DISTRICT COURT, LARIMER COUNTY, STATE OF COLORADO LARIMER COUNTY JUSTICE CENTER 201 LA PORTE AVENUE SUITE 100 FORT COLLINS, COLORADO 80521-2761	DATE FILED: December 20, 2017 CASE NUMBER: 2016CV30362
Plaintiff: LOVELAND EISENHOWER INVESTMENTS, LLC, a California limited liability company, **v.** **Defendant:** THE CITY OF LOVELAND, THE GREELEY AND LOVELAND IRRIGATION COMPANY, a Colorado non-profit corporation and JOHN DOES 1 through 50.	▲ ▲ **COURT USE ONLY**
THE HONORABLE SUSAN BLANCO **DISTRICT COURT**	Case Number: 2016CV30362 Courtroom: 4C

ORDER RE: DEFENDANT CITY OF LOVELAND'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND REQUEST TO STAY PURSUANT TO C.R.S. 24-10-108, DEFENDANT GREELEY AND LOVELAND IRRIGATION COMPANY'S MOTION FOR SUMMARY JUDGMENT, AND PLAINTIF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on the Defendant City of Loveland's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and Request to Stay Pursuant to C.R.S. 24-10-108, Defendant Greeley and Loveland Irrigation Company's Motion for Summary Judgment, and, Plaintiff's Partial Motion for Summary Judgment, all filed August 28, 2017. Having reviewed all motions, the responsive pleadings, the supporting affidavits and exhibits, and the complete file in this matter, and being fully advised in the premises, the Court FINDS and ORDERS as follows:

I. BACKGROUND

The Chubbuck Ditch appropriates water along the Big Thompson River. Pl. Mot. Summ J. 3. On November 1, 1877, the owner of the Chubbuck Ditch entered into an agreement with

shareholders in the Larimer County Irrigating and Manufacturing Company (the "Company")[1], which granted parties to the agreement first priority to the water delivered by the Chubbuck Ditch system. *Id.* At 3–4. Under the agreement, any residual water not used by the parties to the agreement was available to the Company's other shareholders who were not involved in the agreement. *Id.* at 4.

In 1977, nearly one hundred years after the initial agreement, the Company and the City entered into an agreement to accommodate urban growth, where the City could acquire "contractual inches" of Chubbuck water rights (the "Chubbuck Inches"), and convert them from agricultural to municipal use through water court proceedings. Def. Company's Mot. Summ. J. 2. New developments in the City must either pay for or contribute water rights to the City in exchange for municipal water service. *Id.* at 3. A developer can contribute water rights, like the Chubbuck Inches, which are then held in the City's water bank and can be credited to a developer later when it is time to contribute water rights. *Id.*

Since the 1977 agreement, the City converted a great deal of the Chubbuck Inches to municipal use, and allegedly started withholding the remaining return flows. Pl. Mot. Summ. J. at 5–6. The Company thus objected to the most recent conversion of the Chubbuck Inches to municipal use. *Id.* at 6. In January of 2010, the Company and the City reached a settlement (the "Settlement Agreement") in which the City agreed that it would no longer convert the Chubbuck Inches to municipal use. Def. Company's Mot. Summ. J. 2; Def. City's Mot. Summ. J. 4. When the Water Court entered its final decrees in February of 2010, the Company and City's agreement became public record. Def. City's Mot. Summ. J. at 6.

Plaintiff Loveland Eisenhower Investments, LLC ("LEI"), is a developer that owns 58 acres of land in Larimer County, Colorado that it incrementally purchased between 2001 and 2007. Pl. Mot. Summ J. 3. It purchased 17 acres in 2001, 31 acres in 2004, and the last 9 acres in 2007. *Id.* LEI's predecessors in title to the second and third parcels were among the original parties to the 1877 agreement, and thus maintained first priority in the water from the Chubbuck Ditch

[1] Defendant Greeley and Loveland Irrigation Company's predecessor in interest was Larimer County Irrigating and Manufacturing Company. Both are hereinafter referred to as the "Company".

system. *Id.* As such, LEI is entitled to 31.25 of the total 1590.4 Chubbuck Inches based on the 1877 agreement. *Id.*

At the time LEI acquired the second and third parcels, the first parcel was already annexed within the City, and was zoned PUD for high density residential development. Pl.'s Mot. Summ. J. 7. LEI submitted a Petition for Annexation to the City on January 18, 2010, for the remaining second and third parcels. Def. City's Mot. Summ. J. 5. The City and LEI entered the Annexation Agreement in April of 2010. *Id.* at 7.

The Annexation Agreement did not mention contribution of water rights as that is not required until the building permit stage or at final approval for residential development. Def. City's Mot. Summ. J. 6. However, the Annexation Agreement does refer to the municipal water the City supplies in exchange for water rights:

> Except as this Agreement expressly states otherwise, the City shall have the responsibility to provide its customary municipal water services to the Project on an equivalent basis to those provided to any other area of the City on a uniform and non-discriminatory basis, including, without limitation: sanitary sewer and potable and non-potable water service and facilities (including supplies, conveyance and treatment capacities) . . . .

Def. City's Mot. Summ. J. at 7; Pl.'s Mot. Summ. J. at 5. Plaintiff claims the City knew of its proposed development and entering the Settlement Agreement unfairly and discriminatorily precluded it from contributing its Chubbuck Inches water rights. *Id.* at 6–7. According to the City, LEI had some knowledge that there was a dispute between the Company and the City surrounding the Chubbuck Inches, but it failed to get involved by filing a Statement of Opposition in the City's Water Court proceedings. *Id.* at 8. LEI claims it had no knowledge the dispute would impact its intended use of the Chubbuck Inches. Pl. Mot. Summ. J. at 8–10.

In its Complaint, Plaintiff alleges a number of claims against the City, the Company, and nonparty shareholders of the Company entitled to use LEI's unused portions of the Chubbuck Inches. Plaintiff alleges the following claims against the City: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) declaratory relief that the City engaged in unlawful delegation of legislative authority. Plaintiff seeks a permanent injunction of the settlement agreement between the City and the Company. Plaintiff further alleges intentional

interference with contractual relations against the Company. Finally, Plaintiff alleges unjust enrichment against the nonparty shareholders. LEI, the City, and the Company have filed motions for summary judgment pursuant to C.R.C.P. 56, and the City has filed a motion to dismiss pursuant to C.R.C.P. 12(b)(1) and the Colorado Governmental Immunity Act.

II. STANDARD OF REVIEW

A. The Colorado Governmental Immunity Act

The Colorado Governmental Immunity Act ("CGIA"), C.R.S. § 24-10-108, provides:

> sovereign immunity shall be a bar to any action against a public entity for injury which lies in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant. If a public entity raises the issue of sovereign immunity prior to or after the commencement of discovery, the court shall suspend discovery, except any discovery necessary to decide the issue of sovereign immunity and shall decide such issue on motion.

The CGIA defines an "injury" as "death, injury to a person, damage to or loss of property, of whatsoever kind, which, if inflicted by a private person, would lie in tort or could lie in tort regardless of whether that may be the type of action or the form of relief chosen by a claimant." C.R.S. § 24–10–103(2).

"Whether governmental immunity bars a claim is a question of subject matter jurisdiction that, if raised before trial, is properly addressed by the trial court as a C.R.C.P. 12(b)(1) motion to dismiss [for lack of subject matter jurisdiction]." *Tidwell v. City & County of Denver,* 83 P.3d 75 (Colo. 2003). Furthermore, whether a particular claim lies in tort is a case-by-case determination considering the nature of the injury and the relief sought. *Id.* "The nature of the injury alleged—not the relief requested—is the primary inquiry to determine whether the CGIA applies to the claim. Other questions—such as whether the claim could lie in tort and the type of relief sought—follow this initial injury analysis." *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 579 (Colo. 2016).

A. Subject Matter Jurisdiction

Subject matter jurisdiction is the courts authority "to resolve a dispute in which it renders judgment." *Trans Shuttle, Inc. v. Pub. Utils. Comm'n,* 58 P.3d 47, 49–50 (Colo. 2002). A court has jurisdiction over the subject matter if the case is one of the types of cases the court has been empowered to entertain by the sovereign from which the court derives its authority. *In re Marriage of Orr,* 36 P.3d 194, 196 (Colo. App. 2001). In considering a motion to dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), a district court examines the substance of the claim based on the facts alleged and the relief requested. *City of Aspen v. Kinder Morgan, Inc.,* 143 P.3d 1076, 1078 (Colo. App. 2006). "The plaintiff has the burden of proving jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge." *Id.*

B. Summary Judgment

A Court may properly grant a motion for summary judgment if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). Summary judgment is a disfavored and "drastic remedy" because it eliminates a trial on the facts. *Kaiser Found. Health Plan of Colo. v. Sharp,* 741 P.2d 714, 718 (Colo. 1987). Thus, "[w]here there are genuine issues of material fact, summary judgment is not appropriate 'no matter how enticing [given] congested dockets.'" *People In Interest of S.N. v. S.N.*, 329 P.3d 276, 281 (Colo. 2014) (citing *Sullivan v. Davis,* 474 P.2d 218, 221 (1970)).

"The party seeking summary judgment must show there is no genuine issue of material fact, and all doubts must be resolved against that party." *People ex rel. A.C.*, 170 P.3d 844, 846 (Colo. App. 2007). For summary judgment purposes, a "material fact" is one that will affect the case's outcome. *Olson v. State Farm Mut. Auto. Ins., Co.*, 174 P.3d 849 (Colo. App. 2007). The material evidentiary facts, not the ultimate legal conclusion, must be undisputed in order for a court to grant summary judgment. *People In Interest of S.N. v. S.N.*, 329 P.3d 276 (Colo. 2014). If the moving party establishes that there are no issues of material fact, "the burden shifts to the nonmoving party to establish that there is a triable issue of fact." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1149 (Colo. 1997).

III. ANALYSIS

Defendant City of Loveland has filed a motion to dismiss for lack of subject matter jurisdiction, claiming it has governmental immunity pursuant to the CGIA. The City, the Company, and LEI have also filed motions for summary judgment. The Court will first address the City's motion to dismiss, and then it will turn to the motions for summary judgment.

A. The City's Motion to Dismiss Pursuant to C.R.C.P. 12(b)(1) and the CGIA

The first issue is whether this Court has jurisdiction over the Plaintiffs claims as they relate to the City when the City has asserted immunity under the CGIA. Specifically, the issue is whether LEI's claims lie in contract or tort.

The CGIA is a defense to claims against a public entity "which lie[] in tort or could lie in tort." C.R.S. § 24-10-108 (2017). In determining the applicability of the CGIA, courts employ a two step test. First they determine whether "the plaintiff had suffered an injury," and second they "assess[] the nature of that injury . . . ." *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 580 (Colo. 2016). The initial inquiry is whether the injury has already occurred or if the relief seeks to prevent some future injury. *Id.*

"[T]he form of the complaint is not determinative of the claim's basis in tort or contract." *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008). Rather, "[t]he nature of the injury alleged—not the relief requested—is the primary inquiry to determine whether the CGIA applies to the claim." *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 579 (Colo. 2016). The primary difference between an obligation under tort and one under contract is the source of the parties' duties. *Carothers v. Archuleta County Sheriff,* 159 P.3d 647, 655–56 (Colo. App. 2006). Contractual obligations generally "arise from promises made between parties," while "[t]ort obligations generally arise from duties imposed by law." *Id.*

The City argues that while LEI's claims are contractual on their face, they are factually rooted in tort. It relies on *Robinson* in making the argument that LEI's allegations are really that of misrepresentation or fraud, which lie in tort for the purposes of the CGIA. *Robinson*, 179 P.3d 998 (Colo. 2008). In *Robinson*, the plaintiff brought suit against the Colorado Lottery for continuing to sell lottery tickets after all the prizes had been awarded. *Id.* at 1001. In that case,

the complaint framed plaintiff's claims in contract law, arguing that she had bought lottery tickets under the belief, based on the Lottery's representations, that she had a chance to win certain represented prizes. *Id.* The Colorado Supreme Court reasoned that the plaintiff's factual allegations revealed that her injury was really based on the Lottery's misrepresentations regarding the availability of the represented prizes which induced purchase of lottery tickets. *Id.* at 1005. Such a misrepresentation, according to the Supreme Court, is a breach of a duty arising in tort. *Id.* Indeed, the *Robinson* Court also acknowledged that a claim for breach of a promise detrimentally relied upon, rather than an alleged misrepresentation of facts, is not a tort claim for purposes of the CGIA. *Id.* at 1004.

The Court finds *Open Door Ministries v. Lipschuetz* informative in this matter. 373 P.3d 575 (Colo. 2016). In that case, the City and County of Denver issued a room and board permit to Open Door Ministries, and its neighbor, Mr. Lipschuetz, challenged the validity of the permit. *Id.* at 576. On appeal, Lipschuetz argued that Open Door's cross claims against the City, seeking declaratory and injunctive relief to prevent revocation of its permit, were barred by the CGIA because they could lie in tort. *Id.* The Colorado Supreme Court ruled that the CGIA did not apply because Open Door's injury was prospective—it sought injunctive relief so that the injury would not occur. *Id.* at 579. The Court reasoned "the statutory language is clear: the CGIA applies only to claims that allege that an injury has already occurred" *Id.* Supporting that reasoning, the Court stated: "the CGIA defines injury to include death, personal injury, and property damage. Such injuries are cognizable only after they occur; a person cannot pursue a tort claim for future death, future physical injury, or future property damage." *Id.*

The instant matter is more similar to *Lipschuetz* than to *Robinson*. In *Robinson*, the plaintiff was injured by relying on the Lottery's misrepresentations that prizes were still available when really all the prizes had already been awarded. Here, LEI has not yet experienced an injury. Rather, LEI has alleged breach of contract and breach of implied covenant of good faith and fair dealing because the Settlement Agreement precluded the City from accepting Chubbuck Inches in satisfaction of water rights dedication requirements. LEI's injury would occur if it has to pay for some other water rights contribution in exchange for municipal water. Much like in *Lipschuetz*, the injury here has not yet occurred; LEI has not yet paid a greater amount to satisfy its water rights

contribution. Therefore, LEI cannot possibly pursue a tort claim for recovery of money damages that have not been incurred.

This case presents the "breach of a promise detrimentally relied upon" claim that the *Robinson* Court recognized as contractual rather tortious in its analysis of *Berg v. State Board of Agriculture* and *Board of County Commissioners v. DeLozier*. *Berg*, 919 P.2d 254 (Colo. 1996); *Delozier*, 917 P.2d 714 (Colo.1996). The *Robinson* Court recognized that "[a] promise relating to future events without a present intent not to fulfill the promise is not actionable as a tortious misrepresentation of facts." *Robinson*, 179 P.3d 998, at 1004 (Colo. 2008) (citing *DeLozier*, 917 P.2d 714, at 716 (Colo.1996)) (internal quotations omitted). LEI alleges breach of a promise relating to future contribution of water rights in exchange for municipal water supply. It does not allege that the City expressly promised to accept Chubbuck Inches with the intent to lure LEI into the Annexation Agreement. Furthermore, LEI seeks specific performance under the Annexation Agreement, a contractual remedy. Therefore, this situation falls under the "breach of a promise detrimentally relied upon" class of cases rather than the negligent misrepresentation or fraud class of cases.

LEI's claims against the City are rooted in contract and not tort, and the CGIA does not bar LEI's first two claims against the city. Therefore, the Court DENIES the City's motion to dismiss for lack of subject matter jurisdiction.

B. Summary Judgment

The next issue is whether LEI, the City, or the Company are entitled to summary judgment on the claims set forth in their motions; Plaintiff's claims one through five. Summary judgment is appropriate only where the material facts are undisputed. C.R.C.P. 56(c). Material facts are those that will affect the outcome of the case. *Olson*, 174 P.3d 849 (Colo. App. 2007). Each of plaintiff's claims require different facts to either fail or succeed as a matter of law. Thus, the Court will address each claim separately to determine whether any party is entitled to summary judgment in its favor on claims one through five.

1. Plaintiff's First Claim: Breach of Contract

Plaintiff's first claim against the City is for breach of contract. A claim for breach of contract requires: (1) the existence of a contract; (2) performance under the contract by the plaintiff or a justification for non-performance; (3) defendant's failure to perform under the contract; and (4) resulting damages. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). In the context of contract interpretation, summary judgment is precluded when "the contracting parties in good faith . . . disagree about the inferences to be drawn from [basic facts not in dispute], what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts." *City of Colorado Springs v. Mountain View Elec. Ass'n, Inc.*, 925 P.2d 1378, 1388 (Colo. App. 1995) (citing *S.J. Groves & Sons Co. v. Ohio Turnpike Commission,* 315 F.2d 235, 237–38 (6th Cir.1963)).

LEI and the CIty are in dispute as to the interpretation of a material term of the Annexation Agreement. Namely, whether section 2.18 of the Annexation Agreement detailing the City's responsibility to provide customary municipal water services includes the exchange of Chubbuck Inches for municipal water, as was the City's practice from 1977 until it entered the Settlement Agreement in February of 2010. The City argues that LEI fails to establish the third element of breach of contract by prematurely bringing the breach claim. It argues that section 2.18 of the Annexation Agreement does not address the City's acceptance of the Chubbuck Inches, rather LEI has conflated the water rights contribution requirement and the requirement the City provide customary municipal services, including water. LEI argues the services outlined in the Annexation Agreement "without question" includes accepting and applying water rights in exchange for municipal water service. While the parties do not dispute the words contained in section 2.18, they disagree about inferences that can be drawn from the term and their intentions in regard to that term. The facts in dispute directly relate to how the parties interpreted section 2.18. The Court finds that the conflicting interpretations and intentions are disputes of a material fact that preclude summary judgement in favor of either the City or LEI. Thus, the Court DENIES the City and LEI's motions for summary judgment as they pertain to LEI's breach of contract claim.

2. Plaintiff's Second Claim: Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiff's second claim against the City is for breach of the implied covenant of good faith and fair dealing. The good faith performance doctrine is intended as a mechanism to promote the "central policy underlying contract law, that of construing contracts so as to effectuate the parties' intentions." *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 498 (Colo. 1995). Performing under a contract in good faith involves "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* (citing *Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*,872 P.2d 1359, 1362 (Colo.App.1994)) (internal quotations omitted). However, it is not meant to "inject new substantive terms or conditions into a contract." *City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 204 (Colo. App. 1999).

Here, as is true with the breach of contract claim, the parties dispute whether section 2.18 of the Annexation Agreement requires the City accept LEI's Chubbuck Inches in exchange for municipal water rights. The City argues the plain language of the agreement creates no reasonable expectation that it would accept the Chubbuck Inches as LEI's water rights contribution. It argues LEI would use the good faith performance doctrine to graft a new obligation into the agreement requiring the City to accept Chubbuck Inches in direct conflict with its existing Settlement Agreement. Contrary to the City's position, LEI maintains the language in the agreement coupled with the City's previous practice of exchanging Chubbuck Inches for municipal water created a reasonable expectation it would continue accepting Chubbuck Inches in exchange for municipal water. This interpretation issue speaks to the conflicting intentions of the parties. There is a dispute about whether LEI's interpretation of section 2.18 was reasonable such that enforcement of LEI's interpretation would effectuate the intentions of the parties at the time they entered the Annexation Agreement. Because of this dispute of material fact, the Court finds that summary judgment in favor of either party is inappropriate. Thus, the Court DENIES the City and LEI's motions for summary judgment as they pertain to LEI's claim of breach of the implied covenant of good faith and fair dealing.

3. Plaintiff's Third Claim: Declaratory Judgment that the City Engaged in Unlawful Delegation of Authority

Plaintiff's third claim is for a declaratory judgment that the City engaged in an unlawful delegation of authority by contracting away its ability to accept Chubbuck Inches in exchange for municipal water. LEI relies on *Bennett Bear* in arguing the City cannot divest its legislative powers, including municipal water rate setting, by contracting that authority away. *Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cty. of Denver By & Through Bd. of Water Comm'rs*, 928 P.2d 1254, 1270 (Colo. 1996). However, the Court finds there are insufficient facts to rely on *Bennet Bear* for two reasons: (1) it is unclear that this case involves a full vesting of legislative authority as was the case in *Bennet Bear*; and (2) the exchange of Chubbuck Inches for municipal water is a quasi-judicial process rather than a purely legislative function.

Bennett Bear involved a challenge to the rates and charges set by the Denver Water Board for municipal water service outside the City and County of Denver. *Id.* at 1258. Part of the Plaintiff's argument was that the Water Board limited its legislative authority to set rates by entering contracts that capped the rate spread between in-city and extraterritorial water service. The Supreme Court recognized in *Bennett Bear* that rate setting is a legislative function. It further recognized that "[c]ontracts of a government entity cannot divest its legislative powers [such as rate setting], and contracting parties are charged with a knowledge of the retained nature of such authority." *Id.* at 1269–70. The instant matter is distinguishable from *Bennett Bear* because this is not a situation where the City has entered contracts limiting how it exercises water transactions across the board. Rather, it is an agreement to no longer accept water rights in exchange for municipal water from a specific source, namely, the Chubbuck Ditch.

The instant matter is also distinguishable form *Bennett Bear* because this is a dispute over conversion of water rights for municipal water, rather than pure rate setting. "[W]ater judge[s] have exclusive jurisdiction of water matters within the division, and no judge other than the one designated as a water judge shall act with respect to water matters in that division." C.R.S. § 37-92-203(1). The authority to convert water from agricultural to municipal use is not a purely legislative function; it is within the exclusive jurisdiction of the Division I Water Court. Furthermore, Colorado law requires the water court "give effect to the stipulations of the parties" in a water court case. *USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997).

Here, the exchange of Chubbuck Inches for municipal water services involves two key aspects: (1) whether the City will accept Chubbuck Inches to lessen its baseline rates; and (2) converting the Chubbuck Inches from agricultural to municipal use in water court. It is not an issue of pure legislative rate setting. The Company challenged the latest conversion of Chubbuck inches while it was being processed in Division I Water Court. The Company and the City then agreed the City could convert the water rights at issue in the water court proceedings, but it could no longer accept Chubbuck Inches in exchange for municipal water from that point forward. The Water Court then entered its decrees that listed each settlement and stipulation. To a certain extent the Settlement Agreement limits the City's legislative authority because it no longer has the discretion to accept Chubbuck Inches if it wanted to. However, it is unclear that the Settlement Agreement precluding the exchange of Chubbuck Inches involves a divestment of legislative authority. When viewed as a whole, the conversion process involves both legislative and judicial aspects. Thus, the Court finds there is insufficient information to grant summary judgment in either party's favor on LEI's claim seeking declaratory judgment that the City engaged in unlawful delegation of legislative authority.

The City also seeks dismissal of LEI's claim for declaratory relief because the complaint was filed after the two year statute of limitations had already run. Claims against government entities, like the City, must be filed within two years. C.R.S. § 12-80-102(f). The date the statute of limitations begins tolling is when both the injury and its cause are known or should have been known by the exercise of reasonable diligence. C.R.S. § 12-80-108(1). The inquiry into whether the plaintiff knew or should have known of the character and degree of his or her injuries and the circumstances giving rise to them is a question of fact. *DiChellis v. Peterson Chiropractic Clinic*, 630 P.2d 103, 106 (Colo. App. 1981). A dispute as to such a fact precludes summary judgment. *Id.*

Here, the City alleges that LEI knew of a dispute surrounding the Chubbuck Inches as early as 2009. LEI contests this fact, arguing that any mention of the dispute was made in passing and did not indicate it could affect its intended exchange of Chubbuck Inches for municipal water. The City also argues LEI learned of the Settlement Agreement in January of 2014. LEI maintains it did not learn of Settlement Agreement until December of 2014. Such factual disputes preclude summary judgment because the time when the plaintiff learned or should have known about the

character of its injury is a primary consideration in addressing a motion for summary judgment based on failure to meet the applicable statute of limitations.

Therefore, the Court DENIES both the City's and LEI's motions for summary judgment regarding LEI's third claim for declaratory relief.

4. Plaintiff's Fourth Claim: Permanent Injunction

Plaintiff's fourth claim seeks an injunction on the Settlement Agreement, that would require the City to continue accepting Chubbuck Inches. A permanent injunction requires a showing of: (1) likely success on the merits; (2) irreparable harm if the injunction is not issued; (3) the threatened injury outweighs the harm the injunction may cause to the opposing party; and (3) the injunction serves the public interest. *Langlois v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 78 P.3d 1154, 1157 (Colo. App. 2003). Here, the Court is unaware of any dispute of material fact pertaining to this claim, as the parties have not pointed to any. Furthermore, LEI has failed to show it is likely to succeed on the merits. Thus, the Court DENIES LEI's motion for summary judgment on its fourth claim for a permanent injunction.

5. Plaintiff's Fifth Claim: Intentional Interference with Contractual Relations

Plaintiff's fifth claim is against the Company for intentional interference with contractual relations. Intentional interference with contractual relations requires the defendant: (1) be aware of a contract between two parties; (2) intend one of the parties breach the contract; and (3) induce the party to breach or make it impossible for the party to perform under the contract. *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859, 871 (Colo. 2004).

LEI claims the Company interfered with its Annexation Agreement with the City by entering the Settlement Agreement requiring the City no longer accept Chubbuck Inches in exchange for municipal water rights. It is undisputed that the City and the Company entered into their agreement on January 25, 2010. It is also undisputed that the Annexation Agreement was entered on April 20, 2010. Given LEI entered the Annexation Agreement after the Company entered the settlement agreement, the Court finds the Company had no way of knowing of the Annexation Agreement when entering the settlement with the City. The Court finds LEI cannot succeed as a matter of law in its fifth claim for relief against the Company for intentional

interference with contractual relations because the first element of intentional interference with contractual relations is not satisfied. Therefore, the Court GRANTS Defendant Company's Motion for Summary Judgment as it pertains to Plaintiff's claim for intentional interference with contractual relations.

IV. CONCLUSION

ACCORDINGLY, Plaintiff's Partial Motion for Summary Judgment is DENIED. Furthermore, Defendant City's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment is DENIED. Finally, Defendant Company's Motion for Summary Judgment is GRANTED in part and DENIED in part.

SO ORDERED this 20TH day of ~~November~~ December, 2017

BY THE COURT:

Susan Blanco
District Court Judge