DISTRICT COURT, PITKIN COUNTY, COLORADO 506 East Main Street Aspen, CO 81611 (970) 925-7635 Plaintiff: **BASE VILLAGE METROPOLITAN DISTRICT NO. 2** vs. Defendants: **THE RELATED COMPANIES, LP,** a New York limited partnership; *et al.*	▲ **COURT USE ONLY** ▲ Case Number: 2017 CV 030137 Div.: 5
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PLAINTIFF'S OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED COMPLAINT

CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 5

A. District 2's Claims Are Plausible and Particularized 5

1. The Standards of Review 5

2. The FAC Is Sufficiently Plausible and Particularized 7

3. District 2 Need Only Allege Intent Generally Under Rule 9 34

4. District 2 Has Adequately Put the Defendants on Notice 35

5. Defendants' Challenges to the Unjust Enrichment and Accounting Claims Are Meritless 37

B. The SPSA's 30-Day Statute of Limitations Period Does Not Apply to Any Claim in This Case 38

1. The Plain Language Indicates that the Limitation Only Applies to Claims Challenging "Legislative Acts or Proceedings" 39

2. The Legislative History Shows that the SPSA Was Intended to Limit Challenges to Official Acts Authorizing the Bonds and to the Bonds' Underlying Validity 41

C. District 2's Claims Are Not Otherwise Time-Barred 44

1. Timeliness Is Measured from the Filing of Plaintiff's Complaint, Not from Service 44

2. At Least Two of Related's Wrongful Acts Occurred Within 3 Years of Filing and Thus May Be Remedied Through This Litigation 46

3. All of Defendants' Conduct is Actionable Under COCCA, Which Only Requires That One of the Predicate Acts Occur Within Five Years 46

4. District 2 Can Challenge All of Related's Wrongful Acts Under the Discovery Rule or Doctrine of Equitable Tolling 47

5. Related's Co-Defendants Add Nothing That Would Make Plaintiff's Claims Untimely 52

D. District 2 Has Met its Certificate of Review Obligations 55

1. District 2 Complied with the Certificate of Review Obligations with Regard to WBA 56

2. CLA's Motion to Dismiss on Certificate of Review Grounds Should Be Denied 59

TABLE OF AUTHORITIES

Cases

Am. Gateway Bank v. Crews & Assocs., Inc.,
2012 WL 13001556 (M.D. La. Apr. 27, 2012) 35
Am. Woodmen's Life Ins. Co. v. Supreme Camp of Am. Woodmen,
549 P.2d 423 (Colo. App. 1976) 38
Arvada Dev. Grp., LLP v. All Envtl., Inc.,
2008 WL 927651 (D. Colo. Apr. 3, 2008) 58
Baumgarten v. Coppage,
15 P.3d 304 (Colo. App. 2000) 61
Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 5, 6, 37
Bolsa Res., Inc. v. AGC Res., Inc.,
2012 WL 1454023 (D. Colo. Apr. 25, 2012) 57, 59
Brodeur v. Am. Home Assur. Co.,
169 P.3d 139 (Colo. 2007) 51
Broker House Int'l, Ltd. v. Bendelow,
952 P.2d 860 (Colo. App. 1998) 49
Buchhalter v. Myers,
276 P. 972 (Colo. 1929) 37
Busse v. City of Golden,
73 P.3d 660 (Colo. 2003) 44
Cacioppo v. Eagle County School Dist.,
92 P.3d 453 (2004) 43
CAMAS Colorado, Inc. v. Bd. of Cty. Comm'rs,
36 P.3d 135 (Colo. App. 2001) 49
Carpenter v. United States,
484 U.S. 19 (1987) 2, 6
Carson v. United States,
2014 WL 3563021 (D. Colo. July 18, 2014) 58
CGC Holding Co., LLC v. Broad and Cassel,
773 F.3d 1076 (10th Cir. 2014) 9, 30
Church Mut. Ins. Co. v. Coutu,
2018 WL 822552 (D. Colo. Feb. 12, 2018) 36
Clementson v. Countrywide Fin. Corp.,
464 F. App'x 706 (10th Cir. 2012) 46
Corsentino v. Hub Int'l Ins. Servs., Inc.,
2018 WL 582398 (D. Colo. Jan. 29, 2018) 58
Day v. Stascavage,
251 P.3d 1225 (Colo. App. 2010) 11
Dean Witter Reynolds, Inc. v. Hartman,
911 P.2d 1094 (Colo. 1996) 50, 51

DeBuhr v. Hern,
2016 WL 9738100 (D. Colo. Sept. 12, 2016) 58
Denver West Metropolitan Dist. v. Geudner,
786 P.2d 434 (Colo. App. 1989) 1
Dolphin & Bradbury, Inc. v. Sec. & Exch. Comm'n,
512 F.3d 634 (D.C. Cir. 2008) 14, 16
Enger v. Walker Field, Colorado Pub. Airport Auth.,
508 P.2d 1245 (Colo. 1973) 42
F.D.I.C. v. Appling,
992 F.2d 1109 (10th Cir. 1993) 50
F.D.I.C. v. Refco Grp., Ltd.,
989 F. Supp. 1052 (D. Colo. 1997) 49
Falcon v. Saint-Veltri,
23 F. App'x 908 (10th Cir. 2001) 61
Giron v. Koktavy,
124 P.3d 821 (Colo. App. 2005) 55, 56
Gognat v. Ellsworth,
259 P.3d 497 (Colo. 2011) 49, 52
Gordon Inv. Co. v. Jones,
227 P.2d 336 (1951) 60
Hanly v. Sec. & Exch. Comm'n,
415 F.2d 589 (2d Cir. 1969) 15
Hansen v. Lederman,
759 P.2d 810 (Colo. App. 1988) 49
Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.,
573 F.3d 947 (10th Cir. 2009) 37
Huffman v. Westmorland Coal Co.,
205 P.3d 501 (Colo. App. 2009) 12
In re DNTW Chartered Accountants Sec. Litig.,
96 F. Supp. 3d 155 (S.D.N.Y. 2015) 35
In re Donnell,
479 B.R. 592 (D. Colo. 2012) 60
In re FKF 3, LLC,
2018 WL 5292131 (S.D.N.Y. Oct. 24, 2018) 14
In re Marriage of Lockwood,
857 P.2d 557 (Colo. App. 1993) 58
In re Oakwood Homes Corp.,
389 B.R. 357 (D. Del. 2008) 14
In re Wellbutrin XL Antitrust Litigation,
133 F. Supp. 3d 734 (E.D. Pa. 2015) 26
In the Matter of Charles E. Bailey & Co.,
35 S.E.C. 33 (Mar. 25, 1953) 15
Indianapolis Hotel Inv'rs, Ltd. v. Aircoa Equity Interests, Inc.,
733 F. Supp. 1406 (D. Colo. 1990) 7

Interbank Investments, LLC v. Eagle River Water & Sanitation District,
77 P.3d 814 (Colo. App. 2003) ... 38
Jacobs v. Credit Suisse First Boston,
2011 WL 4537007 (D. Colo. Sept. 30, 2011) ... 35, 36
Jennings v. A-1 Traffic Control & Barricade, Inc.,
2006 WL 1351659 (D. Colo. May 15, 2006) ... 58
Kingsley v. City & Cty. of Denver,
247 P.2d 805 (Colo. 1952) ... 42
Klein v. Cornelius,
786 F.3d 1310 (10th Cir. 2015) ... 48
Landmark Towers Association, Inc. v. UMB Bank,
2018 WL 2436817 (Colo. App. 2018) ... 1, 39
Lutheran Broth. v. Kidder Peabody & Co.,
829 S.W.2d 300 (Tex. App. 1992) ... 17
McCann v. Jackson,
429 P.2d 265 (Colo. 1967) ... 13
McDonnell v. United States,
136 S. Ct. 2355 (2016) ... 32
McNally v. United States,
483 U.S. 350 (1987) ... 6, 12
Morrison v. Goff,
91 P.3d 1050 (Colo. 2004) ... 49, 50, 51
Morrison v. Goodspeed,
68 P.2d 458 (Colo. 1937) ... 6
Moses v. Diocese of Colorado,
863 P.2d 310 (Colo. 1993) ... 10, 27
Mun. Sec. Disclosure,
S.E.C. Release No. 26100 (Sept. 22, 1988) ... 16
People v. Chaussee,
880 P.2d 749 (Colo. 1994) ... 8
People v. Davis,
296 P.3d 219 (Colo. App. 2012) ... 47
People v. Frazier,
77 P.3d 838 (Colo. App. 2003) ... 39
Perfect Place, LLC v. Semler,
426 P.3d 325 (Colo. 2018) ... 39
Pinon Sun Condominium Assoc., Inc. v. Atain Specialty Ins. Co.,
2018 WL 3209116 (D. Colo. June 29, 2018) ... 6
Polk v. Hergert Land & Cattle Co.,
5 P.3d 402 (Colo. App. 2000) ... 47
Prospect Dev. Co., Inc. v. Holland & Knight, LLP,
2018 COA 107, , 2018 WL 3580981 ... passim
RMB Servs., Inc. v. Truhlar,
151 P.3d 673 (Colo. App. 2006) ... 57, 58

RMB Servs., Inc. v. Truhlar,
2005 WL 5950367 (Colo. Dist. Ct.) 57
Rosenthal v. Dean Witter Reynolds, Inc.,
908 P.2d 1095 (Colo. 1995) 1, 7
S K Peightal Engineers, Ltd v. Mid Valley Real Estate Solutions V, LLC,
342 P.3d 868 (Colo. 2015) 31
S.E.C. v. Cochran,
214 F.3d 1261 (10th Cir. 2000) 19
Salazar v. Am. Sterilizer Co.,
5 P.3d 357 (Colo. App. 2000) 52
Satterfield v. Malloy,
700 F.3d 1231 (10th Cir. 2012) 27
Schmuck v. United States,
489 U.S. 705 (1989) 8
Sec. & Exch. Comm'n v. Dain Rauscher, Inc.,
254 F.3d 852 (9th Cir. 2001) 15
Sender v. Mann,
423 F. Supp. 2d 1155 (D. Colo. 2006) 9
Skilling v. United States,
561 U.S. 358 (2010) 32
Smith v. United States,
568 U.S. 106 (2013) 53
Smithfield Foods, Inc. v. United Food and Commercial Workers International Union,
593 F. Supp. 2d 840 (E.D. Va. 2008) 14
Snell v. Johnson County School Dist.,
86 P.3d 248 (Wyo. 2004) 44
Srebnik v. Dean,
2006 WL 2790408 (D. Colo. Sept. 26, 2006) 59
Strategis Asset Valuation & Management, Inc. v. Pacific Mut. Life Ins. Co.,
805 F. Supp. 1544 (D. Colo. 1992) 28
Tallman Gulch Metropolitan District v. Natureview Development, LLC,
399 P.3d 792 (Colo. App. 2017) 1
Tara Woods Ltd. P'ship v. Fannie May,
731 F.Supp.2d 1103 (D. Colo. 2010) 10
Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007) 35
Tepley v. Public Employees Retirement Ass'n,
955 P.2d 573 (Colo. App. 1997) 9, 23, 31
Town of Alma v. AZCO Constr., Inc.,
10 P.3d 1256 (Colo. 2000) 31
Trierweiler v. Croxton & Trench Holding Corp.,
90 F.3d 1523 (10th Cir. 1996) 59
United States v. Bergman,
852 F.3d 1046 (11th Cir. 2017) 54

United States v. DeMizio,
No. 08-CR-336 JG, 2012 WL 1020045 (E.D.N.Y. Mar. 26, 2012).. 32
United States v. Dial,
757 F.2d 163 (7th Cir. 1985) 7, 9, 11
United States v. Godwin,
765 F.3d 1306 (11th Cir. 2014) 24
United States v. Hughes,
191 F.3d 1317 (10th Cir. 1999) 54
United States v. Johnson,
645 F.2d 865 (10th Cir. 1981) 24
United States v. Kamahele,
748 F.3d 984 (10th Cir. 2014) 9, 30
United States v. Kennedy,
64 F.3d 1465 (10th Cir. 1995) 9
United States v. Milovanovic,
678 F.3d 713 (9th Cir. 2012) 34
United States v. Nagelvoort,
856 F.3d 1117 (7th Cir. 2017) 54
United States v. Ring,
768 F. Supp. 2d 302 (D.D.C. 2011) 32
United States v. Urciuoli,
613 F.3d 11 (1st Cir. 2010) 34
United States v. Wang,
898 F. Supp. 758 (D. Colo. 1995) 34
United States v. Welch,
327 F.3d 1081 (10th Cir. 2003) 8, 32
United States v. Wright,
665 F.3d 560 (3d Cir. 2012) 32
Vigil v. Franklin,
103 P.3d 322 (Colo. 2004) 40
Wagner v. Grange Ins. Ass'n,
166 P.3d 304 (Colo. App. 2007) 7
Warne v. Hall,
373 P.3d 588 (Colo. 2016) 5, 6
Weaver v. Mobile Diagnostech, Inc.,
2007 WL 1830712 (W.D. Pa. June 25, 2007) 9
Wiley v. Byrd,
408 P.2d 72 (Colo. 1965) 6
Wilson v. Parisi,
549 F. Supp. 2d 637 (M.D. Pa. 2008) 8
Wing v. Buchanan,
533 F. App'x 807 (10th Cir. 2013) 50
Wing v. Dockstader,
482 F. App'x 361 (10th Cir. 2012) 51

Winkler v. Rocky Mountain Conference of United Methodist Church,
923 P.2d 152 (Colo. App. 1995) 18, 23
Wojdacz v. Ireland,
2013 WL 1365768 (D. Colo. Mar. 4, 2013) 60
Yadon v. Southward,
64 P.3d 909 (Colo. App. 2002) 57

Statutes

15 U.S.C. § 78u-4(b) 35
18 U.S.C. § 1346 .... 8, 12
18 U.S.C. § 1961(1)(B) (RICO) 8
18 U.S.C. § 201(a)(3) 32
18 U.S.C. §§ 1341 and 1343 .... 6, 8, 12
18 U.S.C. §§ 201(b), 666(a) 32
41 U.S.C. § 8710(2) 32
41 U.S.C. §§ 52(2), § 8701 32
C.R.S. § 11-51-101(2) 16
C.R.S. § 11-51-201(9.5)(b)(VI) 18
C.R.S. § 11-51-501 .... 35, 43, 44
C.R.S. § 11-51-501(1) and (5) 12
C.R.S. § 11-51-604(8) 43
C.R.S. § 11-57-212 .... 39, 40
C.R.S. § 11-59-101 43
C.R.S. § 13–20–601 55
C.R.S. § 13-20-602(1) 55
C.R.S. § 13–20–602(1)(a) 57
C.R.S. § 13-20-602(2) 59
C.R.S. § 13-80-101(1)(a), (c), (f) 45
C.R.S. § 13-80-103.8(1)(d) 45, 46
C.R.S. § 13-80-108(8) 47
C.R.S. § 18-17-103(5) 8, 9, 34
C.R.S. § 18-17-103(5)(a) 8
C.R.S. § 18-17-104(1)-(4) 8
C.R.S. § 18-5-206(1) 12
C.R.S. § 23-70-112 (1999) 42
C.R.S. § 24-18-103 10
C.R.S. § 2-4-203 (2018) 39
C.R.S. § 31-1-101 12
C.R.S. §§ 18-17-101 2
C.R.S. §§ 29-23-115 42
C.R.S. 11-51-501(1)(a) 7
C.R.S. 11-51-604(5)(c) 30

Rules

C.R.C.P. 3(a) 45
C.R.C.P. 7(b) 60
C.R.C.P. 7(b)(1) 60
C.R.C.P. 8 5
C.R.C.P. 9(b) 5, 6, 12, 35
Fed. R. Civ. P. 10(c) 36

Regulations

3 CCR § 705-1 .... 20, 22

Other Authorities

Colo. Jury Instr., Civil 26:2 .... 9, 23, 31
H.B. 00-1046 .... 41, 42, 43

I. INTRODUCTION

Metro Districts are easy targets for fraud and abuse. They provide a tax-free mechanism for developers to raise millions of dollars through control of low-transparency, quasi-municipal governmental bodies. According to the Colorado Department of Local Affairs, there are 1,678 Metropolitan Districts in Colorado, compared to fewer than 300 towns and cities and 178 School Districts.[1] While Defendants' motions suggest that using a metro district for self-dealing is implausible, numerous Colorado cases reflect otherwise. *See, e.g.*, *Landmark Towers Association, Inc. v. UMB Bank*, -- P.3d --, 2018 WL 2436817 (Colo. App. 2018); *Tallman Gulch Metropolitan District v. Natureview Development, LLC*, 399 P.3d 792 (Colo. App. 2017); *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995); *Denver West Metropolitan Dist. v. Geudner*, 786 P.2d 434 (Colo. App. 1989).

In *Tallman*, the court denied a motion to dismiss involving a scheme to self-deal similar to the one that Plaintiff Base Village Metropolitan District No. 2 ("District 2") alleges here. There, the developer of a residential development formed a metro district that issued millions of dollars in bonds to fund public improvements for the project. Request for Judicial Notice ("RJN") Ex. A (*Tallman* FAC) at ¶¶ 7-9, 31-39. As here, the developer controlled the board of the metro district and the bonds were to be serviced from taxing district residents. *Id.* at ¶ 9. The Tallman Gulch metro district sued alleging that the developer failed to disclose the poor financial condition of the project before the district issued bonds to pay the developer for public improvement work. *Id.* at ¶¶ 31-39. Like Defendant The Related Companies, L.P. and its numerous affiliates and

[1] Figures available at https://dola.colorado.gov/lgis/lgType.jsf.

subsidiaries[2] (collectively, "Related"), the developer in *Tallman* moved to dismiss, arguing that the metro district's board members had full knowledge of the project's financial condition because the board and the developer were the same. But the trial court allowed claims for breach of fiduciary duty, securities fraud and unjust enrichment to proceed. RJN Ex. B at pp.1-7.

Like *Tallman*, this case exemplifies public corruption. Related engaged in a decade-long conspiracy to self-deal through abusive control over District 2. Related's self-dealing as a fiduciary is a well-recognized basis for mail and wire fraud, the predicate acts that undergird most of District 2's case under the Colorado Organized Crime Control Act ("COCCA"), C.R.S. §§ 18-17-101, *et seq*. *See, e.g.*, *Carpenter v. United States*, 484 U.S. 19, 27 (1987).

As the First Amended Complaint ("FAC") alleges, Related and other members of the COCCA conspiracy shifted losses onto District 2 year after year. Related used its power over District 2 to issue nearly $50 million in debt when it knew the Base Village project was headed for foreclosure. In addition, Related illegally billed District 2 for millions of dollars in private construction costs and funneled the proceeds to itself through control of District 2's board. In 2013 and 2016, Related "refinanced" District 2's debt in two self-interested transactions, causing District 2 to pay millions of dollars for junk debt held by Related. Since 2008, District 2's debt has *increased*, despite an astounding economic recovery since the nadir of the Great Recession.

The other Defendants this conscious self-dealing. The fact that they are "professionals" does not render District 2's complaint implausible. It made the racketeering activity pernicious.

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[2] These entities are Related Westpac, LLC; Base Village Owner, LLC; Snowmass Acquisition Company, LLC; Snowmass Related Holdco, LLC; Snowmass Holdco BV, LLC; and Related Colorado Real Estate, LLC. In its Motion to Dismiss, Related treats all of these entities as the same, so Plaintiff follow that convention. Related MTD at p.1.

Defendant White Bear Ankele Tanaka & Waldron ("WBA" or "Ankele law firm") provided a veneer of "legal" advice for a decade to help Related extract District 2's assets.

D.A. Davidson & Co. — currently under an SEC settlement decree for its company-wide lack of due diligence standards in underwriting municipal securities[3] — provided a professional imprimatur to the scheme. But its role was just as conflicted. While underwriters typically assume market risk, D.A. Davidson was rewarded for assuming *no* market risk and "placing" securities with Related itself in 2013 and 2016. D.A. Davidson also systematically violated Municipal Securities Rulemaking Board ("MSRB") rules by playing the conflicted roles of financial advisor, placement agent and underwriter. It knew of Related's fraudulent abuse of the District, but underwrote three transactions (in 2008, 2013 and 2016) for Related's benefit.

Clifton Larson Allen, LLP ("CLA"), District 2's accountant, in 2008 certified vastly inflated public costs that enabled Related to fraudulently obtain money for private development. CLA also deflected attention from District 2's worsening debt load by authoring misleading annual budgets designed in part to thwart oversight from the Town of Snowmass Village ("the Town").

Hypo Real Estate Capital Corporation and its subsidiary Snowmass BV Holdco, LLC (collectively, "HRECC") agreed to a settlement and sale of the Base Village project with Related funded in part by illicit debt, which caused District 2 further financial harm.

Lowe Enterprises Real Estate Services, Inc. and Destination Snowmass Services, Inc. (collectively, "Lowe"), together with HRECC, knowingly failed to challenge the validity of the "Guarantor Bonds" (bonds which were issued in 2011 after Related forced a default on District 2's debt). Lowe could have challenged these ruinous bonds by intervening in an HRECC-Related

[3] *In the Matter of D.A. Davidson & Co.*, S.E.C. Administrative Proceeding File No. 3-17087, February 2, 2016. Available at https://www.sec.gov/litigation/admin/2016/33-10019.pdf.

lawsuit over their legitimacy, or by using District 2's power under the bond indenture to object to their sale. HRECC and Lowe chose not to act in order to bolster the sales price of the project to Related, directly placing their interests ahead of District 2's. HRECC and Lowe thereby allowed Related to continue its financial machinations from 2013 through 2016.

North Slope Capital Advisors ("North Slope") authored a highly misleading financial report used to justify the 2016 refinancing and eventual sale to defendant Snowmass Ventures, LLC. Without this report, District 2 could not have justified the harmful 2016 refinancing.

As the *coup de grace*, Snowmass Ventures conspired with Related to use District 2 to pay part of the consideration needed to buy the Base Village project from Related in 2016. The 2016 refinancing was contemporaneous with the real estate closing, forcing District 2 to overpay for debt held by Related, which was calculated as part of the total consideration for the project.

These financial transactions have cost District 2 tens of millions of dollars. While much of its debt was scheduled to discharge at maturity, each refinancing has obligated District 2 to pay a greater portion of its debt in full, even though it never should have been issued in the first place.

The FAC lays out this complex scheme with plausible and particularized allegations against each Defendant. The Defendants infiltrated District 2, abused the public trust and perverted a tool of infrastructure development into a lucrative scheme to self-deal. The stakes in this case are about much more than money. Because metropolitan districts often issue bonds and spend proceeds before there are residents, ordinary democratic checks and balances do not provide meaningful oversight. Defrauded metro districts must have access to the courts. Anything less will enable these schemes to flourish and erode public confidence in our government.

II. ARGUMENT

District 2 has made plausible and particularized claims against the Defendants that satisfy the heightened pleading requirements applicable to actions sounding in fraud. Defendants' arguments that District 2's claims are untimely also fail for several reasons, including that the plain language, legislative history and statutory context show that the 30-day limitations period of the Colorado Supplemental Public Securities Act ("SPSA") limitations period does not apply. Finally, despite WBA's and CLA's arguments to the contrary, District 2 diligently complied with the mandates of Colorado's certificate of review statute to the extent applicable.

A. District 2's Claims Are Plausible and Particularized

1. The *Iqbal* and C.R.C.P. 9(b) Standards of Review

Defendants raise two related objections: that the FAC fails to satisfy the *Iqbal/Twombly* "plausibility" test, and that its claims sounding in fraud do not satisfy the C.R.C.P. 9(b)'s heightened pleading standard.[4] Both arguments lack merit.

To satisfy the *Iqbal/Twombly* pleading standard, a complaint must state a "plausible" claim for relief. *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (applying federal pleading standards to C.R.C.P. 8). "Plausible" is not a heavy burden. A complaint need not contain "detailed factual allegations"; it simply needs more than "labels and conclusions" to raise the "right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The plausibility requirement does "not impose a probability requirement at the pleading stage." *Id.* at 556. A well-pleaded complaint may proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely." *Id.* (citations omitted). A plaintiff need

[4] Related MTD pp.5-15; CLA MTD pp.8-12; D.A. Davidson MTD pp.12-19; HRECC MTD pp.8-15; Lowe MTD pp.8-15; North Slope MTD pp.6-9; Snowmass Ventures MTD pp.5-13.

only allege facts from which a Court can infer an entitlement to relief. *Id.* at 556 (requiring sufficient allegations "to raise a reasonable expectation that discovery will reveal evidence" of the claims). Only where a plaintiff alleges merely facts that are "equally consistent with non-tortious conduct" does a complaint fail to state a plausible claim for relief. *Warne*, 373 P.3d at 573.

C.R.C.P. 9(b) requires that "the circumstances constituting fraud or mistake shall be stated with particularity." However, "[m]alice, intent, knowledge and other condition of mind of a person may be averred *generally*." *Id.* (emphasis added). *See also Pinon Sun Condominium Assoc., Inc. v. Atain Specialty Ins. Co*., 2018 WL 3209116 (D. Colo. June 29, 2018) (rule 9(b) does not "require any particularity connection with an averment of intent, knowledge, or condition of mind").

As "fraud may . . . manifest itself in a multitude of forms," *Wiley v. Byrd*, 408 P.2d 72, 74 (Colo. 1965), a Court should keep in mind the *type* of fraud that is alleged. Here, while Defendants attempt to cabin all of Plaintiff's fraud allegations to material misstatements,[5] the FAC also (1) concealment and (2) conscious breach by a fiduciary in a scheme to self-deal. The former has long been recognized under Colorado common law. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). The latter is a species of a "scheme to defraud" as that concept has evolved under the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, and is broader than common law fraud.

A scheme to defraud generally describes all "intentional efforts to despoil." *McNally v. United States*, 483 U.S. 350, 357 (1987). It can be "the deprivation of something of value by trick, deceit, chicane or overreaching." *Id.* at 358. It specifically encompasses conscious self-dealing by a fiduciary. *Carpenter*, 484 U.S. at 27-28. As Judge Posner explained,

> [I]t is fraud to fail to "level" with one to whom one owes fiduciary duties. The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego rather

[5] *See, e.g.,* Related Motion to Dismiss at p.25-6; D.A. Davidson Motion to Dismiss at p.15-16; Lowe Motion to Dismiss at p.14; North Slope Motion to Dismiss at p.4; Snowmass Ventures Motion to Dismiss at p.6.

> than to assume the standard arm's length stance . . . . Hence the principal is not armed with the usual wariness that one has in dealing with strangers; he trusts the fiduciary to deal with him as frankly as he would deal with himself — he has bought candor.

United States v. Dial, 757 F.2d 163, 168 (7th Cir. 1985).

Colorado's securities fraud law — which the FAC pleads both as predicate acts for the COCCA violations, FAC at ¶ 267(c), as well as an independent cause of action, *id.* at ¶¶ 277-85, is similarly expansive. It reaches "any device, scheme, or artifice to defraud," C.R.S. 11-51-501(1)(a), and explicitly embraces fraud beyond that contemplated under the common law, *id.* § 11-51-201(7) ("'Fraud', 'deceit', and 'defraud' are not limited to common-law deceit"); *Rosenthal*, 908 P.2d at 1100 (securities purchasers need not "claim that they relied on a defendant's 'untrue statement' or omission of 'material fact' to be entitled to relief").

In deciding whether claims are particularized and plausible, courts consider the entirety of a complaint, not paragraphs construed in isolation. *Indianapolis Hotel Inv'rs, Ltd. v. Aircoa Equity Interests, Inc*., 733 F. Supp. 1406, 1407 (D. Colo. 1990) (RICO and COCCA complaint had to be read in entirety). A court must also "view the allegations in the light most favorable to the plaintiff" on a motion to dismiss. *Wagner v. Grange Ins. Ass'n*, 166 P.3d 304, 306-07 (Colo. App. 2007).

2. The FAC Is Sufficiently Plausible and Particularized

Under these standards, and in light of the causes of action alleged, District 2 has cleared the plausibility and particularity thresholds. The COCCA claims form a central part of this case that, unlike the other arguably more straightforward claims against Defendants, might benefit from a quick summary. COCCA prohibits four activities: (1) to knowingly receive and use or invest proceeds from a pattern of racketeering activity in real property or operating an enterprise; (2) to, knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through a pattern of racketeering activity; (3) to knowingly conduct or participate,

directly or indirectly, in an enterprise through a pattern of racketeering activity when employed by or associated with such enterprise; and (4) to "conspire or endeavor to violate" any of those three prohibitions. C.R.S. § 18-17-104(1)-(4).

A "pattern of racketeering activity" is established through "two acts of racketeering activity . . . related to the conduct of the enterprise." *People v. Chaussee*, 880 P.2d 749, 758 (Colo. 1994) (emphasis omitted). "Racketeering activity" means "to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit" certain enumerated unlawful acts, otherwise known as "predicate acts." C.R.S. § 18-17-103(5).

A wide range of federal and state statutes define COCCA predicate acts. C.R.S. § 18-17-103(5)(a). The relevant federal predicates here are mail, wire, and financial institution fraud. *See* 18 U.S.C. § 1961(1)(B) (RICO) (citing *id.* §§ 1341 (mail fraud), 1343 (wire fraud), and 1344 (bank fraud)). The federal mail and wire fraud provisions require "(1) a scheme or artifice to defraud or obtain property by means of false or fraudulent pretenses, representations, or promises, (2) an intent to defraud, and (3) use of the mails [or wires] to execute the scheme." *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003). Mail or wire fraud can be based on the deprivation of either property or honest services. *See* 18 U.S.C. § 1346 (defining the phrase "scheme or artifice to defraud" to include honest services fraud). "It is not essential that the scheme involve an affirmative misrepresentation[.]" *Wilson v. Parisi*, 549 F. Supp. 2d 637, 659 (M.D. Pa. 2008). In other words, there is no requirement that mailings or wire communications be misleading. Additionally, mailings and wires may be "incident to an essential part of the scheme," or "a step in the plot," not a part of it. *Schmuck v. United States*, 489 U.S. 705, 711-12 (1989).

When a COCCA scheme involves a fiduciary relationship, fraud premised on misrepresentation and reliance is substantially relaxed.[6] "[F]raud, in its elementary common law sense of deceit, includes deliberate concealment of material information in a setting of fiduciary obligation." *Dial*, 757 F.2d at 168; *see also Weaver v. Mobile Diagnostech, Inc*., 2007 WL 1830712, at *16 (W.D. Pa. June 25, 2007) (noting "several cases in the fiduciary context . . . suggesting that RICO fraud may *be* co-extensive with constructive fraud, *i.e*., that self-dealing in breach of fiduciary obligations is itself sufficient") (emphases in original); *id.* at *18.

COCCA also specifies violations of Colorado criminal provisions as predicate acts. C.R.S. § 18-17-103(5). These include offenses involving cybercrimes, fraud, government operations, and securities offenses. *Id.* § 18-17-103(5)(b)(III), (IV), (VII), (XIII).[7]

While a COCCA claim requires proof of two predicate acts, a COCCA conspiracy claim need not allege that each defendant committed two predicate acts or even one predicate act; it is sufficient if the enterprise does so. *See, e.g.*, *CGC Holding Co., LLC v. Broad and Cassel*, 773 F.3d 1076, 1088 (10th Cir. 2014); *United States v. Kamahele*, 748 F.3d 984, 1006 (10th Cir. 2014). A COCCA conspiracy claim merely requires an agreement to a pattern of racketeering activity and to the proscribed conduct. *Sender v. Mann*, 423 F. Supp. 2d 1155, 1178 (D. Colo. 2006).

a. The Related Defendants

As to Related, the allegations are overwhelmingly particularized and plausible. Related does not dispute that it owed District 2 a fiduciary duty while in control of its board.[8] While Related

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[6] Even outside the fiduciary context, "[I]t is not necessary to prove communication of the alleged false representations to the victims." United States v. Kennedy, 64 F.3d 1465, 1477 (10th Cir. 1995) (citing cases).

[7] District 2 did not allege the cybercrime or government operations violations as predicate acts but could do so in an amended complaint.

[8] A fiduciary relationship exists whenever one person is entrusted to act for the benefit of or in the interests of another and has the legal authority to do so. Colo. Jury Instr., Civil 26:2; *Tepley v. Public Employees Retirement Ass'n*, 955 P.2d 573, 577 (Colo. App. 1997). A fiduciary relationship also arises where one party "has a high degree of control

argues that *other* defendants could not have plausibly participated in the conspiracy, it barely suggests that District 2's allegations against it are implausible.

The FAC alleges that Related's scheme to self-deal centered around three transactions. First, in 2008, Related's hand-picked board members approved a $48 million bond issuance when Related knew the real estate industry was in precipitous and used sales and financial projections to justify the bond issuance that were wildly unrealistic. FAC at ¶¶ 10, 116-19, 123-32. Indeed, Related had already sold a quarter of its equity in its global business months before in preparation for the impending real estate collapse. *Id.* at ¶ 15. Instead of issuing debt that the District could afford — and failing to retain an independent real estate consultant to test sales projections, *id.* at ¶¶ 131, 133 — Related used its control to obtain cash in a credit-dry environment. When the 2008 bonds were issued, District 2 paid $32 million to Related's private lender (HRECC) ostensibly as reimbursement for public improvements. *Id.* at ¶¶ 135-37, 140. District 2's lawyer, WBA, had promised the Town that debt would only be issued after sufficient build-out to service the debt, but Related issued the debt prematurely. This set up District 2 for long-term insolvency. *Id.* at ¶¶ 102-03, 123-28. Related also buried millions of dollars within the reimbursement to HRECC — public funds — to fund its *private* development expenses. *Id.* at ¶¶ 138, 141-43.[9]

Second, in 2013, Related engineered a self-interested "refinancing" designed to benefit itself. *Id.* at ¶¶ 188-98. In this transaction, Related authorized District 2 to pay Related par value for Related's "Guarantor Bonds." On the open market these bonds were only a fraction of par

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over the property or subject matter of another." *Tara Woods Ltd. P'ship v. Fannie May*, 731 F.Supp.2d 1103, 1116 (D. Colo. 2010). The Colorado Code of Ethics also considers public officers and local government officials fiduciaries who carry the public trust. C.R.S. § 24-18-103. This is in addition to fiduciary duties that Related and its employees owed to District 2 while in control. An employer may be vicariously liable for an employee's tort committed within the course and scope of employment. *Moses v. Diocese of Colorado*, 863 P.2d 310, 329 (Colo. 1993).

[9] A garage originally projected to cost the District $7 million cost $20 million, and a roundabout originally projected to cost $1 million cost $7.1 million. *Id.* at ¶ 141.

value. *Id.* at ¶¶ 196, 198. Related also authorized District 2 to pay Related in full on a zero-interest note that matured in 2038. *Id.* at ¶¶ 190, 196. The reasonableness of these transactions was not tested by an independent financial analyst and both put Related's profit interest ahead of District 2's financial well-being. *Id.* at ¶¶ 196, 198. *C.f. Day v. Stascavage*, 251 P.3d 1225, 1230 (Colo. App. 2010) (self-interested transactions must be made "in good faith, [be] fair to the [entity], and [be] accompanied by full disclosure.") (citations omitted).

Third, in 2016, to facilitate a real estate deal with Snowmass Ventures, Related again refinanced District 2's debt, again causing District 2 to overpay. *Id.* at ¶¶ 209, 213-14, 222, 226. As in 2013, Related's engineered the transaction to secure an inflated price for its junk bonds. The refinancing was a means of shifting consideration from Related to Snowmass Ventures onto the District, which overpaid for Related's debt to facilitate the real estate closing. *Id.* at 263(h).

While these three transactions form the nucleus of Related racketeering, the FAC also describes numerous other instances of Related's unlawful behavior. These include:

• Binding District 2 to a 2008 bond indenture that was favorable to Related and not District 2. *Id.* at ¶ 151.

• Engaging in fraud by using money from HRECC's construction loan as a cash guarantee on the 2008B bonds, which resulted in Guarantor Bonds being issued to Related. *Id.* at ¶¶ 19-20, 164-71

• Publicly misrepresenting self-interested transactions as "arms-length." *Id.* at ¶¶ 201-03.

• Providing false and misleading annual reports to the Town to deflect attention from the deteriorating financial condition of District 2. *Id.* at ¶¶ 230-44.

• Reclassifying property from District 2 to District 1 in contravention of the Service Plan, which in profited Related by reducing the amount of developer pledges necessary to keep the Districts operational. *Id.* at ¶¶ 39-41, 44, 219, 226, 252-58.

• Instructing employees serving as District 2 board members to act for its benefit, rather than the benefit of District 2. *Id.* at ¶ 87.

These numerous and specific allegations are not, as Related argues, "equally consistent" with ordinary business transactions, Related MTD at p.14; rather they reflect a pattern of abusing a position of trust on the board of District 2. There is no non-tortious explanation for (1) misrepresenting private costs as public costs; (2) approving bond issuances based on false sales projections and absorption rates; and (3) exploiting control over a district to engineer self-interested payments for junk debt. These allegations amply satisfy C.R.C.P. 9(b)'s particularity requirement by demonstrating a "scheme or artifice to defraud," 18 U.S.C. §§ 1341, 1343, perfected by "the deprivation of something of value by trick, deceit, chicane *or overreaching*." *McNally*, 483 U.S. at 357.[10]

b. WBA

The FAC contains detailed allegations against each of the additional defendants who joined the COCCA enterprise. WBA, often through William Ankele, was critically important to the COCCA scheme. WBA assisted a prior developer with organizing the Districts pursuant to the Special District Act, C.R.S. § 31-1-101 *et seq.*, before Related acquired the project. WBA made critical omissions and misstatements to the Town during the organization process to induce approval of the Districts. The firm represented to the Town that if the Districts were approved, development risks would remain with the developer. FAC ¶¶ 94, 101-02. Yet when the 2008 debt

[10] Related also fails to successfully challenge the plausibility of the other predicate acts that District 2 alleges. In terms of securities fraud — both a predicate act and a cause of action in this case, FAC ¶¶ 267(c), 279-84 — District 2's allegations described above clearly satisfy the elements: that it bought or sold a "security," that Related had the proper scienter, that Related's conduct was in relation to the security, that the conduct violated C.R.S. § 11-51-501(1) and (5), and that District was injured by Related's conduct, including through untenable debt. *See Huffman v. Westmorland Coal Co.*, 205 P.3d 501, 505 (Colo. App. 2009) (citing *Rosenthal*). In terms of defrauding a creditor under C.R.S. § 18-5-206(1), moving property from MD2 to MD1 qualifies as a predicate act because it effectively eliminates the security of District 2's bondholders. FAC ¶ 267(d). Related does not challenge District 2's bank fraud predicate act. *See* Related MTD at p.23. The honest services fraud predicate act under 18 U.S.C. 1346 is plausibly alleged for the reasons noted discussing the claim against Snowmass Ventures. *See also* FAC at ¶ 267(f).

was issued, WBA helped shift development risk onto District 2 as there was not sufficient build-out of the project. District 2 was left to navigate the 2008 financial collapse while Related received more than $30 million in public funds. *Id.* at ¶¶ 125-33, 151-53.

The Service Plan that WBA drafted and the Town approved represented that the vast majority of taxable property within the Districts would be within District 2. However, once the Districts were organized, WBA advised Related to adjust the Districts' boundaries to move commercial property into District 1 in violation of the Service Plan. When this reallocation occurred it diminished District 2's already deficient tax base to benefit Related (and later Snowmass Ventures) by enabling the developers to reduce subsidies. *Id.* at ¶¶ 106, 252-58.

The Ankele law firm performed a number of additional misleading acts, including:

•Materially misrepresenting in the 2008 and 2016 bond closing documents that the bonds could be issued without amendment to the Service Plan. *Id.* at ¶¶ 132, 228.

•Failing to retain independent analysts[11] to verify the commercial reasonableness of the 2008, 2013 and 2016 financings, which all involved self-dealing by District 2's board of directors. *Id.* at ¶¶ 118-19, 132, 207, 229.

•Drafting annual reports sent to the Town of Snowmass Village that routinely failed to disclose District 2's material financial problems every year from 2008 to 2016 in an effort to conceal District 2's financial health from the Town. *Id.* at ¶¶ 230-34.

This record of misstatements, omissions and half-truths has no legitimate non-tortious explanation. Indeed, the most plausible conclusion is that the Ankele law firm purposefully participated in the scheme to defraud. *Id.* at ¶ 89.[12]

WBA argues that District 2's claims are barred by the doctrines of unclean hands and *in pari delicto*. But such an argument is inappropriate on a motion to dismiss. *See McCann v. Jackson*,

[11] While North Slope's 2016 report addressed the 2016 refinancing, it did not address the reasonableness of the price paid to Related for the 2013B debt during the 2016 refinancing. FAC ¶ 229.
[12] WBA's Motion to Dismiss does not contest the plausibility or particularity of District 2's allegations other than by reference to Related's Motion to Dismiss.

429 P.2d 265, 266 (Colo. 1967) ("Whether parties are within the application of the maxim is primarily a question of fact."). Moreover, the doctrine does not apply to claims asserted against "insider fiduciaries." *See, e.g., In re FKF 3, LLC*, 2018 WL 5292131, at *8 (S.D.N.Y. Oct. 24, 2018) (citing cases); *In re Oakwood Homes Corp.*, 389 B.R. 357, 365–66 (D. Del. 2008), *aff'd*, 356 F. App'x 622 (3d Cir. 2009). Indeed "it would be absurd to allow a wrongdoing insider to rely on the imputation of his own conduct to the corporation as a defense." *In re FKF 3*, 2018 WL 5292131 at *9 (quotation and citation omitted). *See also Smithfield Foods, Inc. v. United Food and Commercial Workers International Union,* 593 F. Supp. 2d 840, 847 (E.D. Va. 2008) (stating that an overwhelming majority of the district courts had concluded that unclean hands defense is not available in a civil RICO actions).

c. D.A. Davidson

D.A. Davidson, like WBA, was intimately involved in facilitating the wrongdoing. In total, D.A. Davidson reaped $1.6 million in fees as underwriter, remarketing agent and placement agent for the District's three bond transactions — transactions which D.A. Davidson knew to be conflicted but which it helped engineer for Related's benefit. *Id.* at ¶¶ 134, 205-06, 225. D.A. Davidson was critical to the COCCA enterprise, as the bond issuances required its participation. It provided the professional imprimatur to make the transactions appear legitimate. *Id.* at ¶¶ 134, 205, 224-25. *See, e.g.*, *Dolphin & Bradbury, Inc. v. Sec. & Exch. Comm'n*, 512 F.3d 634, 641 (D.C. Cir. 2008) ("An underwriter occupies a vital position in a securities offering because investors rely on its reputation, integrity, independence, and expertise. By participating in an offering, an underwriter makes an implied recommendation about the securities that it has a reasonable basis for belief in the truthfulness and completeness of the key representations made in

any disclosure documents used in their offerings."); *see also Hanly v. Sec. & Exch. Comm'n*, 415 F.2d 589, 596 (2d Cir. 1969) (same).

The FAC alleges that D.A. Davidson knew of Related's conflicts but nevertheless facilitated all three transactions to further Related's abuse. In exchange, D.A. Davidson was handsomely rewarded. *Id.* at ¶¶ 134, 206, 208, 224-25, 263(f), 267(c), 280. Specifically, D.A. Davidson knew of District 2's long-term inability to pay the 2008 bond issuance at the time it was issued, *id.* at ¶ 134, which put District 2 in long-term insolvency but provided Related with more than $30 million in immediate capital. D.A. Davidson also knew the Guarantor Bonds were not worth par value in 2013 due to District 2's inability to pay off those bonds before maturity, *id.* at ¶¶ 205-06, 208, meaning that D.A. Davidson underwrote a transaction that it knew harmed District 2 and benefited Related. D.A. Davidson also knew the 2013B bonds were refinanced at substantially above cost in 2016, *id.* at ¶ 224, again engineering a financial transaction to the COCCA enterprise's benefit.

D.A. Davidson argues that it was "arms-length" from the District, implying that it had no obligation of due diligence. D.A. Davidson MTD at pp.3-4. But this mischaracterizes D.A. Davidson's obligations. Underwriters are "under a duty to investigate." *Hanly*, 415 F.2d at 595. This duty includes the duty to "make an investigation that [provides] a reasonable basis for a belief that the key representations in the statements provided to the investors [are] truthful *and complete*." *Sec. & Exch. Comm'n v. Dain Rauscher, Inc.*, 254 F.3d 852, 858 (9th Cir. 2001) (emphasis added).[13] An underwriter may also be compelled to examine "the issuer's records and current

[13] *See also Hanly*, 415 F.2d at 597 ("A salesman may not rely blindly upon the issuer for information concerning a company. . . . Securities issued by smaller companies of recent origin obviously require more thorough investigation."); *In the Matter of Charles E. Bailey & Co.*, 35 S.E.C. 33 (Mar. 25, 1953) ("[W]here . . . an issuer seeks funds from the public to finance a new and speculative venture, the underwriter must be particularly careful in verifying the issuer's obviously self-serving statements as to its operations and prospects").

economic trends and forecasts that bear upon the ability of the issuer to repay its debt." Mun. Sec. Disclosure, S.E.C. Release No. 26100 (Sept. 22, 1988). An issuer's "incomplete financial projections" and "faulty assumptions" do not erase an underwriter's "duty to investigate and disclose." *Dolphin & Bradbury*, 512 F.3d at 642.

The allegations in the FAC make clear that D.A. Davidson abandoned all due diligence with respect to District 2. At best, it purposefully looked the other way. Its actions, as alleged, were not consistent with "proper, legal conduct." *Compare* D.A. Davidson MTD at p.12.

While an underwriter's duty to investigate is typically imposed to protect investors, this should not shield D.A. Davidson from participating in and facilitating the harm inflicted by Related on the District as issuer. The Colorado Securities Act was adopted both to "protect investors" and to "maintain public confidence" in securities markets. C.R.S. § 11-51-101(2). The Act must be "broadly construed to effectuate its purposes." *Id.* Metro district securities are rife with potential abuse because of low-transparency and the ease with which a developer can self-deal. Given these unique features, it would thwart the broad remedial purposes of the Act if underwriters could turn a blind-eye to a developer's obvious conflicts or self-dealing. Indeed, MSRB Rules emphasize an underwriter's broad duty of fairness. *See* MSRB Rule G-17 (underwriters and placement agents "shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice").

D.A. Davidson's motion to dimiss introduces an extra-pleading set of bond purchase agreements from 2008 and 2016, as well as a placement agent agreement from 2013. In presenting these documents, D.A. Davidson purports to disclaim any fiduciary obligations to District 2 and asks the Court to accept as a factual matter that D.A. Davidson relied on all of the District's warranties and representations in facilitating the three major transactions in those years. But the

contracts, to the extent they can be considered at all, are irrelevant — District 2 alleges that D.A. Davidson actually *knew* that the transactions were intended to benefit Related and not the District. The FAC further alleges that this scheme required D.A. Davidson's willing participation in underwriting the transactions. Because it participated in the fraud, D.A. Davidson may not rely on warranties supposedly given by District 2 while it was controlled by D.A. Davidson's co-conspirator, Related. *See Lutheran Broth. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 309 (Tex. App. 1992) (a disclaimer "will not protect [a warrantor] if the statements are false and he knows they are false, for in that case his statement that he relies on others for the truth of the information is itself false and he becomes a party to the fraud").

D.A. Davidson also suggests the allegations against it are implausible because it merely collected its standard professional fees as part of this scheme. But the case law it cites does not apply to state law cases. Moreover, the FAC alleges that D.A. Davidson collected fees *other* than standard professional fees. As D.A. Davidson acknowledges, an underwriter purchases securities from an issuer and sells them to investors who are arms-length from the issuer. Underwriters are rewarded for assuming market risk and their market making function. However, with respect to at least the 2013 placement agreement and the 2016B bonds, D.A. Davidson bore *no* market risk: Related was both the issuer (in control of the board) and the investor (purchaser of the bonds). FAC at ¶¶ 190-92, 208, 213-14. Fees for "underwriting" these transactions cannot plausibly be defended as "standard."

The FAC also alleges that D.A. Davidson improperly blurred the lines between underwriter and financial advisor,[14] thereby breaching its obligations under MSRB Rule G-23

[14] D.A. Davidson also violated MSRB Rule G-23(e), which prohibits any broker from serving as a remarketing agent for any issue for which they served as a financial advisor within one year. FAC at ¶ 134.

(prohibiting underwriters from serving as financial advisors on the same transaction).[15] FAC at ¶¶ 27-28, 30, 134, 205-06, 224. The significance here is twofold — it is evidence of conscious participation in the COCCA enterprise, and also evidence that District 2's claims for breach of fiduciary duty against D.A. Davidson are proper. *See* MSRB Rule G-42 (imposing fiduciary obligations on municipal financial advisors). While D.A. Davidson argues that its conduct was permitted under the MSRB rules that define narrow categories of advice that an underwriter may provide, and thereby place it within the "underwriter exception," the FAC's allegations are not limited to activities under the "underwriter exception." *See, e.g.*, FAC at ¶ 205 ("D.A. Davidson provided . . . municipal financial advice"); ¶ 224 ("D.A. Davidson improperly assumed the dual role of a municipal financial advisor and underwriter"). In 2013, for instance, D.A. Davidson was aware that the District did not retain an independent financial advisor, raising the factual question of whether its advice to the District was improper and conflicted. *Id.* at ¶ 208. The FAC alleges that in 2016 Defendant North Slope lifted its analysis directly from D.A. Davidson's own previous financial analysis. *Id.* at ¶ 224. And D.A. Davidson's own submissions show that it acted as both an underwriter and a financial advisor for the same transaction in 2008, activity expressly prohibited by the MSRB. *See* D.A. Davidson MTD, Ex. C, at p.1, ¶ 1 (showing underwriter fees of $190,000 and financial advisor fees of $85,760 connected to the 2008A bonds, and underwriter fees of $406,875 and financial advisor fees of $181,510 connected to the 2008B bonds).

Moreover, Colorado law makes clear that "whether a fiduciary relationship exists is a question of fact to be resolved by the jury." *Winkler v. Rocky Mountain Conference of United*

[15] The dual-role is also prohibited under Colorado law. C.R.S. § 11-51-201(9.5)(b)(VI) (investment adviser does not include "A licensed broker-dealer . . . whose performance of investment advisory services *is solely incidental* to the conduct of the person's business as a broker-dealer and *who receives no special compensation for such services*") (emphasis added).

Methodist Church, 923 P.2d 152, 157 (Colo. App. 1995). That is particularly so here where D.A. Davidson attempts to disclaim a fiduciary duty that seems clear; the SEC has noted the rigorous standards an underwriter must meet to disclaim fiduciary obligations under the underwriters exception.[16] A federal court in Oklahoma held that an underwriter may assume fiduciary duties in its dealings with a municipal agency during a bond transaction under state law. *S.E.C. v. Cochran*, 214 F.3d 1261, 1264-65 (10th Cir. 2000). That inquiry turns on whether one reposes trust and confidence in another, a determination that the *Cochran* court left for the jury.

Read as a whole — and given D.A. Davidson's history of similar misconduct for which it is currently under an SEC consent decree — the FAC adequately alleges D.A. Davidson's participation in the fraudulent schemes here.

d. CLA

CLA's Motion to Dismiss argues rather generically that District 2's claims sounding in fraud are implausible. District 2 does its best here to respond to CLA's motion despite the fact that its arguments are not tethered to individual claims.

Defendant CLA played a key role in the conspiracy. Related retained CLA as accountant for both Districts, and CLA willingly and knowingly ignored evidence that Related and the other defendants were abusing District 2 for private gain. FAC at ¶ 263(e). In fact, CLA affirmatively facilitated the schemes. From 2006 to 2016, CLA prepared the annual budgets that the Districts submitted to the Town and on which the Town relied. *Id.* at ¶ 62. In each year from 2009 to 2016, CLA filed an annual budget that failed to disclose District 2's shortfalls on its debt payments. *See*

[16] SEC, Registration of Municipal Advisors, FAQs, 5.1 ("[A] broker-dealer's unilateral action to identify itself in writing as an underwriter and not as a financial advisor under MSRB Rule G-23 for purposes of that conflicts rule is insufficient to establish that the broker-dealer meets the underwriter exclusion and thus does not allow the broker-dealer to give advice in reliance on the underwriter exclusion."). Available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml#section5.

id. at ¶ 244. For example, CLA failed to disclose these shortfalls in a section of the annual budget specifically named "Debt Service." *Id.* at ¶ 244. Nor did CLA's annual budgets disclose that Related defaulted on its construction loan in 2009, meaning the 2008 bonds would also likely go into default. *Id.* at ¶ 267(a)(i). CLA also knew, from reviewing the prior year's audits, that District 2 could not make its debt service payments — yet never disclosed that in any annual budget. *Id*. at ¶ 244.

CLA also omitted a summary of significant accounting policies from its annual budgets; this summary would have alerted the reader to District 2's deepening insolvency. *Id*. at ¶ 243-44. CLA contends that AICPA standards allow such an omission unless the CPA has "actual knowledge that the omission is intended to mislead." CLA MTD at p.14. The FAC alleges exactly that. CLA was well aware of District 2's precarious budgetary situation. *Id.* at ¶ 244. CLA's knowing omission of critical information violated its professional obligations, even in a compilation.[17]

Worse still, in 2008 CLA certified $39 million in costs spent on public infrastructure without reviewing actual invoices or proof of those costs. *Id.* at ¶ 146. This cost certification caused $39 million to be paid to Related for money that had been purportedly spent on public infrastructure, when much of that money was actually spent on private construction costs for Related's benefit. *Id*. at ¶ 267(b).

In arguing that these allegations are implausible, CLA improperly introduces its own version of facts and draws its inferences (and extraneous documents) in the light most favorable

[17] 3 CCR § 705-1 (Rule 9.1.A, on "Integrity", states that each licensee must "be honest and candid," and "observe both the form and the spirit of technical and ethical standards," and that the public trust is the "benchmark against which [an accountant] must ultimately test all decisions. It can accommodate the inadvertent error and the honest difference of opinion. It cannot accommodate dishonesty, deceit, or subordination of principle.").

to itself. CLA states that anything it purportedly tried to conceal would have been publicly filed in the audits that a separate firm prepared each year, and that the auditors examined and "issued clean opinions" on CLA's annual budgets. CLA MTD at pp.10-11. But the FAC does not allege that the audits included such disclosures or that the annual budgets were "clean." In fact, the FAC alleges that the audits were never even sent to the Town, and no audit was ever filed for 2011 — the year that the Guarantor Bonds were issued. [18] *Id.* at ¶¶ 241, 242. Whether the audits "contain[ed] the very information that CLA was supposedly trying to cover up," CLA MTD at p.10, as well whether the annual budgets were "clean" and somehow absolve misconduct are factual questions that cannot be resolved on a motion to dismiss.

CLA also argues it had no obligation to "include[ ] additional assumptions about District 2's long-term ability to pay its debts." CLA MTD at p.16. But the FAC states that CLA failed to disclose material changes to District 2's financial condition that it knew about and that *already happened or were happening* in an effort to mislead the Town. FAC at ¶ 244. CLA knew that the Town relied on the annual budgets to assess the financial health of the Districts. *Id.* at ¶ 243. Yet the budgets all failed to disclose material changes to District 2's financial status — including that it was in a worsening debt crisis and defaulted on its debt in 2011. *Id.* at ¶¶ 231, 267(e).

CLA essentially argues that it was permitted to look the other way as Related pillaged the District because it was merely performing "mundane" accounting services. CLA MTD at p.2. CLA points to a disclaimer in its annual budgets, which read as follows:

> Management [*i.e.*, Related] has elected to omit the summary of significant accounting policies require by the guidelines for presentation of a forecast established by the American

[18] CLA claims that District 2 is wrong in alleging that an audit was never filed for 2011. CLA MTD, p.15, n.10. This statement is not only improper to raise on a motion to dismiss – where the Court is to view the allegations in the light most favorable to Plaintiff – but raises a question of fact. The Colorado Department of Local Affairs website (https://www.colorado.gov/pacific/dola) does not include a 2011 audit for District 2. The exhibit that CLA attaches to its motion as "evidence" that the 2011 audit was filed that year is for District *1*, not District *2*. *See* Ex. 8 to CLA MTD.

> Institute of Certified Public Accountants. If the omitted disclosures were included in the forecast, they might influence the user's *conclusions* about the District's result of operations for the forecasted periods. Accordingly, this forecast is not designed for those who are not informed about such matters.

CLA cites to the AICPA standards, which the State Board of Accountancy has incorporated, *see* 3 CCR § 705-1 (Chapter 9),[19] in defense of this disclaimer. But the AICPA standards only highlight CLA's deficiencies. District 2 alleges that CLA's failure to include a summary of significant assumptions in CLA's annual budgets was designed to mislead. Indeed, the AICPA standards state:

> the summary of significant assumptions is essential to the user's understanding of prospective financial information. Accordingly, *the accountant should not issue a compilation report on prospective financial information that excludes disclosure of the summary of significant assumptions.*"

Compilation Engagements, AR-C section 80.24 (emphasis added). Additionally, an accountant should not issue a compilation report that omits substantially all disclosures if the disclosures are intended to mislead those who might reasonably be expected to use the financial statements. *Id.* at 80.26. Furthermore, where a compilation report omits one or more notes — as District 2 alleges here — the accountant is under an obligation to describe "the effects, if known" of the departure. *Id.* at 80.28.[20] The annual budgets do not contain any such detailed description of the effects of the omission. Indeed, the disclaimer is couched in vague language (the omission "might" influence a user's conclusions if provided). This is a far cry from disclosing the *actual* effects of the omission that CLA knew would be useful to the annual budget's users.

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[19] *See* www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=7823&fileName=3%20CCR%20705-1.

[20] Furthermore, an accountant must bring to management's attention any information that the accountant sees as incomplete or otherwise unsatisfactory. *See Compilation Engagements*, AR-C section 80.14. The accountant should withdraw from an engagement if he or she discovers that the financial statements are misleading or not otherwise in accordance with the applicable financial reporting framework management fails to take sufficient corrective actions. *Id*. at 80.15-16.

With respect to the 2008 cost certification, CLA does not address the key allegations regarding its failure to include actual invoices or proof of the costs certified. CLA only tries to blame another non-party, Nolte (the consulting engineers), for certifying the costs as reimbursable. CLA claims that its job was merely to compile those costs. CLA MTD at p.13. But District 2 disputes CLA's factual assertion that Nolte was solely responsible for determining the legitimacy of costs to be reimbursed to Related. Indeed, CLA's own exhibit attached to its motion to dismiss shows that it was required to examine the "overall reasonableness" of the costs. CLA MTD, Ex. 2, at p.2.[21] Discovery will further confirm Plaintiff's allegations that CLA was charged with reviewing documentation supporting the public infrastructure costs, that CLA certified costs without seeing any actual invoices and to facilitate a large payment to Related.[22]

CLA does not discuss why District 2's breach of fiduciary duty claim — which does not necessarily turn on fraud — is likewise implausible. CLA makes one veiled reference suggesting that it cannot be liable for breaches of fiduciary duty, citing two retainer agreements attached to its motion. But whether there is a fiduciary duty, and whether a disclaimer is effective, are questions of fact. *Winkler*, 923 P.2d at 157 (Colo. App. 1995). The inquiry turns on whether District 2 entrusted CLA to act for its benefit and CLA had the legal authority to do so. Colo. Jury Instr., Civil 26:2; *Tepley*, 955 P.2d at 577. At most, CLA's extra-pleadings evidence disclaim a

[21] The FAC states that the 2008 CLA letter certifying costs was based on the engineer's report (FAC at ¶ 146), but does not say that Nolte had sole responsibility for verification. Rather, the FAC makes clear that CLA claims to have itself "read and considered amounts and descriptions of work performed on pay applications from contractors, as well as payments to contractors, and confirmed that BVO had spent $39,109,468 on public infrastructure." *Id.*

[22] CLA also asks the Court for a dismissal with prejudice, and introduces 27 exhibits — not all of them public documents — for the Court to consider in evaluating plausibility. But these documents raise more questions than they answer. The transmission note accompanying the 2014 budget, Ex. 19, is dated November 27, 2013, as are the tables on pages 2-6. However, page 9 refers to an agreement that was "entered into" on December 3, 2013, a week later. District 2 has discovered other instances of such suspicious dating, which an amended complaint could spell out if necessary. More to the point, such instances highlight that CLA should not be permitted to defeat a motion to dismiss upon introduction of a selective trove of documents.

fiduciary relationship for 2007, 2008 and 2016 — the temporal scope of the engagement letters that include the disclaimers. CLA MTD, Exs. 2, 3. District 2 alleges an ongoing relationship with CLA over the course of a decade, wherein CLA provided numerous accounting services in close coordination with other co-defendants, meaning there is at least no dispute as to CLA's fiduciary duties for 2009-2015. Whether CLA could effectively disclaim fiduciary duties by sending an engagement letter to its co-conspirators is also a question of fact. The annual audits that CLA submits with its motion all state that "The District has no employees and all operations and administrative functions are contracted," suggesting that the District reposes particular confidence in the professionals that it hires to oversee its affairs. *See*, *e.g.*, CLA MTD, Ex. 6, p. 7.

e. HRECC and Lowe[23]

In 2010, Related lost control of the Base Village project after it went into default on its construction loan and its lender, HRECC, foreclosed on the property. FAC at ¶¶ 156-59. HRECC subsequently purchased the property out of foreclosure on a credit bid in November 2011. *Id.* at ¶ 160. It subsequently resold the project to Related in September 2012. *Id.* at ¶ 161.

During the first half of this period, Defendant Destination Snowmass Services (a subsidiary of Defendant Lowe Enterprises) served as the Court-appointed receiver over the Project. *Id.* at ¶ 160. After the receivership ended, HRECC hired Lowe as its property manager over the Project until the sale back to Related. *Id.* Employees of Lowe served on the Board of District 2 during the receivership, and also afterwards while acting as agent for HRECC. *Id.* at ¶¶ 75, 177-80.

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[23] Defendants other than Related, WBA, D.A. Davidson and CLA might not have participated in all aspects of the COCCA conspiracy. However, this does not allow them to escape COCCA liability. *See United States v. Johnson*, 645 F.2d 865, 868 n.2 (10th Cir. 1981) ("It is not necessary that each member of the conspiracy know all of the details or be acquainted with all of the parties to the illegal scheme"); *see also United States v. Godwin*, 765 F.3d 1306, 1324 (11th Cir. 2014) (similar).

It is true that the two parties were adverse for a brief period. They filed a number of lawsuits against one another involving HRECC's significant losses on its loan, as well as Related's chicanery in fraudulently using HRECC's construction loan funds to trigger a default on the 2008B bonds and obtain the Guarantor Bonds. *Id.* at ¶¶ 158, 171. The Defendants suggest this adversity means it is implausible that the two would conspire together. But that is a misdirection from the core of District 2's claims — that the two defendants shifted costs onto District 2 as a means of settling their differences. *Id.* at ¶¶ 173-77. While HRECC was financially harmed by Related in private business dealings, that is irrelevant to the allegations here. Whether District 2's allegations are plausible does not turn on whether HRECC and Related were friends, but whether their abuse of the District to settle their differences is consistent with non-tortious conduct. It is not.

While the mechanics are somewhat complex, the basic scheme was simple. Related triggered a default on District 2's 2008B debt by taking money from HRECC's construction loan and using it as collateral to supply creditworthiness to the bonds. *Id.* at ¶ 167. In late 2011, as District 2 was attempting to negotiate an extension on a letter of credit that would keep the creditworthiness of the bonds, Related triggered a default by objecting to the extension of the letter of credit. *Id.* at ¶¶ 162-64. This caused U.S. Bank (the bond trustee) to issue the Guarantor Bonds to Related. *Id.* at ¶ 165. But Related never would have objected to the extension of the letter of credit if its own money would be at risk in the event of a default on the bonds. It was only able to engineer the default because it defrauded HRECC. *Id.* at ¶ 167.

Indeed, during the initial period immediately after HRECC's foreclosure on the property — and while Related and HRECC were still adverse — the receiver (Lowe) worked to try and extend the letter of credit. After the default on the bonds, Lowe initially also considered ways to mitigate the harm from the issuance of the Guarantor Bonds, as a faithful director should have

done. *Id.* at ¶ 177. However, when it became clear that HRECC and Related would settle — and HRECC could more profitably extricate itself from the project — all parties conspired to extract maximum value out of the real estate deal at the expense of District 2. *Id.* at ¶¶ 176, 179-80. *See In re Wellbutrin XL Antitrust Litigation*, 133 F. Supp. 3d 734, 770 (E.D. Pa. 2015) ("The existence of the Wellbutrin Settlement—an agreement—is sufficient evidence for a reasonable jury to find that GSK participated in the alleged conspiracy.") All efforts to mitigate the harmful financial effects of the Guarantor Bonds were abandoned. *Id.* at ¶¶ 178-80. District 2 did not intervene in the HRECC-Related lawsuit over the issuance of the bonds, as it could have done with a claim of unjust enrichment. And although Lowe had identified a means of disrupting the HRECC-Related settlement under the bond indenture by objecting to a transfer of the Guarantor Bonds during that sale — which would have provided District 2 with leverage to renegotiate the Guarantor Bonds — it failed to do so. *Id.*

The FAC alleges that these inactions were not mere failure of oversight but were an intentional part of the scheme to inflate the value of the real estate deal so that Related and HRECC could obtain maximum value. Indeed, as paragraph 173 states:

> [O]nce it became clear that Related would be interested in repurchasing the Base Village project from HRECC, HRECC placed its own interests in selling the Base Village project at maximum value over the interests of District 2. HRECC used its control over District 2 to help inflate the purchase price of the Base Village project. The purchase price that HRECC received from Related's subsidiary Snowmass Acquisition Company for the Base Village project was inflated due to the value that Snowmass Acquisition Company could realize through simultaneous control of the Guarantor Bonds and District 2.

HRECC effectively inflated the settlement price for the Base Village Project by abandoning its responsibilities to District 2 to try and mitigate the financial harm of the Guarantor Bonds. Lowe acted at its behest.

This was not reasonable commercial behavior by a disinterested party, as HRECC suggests. Rather, HRECC breached its fiduciary obligations to the District by using the debt that it knew to be unlawfully obtained and financially ruinous to District 2 to its own advantage, and even to sell it back to the party who had defrauded it (and the District) in prior years.[24] Indeed, the final receivership report, submitted by Lowe, notes that at the termination of the receivership, Snowmass BV Holdco (HRECC's subsidiary and owner of the base village project) was aware of the harmful impact of the Guarantor Bonds on District 2 and that it would "be taking over the Receiver's negotiation positions as part of the discharge of the Receiver." Lowe MTD, Ex. A, at p.10. The fact that this did not occur, and instead HRECC sold its interest in the Guarantor Bonds to its adverse party, is clear evidence of actions to further the racketeering scheme. Indeed, the Guarantor Bonds turned out to be exceedingly profitable for Related, who extracted nearly par value for the bonds over the course of the 2013 and 2016 refinancings, facilitating an ongoing scheme to defraud. *Id.* at ¶¶ 192, 213.

HRECC and Lowe both argue that the receivership bars this action on the theory that receivers are immune from suit without leave of the Court supervising the receivership. *Satterfield v. Malloy*, 700 F.3d 1231, 1237 (10th Cir. 2012). That fails for several reasons. First, the critical misconduct happened *after* the receivership ended. FAC at ¶ 174. District 2's allegations against Lowe are with regards to its capacity as manager for HRECC, not while its subsidiary DSS was receiver. Second, only DSS was appointed as receiver, so to the extent any defendant has immunity from suit it is DSS alone. *See* Lowe MTD, Exs. A-C. Third, the receivership was over the suite of

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[24] Lowe was in control of the Districts' boards at this point in time. Lowe was hired as HRECC's property agent. Hypo is therefore vicariously liable for Lowe's breaches of fiduciary duty on the board, which were undertaken at HRECC's direction. *See Moses v. Diocese of Colorado*, 863 P.2d 310, 329 (Colo. 1993).

assets that were pledged as security in the HRECC loan. This did not include the Metro Districts, which were not under Court supervision. *See* HRECC MTD, Ex. A, at p.44 (defining "property"). That DSS served on the board of the Districts while also serving as receiver over the underlying property within the districts for a private party does not immunize DSS from abuse while serving on the board of District 2 and for actions taken as a board member and duly-sworn public official, not receiver. *Strategis Asset Valuation & Management, Inc. v. Pacific Mut. Life Ins. Co.*, 805 F. Supp. 1544, 1554 (D. Colo. 1992) (stating that court approval must be sought to impose liability on a receiver "in its *official* capacity") (emphasis supplied). Fourth, and finally, DSS objects that the District did not seek leave from the Court supervising the receivership or object to the receiver's final report. But at that point, *the district was the receiver*, and such an argument asks this Court to assume that DSS would have objected to its own receivership.

HRECC's motion misses the point in suggesting that District 2's allegations of wrongdoing center on HRECC's attempt to recoup money from Related during its lawsuit over the Guarantor Bonds, or in selling the project to Related for an inflated price. HRECC MTD at p.12. The wrongdoing, however, is using District 2 to extract that higher price and abusing a position of trust to do so. That a German Bank located 7,000 miles away from the project used the wires to perpetrate this scheme may obviously be inferred from the FAC.

In terms of COCCA, District 2 adequately alleged at least two predicate acts against HRECC, including (1) the failure to challenge the Guarantor Bonds, FAC ¶¶ 174-180, 267(e), 29 and (2) handing over all of HRECC's controlled board seats (through its agent Lowe) back to Related, *id*. at ¶¶ 74-76, 161, 172, 181.

f. North Slope

North Slope similarly facilitated the fraud. In 2016, District 2 was required to obtain an independent financial analysis to justify the alleged savings from a proposed refinancing. North Slope was engaged as a municipal financial advisor with express fiduciary obligations to District 2. FAC at ¶ 222. To justify the refinancing, North Slope authored a misleading and factually inaccurate report that inflated District 2's pre-refinancing debt by nearly $10 million by treating developer obligations as part of District 2's debt stack. *Id.* at ¶¶ 215-23. *See also* North Slope Motion to Dismiss ("North Slope MTD"), Ex. B, at p.7 (noting $5,434,730 in "Reimbursement Ob. Outstanding" and $3,818,106 in "Reimbursement Accrued Unpaid Int. 12/20").

However, these obligations had never been treated as debt. CLA had always treated them in the annual budgets as revenues that were only to be repaid when, if ever, District 1 — not District 2 — had enough revenue to issue bonds to pay for the obligations. FAC at ¶ 220. *See also* 2014 Annual Report to the Town, District 1 Budget, at p.8 ("**Developer Advance**. In 2015, Developer advances are expected to fund a portion of the general fund expenditures. Developer advances *are to be recorded as revenue for budget purposes* with an obligation for future repayment when [District 1] is financially able to issue bonds to reimburse the developer.") (bold in original, italics added). RJN Ex. C. Indeed, the 2015 audit submitted with CLA's motion to dismiss makes no reference to *any* developer obligations as part of District 2's long term liabilities. CLA Motion to Dismiss, Ex. 13, at pp.3, 13-16. By including these obligations in the debt stack, the "refinancing," which "forgave" these obligations, appeared to lower District 2's debt after the refinancing. FAC at ¶ 220. However, if one did not count the developer obligations as part of District 2's debt stack in the first place, the refinancing actually *cost* District 2 money.

The FAC alleges additional improprieties and irregularities with the 2016 North Slope report, strongly suggesting it was a strawman report meant to facilitate the real estate closing

between Related and Snowmass Ventures, including mischaracterizing the increased interest rates on the District's debt, *id.* at ¶ 216, its failure to consider the likelihood that developer obligations would be reimbursed in the long term, *id.* at ¶ 218 and failing to note the long-term harm to District 2 of shifting taxable property to District 1 and shrinking its tax base. *Id.* at ¶ 219.

While North Slope argues otherwise, the FAC sufficiently alleges two predicate acts. North Slope's extensive use of the mails and wires to author a refinancing report that coordinates input from multiple parties — including the Districts, Snowmass Ventures, Related and D.A. Davidson — can be inferred. Furthermore, the FAC alleges that North Slope engaged in both securities fraud, FAC at ¶¶ 277-85, a predicate act under COCCA, as well as conscious breach of fiduciary duty, *id.* at ¶¶ 286-94, and the commission of that breach in furtherance of the scheme here involved mail and wire communications, constituting an independent predicate act. Moreover, North Slope's liability under conspiracy to violate COCCA does not require that District 2 allege *any* predicate act, only agreement to engage in the underlying COCCA enterprise. *See, e.g.*, *CGC Holding Co.,* 773 F.3d at 1088; *Kamahele*, 748 F.3d at 1006. Finally, North Slope's submissions with its Motion to Dismiss indicate it sent a prior draft report to District 2's board on October 13, 2016. *See* North Slope MTD, Ex. A, at p.4 (referencing "North Slope Capital's first report to the Board on October 13th"). District 2's allegations could be amended to specify additional predicate acts should the Court determine the FAC does not sufficiently plead COCCA liability against North Slope.

North Slope argues that it cannot be liable for securities fraud, because it is not a buyer or seller of securities. But that argument ignores that under C.R.S. 11-51-604(5)(c) any person who gives "substantial assistance" to one engaged in securities fraud is jointly and severally liable to the same extent as the buyer or seller. Whether North Slope's strawman report provided

"substantial assistance" to the 2016 fraudulent refinancing is a determination that should be left for the jury.

Furthermore, North Slope argues that District 2's claim for breach of fiduciary duty cannot proceed because of the economic loss rule. Without recognizing the irony, North Slope tries to use its admission in a 2016 Report that it owed District 2 a fiduciary duty to evade responsibility for breaching this duty. But the economic loss rule applies where there is a *contractual* duty that governs the relationship between the parties. North Slope's 2016 Report describing its fiduciary duties is not a contract. *See* Ex. A to North Slope Motion to Dismiss. Even if it was a contract, the economic loss rule does not apply where there is "[a] breach of a duty *arising independently* of any contract duties between the parties." *Town of Alma v. AZCO Constr., Inc*., 10 P.3d 1256, 1262 (Colo. 2000) (emphasis in original). In *S K Peightal Engineers, Ltd v. Mid Valley Real Estate Solutions V, LLC,* 342 P.3d 868, 875 (Colo. 2015), the Colorado Supreme Court clarified that an "independent duty" exists where there is a "special relationship" between the parties. There is a special relationship here because MSRB Rule G-42 imposes fiduciary duties on municipal advisors like North Slope, as would Colorado common law. *See* Colo. Jury Instr., Civil 26:2; *Tepley*, 955 P.2d at 577.

g. Snowmass Ventures

At the end of 2016, Related sold the Base Village project to Snowmass Ventures. As a condition of sale, Snowmass Ventures insisted that large swaths of the project be moved from District 2 into District 1, thereby enabling fewer developer advances to the project and depriving District 2 of taxpayer base and significant revenue. FAC at ¶ 227. One-sixth of District 2's property was transferred over to District 1, including the land where the Limelight hotel is now built. *Id.* at ¶ 227. This maneuver violated the Service Plan, which has always described District 2 as the

financing district with most of the taxable property. *Id.* at ¶ 228. Snowmass Ventures also insisted on the refinancing in which District 2 overpaid for the 2013B debt held by Related; that money was effectively used as consideration between the parties to close the sale. *Id.* at ¶¶ 213-14, 263(h). In other words, Snowmass Ventures facilitated Related using its power over District 2 to take District assets as part of their private real estate closing. Snowmass Ventures violated COCCA by, among other predicate acts, committing honest services fraud under federal law.

Honest services fraud involves using the mail or wires to carry out a scheme or artifice to defraud another of the intangible right of honest services, where the defendant is involved in a bribery or kickback scheme through which something of value is exchanged for "an official act."[25] The bribery theory requires a *quid pro quo*, unlike a gratuity, but the *quid* need not be linked to the particular quo. *United States v. Wright*, 665 F.3d 560, 567–68 (3d Cir. 2012); *United States v. Ring*, 768 F. Supp. 2d 302, 309 (D.D.C. 2011) (similar).

An honest services fraud scheme can even result in financial or property *gain* for the betrayed party: the "actionable harm lay in the denial of that party's right to the offender's 'honest services.'" *Skilling v. United States*, 561 U.S. 358, 400 (2010). Similarly, the defendant's intent to *gain* need not be alleged; "the only intent that need be proven in an honest services fraud is the intent to deprive another of the intangible right of honest services." *Welch*, 327 F.3d at 1106.

District 2 has a more than plausible case against Snowmass Ventures for honest services fraud. District 2 alleges that Snowmass Ventures bribed Related in its capacity as controlling

[25] Various federal statutes define "bribery" and "kickback." *See, e.g.*, 18 U.S.C. §§ 201(b), 666(a); 41 U.S.C. §§ 52(2), § 8701; 41 U.S.C. § 8710(2) (broadly defining bribery as "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided to [persons] to improperly obtain or reward favorable treatment"). *See also United States v. DeMizio*, No. 08-CR-336 JG, 2012 WL 1020045, at *7 (E.D.N.Y. Mar. 26, 2012), *aff'd*, 741 F.3d 373 (2d Cir. 2014) (emphasizing the fluidity of the forms that bribery and kickbacks can take). The phrase "official act" is defined by statute and elaborated upon by case law. *See, e.g.*, 18 U.S.C. § 201(a)(3) (federal bribery statute); *McDonnell v. United States*, 136 S. Ct. 2355, 2367 (2016).

District 2 board into engineering yet another refinancing that gave Related a windfall of $10 million (converting its junk debt into a cash payment) as well as a stronger set of bonds in return for Related selling the project to Snowmass Ventures at a reduced price, which fraud deprived District 2 of Related's honest services. Related, through the directors, violated its duties to protect District 2 by engaging in yet another detrimental refinancing.

Snowmass Ventures mischaracterizes, and narrows, the bases for District 2's COCCA claims. Snowmass Ventures attaches an Exhibit A to its Motion to Dismiss that purports to contain all the relevant allegations against it. But its Exhibit A omits paragraphs 35, 213 and 214 of the FAC, which, among others, provide critical support for the honest services fraud predicate act by detailing the consideration provided to Related as part of the 2016 refinancing that constitutes a bribe or kickback. District 2 drew these arguments together by alleging that "Snowmass Ventures . . . used the fraudulent transaction as a way to shift profits to Related at the District's expense as total consideration for the sale of the Base Village project." FAC at ¶ 263(h). The First Cause of Action built on that narrative in alleging that Snowmass Ventures committed honest services mail and wire fraud by "paying Related and its affiliates to engineer these transactions," including both the 2016 refinancing and the movement of property. *Id.* at ¶ 267(f). Thus, the FAC satisfies the element of honest services fraud by plausibly alleging that Snowmass Ventures used the mail or wires to intentionally defraud District 2 of its rights to the honest services of the board members, who were Related's employees under Related's control. *See also, e.g.*, ¶¶ 40; 267d (boundary adjustments that required communications with other defendants); 267(a)(iii) (communications in 2013 and 2016).

Nor can Snowmass Ventures defeat the honest services fraud predicate by arguing that it was not a fiduciary. *See* Snowmass Ventures MTD at p.8. First, while several federal circuits have

interpreted the Supreme Court's language in *Skilling* to require a fiduciary duty in honest services cases, no 10th Circuit case has decided that question, and the relevant language in *Skilling* is arguably dicta. Moreover, this case involves state claims in a state court. Second, a sufficient relationship of trust has been alleged here, as Snowmass Ventures took control of District 1 on the day of the refinancing, also the day of its purchase of the project. District 1 is indisputably the "service district" for District 2. *See, e.g.*, FAC at ¶ 70. *See United States v. Milovanovic*, 678 F.3d 713, 724 (9th Cir. 2012), *as amended* (May 22, 2012) (finding a fiduciary relationship required post-*Skilling* but interpreting that relationship broadly). Third Snowmass Ventures solicited or coerced Related into violating its duties to District 2, which count as a COCCA predicate act. C.R.S. § 18-17-103(5).

Fourth, and most important, the fact that Related and other defendants violated fiduciary duties as part of the COCCA scheme is sufficient. *See, e.g.*, *United States v. Wang*, 898 F. Supp. 758, 761 (D. Colo. 1995) ("a non-fiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail (or wire) fraud statutes"); *United States v. Urciuoli*, 613 F.3d 11, 17-18 (1st Cir. 2010) (similar).

3. District 2 Need Only Allege Intent Generally Under Rule 9

Various defendants argue that District 2's claims are not plausible because it has not alleged a motive for some defendants to participate in the COCCA enterprise because they only received professional fees.[26] However, this argument misconstrues the pleading requirements here.

Pleading receipt of professional fees without more is only insufficient in the narrow context of federal securities fraud claims, where the Private Securities Litigation Reform Act ("PSLRA"),

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[26] CLA MTD at pp.8-10; D.A. Davidson MTD at p.14; Related MTD at p.8.

15 U.S.C. § 78u-4(b), requires a plaintiff to plead intent with particularity. *See generally Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320-21 (2007). The PSLRA ratchets up the pleading standard of Rule 9(b), which permits pleading intent generally. *See In re DNTW Chartered Accountants Sec. Litig.,* 96 F. Supp. 3d 155, 163 (S.D.N.Y. 2015). The PSLRA has no application here because District 2's claims are premised on Colorado — not federal — securities fraud. The PSLRA simply does not impose a pleading limitation on Colorado's rules of civil procedure. The General Assembly has chosen not to enact extra heightened pleading standard for Colorado securities fraud claims. *See generally* C.R.S. § 11-51-501 *et seq.* Thus, C.R.C.P. 9(b) is the operative pleading requirement. *See also Am. Gateway Bank v. Crews & Assocs., Inc.*, 2012 WL 13001556, at *8 (M.D. La. Apr. 27, 2012) ("the PSLRA's pleading, scienter and other requirements were not intended to apply to individual suits by plaintiffs bringing claims under state laws in state courts").

Furthermore, most of District 2's claims are not premised on securities fraud, rendering PSLRA case law doubly inappropriate. Finally, in the unlikely event that this Court adopts the Defendants' reading, the FAC would satisfy the PSLRA heightened pleading standards. Scienter can be established by showing motive, *or by showing "strong circumstantial evidence of conscious misbehavior or recklessness*." *In re DNTW,* 96 F. Supp. 3d at 164. As more fully alleged above, the allegations of nearly a decade of abuse lead to a "strong inference" of conscious misbehavior.

4. District 2 Has Adequately Put the Defendants on Notice

Several Defendants also argue that District 2 has employed improper "shotgun" pleading, denying them the right to fair notice. But their collective reliance on *Jacobs v. Credit Suisse First Boston,* 2011 WL 4537007 (D. Colo. Sept. 30, 2011), is misplaced. First, they are simply wrong that District 2's COCCA, securities fraud, and breach of fiduciary duty claims employ "shotgun"

pleading. Related MTD at p.29. Each of these causes of action specifies why each named defendant is liable. FAC at ¶¶ 259-70, 276-89. The COCCA cause of action specifies each Defendant's individual role in the scheme to defraud and enumerates predicate acts that undergird the COCCA allegations. *Id.* at ¶¶ 263, 267. The breach of fiduciary duty cause of action (which does not apply to all defendants) specifies the basis on which District 2 brings the claim against each individual defendant, as does the securities fraud claim. *Id.* at ¶¶ 277-94.

To streamline an already particularized FAC, District 2 did not repeat all relevant facts in the COCCA conspiracy cause of action, nor did it repeat the dozens of pages of particularized factual allegations in the aiding and abetting, conspiracy, unjust enrichment, and fraudulent concealment causes of actions. *See* Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion."); *see also Church Mut. Ins. Co. v. Coutu*, 2018 WL 822552, at *10 (D. Colo. Feb. 12, 2018) (where a complaint successfully alleges a COCCA enterprise and specifies the role of each defendant in the enterprise, it also successfully alleges a COCCA conspiracy).

The FAC here provides ample detail that allows Related and all other defendants to ascertain their particular acts of wrongdoing. *Compare Jacobs*, 2011 WL 4537007, at *7. District 2's FAC is a far cry from the "exceedingly sparse" allegations in *Jacobs*. *Id*. at *2, 8. Further, the *Jacobs* court dismissed the claims because the plaintiffs failed to allege that "the given Defendant actually participated in the conduct," but District 2's FAC contains ample detail about the specific roles each defendant played in the fraudulent scheme.

5. Defendants' Challenges to the Unjust Enrichment and Accounting Claims Are Meritless

All of the motions to dismiss include brief arguments — most with little analysis or authority — that the unjust enrichment and accounting claims are implausible and/or not pleaded with sufficient particularity. Related MTD at p.29; CLA MTD at pp.11-12; Davidson MTD at pp.11-12; HRECC MTD at pp.18-20; Lowe MTD at pp.18; Snowmass MTD at pp.11-13; WBA MTD at p.17. But as WBA concedes, Plaintiff need only plead sufficient facts to "to raise a right to relief above the speculative level." WBA MTD at p.17 (citing *Twombly*, 550 U.S. at 556-57).[27] Only by ignoring the detailed allegations incorporated by reference into the unjust enrichment and accounting claims — and the analysis above — could one claim conclude that it is implausible that Defendants, or some of them, unjustly enriched themselves in a manner that cannot be determined absent an accounting.

Hypo argues no accounting is required because a jury may be able to assess damages. HRECC MTD at pp.19-20; *see also* Davidson MTD at p.20; Snowmass MTD at p.13. But whether that is or is not true cannot be determined until later in this litigation. *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 964–65 (10th Cir. 2009), upon which Hypo relies, stands for the proposition that an accounting is appropriate only where there is no adequate remedy at law because the "accounts between the parties are of such a complicated nature that only a court of equity can satisfactorily unravel them." This determination simply cannot be made at the pleading stage. Neither *Haynes Trane Serv. Agency*, nor *Buchhalter v. Myers*, 276 P. 972 (Colo.

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[27] No defendant cites any authority for the proposition that these claims must be pleaded with a heightened degree of particularity.

1929), the other case on which Hypo relies, support making that determination on a motion to dismiss.

Hypo cites *Am. Woodmen's Life Ins. Co. v. Supreme Camp of Am. Woodmen*, 549 P.2d 423, 427 (Colo. App. 1976), for the proposition that a plaintiff must plead a demand and refusal to pay in an accounting claim. HRECC MTD at p.19. One need look no further than the Snowmass motion to know that is not correct. Snowmass correctly notes that a demand and refusal is what is *usually* required, but there is not strict set of pleading requirements necessary to seek an accounting in Colorado. Snowmass MTD at p.12. In any event, it is clear that defendants here have not agreed to provide an accounting; if they had, they would not be seeking a dismissal of this claim.

Finally, Hypo and D.A. Davidson argue the unjust enrichment claim must be dismissed because there is a contract covering the same subject matter. HRECC MTD at pp.18-19; Davidson MTD at p.19. Both rely on *Interbank Investments, LLC v. Eagle River Water & Sanitation District*, 77 P.3d 814 (Colo. App. 2003), a case that deals with a particular form of unjust enrichment not applicable here, *i.e.*, where a court implies a contract to avoid one party's unjust enrichment at the expense of another. *Interbank Investments* does not hold that there can be no unjust enrichment claim in any case where there is a contract between the parties. Rather it holds only that an unjust enrichment claim cannot be invoked to avoid the constraints of a breach of contract claim, something Plaintiff is not seeking to do in this case, which clearly sounds in fraud.

B. The SPSA's 30-Day Statute of Limitations Period Does Not Apply to Any Claim in This Case

Defendants' argument that the 30-day statute of limitations under the SPSA bars *all* claims having any relationship to securities is meritless. The SPSA provides that: "No legal or equitable action brought with respect to any legislative acts or proceedings in connection with the

authorization or issuance of securities by a public entity shall be commenced more than thirty days after the authorization of such securities." C.R.S. § 11-57-212. The plain language and legislative history of the SPSA all indicate that its 30-day limitations period applies only to challenges to the official acts involved in authorizing municipal bonds, not all claims that relate to such bonds.

District 2 is not challenging the validity of the issuance of the bonds, by, for example, alleging that there was no quorum at the meetings authorizing the issuances or that the board members were not duly qualified. Such allegations might constitute challenges related to "legislative acts or proceedings." Rather, District 2 alleges wrongdoing principally related to the *use* of proceeds obtained from bond issuances as well as actionable lies and omissions conveyed to District 2 to induce it to issue securities. Thus, the SPSA's limitations period does not apply.[28]

Courts construe a statute to "effectuate the intent and purpose of the General Assembly." *Perfect Place, LLC v. Semler*, 426 P.3d 325 (Colo. 2018) (citation and quotations omitted). To do so, courts first apply the "plain and ordinary meaning of the provision," striving to read the statute "as a whole, construing each provision consistently and in harmony with the overall statutory design, if possible." *Id.* (citations and quotations omitted). If necessary, courts also apply the standard rules of statutory construction to ascertain legislative intent, including looking to "legislative history, prior law, the consequences of a given construction and the goal of the statutory scheme." *People v. Frazier*, 77 P.3d 838, 839 (Colo. App. 2003); *see also* C.R.S. § 2-4-203 (2018) (identifying above as aids for construing ambiguous statutes). Each of these favors holding that the SPSA's 30-day limitations period does not apply to District 2's claims here.

1. The Plain Language Indicates that the Limitation Only Applies to Claims Challenging "Legislative Acts or Proceedings"

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[28] The only case to consider the SPSA has given it a narrow construction and has concluded that it may be equitably tolled. *See Landmark Towers*, 2018 WL 2436817 at * 4.

Where a statute is clear and unambiguous, no other construction is required. *See, e.g.*, *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) ("If a statute is clear and unambiguous on its face, then we need not look beyond the plain language[.]"). The plain language of the limitations provision indicates that it is directed to actions challenging the acts formally involved in issuing public securities. The 30-day limitations period applies to any "action brought with respect to any legislative acts or proceedings in connection with the authorization or issuance of securities by a public entity." C.R.S. § 11-57-212. Thus, as a matter of grammar, the 30-day requirement applies to "*action[s] brought with respect to any legislative acts or proceedings*," if and only if such legislative acts and proceedings are connected with the *authorization or issuance* of securities by a public entity. The provision encompasses suits brought *against* a public entity regarding the sufficiency of the legislative acts and proceedings related to a bond issuance. Defendants do not (and cannot) explain how District 2's asserted claims — which focus on self-dealing and the misuse of bond funds by individuals and businesses who abused District 2 — qualify as actions "with respect to any legislative acts or proceedings." Instead, Defendants ask this Court to construe § 11-57-212 to apply to any "action brought with respect to . . . securities [issued] by a public entity," in essence deleting thirteen words from the statute.

No claim in this action asserts wrongdoing in the formal process of authorizing or issuing the bonds. Instead, the claims focus on misstatements and omissions to District 2 itself, the fraudulent use of proceeds obtained *after* issuing bonds, misstatements to the Town to cover up deepening insolvency, and flagrant actions in violation of District 2's Service Plan.

2. The Legislative History Shows that the SPSA Was Intended to Limit Challenges to Official Acts Authorizing the Bonds and to the Bonds' Underlying Validity

The SPSA's legislative history also contravenes Defendants' overly expansive interpretation. As shown by the legislative history submitted by Defendant D.A. Davidson, the bill's co-sponsor, Nancy Spence, summarized the purpose of the limitations provision as follows:

> Section 212 is a statute of limitations for actions concerning bonds that would say that if anybody wants to bring an action *about the validity of a bond issue*, [he or she] has to do so within 30 days after its authorization. That, too, appears in several Colorado statutes but is not uniform. For those of you who don't have experience in the bond market, *the bond market values certainty and finds uncertainty to be a problem*. And so this is just about giving *certainty to bondholders* ultimately and again making what is a provision available to some, but not all, available to all.

Hearing on H.B. 00-1046 Before the H. Fin. Comm., 2000 Leg., 62d Sess. 10:21-11:7 (Colo. Jan. 19, 2000) (emphasis added). The bill's Senate co-sponsor, Ronald Teck, gave a similar summary:

> Section 212 is really about giving the market certainty. And this is a statute of limitations provision that applies again in many instances today for some Colorado governments but not for all. It basically says, *if somebody wants to litigate whether bonds are being validly issued*, they ought to act pretty quickly to do that. I mean, they ought to act in 30 days after the authorization of those securities or forever hold their peace. And usually that happens pretty much anyway because once the bonds are issued, whatever people are complaining about, it's almost too late. But this gives the market certainty. And again, it's a fairly standard provision, and *it does not affect again the securities law process*.

Hearing on H.B. 00-1046 Before the S. Fin. Comm., 2000 Leg., 62d Sess. 26:16-27:7 (Colo. Feb. 15, 2000) (emphases added). *See also* D.A. Davidson MTD, Ex. H.

These statements include three important points. First, both sponsors made clear that the law was only intended limit actions potentially affecting the *validity* of bonds. The sponsors' goals were to give certainty and stability to the bond market and bondholders by limiting the amount of time during which the bonds' validity could be questioned. None of the pending claims here, however, challenge whether District 2 bonds were or are valid, or question whether they were

validly issued. *Compare, e.g.*, *Enger v. Walker Field, Colorado Pub. Airport Auth.*, 508 P.2d 1245 (Colo. 1973), and *Kingsley v. City & Cty. of Denver*, 247 P.2d 805, 808 (Colo. 1952).

Second, the statements also indicate that the SPSA was intended to apply limitations provisions already applicable to some Colorado public securities to all public bond offerings. In a House hearing, Representative Spence noted that "[t]here are at least six separate statutes which govern the issuance of general obligation bonds by municipalities, counties, school districts, special districts, and improvement districts." Hearing on H.B. 00-1046 Before the House as a Whole, 2000 Leg., 62d Sess. 4:9-14 (Colo. Jan. 31, 2000). RJN Ex. D.

Although the legislative history does not include a list of the statutes to which Spence referred, there were at least eleven limitations provisions that applied to publicly-issued bonds at that time. Four of those statutes explicitly link the limitations period to official governmental actions in the form of an "ordinance," "resolution" or "other official action." *See* C.R.S. § 23-70-112 (1999); *id.* § 29-3-122; *id.* § 31-25-813.5; *id.* § 31-25-538(2).

The remaining statutes refer more generally to actions addressing "acts or proceedings" related to the issuance of bonds.[29]

Against this statutory backdrop, the fact that the SPSA refers not just to "acts and proceedings," but specifically to "*legislative* acts and proceedings" takes on additional significance. The adjective underscores the SPSA's focus on challenges to the official acts of the governmental body that resulted in the bonds at issue, rather than "acts or proceedings" by any other persons who may have been involved in their creation. Taken together, the text of the provision, the sponsors' statements and the prior law compel the conclusion that the SPSA

[29] *See* C.R.S. §§ 29-23-115; 30-20-534; 30-20-625; 31-25-633; 32-15-125.5; 43-4-520; 43-4-619.

limitation only applies to challenges to official acts: that reading is not only consistent with all of the statutory language, but is also the only interpretation that harmonizes all the statutes, since four *must* be read that way.[30]

Finally, the legislative history and other SPSA provisions also indicate that the General Assembly did not intend for the 30-day limitations period to apply to all alleged wrongdoing relating to municipal bonds. As noted, Senator Teck stated that the provision "does not affect again the securities law process"; Representative Spence similarly noted in the House hearings that the Colorado Securities Commissioner had requested the addition of language "to make it clear that nothing in this Bill adversely affects the State Securities law including the rights of securities holders and the Commissioner to bring enforcement actions or civil actions involving securities." Hearing on H.B. 00-1046 Before the H. Fin. Comm., 2000 Leg., 62d Sess. 37:10-13 (Colo. Jan. 19, 2000). RJN Ex. E. The requested language appears in Section 11-51-501, in the statement that "[t]his part 2 shall not modify or limit any provisions of articles 51 and 59 of this title." C.R.S. § 11-51-501 *et seq.* is the Securities Act, addressing securities fraud, and the basis for both predicate acts and independent causes of action in this case, and C.R.S. § 11-59-101 *et seq.* is the Municipal Bond Supervision Act.

Thus, the inclusion of this cautionary language in Section 11-51-501 means that the 30-day limitations period cannot apply to Metro District's claim under the Securities Act because that legislation contains its own statute of limitations. *See* C.R.S. § 11-51-604(8). The overly expansive reading of the statute that Defendants proffer would not only sweep all securities fraud claims

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[30] Limiting the statute to claims challenging official actions would also comport with Colorado's treatment of similar provisions. For instance, although challenges to the "form or content" of a ballot item are subject to the state's five-day limitations period for election contests, the requirement does not apply to claims challenging the "substance" of the ballot item. *See Cacioppo v. Eagle County School Dist.*, 92 P.3d 453 (2004).

within the ambit of the limitations provision, in defiance of section 11-51-501, but would also mean that the entities issuing municipal bonds have the option to, in effect, shield themselves and others from liability for any issue relating to municipal bonds or the use of their proceeds . Nothing in the text, legislative history or statutory backdrop of the legislation indicate any such intent.[31]

C. District 2's Claims Are Not Otherwise Time-Barred

All of the Defendants except for Snowmass Ventures and North Slope also contend that Plaintiff's non-COCCA claims are barred by a 3-year statute of limitations and its COCCA claims by a 5-year statute of limitations. The argument is erroneous for several reasons. First, Related (which filed the lead motion) incorrectly measures the timeliness of Plaintiff's claims from the date of service rather than from the date of filing. Second, significant misconduct occurred within the 3-year statute of limitations for non-COCCA claims. Third, COCCA permits Plaintiff to rely on racketeering activity that occurred outside of the statute of limitations so long as at least one predicate act occurred within the past 5 years. And fourth, Related's control of District 2's Board of Directors made it impossible, as a practical matter, for District 2 to file suit against Related or any of its co-conspirators until an independent board took control in 2017. Under either the discovery rule or the doctrine of equitable tolling, Plaintiff should be permitted to hold Related and its co-defendants responsible for all of their wrongful conduct.

1. Timeliness Is Measured from the Filing of Plaintiff's Complaint, Not from Service

[31] Indeed, Defendants' proffered interpretation would also distort the regulatory landscape by mandating different treatment of claims involving bonds authorized by special districts and those authorized through ballot measures. For the latter category, the law is already clear that, while challenges rooted in the election process are limited by the short limitations period applicable to electoral contests, challenges to, for instance, the subsequent expenditure of bond proceeds are not. *See Busse v. City of Golden*, 73 P.3d 660, 663-665 (Colo. 2003); *see also Snell v. Johnson County School Dist.*, 86 P.3d 248, 255 (Wyo. 2004) (similar).

The statutes of limitations governing Plaintiff's claims state that a civil action "shall be commenced" within the prescribed period of time: 5 years for COCCA claims and 3 years for non-COCCA claims. C.R.S. § 13-80-103.8(1)(d); C.R.S. § 13-80-101(1)(a), (c), (f). According to the Colorado Rules of Civil Procedure, a civil action may be "commenced" by the filing of a complaint, which in this case occurred on December 1, 2017. C.R.C.P. 3(a). Related argues, however, that the statutes of limitations should be measured from the date the complaint was first served on February 14, 2018. Related Mot. at 18. It cites to *Malm v. Villegas* to support its contention, but that case actually confirms Plaintiff's position that "filing a complaint tolls the statute of limitations." 342 P.3d 422, 425 (Colo. 2015). *Malm* simply held that a complaint is subject to dismissal for failure to prosecute if not served within a reasonable time, which in that case was seven and a half years.

Here, the time between filing and service was 75 days — nowhere close to the seven years found unreasonable in *Malm*. Related is not moving to dismiss for failure to prosecute — the issue addressed in *Malm*. Instead, it seems to be arguing that because it could have argued for dismissal under Rule 4(m) the filing should be treated as if it were dismissed for statute-of-limitations purposes. The defendant in *Curry v. Zag Built LLC* recently made a similar argument, arguing that because the plaintiffs' complaint was not served within Rule 4(m)'s 63-day period, it should be considered a nullity and the statute of limitations measured from the filing of plaintiff's amended complaint. --P.3d--, 2018 WL 2058176, at *3 (Colo. App. 2018). The Court of Appeals disagreed, noting that dismissal under Rule 4(m) is discretionary and requires that the plaintiff first be given notice. *Id*. at *3-5 Like Related, the defendant in *Curry* pointed to *Malm*, but the court found that plaintiffs' 121-day delay was *presumptively* reasonable under *Malm*. *Id.* at *8.

As in *Curry*, Plaintiff's complaint "was not a nullity" — it was never dismissed nor was dismissal required under Rule 4(m). *Id.* at *12. Filing therefore "commenced this case" and marks the point from which compliance with the applicable statute of limitations should be measured.

2. At Least Two of Related's Wrongful Acts Occurred Within 3 Years of Filing and Thus May Be Remedied Through This Litigation

The parties agree that a 3-year statute of limitations applies to each of Plaintiff's non-COCCA claims. Any allegations of wrongful conduct that occurred after December 1, 2014, fall within the limitations period. Related incorrectly contends that Plaintiff did not adequately allege any wrongful conduct during this limitations period.

In 2016, Related used its control of the District 2 board to pay itself $10 million in exchange for junk bonds that were worth far less. FAC at ¶¶ 213-14. Related could not have sold these bonds on the open market for anywhere near $10 million, as there was little chance that District 2 would be able to re-pay its junior debt before it was automatically discharged. *Id.* at ¶¶ 211(b), 217. Also, in 2016, Related used its control of the District 2 board to move property out of District 2 and into District 1. *Id.* at ¶ 226. This border adjustment deprived District 2 of at least 1/6 of its tax base costing it millions of dollars in revenue. *Id*. at ¶ 227. But it benefited Related by facilitating its sale of the Base Village project to Snowmass Ventures. *Id.* at ¶¶ 209, 226. These transactions fall within the statute of limitations for Plaintiff's non-COCCA claims.

3. All of Defendants' Conduct is Actionable Under COCCA, Which Only Requires That One of the Predicate Acts Occur Within Five Years

Plaintiff's COCCA claims are subject to a five-year statute of limitations and so encompass an even wider swath of the COCCA enterprise's wrongdoing. C.R.S. § 13-80-103.8(1)(d); *Clementson v. Countrywide Fin. Corp.*, 464 F. App'x 706, 712, n.2 (10th Cir. 2012). It not only covers all predicate acts associated with the 2016 transactions but also all predicate acts associated

with the 2013 refinancing — through which Related caused District 2 to pay it $7.5 million for essentially worthless Guarantor Bonds. FAC at ¶¶ 196-98. Among these predicate acts are the COCCA enterprise's regular use of mail and e-mail to plan and implement the 2013 and 2016 refinancings, *id.* at ¶ 267(a), (a)(iii); the Securities Act violations associated with the refinancings, *id.*, ¶ 267(c); the unlawful transfer of secured collateral from District 2 to District 1 in 2016, *id.* at ¶ 267(d); and the mailing of misleading Annual Reports designed, *id.* at ¶ 267(a)(i).

A number of other predicate acts occurred in connection with the COCCA Enterprise's 2008 misappropriation of $32 million in bond proceeds. *Id.* at ¶ 267(a)(i), (b), (c). Although these acts occurred more than 5 years before the complaint was filed, they may still be used to establish that Defendants engaged in a pattern of racketeering activity. So long as one predicate act of racketeering activity falls within COCCA's 5-year statute of limitations, "other predicate acts occurring within ten years before the occurrence of the first can be presented as evidence of racketeering activity." *People v. Davis*, 296 P.3d 219, 229 (Colo. App. 2012).

4. District 2 Can Challenge All of Related's Wrongful Acts Under the Discovery Rule or Doctrine of Equitable Tolling

a. The Statute of Limitations Did Not Begin to Run Until After District 2 Discovered the Factual Basis for Its Claims in 2017

Related invokes the discovery rule to argue that the time to challenge some of its alleged self-dealing has already expired. Related Mot. at 18-19. The discovery rule provides that a legal claim accrues — and the statute of limitations on that claim begins to run — "when the injury, loss, damage, or conduct giving rise to the cause of action is discovered or should have been discovered by the exercise of reasonable diligence." *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 405 (Colo. App. 2000); C.R.S. § 13-80-108(8). Related contends that "[t]here can be no dispute that Plaintiff … [was] aware of any alleged cause of action related to the bonds before

2013," because "the District itself issued the bonds, spent and accounted for the bond proceeds, and refinanced the debt," and was "involved in every significant allegation in the Amended Complaint." Related Mot. at 18-19. The only reason District 2 was involved, however, was because *Related* had appointed its employees to District 2's Board of Directors, where they could facilitate Related's self-dealing internally. FAC at ¶¶ 74, 76, 85, 120, 263(a). In essence, Related is trying to attribute its own knowledge to District 2. The trial court rejected a similar argument in *Tallman*. RJN Ex. B. The developer in that case (Natureview) claimed it could not have defrauded the Tallman Gulch district because its owner (Richardson) also served as the district's President: "according to Defendants … Richardson as President of the District, had the same knowledge as the buyer of the bonds, Richardson as owner of Natureview." *Id.* at 3. The *Tallman* court saw through that argument, and this Court should too. Related should not be permitted to impute its own employees' knowledge about defrauding District 2 to District 2, especially to advance its statute-of-limitations defense. *See Klein v. Cornelius*, 786 F.3d 1310, 1322 (10th Cir. 2015) ("[T]he knowledge and effects of the fraud of the principal of a Ponzi scheme in making fraudulent conveyances of the funds of the [entities] under his evil coercion are not imputed to his captive [entities].") (citation omitted).

Related also argues that the Court can use judicially noticeable facts to conclude that District 2 should have known that it had legal claims against Related. Related Mot., at 19 & n.12; 20 & n.14. It points to an unrelated lawsuit filed by District 2's counsel against Related in 2011, and to local news coverage of the state of construction in Snowmass, the Metro District bonds, and associated District taxes. *Id.* These facts are "not part of the bare allegations of [Plaintiff's] complaint," and so cannot be considered at the pleading stage. *Prospect Dev. Co., Inc. v. Holland & Knight, LLP*, 2018 COA 107, ¶¶ 22-23, 2018 WL 3580981 (district court erred in taking judicial

notice of documents not referenced in the complaint). More to the point, District 2's current attorneys did not represent District 2 until 2017, after an independent board took control of District 2 for the first time in its history. FAC at ¶ 78. Only then — finally free from Defendants' captive-control — could District 2 reasonably be expected to know the facts giving rise to the legal claims they are now asserting. Defendants cite no caselaw imputing an attorney's prior knowledge to his client.

Statute of limitations issues are not well-suited for a motion to dismiss. *Morrison v. Goff*, 91 P.3d 1050, 1057 (Colo. 2004) ("determination of when claims accrue 'is normally a question of fact'") (quoting *Broker House Int'l, Ltd. v. Bendelow*, 952 P.2d 860, 863 (Colo. App. 1998)). The unsuitability of the issue at the pleading stage is further complicated by Related and its co-defendants' fiduciary relationship with District 2, which "lessens the duty of reasonable inquiry as to facts which underlie a claim for fraud." *Hansen v. Lederman*, 759 P.2d 810, 812 (Colo. App. 1988). In addition, for purposes of Plaintiffs' COCCA claims, the issue is not just when District 2 could have discovered a single instance of wrongdoing, but when District 2 "knew or should have known of a *pattern* of racketeering activity causing injury." *F.D.I.C. v. Refco Grp., Ltd.*, 989 F. Supp. 1052, 1078 (D. Colo. 1997) (emphasis added). Because the pleadings do not establish that District 2 knew or should have known all material facts essential to each element of their claims "before 2013," as Related contends, dismissal of any part of Plaintiff's claims on statute of limitations grounds is inappropriate. *See Gognat v. Ellsworth,* 259 P.3d 497, 502 (Colo. 2011); *CAMAS Colorado, Inc. v. Bd. of Cty. Comm'rs*, 36 P.3d 135, 139 (Colo. App. 2001).

b. Equitable Tolling Is Appropriate Because Defendants' Domination of the District 2 Board Prevented Plaintiff from Bringing Suit

More to the point, District 2's Board was controlled by Related and its co-defendants until February 2017 — making a lawsuit against Related and its co-defendants impossible. FAC at ¶¶ 74-78; 263(a), (c). Related achieved that control by giving certain handpicked employees option contracts to purchase small parcels of land that Related owned in District 2. *Id.* at ¶¶ 85 & n.4, 120. That is why District 2 approved a transfer of $31 million to Related in 2008 without verifying the money was for public infrastructure (it was not). *Id.* at ¶¶ 136-38. It is also why the board approved payment of $7.5 million to Related in 2013 for Guarantor Bonds that were virtually worthless on the open market. *Id.* at ¶¶ 196-97. And it is why the board approved payment of $10 million to Related in 2016 for junk bonds that were worth nowhere near that amount. *Id.* at ¶¶ 213-14. It is a stretch to expect that Related would have sued itself.

Equitable tolling authorizes a court to "suspend a statute of limitations period when 'flexibility is required to accomplish the goals of justice.'" *Morrison*, 91 P.3d at 1053 (quoting *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996)). The doctrine is most often applied "where the defendant's wrongful conduct prevented the plaintiff from asserting [its] claims in a timely manner," which is precisely what occurred here. *Dean Witter*, 911 P.2d at 1096. The 10th Circuit has captured this idea under the doctrine of "adverse domination" to preserve a captive entity's legal claims in similar circumstances. *See, e.g.*, *Wing v. Buchanan,* 533 F. App'x 807, 811 (10th Cir. 2013); *F.D.I.C. v. Appling*, 992 F.2d 1109, 1115 (10th Cir. 1993). Those cases acknowledge that "[c]ontrol of the [entity] by culpable directors and officers precludes the possibility of filing suit because these individuals can hardly be expected to sue themselves or initiate any action contrary to their own interests." *Wing,* 533 F. App'x at 811 (quoting *Appling*,

992 F.2d at 1115). "Under the adverse domination theory, 'as long as a corporation is controlled or "dominated" by wrongdoers against whom a cause of action exists, the statute of limitations is tolled because the wrongdoers cannot be expected to bring an action against themselves.'" *Wing v. Dockstader,* 482 F. App'x 361, 364–65 (10th Cir. 2012) (citation omitted).

While Colorado courts have not yet used the term "adverse domination," the doctrine is perfectly consistent with principles of equitable tolling that the Colorado Supreme Court has recognized. *See, e.g.*, *Brodeur v. Am. Home Assur. Co*., 169 P.3d 139, 149 (Colo. 2007); *Morrison*, 91 P.3d at 1053; *Dean Witter*, 911 P.2d at 1096. Under whatever label, tolling is appropriate here because "a person should not be permitted to benefit from his or her own wrongdoing." *Dean Witter*, 911 P.2d at 1096.

c. HRECC's Temporary Control of the Board Does Not Defeat the FAC's Timeliness

Related has anticipated that its domination of District 2's board impedes its limitations defense. Related MTD at p.20. In order to overcome this obvious basis for tolling, it points out that it did not control the board for about two years between 2010 and 2012 while HRECC was in control. FAC at ¶¶ 75, 158-61. Related suggests this board could have filed suit, but that contention ignores Plaintiff's allegations that the HRECC-controlled board was no more independent than the Related-controlled board. *Id.* at ¶¶ 174, 263(c). While HRECC and its board-appointees from Lowe might have been temporarily adverse to Related, they recognized the profitability of joining the COCCA enterprise when HRECC and Related reached an agreement that benefited each side at the expense of District 2. HRECC used its control of the District 2 board to secure a higher sale price for the Base Village project. *Id.* at ¶¶ 175-76, 180. In fact, HRECC and the Lowe defendants

facilitated the continued exploitation of District 2 by selling control of District 2's board back to Related, engaging in the exact same scheme as pioneered by Related.

Even if the statute of limitations is not tolled during HRECC's control of the District, the majority of Plaintiff's claims are timely. The statute would only begin to run after the new board discovered or should have discovered the self-dealing that gives rise to Plaintiff's claims. *Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 363 (Colo. App. 2000). As discussed above, such matters are typically reserved for a jury. *Gognat*, 259 P.3d at 502. And even if HRECC learned about the relevant facts immediately after it gained control of the Base Village project on July 9, 2010, it sold control back to Related on September 28, 2012, meaning that the statute of limitations could only have run for 812 days (a little over 2 years and 2 months). FAC at ¶¶ 159, 161. At that point, the statute would again be equitably tolled to account for the fact that Related cannot be expected to sue itself. It could not begin to run again until sometime after an independent board was appointed for the first time in District 2's history on February 22, 2017. *See* FAC at ¶ 250 (the complaint does not specify that the appointment took place on the 22nd , but could be amended to do so, if needed). A total of 282 days (about 9 months) elapsed between that appointment and the filing of Plaintiff's complaint. When added to the 812 days during which HRECC and Lowe controlled the Base Village project, that amounts to 1094 days, or just under 3 years.

5. Related's Co-Defendants Add Nothing That Would Make Plaintiff's Claims Untimely

Most of Related's co-defendants simply incorporate by reference or otherwise restate Related's statute-of-limitations arguments. *See* WBA MTD at 15-16; CLA MTD at 6; Davidson MTD at 8; North Slope MTD at 5; Snowmass MTD at 13; HRECC MTD at 2. For the same reasons that Plaintiff's claims are timely against Related, therefore, they are also timely against these co-

defendants. Plaintiff's claims against North Slope and Snowmass Ventures arise from conduct that occurred in 2016 and so fall within both the 5-year statute of limitations that applies to Plaintiff's COCCA claims and the 3-year statute of limitations that applies to Plaintiffs' non-COCCA claims. *See, e.g.*, FAC at ¶¶ 215-23, 263(g)-(h). D.A. Davidson, WBA, and CLA also conspired directly with Related's self-dealing in 2016, which brings their conduct within the same 3-year statute of limitations and allows Plaintiff to introduce evidence of all of those defendants' other predicate acts under COCCA. *See, e.g.*, *id.* at ¶¶ 224, 228, 243, 267(a)(i), (iii). And just as Defendants' control of the District 2 board prevented District 2 from discovering Related's self-dealing and filing suit, so too did it prevent District 2 from discovering others' participation in the fraudulent scheme and suing for recompense. Under either the discovery rule or the doctrine of equitable tolling, District 2's claims have been timely asserted against all defendants.

The only co-defendant that offers an independent statute-of-limitations argument is Lowe, which claims it is entitled to be treated differently because it "withdrew" from the ongoing conspiracy. Lowe Mot. at 9-10. But withdrawal is an affirmative defense, and as such may only be raised in a motion to dismiss if "the bare allegations of the complaint" reveal that the defense applies. *Prospect Dev.*, 2018 COA 107, ¶ 14; *Smith v. United States*, 568 U.S. 106, 113 (2013) (burden of proof lies with defendant and "the analysis does not change when withdrawal is the basis for a statute-of-limitations defense"). Here, the bare allegations of Plaintiff's complaint show that Defendant HRECC controlled District 2 from 2010-2012 by appointing Lowe employees to serve as board members and do HRECC's bidding. FAC at ¶¶ 75, 174. HRECC and Lowe effectively sold this control back to Related in 2012. *Id.* at ¶¶ 158-61, 175-80. Lowe contends that these allegations mirror the facts in *Morton's Market, Inc. v. Gustafson's Dairy, Inc*, where one of the co-conspirators sold its dairy, severed all ties its co-conspirators' milk price-fixing conspiracy,

and communicated its withdrawal to its co-conspirators through the media. 198 F.3d 823, 839 (11th Cir. 1999). Lowe says that it too severed all ties with its co-defendants and that its withdrawal was "highly publicized" in the media. Lowe Mot. at 10. But there are no such allegations in the FAC, and at this stage, only the "bare allegations" of District 2's complaint may be considered. *Prospect Dev.*, 2018 COA 107, ¶ 14.

In addition, it is far from clear that media publicity is sufficient to establish withdrawal. The Seventh Circuit has rejected *Morton's* relaxed interpretation of withdrawal, and even the Eleventh Circuit has since clarified that "*Morton's Market* does not state that all resignations constitute effective withdrawal no matter the circumstances." *United States v. Nagelvoort*, 856 F.3d 1117, 1128 (7th Cir. 2017) ("Our cases, however, requires something more [than *Morton's Market*]"); *see also United States v. Bergman*, 852 F.3d 1046, 1064 (11th Cir. 2017). Neither Colorado courts nor the Tenth Circuit has addressed *Morton's Market*, but the Tenth Circuit has stated unequivocally that "[m]ere cessation of one's participation in a conspiracy is insufficient to demonstrate withdrawal," and that withdrawal requires some sort of "affirmative action." *United States v. Hughes*, 191 F.3d 1317, 1321 (10th Cir. 1999). Whether Lowe took the requisite steps to legally withdraw from defendants' conspiracy is thus a question of fact that cannot be resolved at this time. *Prospect Dev.*, 2018 COA 107, ¶ 14 ("a plaintiff has no obligation to anticipate an affirmative defense in the complaint and include allegations intended to negate it"). Finally, even if Lowe could establish withdrawal using only the pleadings, Plaintiffs' claims against Lowe would still be timely for the same reasons Plaintiffs' claims against Lowe's co-defendants are timely. Lowe aided HRECC's sale of its board seats back to Related making it impossible for District 2 to discover the basis for its claims or bring suit during Related's subsequent control . FAC at ¶¶ 175, 176-80.

D. District 2 Has Met its Certificate of Review Obligations

WBA and CLA assert that District 2 was required to file a certificate of review against them and failed to timely do so. District 2 filed a certificate of review with respect to WBA within 60 days of filing the First Amended Complaint but has not done so for CLA.

Colorado requires that certificates of review accompany certain claims against licensed professionals, C.R.S. § 13-20-602(1), but only where "expert testimony would be necessary to establish a prima facie case," C.R.S. § 13–20–601.

Because District 2's claims sound in fraud and the District does not anticipate the need for expert testimony, no certificate of review is necessary. District 2 has accused both WBA and CLA of fraud and abuse by facilitating Related's self-dealing and covering up material information to facilitate the fraud. A jury can evaluate these allegations without the aid of an expert, so a certificate is not required. These abuses do not turn on technical professional duties; to the extent they do, they are obvious and explicit duties which do not require the interpretation of an expert. *See Giron v. Koktavy*, 124 P.3d 821, 825 (Colo. App. 2005) (no certificate of review required for attorney malpractice when claim based on failure to file within statute of limitations, an easy determination for jury to make without aid of expert).

1. District 2 Complied with the Certificate of Review Obligations with Regard to WBA

a. District 2 Was Not Required to Submit a Certificate of Review to Support Its Breach of Fiduciary Duty Claim Against WBA

In this case, District 2 filed a certificate of review with its amended claims against WBA. However, contrary to WBA's argument, this certificate is not required because District 2 does not need an expert to establish its breach of fiduciary duty claim against the firm.[32]

Indeed, if the "plaintiff determines that expert testimony is not required, no certificate need be filed." *Shelton*, 984 P.2d at 626. In turn, as the certificate of review requirement is not jurisdictional, this Court exercises its discretion in determining whether a certificate was required "under the circumstances." *Giron*, 124 P.3d at 825. The test is whether the plaintiff's reasons "have arguable merit." *Shelton*, 984 P.2d at 627.

District 2's reasons for not filing a certificate with the original complaint had more than "arguable merit." *Id.* The original complaint cited acts by WBA that showed such an obvious pattern of placing Related's interests ahead of District 2's; expert testimony was not required to establish a prima facie case. The FAC added a few allegations that arguably turn on WBA's professional obligations, including the failure to secure independent financial counselors to review the 2008, 2013 and 2016 transactions, so District 2 decided to file a certificate to hedge any argument that a certificate was required. But District 2 does not need expert testimony to prove its case. Thus, this Court should exercise its discretion to find that a certificate of review is not required and deny WBA's motion.

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[32] WBA only argues that the Certificate was necessary for the breach of fiduciary duty claims. WBA MTD at p.19. It has not argued it is necessary for District 2's other claims.

b. District 2 Had Good Cause for Filing a Certificate of Review with the Amended Complaint

Even if this Court determines that a certificate should have been filed, good cause exists for Plaintiff's filing the certificate with the amended rather than original complaint.

While certificates of review are to be filed "within sixty days after service of the complaint," courts may determine that a longer filing period is acceptable if a party shows "good cause" under C.R.S. § 13–20–602(1)(a). "To determine whether good cause exists, the trial court must consider (1) whether the neglect causing the late filing was excusable, (2) whether the moving party has alleged a meritorious claim or defense, and (3) whether permitting the late filing would be consistent with equitable considerations, including any prejudice to the nonmoving party." *RMB Servs., Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo. App. 2006). Moreover, this Court "must consider all three criteria because evidence relating to one factor might shed light on another." *Id.* The *RMB Services* court held that that the trial court had abused its discretion by failing to properly consider these factors, *id.*, in a case where, as here, the plaintiff had first filed the certificate of review with its amended complaint.[33] *See also Yadon v. Southward*, 64 P.3d 909, 913 (Colo. App. 2002) ("the trial court abused its discretion by not granting plaintiff additional time to file the certificate of review").[34] Not all of the three factors must be satisfied in order for the court to find good cause. *See, e.g.*, *Bolsa Res., Inc. v. AGC Res., Inc.*, 2012 WL 1454023, at *1 (D. Colo. Apr. 25, 2012);

[33] Plaintiffs' Response to Defendants' Motion to Dismiss, *RMB Servs., Inc. v. Truhlar*, 2005 WL 5950367 (Colo. Dist. Ct.), No. 03CV5095 (Feb. 4, 2005).
[34] Generally, the request for more time for good cause is filed within the 60-day deadline, but doing so is not mandatory. *Cf. Martinez*, 842 P.2d at 251 (noting that the request for an order extending the filing period "should *normally* be filed within the sixty-day period") (emphasis added). Leeway makes sense given the principle in favor of permitting meritorious claims underlying the good cause analysis. Here, of course, since District 2 did not believe a certificate was required with the original complaint, it would not have requested an order extending the filing period within 60 days of serving that complaint.

Carson v. United States, 2014 WL 3563021, at *6 (D. Colo. July 18, 2014); *Jennings v. A-1 Traffic Control & Barricade, Inc*., 2006 WL 1351659, at *3 (D. Colo. May 15, 2006).

"In determining whether good cause exists, the trial court should be guided by the general rule favoring resolution of disputes on their merits." *RMB Servs., Inc.*, 151 P.3d at 676. In tandem with protecting the interests of professionals, the good cause criteria must "be liberally construed in favor of resolution on the merits" because they are drawn from default judgment principles. *DeBuhr v. Hern*, 2016 WL 9738100, at *2 (D. Colo. Sept. 12, 2016) (citation omitted).

As to the first good cause factor, excusable neglect, District 2 has a good faith basis for its position that a certificate was not required because expert testimony is not needed to make a *prima facie* case given WBA's flagrant violations of its fiduciary duties. WBA presents no authority that the certificate of review's 60-day period only runs from the filing of the original complaint.[35] As WBA acknowledges in a previously filed motion in this case, "An amended complaint supersedes the original complaint and becomes the sole statement of the plaintiff's cause of action." *See* WBA's Motion to Strike Responsive Briefing on Motion to Dismiss or, in the Alternative, for an Extension of Time (July 31, 2018), at p.2 (quoting *In re Marriage of Lockwood*, 857 P.2d 557, 561 (Colo. App. 1993)).[36] Where there is an open legal question regarding the application of the certificate of review statute, courts must find good cause for delay. *Arvada Dev. Grp., LLP v. All Envtl., Inc*., 2008 WL 927651, at *4 (D. Colo. Apr. 3, 2008) ("Without answers to these questions, the Court cannot determine that, as a matter of law, the Plaintiff's claims should be dismissed for failure to file a certificate of review"); *Corsentino v. Hub Int'l Ins. Servs., Inc*., 2018 WL 582398,

[35] Plaintiff has searched and also found none — it appears to be an open question under Colorado law whether the 60-day period is re-triggered by the filing of an amended complaint before the case is at issue.
[36] WBA also noted that numerous paragraphs in the FAC have "materially altered, if not altogether deleted" a number of paragraphs from the original complaint. *Id.* at p.4.

at *4 (D. Colo. Jan. 29, 2018) ("Given the legal uncertainty over whether a second certificate of review was necessary, the Court finds excusable neglect"); *Trierweiler v. Croxton & Trench Holding Corp*., 90 F.3d 1523, 1542 (10th Cir. 1996) (noting that a finding of good cause can be appropriate where a certificate of review point of law is unclear). The second factor strongly supports extending the time for filing the certificate because District 2 has alleged in great detail a meritorious scheme to fleece District 2 in which WBA played a key role.

Finally, the third factor, equitable considerations, supports the extension because WBA has suffered no prejudice. Specifically, a "deposition had not been taken before the certificate of review was filed. No trial date has been set, and the certificate of review was filed before any expert disclosures were due." *Bolsa Res., Inc.*, 2012 WL 1454023, at *2; *Srebnik v. Dean*, 2006 WL 2790408, at *7 (D. Colo. Sept. 26, 2006) (similar, no prejudice). Indeed, C.R.S. § 13-20-602(2) contemplates that a defendant who believes an expert is necessary to defend the claim can move the court for an order requiring the filing of the certificate and the court simply cannot set a trial date before deciding such a motion. Thus, filing a certificate before discovery begins is well within the timeframe that the statute contemplates as fair to the defendant. For any of the reasons stated above, WBA's motion to dismiss on certificate of review grounds should be denied.

2. CLA's Motion to Dismiss on Certificate of Review Grounds Should Be Denied

CLA's motion should be denied for three independent reasons: 1) CLA does not specify which claims are subject to the certificate of review; 2) District 2's claims do not require expert testimony; and 3) District 2 would have good cause for a late filing if the Court determines a certificate is necessary to establish a *prima facie* case.

First, CLA's motion fails to specify which of the seven claims[37] it believes requires a certificate of review and, more importantly, why each would require a certificate. *See* CLA MTD at p.8. The reasons could differ for, say, a COCCA claim and a breach of fiduciary duty claim.[38] Under C.R.C.P. 7(b)(1), a motion to dismiss "shall state with particularity the grounds therefor." CLA does not satisfy this standard. *See, e.g.*, *Gordon Inv. Co. v. Jones*, 227 P.2d 336, 339 (1951) ("It cannot successfully be argued that the [defendant's] broad objection . . . is a compliance with this rule" set forth in C.R.C.P. 7(b) and upholding the trial court's denial of the motion to dismiss).

Second, the standards governing when Colorado requires a certificate of review apply with equal force here, mandating the denial of CLA's motion to dismiss because expert testimony is not required to establish prima facie claims against it.

The undersigned have been unable to locate *any* decision requiring a certificate of review for a COCCA, conspiracy, accounting, or unjust enrichment claim. The lack of case law is unsurprising as these claims tend to involve facts where the professional is either obviously acting outside of the scope of professional duties or the professional's material breach is so nefarious that expert testimony is not required to establish liability. *See, e.g.*, *In re Donnell*, 479 B.R. 592, 596 (D. Colo. 2012) (holding that the defendant's duty to disclose arose from roles he held in addition to that of investment advisor, and therefore a certificate of review was not required). *Cf. Wojdacz*

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[37] These are COCCA, conspiracy to violate COCCA, breach of fiduciary duties, aiding and abetting the breach of fiduciary duty by others, civil conspiracy, unjust enrichment and accounting.

CLA also engages in a misleading overview of the case law, asserting that "[t]he certificate of review statute applies to *any* cause of action that claims a defendant has failed to perform a professional duty imposed under the common law or by a statute." CLA MTD at pp.7-8. But as detailed above, Colorado courts have made clear that the statute only applies where an expert opinion is required to establish a *prima facie* case. Its framing of other case law is similarly inapposite.

[38] CLA's motion to dismiss the original complaint was more specific, though still cagey, stating that at a minimum the breach of fiduciary duty and negligent misrepresentation claims should be dismissed. Defendant CliftonLarsonAllen LLP's Motion to Dismiss or for a More Definite Statement (May 19, 2018), at pp.19-20. This earlier specificity suggests that CLA's obfuscation in this second motion is intentional.

v. Ireland, 2013 WL 1365768, at *9 (D. Colo. Mar. 4, 2013), *report and recommendation adopted* ("Not surprisingly, the Court finds . . . no case in which a certificate of review was required to proceed on a COCCA claim"); *Falcon v. Saint-Veltri*, 23 F. App'x 908, 911-12 (10th Cir. 2001) ("a straight-forward fraud claim unrelated to either the caliber of any services provided by [defendant] or any assertions made by [defendant] as to the possibility of success . . . could be proved without expert testimony").

CLA's certificate of review argument fails as applied to the breach of fiduciary duty claim as well. As argued elsewhere in this opposition, CLA failures, omissions, and inaction in the face of fraud were per se violations of its responsibilities under Colorado's statutes and rules governing accountants, including the AICPA standards adopted by Colorado. *See, e.g.*, *Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. App. 2000) (reversing the dismissal of a claim where expert testimony was not needed to show that real estate brokers breached a statutory duty of disclosure). CLA concedes in its motion to dismiss that "CLA provided garden variety accounting services to Plaintiff[.]" CLA MTD at p.2. This is exactly the kind of claim that Colorado courts have blessed as not triggering the certificate of review requirement because expert testimony is not required.

District 2 believes that it need not call any experts to make a prima facie case against CLA, for reasons that have more than "arguable merit." *Shelton*, 984 P.2d at 627. A certificate of review was not and is not required to support District 2's claims against CLA.

Third, if this Court finds otherwise, it should apply the three factors of the good cause analysis for late filings and order District 2 to provide a certificate of review instead of dismissing its claims, as discussed above. *See supra* (outlining the good cause factors).

III. CONCLUSION

For the foregoing reasons, the Defendants' motions to dismiss must be denied.

Dated: November 30, 2018

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on November 30, 2018, a true and correct copy of the foregoing **PLAINTIFF'S OMNIBUS OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS FIRST AMENDED COMPLAINT** was filed and served *via* COLORADO COURTS E-FILING upon the following:

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