included only Cecil Road, than it was subject to the PSA. This information is not clear from the record. Additionally, there is a question of malice of the publication that cannot be decided by this Court as a matter of law.

b. Abuse of Process

In responding specifically to Copper Basin's Motion for Summary Judgment of Beyond Green's Abuse of Process Counterclaim, Beyond Green argues that it:

asserted an abuse of process claim based on the recording of the first lis pendens by Copper Basin, which notice clearly included 3.928 acres that are not the subject of the PSA, and to which Copper Basin had no right. Further, in clear contradiction to I.C. § 5-505, the title and/or right to possession to those 3.928 acres would not be affected by the current litigation.

Mem. in Opp'n to Pl.'s Mot. for Summ J. 30. Beyond Green continues,

Copper Basin cannot, and has not, shown that the right to possession, use, or enjoyment of the 3.928 acres will be affected by this litigation. The lawsuit filed by Copper Basin will not in any way affect the right to possession, use, or enjoyment of the 3.928 acres. Copper Basin has not even attempted to argue otherwise. The act of Copper Basin in including those 3.928 acres in its first lis pendens is a willful act to use the legal process that is not proper in the regular course of litigation.

Id. at 31.

For purposes of defeating summary judgment, the facts of this case would allow a jury to infer that Copper Basin had an improper purpose in recording the first lis pendens. That improper purpose was to delay or

impede the sale of property that included the future Cecil Road right-of-way to Douglass so that Beyond Green would build Cecil Road and assist Copper Basin in closing the escrow of the PSA after the 120 day approval period had run.

Copper Basin knew that Beyond Green intended to sell the adjacent property, which would include the 3.928 acres of Cecil Road, to Harlan Douglass.

Id. at 31-32.

The elements of an abuse of process claim include “(1) a willful act in the use of legal process not proper in the regular course of the proceeding that was (2) committed for an ulterior, improper purpose.” *Berkshire Investments, LLC v. Taylor*, 153 Idaho 73, 84 (2012) (citing *Badell v. Beeks*, 115 Idaho 101, 104 (1988)); *Beco Constr. Co., Inc. v. City of Idaho Falls*, 124 Idaho 859, 865 P.2d 950, 954 (Idaho 1993)).

coercion, punishment, and harassment are certainly improper purposes for the use of civil process. 1 Am.Jur.2d *Abuse of Process* § 6 (2012) (“The ulterior motive or purpose generally required in an abuse of process action may take the form of coercion to obtain a collateral advantage not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club....”).

Beco Constr. Co., Inc., 124 Idaho at 859, 865 P.2d at 954.

Here, there is material question of fact related to if Copper Basin had an improper purpose in recording the lis pendens, to include delaying or impeding the sale of the property, which may or may not be subject to this litigation, to Douglass. With such question of material fact, this Court cannot find that Copper Basin is entitled to summary judgment as a matter of law.

5. Attorney Fees will not be granted in this matter.

Copper Basin’s prayer for relief includes a request for “corporation’s reasonable attorney’s fees and costs incurred herein.” Ver. Compl. 6, ¶ 2.

Pursuant to the PSA, Attorney's Fees will not be awarded to either side in this case, as Paragraph 9.5 of the PSA, entitled Attorney Fees in Case of Litigation, provides that:

"[i]n the event of any litigation between the Parties hereto to enforce any of the provisions of this Agreement, or to declare any right of either party. . . then, as between the Buyer and Seller, each Party to such litigation agrees to pay its costs and expenses, including attorney's fees, incurred therein, regardless of prevailing party."

Ver. Compl. 2, ¶ 5, Ex. C, 7, ¶ 9.5. Attorney fees cannot be awarded under the terms of the PSA. Summary judgment is granted to Beyond Green on this issue.

IV. CONCLUSION AND ORDER.

For the foregoing reasons, defendant Beyond Green's Motion to Amend Answer and Counterclaim is granted.

For the foregoing reasons, plaintiff Copper Basin's Motion for Summary Judgment is denied in part and granted in part (Copper Basin is entitled to specific performance because Beyond Green breached the PSA by failing to sell the property).

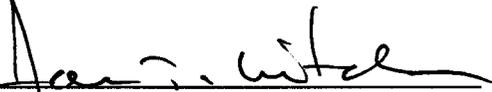
For the foregoing reasons, defendant Beyond Green's Second Motion for Summary Judgment is denied in part and granted in part (attorney fees cannot be awarded under the terms of the PSA; and the contingencies were approved by Copper Basin and thus cannot be claimed by Copper Basin to have been breached by Beyond Green).

IT IS HEREBY ORDERED defendant Beyond Green's Motion to Amend Answer and Counterclaim is **GRANTED**.

IT IS HEREBY ORDERED plaintiff Copper Basin's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part (Copper Basin is entitled to specific performance because Beyond Green breached the PSA by failing to sell the property).

IT IS HEREBY ORDERED defendant Beyond Green's Second Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part (attorney fees cannot be awarded under the terms of the PSA; and the contingencies were approved by Copper Basin and thus cannot be claimed by Copper Basin to have been breached by Beyond Green).

Entered this 31st day of January, 2023.


John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2023, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

<u>Lawyer</u>	<u>email</u>	<u>Lawyer</u>	<u>email</u>
Paul Daugharty	paul@pdaughartylaw.com	E. Don Copple	edcopples@davisoncopples.com
Edward Guerricabeitia	edge@davisoncopples.com	Chris Kronberg	ck.idaholaw@gmail.com


Jeanne Clausen, Deputy Clerk