DENVER COUNTY DISTRICT COURT, COLORADO 1437 Bannock Street Denver, Colorado 80202 (720) 865-8301	DATE FILED: October 31, 2018 4:34 PM FILING ID: 9B0634F9334A6 CASE NUMBER: 2018CV33495
PLAINTIFF: DENVER TRANSIT PARTNERS, LLC, a Delaware limited liability company, v. **DEFENDANT:** REGIONAL TRANSPORTATION DISTRICT, a political subdivision of the State of Colorado.	**▲COURT USE ONLY▲**
Attorneys for Plaintiff: Tiffanie D. Stasiak, No. 21535 Thomas W. Snyder, No. 33106 Thomas A. Isler, No. 48472 Kutak Rock LLP 1801 California Street, Suite 3000 Denver, CO 80202 (303) 297-2400 Tiffanie.Stasiak@KutakRock.com Thomas.Snyder@KutakRock.com Thomas.Isler@KutakRock.com	Case No.: 18CV33495 Div.: 368

PLAINTIFF DENVER TRANSIT PARTNERS, LLP'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

Plaintiff Denver Transit Partners, LLC ("DTP"), by and through its counsel, Kutak Rock LLP, hereby moves to dismiss Defendant Regional Transportation District's ("RTD") counterclaims (the "Counterclaims") pursuant to C.R.C.P. 12(b)(5), and in support thereof states the following:

C.R.C.P. 121 §1-15(8) Certificate of Compliance: The undersigned has conferred with opposing counsel by telephone and email and Defendant RTD opposes the relief requested herein.

I. INTRODUCTION

The Eagle Commuter Rail Project (the "Project"), is the first public-private partnership project for commuter rail in the U.S. The parties' are governed by the 2010 Concession and Lease Agreement (the "CA"), which contains a very specific and required method for dispute resolution, including submission to the "Dispute Resolution Panel," before filing suit.

During the course of the Project, several discreet disputes arose relating to three changes in law (defined in the CA as "Change in Law") and unforeseen and new requirements (defined in the CA as "Force Majeure Events"). These Changes in Law and Force Majeure Events, coupled with RTD's refusal to extend certain deadlines and pay incurred costs, caused DTP damages and, as a result, initiate the dispute resolution procedure, including submission to the Dispute Resolution Panel. At no time did *RTD raise any affirmative claims* against DTP, which it acknowledges in its Counterclaim. The Dispute Resolution Panel found that these Changes in Law have, in fact occurred, but RTD still refused to provide DTP the required monetary or schedule relief. DTP therefore was forced to initiate this lawsuit by filing its claims ("DTP's Claims").

RTD has now asserted Counterclaims that are inappropriate and should be dismissed. Only a small portion of RTD's Counterclaims seek declarations of the validity of RTD's defenses to DTP's Claims. Recasting defenses as Counterclaims for declaratory relief is inappropriate, as several courts have recognized. The remainder of RTD's Counterclaims concern damages and matters that were not submitted through the parties' contractually mandated dispute resolution process and, indeed, concern issues that only tangentially relate to DTP's Claims, if at all. RTD cannot leapfrog the parties' contractually negotiated dispute resolution process in an effort to have its claims heard by this Court.

Nor should this Court penalize DTP by staying its Claims to allow RTD to submit its new Counterclaims to dispute resolution, which RTD has not commenced as of this date. RTD is aware that recoverable costs on the order of $80M have been incurred by DTP, to date, with respect to all three of DTP's Change in Law and Force Majeure claims. DTP's costs and interest will continue to mount until a decision is reached in this action and the responsibilities of RTD going forward have been clarified. A delay for unrelated counterclaims would clearly penalize DTP, but not prejudice RTD in any way. Further, because the Counterclaims will address different factual, technical, expert and legal issues, and will require different evidence, testimony, and experts, there is no need to delay adjudication of DTP's claims if RTD decides to follow the contractual dispute resolution process.

Finally, RTD's third claim for relief, regarding bridge construction, accrued as early as 2014 and no later than February 2016, when RTD approved DTP's proposed design variances. Because this claim is subject to a two-year statute of limitations, the claim should be dismissed with prejudice.

II. FACTUAL ALLEGATIONS

The factual allegations below are taken from both DTP's Claims and RTD's Counterclaims. DTP assumes the veracity of RTD's factual allegations, as it must, for purposes of this motion only.

A. The Parties' Contractually Negotiated Dispute Resolution Process

Section 50 of the CA provides, "Except as expressly set out in this Agreement, **any dispute**, difference or agreement (each, a Dispute) between the Parties arising under, out of or in connection with or relating to this Agreement, including any question regarding its existence, validity or termination, **will be resolved in accordance with the provisions of this Section 50**." (Compl., Ex. A § 50 (emphasis added).)

Under the process, the parties' designated senior representatives first must meet and use reasonable efforts to resolve the dispute for a period of at least 15 days. (*Id.* § 50.2(a).) If the representatives cannot resolve the dispute, the matter will either be referred to one or both of two Dispute Resolution Panels (as described in Section 50.3). Thereafter, the matter can be referred to binding arbitration (as set forth in Section 50.5) if the matter is valued at less than $25,000,000 (as set forth in Section 50.4), or to this Court (as set forth in Section 50.7) if the matter equals or exceeds $25,000,000 (as set forth in Section 50.4).

The Dispute Resolution Panels—the "Technical Panel" or "Financial Panel"—are each composed of three individuals, have the power to fix their own rules of procedure for hearing the dispute, and must render a written decision resolving the dispute. (*Id.* §§ 50.3(a), (c), (h), & (j).) A Dispute Resolution Panel's decision is non-binding. Either party may seek judicial review of its claim following the decision or after a prescribed amount of time following referral of the dispute, if no decision is forthcoming. (*Id.* §§ 50.3(j), 50.7(b).) The Court's review is *de novo. Id.*

B. DTP's Claims

DTP's Claims are based on three discrete events that are termed Changes in Law and Force Majeure Events under the CA. First, following the initial completion of construction of the A Line, the Colorado Public Utilities Commission ("CPUC") expressed a desire for bicycle detection at the crossings. This resulted in RTD's decision to implement an exit gate delay at the crossings in 2016. DTP issued a Change in Law Notice to RTD as required by the CA on December 18, 2015. (Compl. ¶28). RTD rejected the Change in Law Notice and ordered DTP to implement the exit gate delay at each crossing. This caused the CPUC applications to reopen and ultimately lead to the requirement of crossing attendants on the Project. (Compl. ¶¶ 22-32.)

Second, requirements related to warning time issues were changed following execution of the CA. DTP therefore issued two separate Change in Law/Force Majeure Notices, one on May 26, 2017 and one on June 9, 2016. (Compl. ¶¶ 45-47). RTD rejected DTP's Change in Law notices.

Third, other requirements resulting from application of the FAST Act, which requirements were unanticipated, were imposed on DTP. DTP issued a Change in Law notice to RTD on October 21, 2016. RTD rejected DTP's Change in Law notice related to the FAST-Act.

C. The Dispute Resolution Panel Decision

In January 2018, DTP initiated the dispute resolution process for three Changes in Law. Ultimately, all issues were submitted to the Dispute Resolution Panel. See, Dispute Resolution Panel decision is attached hereto as **Exhibit B**[1]. The Panel concluded, "**The Panel Concludes that there were three Changes in Law which would entitle DTP to provable damages**." (**Ex. B.** at 22 (emphasis added).)

After the Dispute Resolution Panel decision found three Change in Law events, RTD was required by Section 37.2 of the CA to negotiate costs incurred by DTP related to the three Changes in Law (the "Incurred Costs") as well as extension of relevant dates under the CA. RTD refused to compensate DTP or extend any dates under the CA.

III. ARGUMENT

The CA allows either party to seek *de novo* review of the Dispute Resolution Panel's decision. DTP seeks review by asserting claims for declaratory relief, breach of the implied covenant of good faith and fair dealing, and breach of contract. All of DTP's Claims are within the scope of the three

[1] A dispositive document referred to in a claim can be considered by the Court without converting the motion to a motion for summary judgment. See Yadon v. Lowry, 126 P.3d 332 (Colo. App. 2005).

Change in Law/Force Majeure events brought before the Dispute Resolution Panel. While DTP will argue for specific findings from the Court which may differ from those found by the Dispute Resolution Panel, DTP has not brought any claim to this Court which has not proceeded through the parties' dispute resolution provisions in the CA.

RTD attempts to tether its Counterclaims to DTP's Claims by also seeking declarations concerning RTD's alleged compliance, and DTP's noncompliance, with the CA with respect to the issues raised in DTP's Claims. However, RTD cannot create Counterclaims by simply recasting DTP's Claims as RTD's own requests for declaratory relief. And RTD certainly cannot then use these requested declarations as a foothold for its unripe Counterclaims for breach of contract. Nor would it be appropriate to stay DTP's Claims, for the reasons explained below.

A. RTD's Declaratory Judgment Claim Is Partially Duplicative of Its Affirmative Defenses to DTP's Claims.

RTD's first Counterclaim is for declaratory relief. Paragraph 127 reveals that this request in large part traces DTP's Claims:

> A dispute has arisen between RTD and DTP regarding the cause of Project delays, whether DTP's delays are excusable due to the existence of any Changes in Law or a Force Majeure event, and the apportionment of the parties' damages stemming from the delays and [flaggers]."

The first three phrases of Paragraph 128 confirm RTD is seeking a declaration it is not liable:

> RTD asserts DTP has not established the existence of its alleged Changes in Law or Force Majeure Event; DTP's delays are inexcusable and non-compensable; DTP's damages are self-inflicted;…

Paragraph 128 then does an about-face, however, and purports to seek declarations for new matters that were *not* submitted through dispute resolution, including RTD's purported damages for DTP's actions related to the Change in Law events and claims relating to bridge construction, stating:

> [A]nd RTD is owed all appropriate relief stemming from DTP's failure to comply with the CA and a construction of contract terms regarding future costs and obligations stemming from DTP's failure to so comply. RTD further asserts that DTP is liable for RTD's damages resulting from DTP's failure to design and construct bridges to the standards specified in the CA. DTP disagrees.
>
> Paragraph 129 then states the specific declarations RTD seeks:
>
> > RTD requests that the Court declare that (a) DTP's failure to perform is not excused by the CA's Change in Law and Force Majeure provisions; (b) DTP's failure to timely complete the project pursuant to the Project Requirements is not caused by the actions of RTD, the FRA, or the CPUC, but rather is attributable to DTP's actions and omissions; (c) DTP is not entitled to any relief; (d) RTD is entitled to all damages and relief under the CA resulting from DTP's failure to perform when and as promised; and (e) DTP is in default under the CA, and one or more Concessionaire Termination Events have occurred.

As is evident, subsections (a) through (c) of Paragraph 129 merely seek declarations on RTD's defense that it is not liable for DTP's Claims. These contentions are the flipside of DTP's Claims that changes of law occurred, that DTP was not the cause of the changes, and that DTP is entitled to relief, including damages. (Compl. ¶ 103; *see also id.* ¶¶ 89, 99.) These subset of declarations seek to dress up RTD's defense to DTP's Claims as a counterclaim to raise RTD's media profile[2].

Courts typically dismiss counterclaims that are duplicative of affirmative defenses that will necessarily be addressed in the adjudication of the affirmative claims. *See Murray v. Kerr-McGee Oil & Gas Onshore, LP*, No. 17-cv-2174-RM-KMT, 2018 WL 4697329, at *9 (D. Colo. July 26, 2018) ("this court has found no authority to allow parties to assert a counterclaim while simultaneously asserting an affirmative defense on precisely the same grounds"); *Sprint Nextel Corp. v. Middle Man, Inc.*, No. 12-2159-JTM, 2013 WL 1197137, at *2 (D. Kan. Mar. 25, 2013) (dismissing a counterclaim as redundant of an affirmative defense, because the affirmative defense would necessarily be resolved

[2] Note that RTD, in a departure from local practice, filed its Counterclaims before its Answer to DTP's claims in another effort to raise its media profile.

during litigation, "effectively rendering the counterclaim moot"). Moreover, a claim seeking a declaratory judgment is appropriate only where the party lacks another vehicle that would provide a meaningful remedy. *L3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 69 F. Supp. 3d 1136, 1145 (D. Colo. 2014). But where the adjudication of the party's affirmative defense will provide the party the remedy it seeks, the counterclaim is properly dismissed. *Id.*

Here, the declarations sought by subsections (a) through (c) of Counterclaim Paragraph 129 relate to the three Change in Law events and will necessarily be adjudicated in the natural course of this litigation, as they simply mirror DTP's claims regarding the three Change in Law events. In the course of litigating DTP's claim, RTD's defenses—that changes of law did not occur, that DTP was the cause of the changes, that DTP is not entitled to relief—necessarily will be adjudicated as well. Accordingly, Paragraph 129 subsections (a) through (c) are duplicative of RTD's defenses and will be moot as soon as DTP's declaratory judgment claim is decided. Because RTD has a vehicle to vindicate its rights with respect to these declarations, this portion of RTD's claim for declaratory judgment should be dismissed as redundant or moot.

The Paragraph 129(d) and (e) declarations are not related to DTP's claims. However, because they were not submitted to dispute resolution, they should be dismissed for the reasons set forth below.

B. The Remaining Portion of RTD's Declaratory Judgment Counterclaim, and its other Counterclaims, Must Be Dismissed For Failure to Exhaust Contractual Remedies.

1. Colorado Public Policy Favors Alternative Dispute Resolution.

Colorado law favors alternative dispute resolution as a matter of public policy:

> Alternative dispute resolution mechanisms are favored in Colorado as a convenient, efficient alternative to litigation. The right of parties to contract encompasses the correlative power to agree to a specific procedure for the resolution of disputes. Enforcement of non-arbitration ADR procedures provides guidance and fosters

> stability for those seeking the benefits of ADR in their business dealings. Failure to follow the mandates of a valid ADR clause contravenes Colorado's public policy of supporting ADR as well as frustrates the intent of the parties who initially agreed to an alternate remedy to resolve their disputes.

City & Cnty of Denver v. Dist. Court City & Cnty. of Denver, 939 P.2d 1353, 1370 (Colo. 1997).

Both private parties and governmental entities are bound by the terms of the contracts into which they enter, including provisions addressing alternative dispute resolution. *Castle Rock Constr. Co. v. Dep't of Transp.*, 74 P.3d 491, 492 (Colo. App. 2003) ("Like private parties, state departments and other governmental entities are bound by the terms of the contracts into which they enter. This principle applies to contract provisions addressing the resolution of disputes.") (citations omitted).

Courts enforce alternative dispute resolution provisions and dismiss claims when contractual obligations have not been exhausted, to advance the dual policies of favoring alternative dispute resolution and enforcing the expectations of the contracting parties. *Kiewit W. Co. v. City & Cnty. of Denver*, 902 P.2d 421, 423 (Colo. App. 1994) (affirming dismissal of claims "on the basis that the plaintiff failed to follow" dispute resolution procedures "in the contracts and that, therefore, plaintiff had failed to exhaust its contractual remedies"); *Jefferson Cnty. Sch. Dist. No R-1 v. Shorey*, 826 P.2d 830, 844 (Colo. 1992) (noting that a party is obligated to use contractual dispute resolution remedies before seeking judicial remedy); *Teamsters Local Union No. 17 v. Boulder-Denver Truck Line, Ltd.*, No. CIV. A. 87-A-1207, 1988 WL 76378, at *5 (D. Colo. July 21, 1998) ("plaintiff's failure to exhaust the contractual grievance procedures is a complete defense to its claim"); *see also Brosnan v. Dry Cleaning Station Inc.*, No. C-08-2028 EDL, 2008 WL 2388392, at *1–2 (N.D. Cal. June 6, 2008) ("Failure to mediate a dispute pursuant to a contract that makes mediation a condition precedent to

filing a lawsuit warrants dismissal.").[3]

2. The Remaining Counterclaims Should Be Dismissed, Because RTD Admits That It Has Not Followed The Dispute Resolution Procedure Required By The CA.

RTD admits early in its Counterclaims that it "likewise seeks the Court's *de novo* review and judgment on the Panel's decision and further sets forth its entitlement to (b) A declaration that DTP is in default under the CA and that one or more Concessionaire Termination Events have occurred." (Countercl. ¶ 33 (b) and ¶¶ 126–129). However, RTD's new claim that DTP defaulted and a Concessionaire Termination Event occurred was never brought against DTP in any action, including the dispute resolution process resulting in the Dispute Resolution Panel decision of June 27, 2018.

Specifically, the following allegations of breach of contract, which are sprinkled throughout the Counterclaims and ultimately asserted in Paragraph 129(d) and (e) of the First Counterclaim, and in the Second and Third Counterclaims, were never submitted to the dispute resolution process:

- "Breach of contract damages from DTP as a result of DTP's unexcused Project delay and DTP's failure to satisfy its obligations under the CA." (Countercl. ¶33 (c) and ¶¶130-135);
- "Breach of Contract damages attributable to DTP's failure to design and build Project bridges to the specified design standards." (Countercl. ¶33 (d) and ¶¶136-141);
- RTD's claim that DTP has not timely designed and built the project to satisfy project

[3] The Colorado Supreme Court favorably considered precedent deriving from statutory alternative dispute resolution mechanisms when addressing a purely contractual ADR clause. *City & Cnty. of Denver*, 939 P.2d at 1363 & n.10 ("We acknowledge that ADR clauses requiring arbitration are based on Colorado's statutes (UAA) and those requiring an administrative process possess a different genesis and involve different procedures, but both ADR mechanisms are rooted in similar policies of economy for the parties and judicial efficiency.").

requirements and obtain regulatory approval (Countercl. ¶¶ 57-69 and ¶¶126-135);

- RTD's claim that DTP's design and construction delayed pre-revenue service testing, caused life safety concern and drew regulatory ire (Countercl. ¶¶ 70-75)[4]
- RTD's claim that DTP failed to timely complete and correct the grade crossing systems (Countercl. ¶¶ 87-98 and ¶¶126-135);
- RTD's claim that DTP has not provided a properly functioning constant warning time system and has not achieve all revenue service commencement requirements;
- RTD's claim that DTP has not made RTD whole for DTP's failure to follow the correct design standards on railroad bridges (Countercl. ¶¶ 118-125 and ¶¶136-141)

RTD does not plead that it exhausted the contractual dispute resolution procedure. To the contrary, RTD admits, without excuse, that it has *not* followed the dispute resolution procedure for its claims. (Countercl. ¶ 125 ("To date, neither RTD nor DTP has referred certain of RTD's claims to a Dispute Resolution Panel.").) Indeed, RTD has never invoked the dispute resolution procedure for *any* affirmative claims for damages against DTP, as the CA requires.

It therefore is ironic that RTD has claimed as affirmative defense "E" that DTP's claims are barred by failure to comply with the dispute resolution procedure. RTD provides no factual allegations supporting this defense, as DTP indeed complied with all requisite procedures and RTD never before contended to the contrary. The dispute resolution panel did not find that DTP failed to comply with the requisite dispute resolution procedure mandated in the CA. Regardless, RTD's

[4] Moreover, these allegations contain a conflation of protests from bridge designs to a compression of the testing schedule. RTD's allegations do not contain a sufficient factual matter that, accepted as true would state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal,* 556 U.S. 662, 678, (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

defense confirms the mandatory nature of the dispute resolution process. Indeed, it is hard to square RTD's affirmative defense "E" with the legitimacy of RTD's Counterclaims in light of RTD's admission that its claims have not passed through the dispute resolution process.

C. The Court Should Not Stay This Action Pending RTD's Exhaustion of Contractual Dispute Resolution.

Anticipating that its claims are subject to the Dispute Resolution Procedure, RTD pleads that it "reserves its right to request a stay, or any other appropriate relief, pending a Dispute Resolution Panel process." (Countercl. ¶ 125.) However, the Court should dismiss, rather than stay, RTD's claims, because they need not be decided in conjunction with DTP's claims.

1. RTD's Remaining Counterclaims Are Unrelated To DTP's Claims Regarding Changes in Law.

A compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." C.R.C.P. 13(a). In Colorado, courts determine whether a claim is compulsory or permissive based on the "logical relationship test," which asks whether a counterclaim involves all or many of the same factual and legal issues or are offsets of the same basic controversy between the parties. *Skyland Metro. Dist. v. Mt. W. Enter., LLC*, 184 P.3d 106, 124 (Colo. App. 2007). A "counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts." *Id.*

Although the parties' claims all arise from the CA, it does not follow that the claims arise out of the same transaction or occurrence and must be adjudicated in one action. *See Continental Fed. Sav. & Loan Ass'n v. Delta Corp. of Am.*, 71 F.R.D. 697, 701 (W.D. Okla. 1976) (finding counterclaim permissive where "the only connection between Plaintiff's original claim and the Counterclaim

asserted by Defendant is that they involved alleged breaches of the same contract"); *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 252 F. Supp. 3d 537, 547 (E.D. Va. 2017) (the fact that two claims arise from the same contract "is insufficient" to a finding of a compulsory counterclaims); *Employers Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) ("It does not necessarily follow" that claims based on the same contract "arose out of the same transaction or occurrence").

Here, the CA, including its attachments, contains more than 1,000 pages, concerns a $2.2 billion transportation project, and dictates the parties' relationship through the year 2056. (Countercl. ¶ 1 & p. 21; *see also generally* Compl., Ex. A.) The mere fact that RTD's claims relate to the same, complex contract as DTP's claims does not mean that the claims are logically related and must be adjudicated in the same action, at the same time.

DTP's Claims concern whether three discrete Changes in Law occurred, involving (1) bicycle detection and exit gate delay at crossings (Compl. ¶¶ 22–28), (2) mandatory maximum warning times at crossings (*id.* ¶¶ 43–45), and (3) the application of the FAST Act to the Project (*id.* ¶¶ 63–64). DTP contends these changes in law occurred, and RTD caused DTP damages when it refused to recognize these changes in law or make appropriate modifications to deadlines under the CA. (*Id.* ¶¶ 83–103.)

RTD's declaratory judgment claim, Paragraph 129(d) and (e), concerns entirely separate legal issues, including whether DTP's alleged default constitutes a Concessionaire Termination Event under Section 41.1 of the CA—an issue not raised before or addressed by the Dispute Resolution Panel. (Countercl. ¶ 129(e); *see generally* **Ex. A**.) Further RTD's breach of contract Counterclaim related to bridge design is factually and legally unrelated to any of DTP's claims. Adjudication of RTD's bridge claim will require entirely separate evidence, testimony, and experts—none of which is relevant to DTP's affirmative claims for relief. Finally, RTD's breach of contract Counterclaim

seeks damages related to a delayed opening of the G-Line, and RTD's increased overhead, regulatory, compliance, and insurance costs (Countercl. ¶ 29)—none of which is relevant to DTP's claim regarding three discrete changes of law.

Because RTD's claims are properly considered permissive counterclaims, they do not need to be adjudicated in this action.[5] The lack of substantial duplication of evidence or legal issues among the parties' claims counsels that DTP's action need not be delayed while RTD completes the dispute resolution procedure. RTD's claims may be brought in a follow-on action.

2. **Other Factors Counsel Against a Stay.**

DTP has been damaged extensively by virtue of the three Change in Law events and RTD's refusal to reimburse DTP for costs incurred and to grant DTP the appropriate extensions of time. (Compl. ¶¶ 8, 31 and ¶103.) DTP appropriately initiated the dispute resolution procedure and filed suit. Because of the substantial damages, unnecessary delays will significantly prejudice DTP.

In addition, as a practical matter, the Dispute Resolution Panel does not render decisions as quickly as contemplated in the default schedule in the CA. DTP referred its claims to the Dispute Resolution Panel in January 2018, and the panel, by agreement of the parties, given the complexity of the Project and related claims, did not render its decision for six months. Panelists selected to work on a matter the size of the Eagle Project have extremely busy schedules. The matters involved in the Project are also complex. As a result, significant briefing is required. (Countercl. ¶ 31.) Accordingly, any stay entered by the Court to allow RTD to proceed with a Dispute Resolution Panel would

[5] Even if the Court were to deem RTD's claims compulsory counterclaims, the Court need not delay DTP's Claims while RTD submits its claims to the dispute resolution procedure. As explained, because the factual and legal issues are distinct, RTD's claims may be adjudicated separately without exposing the parties and the Court to a substantial duplication of effort. *See* C.R.C.P. 42(b); C.R.C.P. 13(i); *Skyland Metro. Dist.*, 184 P.3d at 124.

significantly delay adjudication of DTP's claims.

This circumstance is entirely of RTD's making. RTD could have invoked the Dispute Resolution Procedure for its Counterclaims when DTP first invoked the process for its affirmative claims. RTD chose not to do so. DTP should not be penalized for RTD's strategic delay in initiating the dispute process. RTD attempts to deflect responsibility for failure to follow contractual procedure by pleading that "*neither* RTD nor DTP has referred certain of RTD's claims to a Dispute Resolution Panel" (Countercl. ¶ 125, emphasis added), but the notion that DTP bears any responsibility for referring claims for damages against itself to the Dispute Resolution Panel defies credulity.

For these reasons, the Court should dismiss RTD's unripe Counterclaims without prejudice, rather than delay this action for RTD to pursue the contractual dispute resolution process for unrelated claims. To the extent the Court determines a stay to be appropriate, DTP requests that, for the reasons explained above, the stay apply only as to RTD's unripe Counterclaims, and not DTP's Claims, which concern factually and legally distinct issues and are ready to proceed.

D. RTD's Third Claim For Relief is Time-Barred.

Even if RTD's Third Claim for Relief ("Breach of Contract—Bridges") were not subject to dismissal on the grounds stated above, the claim should still be dismissed with prejudice as untimely. In Colorado, claims against contractors are subject to a two-year statute of limitation. C.R.S. § 13-80-104(1)(a) ("all actions against any architect, contractor, builder or builder vendor, engineer, or inspector . . . shall be brought within the time period provided in section 13-80-102 after the claim for relief arises"); C.R.S. § 13-80-102(1) (providing a two-year limitations period).

RTD's Third Claim for Relief alleges that "DTP did not design and construct the rail bridges to AREMA standards" and "caused damages to RTD . . . ." (Countercl. ¶¶ 137, 141.) RTD alleges

that it first raised concerns about bridge design *on or before December 2014*. (Countercl. ¶ 122.) RTD further alleges that *in December 2015*, DTP submitted design variance requests to RTD, which RTD accepted *in February 2016*. (Countercl. ¶ 124.) RTD did not file its Counterclaim related to bridge design and construction until October 11, 2018. (Countercl. at 1.)

According to its own pleadings, RTD's Third Claim for Relief arose as early as 2014, and no later than February 2016. Because RTD did not assert this claim until October 11, 2018—more than two years after the claim arose—it is time-barred, and should be dismissed with prejudice. C.R.S. § 13-80-104(1)(a); C.R.S. § 13-80-102(1).

IV. CONCLUSION

Denver Transit Partners, LLC respectfully requests that the Court grant its motion to dismiss RTD's Counterclaims.

Dated this 31st day of October, 2018.

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CERTIFICATE OF SERVICE

On this 31st day of October, 2018, a copy of the foregoing was served on the following attorneys of record via the Colorado Court's E-Filing System:

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