SUMMARY
March 3, 2022

2022COA30

No. 20CA1778, *Brd of Comm v City and Cnty of Denver* — Contracts — Breach of Contract — Limitation of Actions — Laches — Waiver — Accord and Satisfaction — Claim Preclusion

This case requires our division to interpret the painstakingly negotiated contract between Denver and Adams Counties that outlines the construction and operation of Denver International Airport — a contract expected to bind the parties for fifty to one hundred years. Unsurprisingly, one of Adams's primary concerns was noise generated by aircraft operations and the damage it would cause to its residents and wildlife. The parties addressed this concern through contract language that requires Denver to report specific noise levels annually using a noise monitoring system and to pay a stipulated damage amount per uncured noise violation.

When the airport opened, Denver reported noise levels from both a noise modeling and a noise monitoring system. The two systems produced comparable data. But after a few years, Denver only reported, and the parties negotiated settlements of, noise violations from the modeling system. This case arose in 2014 when Adams learned that the two systems no longer reported comparable data and that the modeling data significantly underreported noise levels. When settlement negotiations failed, Adams filed this action and alleged, among other things, that Denver violated the contract by reporting data from a noise modeling system rather than a noise monitoring system. After a bench trial, the trial court agreed and ordered Denver to pay damages for uncured violations computed by the noise monitoring system.

On appeal, Denver challenges the trial court's denial of its affirmative defenses of statute of limitations, waiver, accord and satisfaction, laches, and claim preclusion, as well as the court's prejudgment interest calculation. We discern no error and affirm the court's judgment.

COLORADO COURT OF APPEALS **2022COA30**

Court of Appeals No. 20CA1778
Jefferson County District Court No. 18CV31077
Honorable Christie A. Bachmeyer, Judge

Board of County Commissioners of Adams County, Colorado; City of Aurora, Colorado; City of Brighton, Colorado; and City of Thornton, Colorado;

Plaintiffs-Appellees,

v.

City and County of Denver, Colorado;

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE FREYRE
Navarro and Harris, JJ., concur

Announced March 3, 2022

Jachimiak Peterson Kummer, LLC, Mark R. Davis, Lakewood, Colorado, for Plaintiffs-Appellees

Kaplan Kirsch & Rockwell, LLP, Samantha Caravello, Sara Mogharabi, Lakewood, Colorado; Kaplan Kirsch & Rockwell, LLP, W. Eric Pilsk, Washington, D.C., for Defendant-Appellant

¶ 1 In this contract dispute between the City and County of Denver (Denver) and the Board of County Commissioners of Adams County and three Adams County cities (Adams), Denver appeals the trial court's judgment enforcing the noise monitoring provision and related uncured noise violations under the 1988 Intergovernmental Agreement between Denver and Adams County (IGA), https://perma.cc/439M-8YGC. The IGA documents the parties' agreements concerning the construction and operation of Denver International Airport (DIA), including, as relevant here, the noise exposure performance standards (NEPS) applicable to noise generated by aircraft flight operations. Denver contends that Adams' enforcement claims are barred by (1) the statute of limitations; (2) waiver; (3) accord and satisfaction; (4) laches; and (5) claim preclusion. Denver also asserts that the trial court erred in its calculation of prejudgment interest for the liquidated damages arising from the lawsuit. We discern no error and affirm the court's judgment.

I. Background

¶ 2 As set forth in the trial court's judgment, during the 1980s, Denver sought to expand the operations of and increase the revenue

from what was then Stapleton International Airport (Stapleton). Adams opposed the expansion because further growth would aggravate the aircraft noise from Stapleton. After a series of discussions spanning several years, Adams and Denver agreed (and voters in both counties agreed) that Denver could annex fifty-five square miles of land in Adams County to build a new airport, conditioned on Denver's agreement to comply with strict airport noise restrictions, including firm limits on noise in particular residential and wildlife areas of Adams County. The parties negotiated extensively to establish the IGA, settling on fixed noise standards and an airport location that satisfied both parties.

¶ 3 During the negotiations, Denver and Adams acknowledged that aircraft flight patterns were the primary cause of harmful airport noise. They also recognized that such flight patterns were determined solely by the Federal Aviation Administration (FAA), which declined to be a party to the IGA. Nevertheless, Denver agreed to work with the FAA and to use its influence as the airport proprietor to achieve the agreed-upon noise levels and to operate the new airport, DIA, in a manner consistent with the IGA.

¶ 4 To address and enforce Adams' noise concerns, the IGA established the NEPS, the maximum noise levels permissible for DIA flight operations in certain areas of Adams County. NEPS violations are divided into two classes — Class I violations (exceeding the NEPS by 2 decibels (dB) or less) and Class II violations (exceeding the NEPS by more than 2 dB). IGA §§ 5.5.1, 5.5.2. Denver agreed to pay Adams $500,000 per uncured Class II NEPS violation each year as compensation for such NEPS violations. IGA § 5.6.3. The IGA provides Denver with a one-year cure period for each Class II violation before compensation is due.[1]

¶ 5 The parties established two benchmarks to measure DIA noise levels for NEPS compliance: (1) the 65 Ldn noise contour and (2) the Leq(24).[2] To collect the data for these benchmarks, Denver agreed

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[1] If Denver chooses to cure a NEPS violation, then the cure period can extend beyond one year.

[2] Ldn noise contours are "a geographic depiction of the outer boundaries of certain Noise Exposure Levels on a map of the land area surrounding [DIA]," and are not at issue here. IGA § 2.31. The Leq(24) is "the 365-day average of the steady A-weighted sound level in decibels over a 24-hour period that has the same acoustic energy as the fluctuating noise during that period which is generated by aircraft flight operations" from DIA, IGA § 2.32, and is measured at various grid points using Remote Monitoring Terminals (RMTs) within 1.5 miles of the points, IGA § 5.4.1.

to "install and operate a noise monitoring system capable of recording noise levels sufficient to calculate Ldn noise contours and Leq(24) values for the purpose of monitoring and enforcing the NEPS." IGA § 5.4. At the time the parties signed the IGA, they knew that a noise monitoring system capable of fulfilling the contract's requirements did not exist and would have to be developed. They also knew that, even when the system was created, it might not be completely accurate. And, they intended the IGA to govern the parties for fifty to one hundred years.

¶ 6 Denver hired Harris Miller Miller & Hanson, Inc. (HMMH), an environmental and transportation consulting firm, to develop its noise monitoring system. Denver rejected HMMH's initial proposal, and in 1991, it told Adams that it would not install a noise monitoring system. Instead, Denver decided to model aircraft noise using a computer program called ARTSMAP, a system based in part on the FAA's Integrated Noise Model.

¶ 7 HMMH developed ARTSMAP as a proprietary noise model for Denver to forecast the noise level of every flight into and out of DIA using the actual flight paths and altitudes of the aircraft. ARTSMAP uses real-time FAA radar and flight tracking data for its

calculations, which are driven by a lateral attenuation algorithm that references a database for aircraft design and engine placement, and then considers atmospheric absorption, temperature, humidity, and ground effects to estimate the noise generated by an aircraft at a particular location on the ground. The algorithm was developed in 1981, and the aircraft database was created in 1993.

¶ 8 Adams objected to Denver's use of ARTSMAP and filed a lawsuit in 1992 (before DIA opened) seeking a court order to compel Denver to install a noise monitoring system. Soon after the suit was filed, HMMH informed Denver that a different company, Technology Integration, Inc., could develop a noise monitoring system accurate enough to distinguish between aircraft and non-aircraft noise. Denver then filed a motion for summary judgment asking the court to dismiss Adams' lawsuit because it could now install and operate a state-of-the-art noise monitoring system, due to technological developments, and argued that the lawsuit was moot. Based on Denver's representations, the court dismissed the lawsuit without prejudice in 1993. Thereafter, in 1995, Denver installed the state-of-the-art Airport Noise and Operations Monitoring System (ANOMS).

¶ 9 Denver contracted with Technology Integration, Inc., to install ANOMS and to field-test it for accuracy. Testing revealed that ANOMS could differentiate aircraft noise from community noise, DIA aircraft from other aircraft, and local non-DIA aircraft noise from community noise; thus, it satisfied Denver's specifications. ANOMS uses data from Remote Monitoring Terminals (RMTs) and a detection and correlation algorithm to collect and report noise events. When an RMT detects an abnormal sound, a sophisticated detection algorithm determines whether the sound constitutes a "noise event."[3] A correlation algorithm then determines whether a DIA aircraft was in the area and can be matched to the noise event. When the noise event shows a significant correlation across all categories, it is reclassified as an aircraft noise event. ANOMS identifies the highest level of noise and the duration of each aircraft noise event and applies a standardized formula to calculate the sound exposure limit (SEL) of that event. The total energy of all

[3] A detection algorithm examines the sound using thirty-five variables of aircraft noise characteristics divided into five categories by using a floating detection threshold that adjusts according to background noise. Each of the five noise categories is weighed, and if the sound reaches a certain level across all categories, then it is identified as a noise event.

aircraft SELs during a defined time period is measured against the Leq(24) benchmark to determine NEPS compliance.

¶ 10 Since Denver installed ANOMS, Denver has updated its software several times and has replaced and upgraded the RMTs it uses. At the time of trial, ANOMS was used at over 200 airports worldwide and comprised 70% of the airport noise monitoring market.

¶ 11 In its first three annual reports, Denver reported NEPS values from both ARTSMAP and ANOMS, which revealed violations. Adams then sued Denver in 1998 for the damages resulting from the uncured NEPS violations. In the 1999 trial, Denver argued that Adams could not use ARTSMAP data to enforce the NEPS because ARTSMAP provided "modeled" rather than "actual" noise levels. But, at that time, the noise levels reported by ANOMS and ARTSMAP varied by only 1 to 3 dB, and that variance appeared to be declining over time. Because the parties knew that any system developed would not be completely accurate and because they never asked the court to determine the proper reporting system, the court did not decide that issue. Instead, the trial court found that Denver bore sole responsibility for reporting NEPS values annually, that the

IGA did not require Adams to perform NEPS calculations, and that the liquidated damages provision of the IGA required Denver to pay for the uncured violations reported by ARTSMAP.

¶ 12 After its first three annual reports, Denver only reported NEPS values from ARTSMAP, and the parties settled subsequent violations based on the trial and appellate courts' rulings in the 1999 case.[4]

¶ 13 In 2014, Denver provided a package of materials to Adams that included an annual "Noise Climate Report." This report documented noise levels from ANOMS. When Adams compared the ANOMS noise levels to the ARTSMAP noise levels reported in the annual report, it discovered a large discrepancy. Rather than the 1 dB to 3 dB difference that existed in 1998, ANOMS now reported

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[4] As relevant here, the trial court found, and a division of this court affirmed that (1) the language of the IGA is unambiguous concerning the definition of actual noise levels constituting the NEPS; (2) Denver was obligated to install a noise monitoring system for the purposes of monitoring and enforcing the NEPS; (3) it was Denver's responsibility to develop a system sufficient to comply with the noise monitoring requirements; (4) the parties knew any system developed would not be completely accurate; (5) Adams was entitled to rely on the NEPS violations Denver reported annually; and (6) the parties contemplated the IGA being effective for 50-100 years. *Bd. of Cnty. Comm'rs v. City & Cnty. of Denver*, 40 P.3d 25 (Colo. App. 2001).

noise levels 20 dB higher than ARTSMAP at some of the noise monitoring locations. Adams then requested additional ANOMS data and hired a noise expert to calculate the NEPS values. Adams discovered that ANOMS and ARTSMAP no longer produced similar noise data, and that the discrepancy between the two had substantially increased over time.

¶ 14 Denver reported no NEPS violations between 2014 and 2016 using ARTSMAP. Adams contested these findings based on the new ANOMS data. In 2017, after attempts to negotiate a settlement failed, Adams filed this action and the case proceeded to a bench trial in 2019. The trial court found that ARTSMAP did not comply with the IGA because it was a noise modeling system rather than a noise monitoring system capable of recording aircraft noise as required by the IGA. Thus, the court found that Denver's exclusive use of ARTSMAP to report aircraft noise violated the IGA. The court rejected Denver's defenses of accord and satisfaction, waiver, statute of limitations, claim preclusion, and laches. It then found that Denver owed Adams liquidated damages for sixty-seven Class II NEPS violations that occurred between 2014 and 2016, and eight

percent interest compounded from December 31 of each year of violation until the date of the judgment, June 19, 2020.

¶ 15 On appeal, Denver does not challenge the trial court's finding that the use of ARTSMAP to satisfy Denver's NEPS obligations violates the IGA. Instead, Denver reasserts various affirmative defenses to Adams' claims.

II. Statute of Limitations

¶ 16 We begin with the statute of limitations defense because it could be dispositive of the remaining claims. Relying on *Bennett Bear Creek Farm Water & Sanitation District v. City & County of Denver*, 907 P.2d 648, 654 (Colo. App. 1995), *aff'd in part and rev'd in part*, 928 P.2d 1254 (Colo. 1996), Denver contends that section 13-80-101(1)(a), C.R.S. 2021, bars the breach of contract claims because claims challenging the method of contractual performance accrue when the method is implemented. Denver reasons that since ARTSMAP constitutes its method of performance, Adams' claims accrued in 1995 when Adams knew that Denver used ARTSMAP for its annual NEPS calculations and Adams knew that ARTSMAP tended to report lower noise levels than the ANOMS noise monitors.

¶ 17 Adams does not dispute that it knew Denver reported ARTSMAP data in 1995. But it responds that it did not know that ARTSMAP produced materially different results than ANOMS until 2014, when it received the Noise Climate Report, and thus it was unaware of any material damages before then. As well, Adams argues that the IGA is a continuing contract that imposes mutual recurring duties between it and Denver each year by requiring Denver to report noise data annually. It reasons that new claims accrue each year for uncured NEPS violations and argues that its breach of contract claims for 2014 through 2016 (filed in 2018 after a tolling agreement between the parties expired) were filed within the three-year statute of limitations.

¶ 18 The trial court agreed with Adams and found that the IGA is a continuing contract and Adams' claims were timely filed. But we note that the IGA violation found here was Denver's use of a noise modeling system rather than a noise monitoring system and that no recurring duties are associated with this claim. Nevertheless, we agree with the trial court's ultimate finding, but for different reasons. *Neher v. Neher*, 2015 COA 103, ¶ 33.

A. Standard of Review and Law

¶ 19 Whether the statute of limitations bars a claim is usually a question of fact, but when the material facts of a case are undisputed, the question can be decided as a matter of law. *Jackson v. Am. Fam. Mut. Ins. Co.*, 258 P.3d 328, 332 (Colo. App. 2011). Statutory interpretation is a question of law that we review de novo. *Sulca v. Allstate Ins. Co.*, 77 P.3d 897, 899 (Colo. App. 2003). Further, we may affirm the trial court's judgment on any basis supported by the record. *Neher*, ¶ 33.

¶ 20 All contract actions, except those provided in section 13-80-103.5, C.R.S. 2021, must be commenced within three years after the cause of action accrues. § 13-80-101(1)(a). A cause of action for breach of contract accrues on the date the breach is discovered or should have been discovered by the exercise of reasonable diligence. § 13-80-108(6), C.R.S. 2021; *Jackson*, 258 P.3d at 332; *Bennett Bear Creek Farm Water & Sanitation Dist.*, 907 P.2d at 654 (the statute of limitations commences when the certainty of harm and incentive to sue are known to the plaintiff). To prove a breach of contract, a plaintiff must show (1) the existence of a contract; (2) performance by the plaintiff or a justification for nonperformance;

(3) the defendant's failure to perform the contract; and (4) damages to the plaintiff. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992); *Montemayor v. Jacor Commc'ns, Inc.*, 64 P.3d 916, 920 (Colo. App. 2002). The plaintiff bears the burden of establishing both the existence and the cause of damages. *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472, 477 (Colo. App. 2003). Further, the plaintiff must show that the damages "are traceable to and are the direct result of the wrong sought to be redressed." *Husband v. Colo. Mountain Cellars, Inc.*, 867 P.2d 57, 59-60 (Colo. App. 1993) (quoting *Runiks v. Peterson*, 155 Colo. 44, 45, 392 P.2d 590, 591 (1964)).

B. Analysis

¶ 21 We conclude that while the undisputed facts show that Adams knew of Denver's failure to use a noise monitoring system to report NEPS compliance in 1995, the claim for breach of contract did not accrue until 2014 when Adams became aware it suffered damages. *See Bd. of Cnty. Comm'rs v. City & County of Denver*, 40 P.3d 25, 35 (Colo. App. 2001) ("[A]n action for breach of contract accrues when the breach and damages occur . . . ."); *Hannon L. Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55, 58 (Colo. App. 2011)

(applying section 13-80-108(6) and recognizing that a cause of action generally accrues when a suit may be maintained thereon), *aff'd*, 2012 CO 61. Therefore, Adams' claims are not barred by section 13-80-101(1)(a).

¶ 22 The record shows that during the 1999 trial, Denver's noise expert testified that ARTSMAP and ANOMS reported comparable numbers of NEPS violations and that the differences between their data appeared to be declining. Since the two systems reported similar NEPS violations from 1995 to 1998, the resulting damage reported by both systems was also similar. Not only was Adams unable to prove that any damages flowed from Denver's use of ARTSMAP rather than ANOMS at that time, a necessary element of a breach of contract claim, but it also had no incentive to sue. *Diodosio*, 841 P.2d at 1058 (the plaintiff in a breach of contract claim must show a failure to perform by the defendant and damages from the nonperformance); *Centric-Jones*, 100 P.3d at 477 (same); *Bennett Bear Creek Farm Water & Sanitation Dist.*, 907 P.2d at 654 (the statute of limitations commences immediately when a plaintiff knows of the certainty of harm and the incentive to sue).

¶ 23 Additionally, the record shows that following the 1999 trial, Adams had no reason to believe that the data Denver reported from ARTSMAP was any different than what ANOMS reported. And the rulings from the 1999 trial and appeal imposed no duty on Adams to perform its own calculations. It was not until 2014, when Adams received the Noise Climate Report, that Adams first knew of any damages flowing from Denver's use of ARTSMAP, thereby providing it with the "certainty of harm and incentive to sue" that triggered the running of the statute of limitations. *Bennett Bear Creek Farm Water & Sanitation Dist.*, 907 P.2d at 654.

¶ 24 Accordingly, we conclude that Adams' claims for breach of contract from 2014 to 2016, filed in 2018 after the parties' tolling agreement expired, were within the three-year statute of limitations, and we affirm the trial court's ruling, albeit on different grounds.

III. Waiver

¶ 25 Denver next contends that Adams implicitly waived its right to challenge the use of ARTSMAP through its course of conduct since 1995. It asserts that Adams (1) chose not to challenge ARTSMAP in 1995 despite warnings from an expert; (2) relied exclusively on ARTSMAP data to enforce the IGA between 1995 and 2013; (3)

accepted payments based exclusively on ARTSMAP data during that time; and (4) chose to keep itself willfully ignorant of the performance discrepancies between ARTSMAP and ANOMS. Denver also alleges that the trial court twice misapplied the law: first by ignoring the holding in Kelley v. Silver State Savings & Loan Ass'n, 534 P.2d 326, 328 (Colo. App. 1975) (not published pursuant to C.A.R. 35(f)), that acceptance of performance is evidence of waiver, and second by finding that the IGA's nonwaiver provision barred its waiver claim, contrary to *Woods v. Monticello Development Co.*, 656 P.2d 1324, 1327 (Colo. App. 1982). We conclude the record supports the trial court's findings and discern no legal error.

A. Additional Facts

¶ 26 The trial court found the following:

- In 1999, Denver participated in a study with HMMH concerning the accuracy of a noise model that used the same lateral attenuation model as ARTSMAP. This study reported that the models underreported noise levels by 3-5 dB.
- In its first three annual reports, Denver reported ARTSMAP and ANOMS data. The data revealed a 1-3 dB

variance between the systems. Thereafter, Denver only reported ARTSMAP data.

- By July 2002, Denver knew that ARTSMAP's lateral attenuation algorithm was underestimating actual noise levels, but it never disclosed this information to Adams.
- In February 2003, Denver hired a noise consultant, Vince Mestre, to calculate NEPS values using existing ANOMS data rather than ARTSMAP data. Mestre calculated forty-four Class II NEPS violations from the ANOMS data, while Denver reported only ten Class II violations using ARTSMAP data that same year. Mestre also recommended that Denver use ANOMS to calculate annual NEPS values and recommended placing eight additional RMTs in NEPS areas. Denver rejected Mestre's recommendations and never reported Mestre's conclusions or recommendations to Adams.
- During the same period, Denver and HMMH knew that ARTSMAP's code was locked, and that ARTSMAP could not be updated. Denver also knew that HMMH no longer

recommended ARTSMAP to its other airport clients. This information was not shared with Adams.

- Since 2006, Denver had possessed annual Noise Climate Reports that included measurement data from ANOMS. These reports revealed that ANOMS consistently reported higher noise values than ARTSMAP. Denver did not share this information with Adams until 2014.
- In 2006, Denver participated in a study of the accuracy of noise models. This study revealed that models reported lower noise levels than actual measured levels. It also showed that in Denver, atmospheric absorption levels created a variance of 4 dB or more, depending on the time of year. Denver never shared this study with Adams.

¶ 27 The trial court found that Denver failed to prove that Adams intended to give up its right to enforce the IGA provision requiring reporting by a noise monitoring system, or that Adams voluntarily gave up that right. In particular, it found that Denver had withheld material information about ARTSMAP that prevented Adams from acquiring the full knowledge necessary to satisfy a waiver. *Ewing v.*

Colo. Farm Mut. Cas. Co., 133 Colo. 447, 452, 296 P.2d 1040, 1043 (1956). Alternatively, the trial court found that the IGA's waiver provision precluded a reformation of the IGA except by a written instrument.

B. Standard of Review and Law

¶ 28 Waiver is an affirmative defense, and the party asserting waiver bears the burden of proof. *Wycoff v. Grace Cmty. Church of Assemblies of God*, 251 P.3d 1260, 1277 (Colo. App. 2010); *see also* C.R.C.P. 8(c). When material facts regarding waiver are disputed, waiver is a factual determination. *NationsBank of Ga. v. Conifer Asset Mgmt. Ltd.*, 928 P.2d 760, 763 (Colo. App. 1996). We review a trial court's factual findings under the clear error standard; we will not disturb them unless they are not supported by the record. *May v. Petersen*, 202 COA 75, ¶ 10.

¶ 29 Waiver arises when a contractual party is entitled to assert a right, knows the right exists, and intentionally abandons that right. *Glover v. Innis*, 252 P.3d 1204, 1208 (Colo. App. 2011). Waiver may be express or it may be implied when a party's conduct is unambiguous and "clearly manifest[s] the intention not to assert the benefit." *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo.

1984); *see also Ewing*, 133 Colo. at 452, 296 P.2d at 1043 (finding that there can be no waiver if a party is not aware of the material facts). To establish waiver, the moving party must prove that (1) the nonmoving party knew the moving party had not performed its contractual promise; (2) the nonmoving party knew the failure of the moving party to perform the contractual promise gave it the right to sue the moving party; (3) the nonmoving party intended to give up this right; and (4) the nonmoving party voluntarily gave up this right. *Assocs. of San Lazaro v. San Lazaro Park Props.*, 864 P.2d 111, 115 (Colo. 1993).

¶ 30 Every contract contains an implied duty of good faith and fair dealing, the essence of which is the protection of the parties' reasonable expectations. *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 506 (Colo. 1995). As well,

> *[s]ubterfuges* and *evasions* violate the obligation of good faith in performance *even though the actor believes his conduct to be justified*. But the obligation goes further: bad faith may be overt or *may consist of inaction*, and *fair dealing may require more than honesty*. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: *evasion of the spirit of the bargain*, *lack of diligence* and slacking off,

> *willful rendering of imperfect performance*, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

Restatement (Second) of Contracts § 205 cmt. d (Am. L. Inst. 1981) (emphasis added).

¶ 31 In addition to the reporting and enforcement sections already discussed, IGA section 5.1 provides:

> Denver recognizes that noise generated by aircraft flight operations *constitutes a primary concern of Adams County* and that *Adams County will rely* on the provisions of this Agreement *to make important land use decisions* concerning the appropriate location of residential, commercial and industrial development. Adams County concludes that the 65 Ldn noise contours and the Leq(24) noise level projections contained [within] constitute *acceptable, necessary and appropriate standards* for maximum Noise Exposure Levels. Denver recognizes that it is vitally important that the design, construction and operation of [DIA] result in *actual Noise Exposure Levels which conform to those standards*.

(Emphasis added.)

C. Analysis

¶ 32 We conclude that the record supports the trial court's finding that Adams lacked the full knowledge necessary to satisfy waiver.

Denver argues that this lack of knowledge results from "willful ignorance" because Adams "chose not to exercise its contract rights to obtain data from the noise monitoring system."[5] But this argument ignores the prior courts' findings that Denver bears the burden of reporting for NEPS compliance, not Adams. Moreover, it contravenes the duty of good faith and fair dealing inherent in all contracts. *See Ervin*, 908 P.2d at 506. The good faith doctrine is typically used to honor and protect the reasonable expectations of the parties. *Id.* at 498, 506; *see also Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.*, 872 P.2d 1359, 1363 (Colo. App. 1994) (Good faith performance of a contract requires "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.").

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[5] During cross-examination in the 2019 trial, the Chairman of the Adams County Airport Coordinating Committee was asked why Adams had not made any independent comparisons between ARTSMAP and ANOMS data between 1998 and 2014. He responded that Adams believed that it could trust that the IGA was being fulfilled and enforced, and that it could trust the information being provided by Denver. He also said it would cost Adams more than one hundred thousand dollars to compare data from the two systems.

¶ 33 A party's good faith obligation to make timely notifications about material issues is especially important in long-term continuing contracts centered on technology. When a contract obligates one party to provide, maintain, or collect and disseminate data using technology, obsolescence concerns are a near certainty. *See, e.g.*, *TBM Land Conservancy, Inc. v. Nextel W. Corp.*, 131 F. Supp. 3d 1130, 1135-37 (D. Colo. 2015) (obsolescence due to technological advancement sufficient to terminate a communications service tower site lease); *SolidFX, LLC v. Jeppesen Sanderson, Inc.*, 935 F. Supp. 2d 1069, 1088 (D. Colo. 2013) ("Anyone with experience in the technology realm would understand that a five year contract would reasonably encompass more than one type of device because a five year old electronics device is often obsolete."), *aff'd*, 841 F.3d 827 (10th Cir. 2016). An "obsolete" item is one that is no longer in general use, and "obsolescence" is a "diminution in the value or usefulness of property, [especially] as a result of technological advances."[6] Black's Law Dictionary 1296

[6] "Functional obsolescence" is "[o]bsolescence that results either from inherent deficiencies in the property, such as inadequate equipment or design, or from technological improvements available after the use began." Black's Law Dictionary 1296 (11th ed. 2019).

(11th ed. 2019). As technology develops, a tool or technique that was adequate to fulfill the bargain at the beginning of a continuing contract may fall behind modern standards, becoming functionally obsolete and unable to perform in a manner that meets the reasonable expectations of the receiving party. *See, e.g.*, *IMAX Corp. v. Capital Ctr.*, 156 F. Supp. 3d 569, 571-76 (M.D. Pa. 2016) (contract dispute over a lease for digital projection system after newer technology rendered the already-leased system obsolete). Indeed, the changing state of technology can create actionable breaches for failure to perform. A party's knowing insistence on using obsolete technology would at best be an evasion of the spirit of the bargain, and at worst would be a willful rendering of imperfect performance. *See* Restatement (Second) of Contracts § 205 cmt. d.

¶ 34 Denver's noise monitoring system must be "capable of recording noise levels *sufficient to calculate*" the Ldn noise contours and Leq(24) values necessary to monitor and enforce the NEPS. IGA § 5.4 (emphasis added). The parties knew that noise monitoring technology would evolve over the 100-year length of the IGA since at the time the agreement was signed, the technology to

fulfill the NEPS monitoring requirements did not exist. It follows that, as time and technology progressed, a system that was "sufficient to calculate" NEPS values in the past may not perform adequately in the future. Moreover, Denver knew that ANOMS had been updated over time and that ARTSMAP had not and could not be updated. Good faith and fair dealing sometimes require more than honesty; in contracts based on developing technology, good faith requires affirmative acts of candor and transparency. *Cf. Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 744 (Colo. 1991) (a party to a business transaction owes a duty to disclose facts about which the other party would reasonably expect to be informed); *Wells Fargo*, 872 P.2d at 1363; *Brinkerhoff v. Campbell*, 994 P.2d 911, 915 (Wash. Ct. App. 2000) (when one party knows that disclosure of a fact would correct a mistake in the other party's basic assumptions, nondisclosure is a failure to act in good faith); Restatement (Second) of Contracts § 205 cmt. d; Raymond T. Nimmer, *The Law of Computer Technology* § 8:28, Westlaw (4th ed. database updated Dec. 2021) (a lessor's failure to disclose that the technology being provided is or will soon be obsolete may constitute fraud sufficient to rescind a lease agreement); *Tandy*

Corp. v. Eisenberg, 488 So. 2d 927 (Fla. Dist. Ct. App. 1986) (contract for computer equipment found fraudulent because the defendant knew that the parts were obsolete at the time the parties entered into the contract).

¶ 35 Because the record shows that Adams was not aware of all material facts related to the performance discrepancies between ARTSMAP and ANOMS since the 1999 litigation, we conclude that the trial court did not clearly err by finding that Adams' decision to accept data from ARTSMAP for the next twenty years did not waive its right to challenge Denver's use of ARTSMAP for NEPS compliance. And because we affirm the trial court's waiver ruling, we need not address Denver's arguments concerning the anti-waiver clause in the IGA.

IV. Accord and Satisfaction

¶ 36 Denver next contends that Adams' challenges to its use of ARTSMAP are barred by the defense of accord and satisfaction. It claims that an accord existed because (1) Adams knew that Denver was using ARTSMAP for NEPS compliance in 1995 and accepted ARTSMAP data to enforce the IGA for several years; (2) the parties entered into an accord permitting the use of ARTSMAP in 1998,

before Denver received the 2002 report about the ARTSMAP and ANOMS discrepancies, rendering the later information irrelevant; and (3) although Denver did not affirmatively provide the ANOMS data, Adams had access to it and could have requested it. Denver also argues that since Adams settled claims using ARTSMAP data for two decades, it could reasonably infer that Adams had waived its right to have the accord in writing as required by IGA section 11.5.3. We address and reject each contention.

A. Standards of Review and Law

¶ 37 The existence of an accord and satisfaction is a question of fact. *R.A. Reither Constr., Inc. v. Wheatland Rural Elec. Ass'n*, 680 P.2d 1342, 1344 (Colo. App. 1984). We review the trial court's findings of fact under the clear error standard, deferring to them unless they find no support in the record. *Petersen*, ¶ 10.

¶ 38 "A party to a contract may . . . make an offer for an accord, which, if accepted and satisfied, would absolve it of its obligations under the original contract." *U.S. Welding, Inc. v. Advanced Circuits, Inc.*, 2018 CO 56, ¶ 11. "An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's *existing duty*." *R.A. Reither Constr.*, 680

P.2d at 1344 (emphasis added). Thus, an accord cannot excuse an obligor from duties that do not yet exist but may arise in the future. *See id.*

¶ 39 A party asserting an accord and satisfaction defense must show that (1) after entering into the initial contract, the parties entered into a later contract; (2) the parties knew or should reasonably have known that the later contract cancelled or changed their remaining rights and duties under the original contract; and (3) the party asserting the defense fully performed the duties it agreed to perform under the later contract. *Caldwell v. Armstrong*, 642 P.2d 47, 49 (Colo. App. 1981); *see also Hinkle v. Basic Chem. Corp.*, 163 Colo. 408, 412, 431 P.2d 14, 16 (1967) (to establish an accord and satisfaction, the evidence must show that the new agreement was expressly accepted as a satisfaction and that the parties intended performance of the new agreement as a condition of satisfying the prior obligation); CJI-Civ. 30:28 (2021). Additionally, for an accord and satisfaction to be effective, both parties must know all relevant facts. *Metro. State Bank v. Cox*, 134 Colo. 260, 269, 302 P.2d 188, 193 (1956).

¶ 40 As relevant here, IGA section 11.5.3 provides that

> [t]his Agreement may be altered, amended or modified by an instrument in writing executed and approved by Denver and Adams County in a manner consistent with section 29-1-203, C.R.S. Neither this Agreement, nor any term hereof, can be changed, modified or abandoned, in whole or in part, except by instrument in writing, and no subsequent oral agreement shall have any validity whatsoever.

B. Analysis

¶ 41 Denver asserts that its decision to use ARTSMAP for NEPS compliance after the airport opened in 1995 constituted an "offer" to use a modeling system to satisfy the IGA's "noise monitoring system" requirement and that Adams "accepted" that offer by using the reported ARTSMAP data to settle NEPS violations, thereby creating a new contract. We reject this assertion for three reasons.

¶ 42 First, the plain language of IGA section 11.5.3 precludes any changes to the IGA except by a written instrument. Both parties' decision to include this writing requirement is consistent with the General Assembly's intent that intergovernmental agreements be approved by the legislative bodies that enter them. *See* § 29-1-203(1), C.R.S. 2021 (governments may contract with one another only with the approval of their legislative bodies or another appropriate authority).

¶ 43 Second, Denver's argument is belied by the record, which shows that even before the airport opened, Adams filed suit to require Denver to use a noise monitoring system rather than ARTSMAP for NEPS compliance. The record further shows that Denver then agreed to install a noise monitoring system (ANOMS) to end the litigation. Following ANOMS' installation, testing revealed that ARTSMAP data and ANOMS data varied by only 1-3 dB.

¶ 44 Third, the record supports the trial court's findings that Adams' decision to accept ARTSMAP data after the airport opened was based on its belief that ARTSMAP reported noise levels similar to the levels that ANOMS reported. When Denver learned that this 1-3 dB variance had grown, it did not inform Adams of the growing discrepancies between the two systems. Thus, because Adams lacked this material information, its continued acceptance of ARTSMAP data through the years does not constitute a binding acceptance. *Cox*, 134 Colo. at 269, 302 P.2d at 193.

¶ 45 Additionally, because Adams accepted ARTSMAP data based on incomplete information about ARTSMAP's performance relative to ANOMS' performance, the record supports the trial court's rejection of Denver's assertion that it could reasonably infer that

Adams had waived IGA section 11.5.3's writing requirement by accepting ARTSMAP data for NEPS compliance. *Cox*, 134 Colo. at 269, 302 P.2d at 193.

¶ 46 Accordingly, we affirm the trial court's finding that Denver failed to prove all elements of accord and satisfaction.

V. Laches

¶ 47 Denver next contends that Adams' claims are barred by the doctrine of laches, because (1) Denver has been using ARTSMAP for twenty years with Adams' knowledge of Denver's noncompliance and its own right to sue; (2) Adams unreasonably delayed this lawsuit for over two decades; and (3) Adams' delay severely prejudiced Denver's ability to defend itself. Essentially, Denver claims that Adams forfeited its right to challenge Denver's use of ARTSMAP for NEPS compliance by accepting ARTSMAP data for years. We conclude that the trial court did not abuse its discretion by rejecting Denver's laches defense.

A. Standards of Review and Law

¶ 48 Whether laches is an available defense is a question of law we review de novo. *In re Marriage of Kann*, 2017 COA 94, ¶ 11. We review a trial court's application of laches for an abuse of discretion

and will reverse only where its ruling was manifestly arbitrary, unreasonable or unfair, or contrary to law. *Bristol Co., LP v. Osman*, 190 P.3d 752, 755 (Colo. App. 2007); *Ryan Ranch Cmty. Assoc., Inc. v. Kelley*, 2014 COA 37M, ¶ 96.

¶ 49 "Laches is an equitable doctrine that may be asserted to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom relief is sought." *Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005). Laches is an affirmative defense and, therefore, the party asserting it has the burden to prove: (1) full knowledge of the facts by the party against whom the defense is asserted; (2) unreasonable delay by that party in the assertion of an available remedy; and (3) intervening reliance by and prejudice to the party asserting the defense. *In re Johnson*, 2016 CO 67, ¶ 16 (citing *Hickerson v. Vessels*, 2014 CO 2, ¶ 12).

B. Analysis

¶ 50 Based on the trial record, we conclude that the trial court reasonably found that Denver failed to prove the elements of laches. First, as described above, Adams lacked full knowledge of the facts. While Adams may have implicitly agreed to a 1-3 dB discrepancy

between the two systems, there is no evidence that, had it known all of the facts, it would have acquiesced to a 20 dB discrepancy.

¶ 51 Second, "[u]nreasonable delay is a question of fact that depends on the circumstances of each case," and the circumstances here support the trial court's finding there was nothing unreasonable about the timing of Adams' lawsuit. *Kann*, ¶ 42. The IGA provides Adams with the right to challenge Denver's reported NEPS violations annually. Adams asserted claims for 2014-2016 within the statute of limitations and in accordance with the parties' tolling agreement. As well, the record shows that Adams challenged the 2014-2016 data as soon as it knew of the large discrepancy between the ARTSMAP and ANOMS data. Therefore, Adams did not sit on its rights and any delay was reasonable.

¶ 52 Finally, in addition to unreasonable delay, a party asserting laches must prove prejudice. *Id.* at ¶ 43. Prejudice must be the result of justifiable reliance on the actions of the opposing party under the circumstances of the case as a whole. *Id.* at ¶¶ 44-45 (citing *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 74 (Colo. 1996)). The record supports the trial court's findings that Denver created any delay by withholding the very information that triggered this

lawsuit and that Denver has likely benefitted from the delay by avoiding noise mitigation payments since the time it learned of the growing discrepancies. Accordingly, we affirm the court's ruling that Denver failed to prove laches.

VI. Claim Preclusion

¶ 53 Denver next contends that Adams' claims are barred by claim preclusion because there is identity of both subject matter and claims with the 1999 litigation. Relying on *Loveland Essential Group., LLC v. Grommon Farms, Inc.* 2012 COA 22, ¶ 16, Denver asserts that because a contract generally denotes a single transaction, claims for different breaches must be brought in the same action. It further argues identity of claims, under *Foster v. Plock*, 2017 CO 39, ¶ 29, because Adams' current claims are related in space, time, origin, and motivation, and form a convenient trial unit with the 1999 litigation, since Denver began using ARTSMAP before that litigation. We disagree.

A. Standard of Review and Law

¶ 54 "Claim preclusion prevents re-litigation of claims that were or could have been litigated in a prior proceeding." *Gallegos v. Colo. Ground Water Comm'n*, 147 P.3d 20, 32 (Colo. 2006). Claim

preclusion applies when (1) the judgment in the prior proceeding is final; (2) the prior and current proceedings involve identical subject matter; (3) the prior and current proceedings involve identical claims for relief; and (4) the parties to the proceedings are identical or in privity with one another. *Id.*; *Meridian Serv. Metro. Dist. v. Ground Water Comm'n*, 2015 CO 64, ¶ 36.

¶ 55 When determining identity of the claims for relief, the "same claim or cause of action requirement is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies." *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 199 (Colo. 1999). Additionally, claim preclusion bars relitigation of all claims that might have been decided if the claims are linked to the same injury. *Id.*

¶ 56 Claim preclusion can be a strict question of law or a mixed question of law and fact. *Camp Bird Colo., Inc. v. Bd. of Cnty. Comm'rs*, 215 P.3d 1277, 1281 (Colo. App. 2009). In cases like this one, where the facts are undisputed and the question of preclusion can be answered by reviewing the judgment or solely by reviewing the record, it is strictly a question of law and reviewed de novo. *Id.*

B. Analysis

¶ 57 Accepting the trial court's finding of a prior final judgment and identity of the parties, we conclude that the prior and current proceedings do not involve identical subject matter or identical claims for relief. To begin, the trial court in the 1999 litigation was never asked to determine whether Denver's use of ARTSMAP violated the IGA. The present litigation decided this issue in Adams' favor.

¶ 58 Denver argued in the 1999 litigation that ARTSMAP could not be used for NEPS compliance under the IGA because it provided modeled noise values rather than actual noise values. Denver took the opposite position in this case to assert that ARTSMAP satisfied the IGA, a position the trial court here rejected, but the 1999 trial court never decided. Further, the 1999 litigation was motivated by Adams' desire to enforce the liquidated damages clause of the IGA, while this case challenged ARTSMAP because it underreported NEPS data.

¶ 59 Additionally, the 1999 litigation concerned NEPS violations for the years immediately following the opening of DIA, while this case concerns violations occurring from 2014 to 2016. Denver has not

explained, nor can we discern, how the claims in this case could have been brought in the 1999 litigation.

¶ 60 Next, the same evidence did not sustain both cases. Only five pieces of evidence overlapped between the trials, and most of the evidence in the 2019 trial did not exist in 1999.

¶ 61 Finally, Adams filed the current claims when it learned of significant discrepancies between ARTSMAP and ANOMS data that arose well after the 1999 litigation. Thus, we conclude that claim preclusion does not bar the current action, which is based on claims that arose following the 1999 litigation. *Loveland Essential Grp.*, ¶ 27.

¶ 62 We are not persuaded otherwise by Denver's reliance on *Loveland* and *Foster*. As noted above, because the claims here arose after the 1999 litigation, *Loveland* does not support Denver's argument. Additionally, for all the reasons described above, we reject Denver's assertion that the two lawsuits sought redress for the same basic wrong and rest on the same or a substantially similar factual basis, as in *Foster*.

¶ 63 Accordingly, we conclude that this case was not barred by claim preclusion.

VII. Prejudgment Interest

¶ 64 Denver last contends that prejudgment interest on any damages should be calculated from November 15, 2017, when Adams notified Denver of its claims, rather than December 31, 2014, the date on which the 2014 violation accrued. We disagree.

A. Standard of Review and Law

¶ 65 We review the calculation of prejudgment interest de novo under section 5-12-102, C.R.S. 2021. *Top Rail Ranch Ests., LLC v. Walker*, 2014 COA 9, ¶ 49.

¶ 66 In cases that do not involve personal injury, section 5-12-102(1)(b) entitles parties to prejudgment interest "at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld." Wrongful withholding occurs when a plaintiff's injury is measured because the damages, if then paid, would make the plaintiff whole. *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821, 827 (Colo. 2008). In breach of contract cases, prejudgment interest accrues from the time of the breach, not from the entry of judgment. *Id.* at 826; *Mesa Sand & Gravel Co. v. Landfill, Inc.*, 776 P.2d 362, 365 (Colo. 1989).

B. Analysis

¶ 67 We conclude that this court's prior decision addressing prejudgment interest is dispositive. The division concluded that an action for breach of the IGA accrues when the breach and damages occur, not when the court selects the remedy for the breach. *Bd. of Cnty. Comm'rs*, 40 P.3d at 35. Moreover, prejudgment interest applies only to uncured noise violations, which accrue on the last day of the year under the IGA. *Id.* And that accrual date is not altered by the IGA's cure process. *Id.*

¶ 68 Applying that holding here, we conclude that the claim for the uncured 2014 breach accrued on December 31, 2014; the claim for the uncured 2015 breach accrued on December 31, 2015; and the claim for the uncured 2016 breach accrued on December 31, 2016. The fact that Denver reported no violations for those years is irrelevant. *Goodyear*, 193 P.3d at 827 ("The plaintiff is wronged when [it] suffers an injury caused by the defendant.").

¶ 69 Accordingly, we discern no error in the court's award of prejudgment interest.

VIII. Conclusion

¶ 70 The judgment is affirmed.

JUDGE NAVARRO and JUDGE HARRIS concur.