



1 the initial Complaint Plaintiffs allege that Anaks was entirely owned by Saipan Shangrila Resort, Inc.  
2 (*See id.* ¶ 59.) Subsequently, on May 21, 2010, Plaintiffs amended their complaint asserting, among  
3 other things, that the Development is a “common interest community.” (FAC ¶¶ 1, 121, 123, 127-28,  
4 130.) Anaks contends that the FAC attempts to alter the legal relationship entered into between  
5 Plaintiffs and Anaks, and also interfere with the legal relationship Anaks has with the majority of the  
6 unit owners. Anaks seeks to secure compensation for the interference with Anaks’ contractual rights  
7 with the majority of Anaks’ unit owners and to secure damages and prevent the breach of Plaintiffs’  
8 sublease agreements.

9 The trial in this matter is set for October 3, 2011. The parties have up to February 15, 2011, to  
10 propounded discovery. Currently before the Court is Anaks’ Motion to File Amended Answer and  
11 Counterclaim (“Motion”) for (1) Interference With Contract Rights and Prospective Economic  
12 Advantage and (2) Anticipatory Breach of Contract.<sup>1</sup>

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14 **II. MOTION TO AMEND PURSUANT TO NMI R. Civ. P. 15(a)**

15 NMI R. Civ. P. 15(a) provides an automatic right to amend pleadings a single time before a  
16 response is filed or, if no response is required, within 20 days after the original pleading to be amended  
17 was served. Here, the FAC was filed on May 21, 2010 and answers to the amended complaint were  
18 filed on August 2, 2010. Accordingly, Anaks is seeking leave of court to amend its answer to the FAC.

19 The Court has discretion to permit the amendment of a pleading.<sup>2</sup> *See In re Adoption of*  
20 *Magofna*, 1 NMI 449, 456 (1991). Under Rule 15(a), leave should be granted “when justice so  
21 requires.” NMI R. Civ. P. 15(a). The burden is on the opposing party to demonstrate why the  
22 amendment should not be permitted. *Laurie v. Alabama Court of Criminal Appeals*, 256 F.3d 1266,  
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26 <sup>1</sup>Although this Motion is captioned as Motion to File Amended Answer and Counterclaim, an examination of  
27 the proposed Amended Answer and the Answer to the FAC shows that both are identical. The only issue before the  
28 court is the addition of two claims in the counterclaim.

<sup>2</sup>*Foman v. Davis*, 371 U.S. 178, 182 (1962).

1 1274 (11th Cir. 2001) (“There must be a substantial reason to deny a motion to amend.”).<sup>3</sup>

2 Ordinarily courts grant leave to amend pleadings unless there is a showing of “undue delay, bad  
3 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment  
4 previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment,  
5 futility of the amendment, etc.” *Foman*, 371 U.S. at 182. In this case, more than six months have  
6 passed since the FAC was filed. In addition, the counterclaims which Anaks seeks to include are not  
7 based on any newly discovered evidence. Anaks concedes that the counterclaims are in response to the  
8 “common interest community” language contained in the FAC. Anaks failed to present a reason that  
9 would justify such a delay in moving to amend.

10 Unfair prejudice can be found when there has been a substantial and unjustified delay in moving  
11 to amend which creates an unfair advantage to the opposing party. *Compare Jennings v. BIC Corp.*,  
12 181 F.3d 1250, 1258 (11th Cir. 1999) (“The U.S. Supreme Court has held that undue delay is an  
13 adequate basis for denying leave to amend.”) *with Bowels v. Read*, 198 F.3d 752, 758 (9th Cir. 1999)  
14 (“Undue delay by itself . . . is insufficient to justify denying a motion to amend.”). In light of the fact  
15 that discovery has not closed and the trial is approximately ten months away, the court finds that undue  
16 delay, in and of itself, does not justify denying the Motion.

17 This Motion is in response to Plaintiffs’ FAC which introduced a new claim classifying the  
18 Development as a “common interest community.” (FAC ¶¶ 117-38.) Anaks argues that if the  
19 Development is found to be a common interest community the Plaintiffs’ existing contractual duties  
20 to Anaks would be extinguished. Therefore, the Court finds that the instant motion is not based on bad  
21 faith.

22 Plaintiffs object to the amendment because they have already concluded, not all, but several  
23 depositions, and if the Court grants leave to amend, Plaintiffs will have to conduct additional  
24 depositions on the witnesses already deposed. Plaintiffs argue that they would suffer undue prejudice  
25 by having to bear the burden of additional costs associated with retaking depositions. However, the

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27 <sup>3</sup>Because the Commonwealth Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure,  
28 federal cases interpreting the counterpart Federal Rules are helpful in interpreting the Commonwealth Rules of Civil  
Procedure. *Ada v. Sadhwani’s Inc.*, 3 NMI 303 (1992).

1 Court has the ability to remove the burdens associated with conducting further depositions by  
2 conditioning allowance of the motion on movant’s acquiescence to pay the reasonable costs of retaking  
3 depositions. See e.g., *Armstrong Cork Co. v. Patterson-Sargent Co.*, 10 F.R.D. 534, 535 (D. Ohio  
4 1950) (granting motion to amend providing that movant eliminate the possibility of prejudice to  
5 opposing party, by paying for the reasonable cost of taking new depositions).

6 Plaintiffs, in their opposition and at oral argument, seem to argue futility of the amendment  
7 contending that the causes of action in the counterclaim are not adequately pled. The Court recognizes  
8 that amended pleadings can be futile if they “fail[] to state a claim upon which relief can be granted.”  
9 *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996). The anticipatory breach of  
10 contract claim is premised on the notion that because Plaintiffs filed a complaint against Anaks, this  
11 resulted in a repudiation of their sublease agreement with Anaks. At oral argument, Anaks attempted  
12 to bolster this claim arguing that a judicial determination that the Development is a common interest  
13 community would eliminate the sublease agreements. The interference with contract claim is based  
14 on the same argument, albeit incorporating the contracts with the sublessees who are not parties to this  
15 action.

16 While the counterclaim makes it clear that Anaks would lose their possessory interest in the  
17 common areas as well as alter agreements with all of the sublessees should it be determined that the  
18 Development is a common interest community, the Court lacks sufficient information to determine  
19 whether allowing Anaks to file an amended answer would be futile.<sup>4</sup> Nevertheless, there are other  
20 procedural methods available for Plaintiffs to address the substance of the pleading. Given the  
21 liberality often afforded to motions for leave to file amended pleadings, the Court will not, in this case  
22 and at this stage, deny the Motion on the basis that the counterclaims are not adequately pled.

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26 <sup>4</sup>The cases Anaks cited to do not seem to be applicable in supporting its arguments. For example, Anaks cites  
27 to *Central Trust Company of Illinois v. Chicago Auditorium Association*, 240 U.S. 581 (1916) to support the  
28 anticipatory breach claim, yet *Central Trust* concerns the filing of a bankruptcy proceeding as repudiating obligations  
under an exculpatory contract. *Central Trust* is distinguishable from the case at bar since the Plaintiffs filed this action  
to determine ownership rights, not declare bankruptcy.

