District Court, Pitkin County, Colorado 506 E. Main Street, Suite 300 Aspen, CO 81611	DATE FILED: September 6, 2019 CASE NUMBER: 2017CV30137
Plaintiff: **BASE VILLAGE METROPOLITAN DISTRICT NO. 2** vs. Defendants: **THE RELATED COMPANIES, LP**, a New York limited partnership; **RELATED WESTPAC, LLC**, a Delaware limited company; **BASE VILLAGE OWNER, LLC**, a Delaware limited liability company; **SNOWMASS RELATED HOLDCO, LLC**, a Delaware limited liability Company; **SNOWMASS HOLDCO BV, LLC**, a Delaware limited liability company; **RELATED COLORADO REAL ESTATE, LLC**, a Delaware limited liability company; **HYPO REAL ESTATE CAPITAL CORPORATION**, a Delaware corporation; **SNOWMASS BV HOLDCO, LLC**, a Delaware limited liability company; **US BANK NATIONAL ASSOCIATION**, a national banking association organized and existing under the laws of the United States; **WHITE, BEAR, ANKELE, TANAKA, & WALDRON**, a Colorado professional corporation; **DA DAVIDSON & CO.**, a New York corporation; **CLIFTON LARSON ALLEN, LLP**; **NORTH SLOPE CAPITAL ADVISORS**, a Colorado corporation; **LOWE ENTERPRISES REAL ESTATE SERVICES, INC.**, a California corporation; **DESTINATION SNOWMASS SERVICES, INC.**, a Colorado corporation; and **SNOWMASS VENTURES, LLC,** a Delaware limited liability company.	**▲COURT USE ONLY▲** Case Number: 2017CV30137 Division: 5

OMNIBUS ORDER ON DEFENDANTS' MOTIONS TO DISMISS THE FIRST AMENDED COMPLAINT

This matter is before the Court on various Motions to Dismiss Plaintiff's First Amended Complaint ("FAC"), filed by Defendants, The Related Companies, LP, 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 (collectively referred to herein as "the Related Entities"), Snowmass Ventures, LLC ("Snowmass Ventures"), North Slope Capital Advisors ("North Slope"), Lowe Enterprises Real Estate Services, Inc. and Destination Snowmass Services, Inc. (collectively referred to herein as "the Lowe Defendants"), Hypo Real Estate Capital Corporation ("Hypo"), D.A. Davidson & Co. ("Davidson"), Clifton Larson Allen, LLP ("CLA"), and White Bear Ankele Tanaka & Waldron, PC ("WBA"). The Court has reviewed the motion filings and the file.

The Court GRANTS in part and DENIES in part the Motions to Dismiss, for the reasons set forth below.

I. FACTS ALLEGED IN THE COMPLAINT

1. Plaintiff, District 2, alleges that the Defendants engaged in a COCCA scheme to control the District's Board, falsely inflate the value of properties within the District in order to obtain approval for the issuance of bonds in 2008, falsely certify private expenditures as public infrastructure, and later refinance the debt in a manner that benefitted the Defendants at the District's expense. The alleged scheme is discussed in more detail below.

II. STANDARD OF REVIEW

2. This Court reviews a motion to dismiss under Rule 12(b)(5), C.R.C.P pursuant to the standard set forth in *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016), which adopted "the more recent and nuanced" approach to F.R.C.P. Rule 12 articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

3. Now, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Warne*, 373 P.3d at 591 (quotations omitted). The new plausibility standard weeds out groundless complaints at the pleadings stage. *See id.* at 594. Because the pleader has an obligation "to provide the grounds of his entitlement to relief," the "factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

4. Courts still accept a plaintiff's well-pleaded facts as true. *Warne*, 373 P.3d at 591; *see, e.g., George v. Urban Settlement Servs.*, 833 F.3d 1242, 1247 (10th Cir. 2016); *Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 386 (Colo. 2001). However, this "is

inapplicable to legal conclusions." *Warne*, 373 P.3d at 591. Courts reject conclusory legal allegations as insufficient to state a claim. *Id.* Conclusory statements remain "not at all entitled to an assumption that they [a]re true," and non-conclusory allegations are insufficient if they are "equally consistent with non-tortious conduct." *Id.* at 596; *see also id.* at 597 (noting the importance of "scrutinizing a complaint for allegations that are not as consistent with proper conduct."). The plausibility standard does not allow a court to question or otherwise disregard non-conclusory factual allegations simply because they seem unlikely.

5. The plausibility standard is not akin to a probability requirement. A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. *See Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827 (7th Cir. 2015) (quoting, inter alia, *Twombly*, 550 U.S. at 556). Courts must look "to the elements of the particular cause of action, keeping in mind that the [Rule 12(b)(5)] standard doesn't require a plaintiff to set forth a prima facie case for each element." *George*, 833 F.3d at 1247. The nature and specificity of the allegations required to state a plausible claim will vary based on context; a claim is facially plausible if the plaintiff has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *see also Iqbal*, 556 U.S. at 678.

6. Pleading based on information and belief does not conflict with the plausibility standards and may, in fact, be useful where facts giving rise to a plausible claim are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible. *See Warne*, 373 P.3d at 595 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1224 n.7); *see also* C.R.C.P. 8(e)(1) ("When a pleader is without direct knowledge, allegations may be made upon information and belief.").

7. When considering a motion to dismiss, the Court may consider only facts alleged in the pleadings, documents attached thereto or incorporated by reference, and matters proper for judicial notice. *See Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). When considering a motion to dismiss based on an affirmative defense, such as the statute of limitations, the Court may not consider any matters outside the bare allegations of the complaint. *Prospect Development Company Inc. v. Holland and Knight, LLP*, 433 P.3d 146, 149-51 (Colo. App. 2018).

III. DISCUSSION

A. Arbitration Agreement with WBA

8. WBA served as counsel to District 2 for most of its history. It moves to dismiss based, *inter alia*, on an arbitration clause contained in certain engagement agreements. "A valid and enforceable arbitration provision divests the court of jurisdiction over all arbitrable issues." *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo. App. 1993). The arbitrability of a claim is for the court to decide. *Id.*; *Estate of Grimm v. Evans*, 251 P.3d 574, 576 (Colo. App. 2010) (under the doctrine of separability, if a party challenges the arbitration provision, that issue is one for the court to decide, but if a party challenges the entire contract, the issue is one for the arbiter to decide). If a factual determination is needed in deciding the motion to compel, the Court resolves such disputes by holding an evidentiary hearing. *Eychner*, 870 P.2d at 491.

9. "On the motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement: … (b) if the refusing party opposes the motion, the court shall proceed summarily to decide the issue and order the parties to arbitrate *unless it finds that there is no enforceable agreement to arbitrate*." §13-22-207(1), C.R.S. (emphasis added). "An agreement contained in a record[1] to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable *except on a ground that exists at law or in equity for the revocation of a contract*." §13-22-206(1), C.R.S. (emphasis added).

10. It is up to the court to decide whether an enforceable arbitration agreement exists, and whether a controversy is subject to that agreement. §13-22-206(2), C.R.S.; *Eychner*, 870 P.2d at 489; *Evans*, 251 P.3d at 576.

11. Here, the arbitration agreements state:

> If a dispute arises regarding our services or fees, any fee dispute will be decided by the Colorado Bar Association Legal Fee Arbitration Committee, in Denver, Colorado. There is no charge for the dispute resolution services provided by the Legal Fee Arbitration Committee, and each party will pay its own costs and expenses. <u>If, either in addition to a pending fee dispute or in the absence of one, any other dispute or</u>

[1] The term "record" means "information that is inscribed on a tangible medium or that is stored in an electronic medium that is retrievable in a perceivable form." §13-22-201, C.R.S.

> claim of any type or nature arises with respect to services rendered pursuant to this engagement agreement, including, without limitation, a claim for legal malpractice, it will be decided by the Judicial Arbiter Group in Denver, Colorado by a single arbitrator to be mutually agreed to by the parties. Each party will be responsible for paying one-half of all fees and expenses charged by the arbitrator. The parties recognize that by agreeing to arbitration as the method for dispute resolution, they relinquish the right to bring an action in court and waive the right to a jury trial and the extensive discovery rights typically permitted in judicial proceedings.

WBA Motion, Exh. A, B, C (emphasis added).

12. Both parties agree that these arbitration agreements "exist on paper" in the retention agreements covering the years from November 2013 to at least November 2016. The parties disagree as to: (1) whether these agreements are enforceable, and, if so, (2) what the scope of the agreements is.

1. The enforceability of the arbitration agreements

13. Plaintiff argues that the arbitration agreements are not valid and enforceable because WBA had a "conflict with its client" and the agreements were signed by members of the Board who also had conflicts of interest as employees of the Related Defendants, who were allegedly conspiring with WBA.

14. In support of this argument, Plaintiff cites §24-18-201(1) and §24-18-203, C.R.S. These provisions hold that public officers shall not be interested in any contract made by them in their official capacity or by any board of which they are members, and that contracts made in violation of that provision are "voidable at the instance of any party to the contract except the officer interested therein." §24-18-201(1); §24-18-203, C.R.S. This does not include any contracts "with respect to which any … public officer … has disclosed a personal interest and has not voted thereon or with respect to which any member of the governing body of a local government has voted thereon in accordance with section 24-18-109(3)(b) …." §24-18-201(1)(b)(V). Under section 24-18-109(3)(b), a board member of a governing body may vote if his participation is necessary to obtain a quorum or otherwise enable the body to act, and if he complies with the voluntary disclosure procedures under section 24-18-110, C.R.S.

15. Here, Plaintiff admits that the two board members who signed the engagement agreements with WBA in 2013, 2014, and 2015, filed voluntary disclosures of their conflicts of interest. Response Exh. 8, 9, 10. Further, the FAC alleges that all of the

board members had similar conflicts of interest, and the board meeting minutes reveal that these members' votes were needed to obtain a quorum or otherwise enable the body to act. Response Exh.7, p.2. Therefore, these board members' signatures on the engagement agreement fall under the exception in §24-18-201(1)(b)(V), C.R.S., and the contract is not voidable under §24-18-203, C.R.S.

16. Contrary to Plaintiff's argument, section 24-18-203, C.R.S. does not apply to any alleged conflicts of interest by WBA. That statute applies on its face only to contracts made by public officers and government officials or employees who labored under an undisclosed conflict of interest. §24-18-203, C.R.S.; §24-18-201, C.R.S. WBA was not a public officer, government official, or government "employee." §24-18-102(3), (6), (8), C.R.S.

17. Plaintiff next argues that an "adversely dominated entity … cannot be deemed to have given informed consent to arbitration." Plaintiff argues that WBA fraudulently inserted the arbitration clause into its retainer agreement years into its representation of the Districts "as part of the fraudulent scheme favoring the Defendants." Finally, Plaintiff argues that the equities support "denying WBA's effort to fragment parties and claims based on a clause inserted without informed consent by an adversely dominated board in the context of fraud."

18. A challenge to the enforceability of an arbitration provision based on allegations of fraud is for the trial court to decide, while a challenge to the enforceability of the whole contract based on allegations of fraud is for the arbiter to decide. *PFW, Inc. v. Residential at Little Nell Development, LLC*, 292 P.3d 1094, 1100 (Colo. App. 2012); *Ingold v. AIMCO/Bluffs, LLC Apartments*, 159 P.3d 116, 121 (Colo. 2007).

19. Here, Plaintiff alleges that the arbitration clause is unenforceable because the *engagement agreement* was signed by board members controlled by the Related Defendants, who were conspiring with WBA to control the board for the Defendants' benefit. As in *PFW*, this type of fraud, if proven, would invalidate the entire contract, not just the arbitration provision. *PFW*, 292 P.3d at 1100; *cf. also Ingold*, 159 P.3d at 121 ("In this case, the Ingolds allege that they were fraudulently induced … into entering the Lease. Since the Ingolds' allegations of fraud are not directed specifically to the Lease's arbitration provision, this is an issue that must be decided by the arbitrator, not the trial court."). Although the arbitration clause was added in 2013, Plaintiff has not alleged any specific conspiracy to add the arbitration clause to a valid contract by fraudulent means. Rather, Plaintiff's allegations of fraud go to the validity of the entire agreement. Therefore, the Court concludes that Plaintiff's challenge implicates the enforceability of the entire contract, and must be decided by the arbitrator. *PFW*, 292 P.3d at 1100; *Ingold*, 159 P.3d at 121.

2. The scope of the arbitration agreements

20. Plaintiff argues that WBA was acting outside the scope of its retainer agreement by working on behalf of the developers rather than the Districts: "Such unlawful acts cannot constitute 'services' to which a valid arbitration provision would apply." Plaintiff also argues that WBA's acts prior to November 2013 and after November 2016 were not governed by the arbitration agreements.

21. An agreement to arbitrate is subject to principles of contract interpretation. *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278, 1283 (Colo. App. 2001), *abrogated on other grounds by Ingold*, 159 P.3d at 124; *Eychner*, 870 P.2d at 490. Thus, the primary goal is to give effect to the parties' expressed intent. *Breaker*, 23 P.3d at 1283; *Eychner*, 870 P.2d at 490. "Arbitration is a favored policy in Colorado." *Breaker*, 23 P.3d at 1283. "Hence, when presented with an agreement to arbitrate specified disputes, all doubts should be resolved in favor of the claim's arbitrability," particularly where the language of the arbitration agreement is broad and inclusive. *Id.* (citing phrases such as "disputes that 'relate to' the contract"). However, ultimately, "the parties' reasonable expectations must determine the reach of the arbitration obligation." *Id.*

22. Here, the arbitration clauses in question state that "any other dispute or claim of any type or nature," including any legal malpractice claim, that "arises with respect to services rendered pursuant to this engagement agreement" will be decided by an arbiter. WBA Motion, Exh. A, B, C. The language about the *types* of claims included within the arbitration agreement is broad. On its face, it covers any dispute or claim "of any type" arising "with respect to" the services rendered "pursuant to this engagement agreement." *Cf. Breaker*, 23 P.3d at 1283.

23. Likewise, the services contemplated by the engagement agreements are broad. The engagement is as "general counsel to Base Village Metropolitan District Nos. 1 & 2." WBA Motion, Exh. A, B, C. It includes authoring memoranda and agreements of common interest to various municipal clients based on current legislation, acting as public records custodian for the Districts, and "handling [the District's] legal matters." WBA Motion, Exh. A, B, C. The engagement agreements specify that "the District will be our client," and that WBA will represent the interests of the District, not the Board of Directors, its members, or the District's employees. WBA Motion, Exh. A, B, C. The 2014 and 2015 versions of the agreement stated that WBA would not act as "municipal advisor" regarding securities under 15 U.S.C. 78o-4(e)(4)(c). WBA Motion, Exh. B, C.

24. The FAC alleges that, from the beginning of its relationship with the Districts, WBA's primary purpose was to benefit the Related Defendants and itself at the District's expense. *See, e.g.*, FAC, ¶¶99-106 & n.7. Having allegedly structured the Districts so

that the Developers would have control and taxpayers would not, WBA positioned itself as both Districts' attorney and, in that conflicted role, recommended or facilitated the various bond issuances and refinancings that allegedly benefited Defendants at Plaintiff's expense, while hiding District 2's true financial condition from the Town of Snowmass. These factual allegations are the basis for all of Plaintiff's claims against WBA. *See* FAC, ¶¶261-263(b), 267(a)(i), 270 (COCCA claim), ¶¶273-275 (conspiracy to commit COCCA), ¶¶280, 282-83 (securities fraud), ¶291 (breach of fiduciary duty), ¶¶294-296 (aiding and abetting breach of fiduciary duty), ¶¶298-302 (conspiracy), ¶¶303-304 (unjust enrichment), ¶¶307-310 (accounting). Thus, the claims all arise with respect to WBA's legal services. *See Bolsa Resources, Inc. v. AGC Resources, Inc.*, 2011 WL 6370409 *7 (D. Colo. 2011) ("In determining whether a claim is arbitrable, the Court must examine the factual underpinnings of the complaint rather than merely considering the labels attached to each of the causes of action it contains."); *Breaker*, 23 P.3d at 1284 (same). Even the claim that WBA was actually working to benefit the Related Defendants rather than the District arises "with respect to" the services rendered pursuant to the agreement, because the agreement explicitly requires WBA to represent only the interests of the District.

25. Contrary to WBA's claims, the unjust enrichment and accounting claims also arise with respect to the services rendered by WBA. They are not "fee disputes" that fall under a separate arbitration provision. The engagement agreements contain separate sections describing "fees, expenses, and retainer" and "billing." WBA Motion, Exh. A, B, C. Claims falling under these provisions are "fee disputes." In contrast, Plaintiff's claim that WBA unjustly enriched itself by purporting to represent District 2 when, in fact, it was working to benefit the Related Defendants and itself at the District's expense, is a dispute regarding WBA's "services." *Bolsa*, 2011 WL 6370409 at *7 (court should look at factual basis of claims); *Breaker*, 23 P.3d at 1284 (same). Further, the accounting claim, as alleged in the FAC, is entirely derivative of Plaintiff's breach of fiduciary duty and unjust enrichment claims, and is factually based on WBA's performance of legal services; it is not a dispute over the firm's fee billing rate or method. *See* FAC, ¶¶306-310.

26. Thus, the Court concludes that the subject matter of all the claims raised in the FAC arose "with respect to" the legal services rendered by WBA pursuant to the engagement agreements. Therefore, the subject matter of these claims falls within the scope of the arbitration agreements.

27. Regarding the temporal element, the parties agree that the arbitration agreements exist only in the 2013, 2014, and 2015 engagement contracts, and that the arbitration provisions were clearly limited in temporal scope to the legal services provided under those specific agreements. *See* WBA Motion, Exh. A, B, C (referencing disputes

"pursuant to *this* engagement agreement") (emphasis added); *cf. Coffman v. Provost Umphrey Law Firm, LLP*, 161 F.Supp.2d 720, 725 (E.D. Tex. 2001) (construing similar language narrowly). The parties disagree about when the 2015 agreement terminated, and whether the claims that include both allegations from 2013-2015 *and* allegations from prior to November 2013 should be dismissed.

28. Regarding when the 2015 agreement terminated, the Court agrees with WBA that the 2015 agreement ended when WBA's services ended. Although the firm appears to have provided new engagement contracts every November from 2013 to 2015, there is no new contract on record for November of 2016. The 2015 agreement contains no expiration date. Rather, the termination clause states that the District has the right to terminate WBA's representation at any time, and WBA has the right to terminate based on the Rules of Professional Conduct (including nonpayment of legal fees). WBA Motion, Exh. C. "Upon conclusion of our services, whether due to termination or completion of the work, we will not thereafter be responsible for legal matters for which our services have not been specifically requested…." WBA Motion, Exh. C. Under these terms, the contract continues until the work is complete or until WBA's services are terminated, which appears to have happened in December of 2016. *See* WBA Motion, Exh. D (special disclosure of costs for legal services in connection with bonds dated 10/26/2016); FAC, ¶¶245-250 (timing of recall petition and 2016 restructuring and refinancing); FAC, ¶77 (alleging Snowmass Ventures acquired Base Village in December of 2016); FAC, ¶209 (alleging that Related sold the project to Snowmass Ventures on 12/23/2016); Response Exh.3 (12/19/17 letter stating that WBA was terminated as counsel "over a year ago"). Regardless of the specific date of termination, all of the claims in the FAC relate to WBA's actions while it was still representing District 2.

29. Regarding WBA's actions *prior* to the adoption of the first arbitration agreement in November of 2013, Plaintiff argues that the arbitration agreements cannot be applied retroactively, and therefore the only claims the Court can sever for arbitration are those based "*entirely* on WBA's conduct *after* November 13, 2013." In contrast, WBA argues that any claim based on WBA's actions prior to 2013 would be barred by the applicable statutes of limitations, and any claims combining allegations from before and after 2013 should be sent to arbitration because "District 2 must rely upon the later actions of WBA from 2013 to 2016 to bring the much older factual bases for its claims … within the applicable statute of limitation."

30. Civil claims under COCCA are subject to a five-year limitations period. §13-80-103.8(1)(d), C.R.S.; *Clementson v. Countrywide Financial Corp.*, 464 F.App'x 706, 712 n.2d (10th Cir. 2012). Five years prior to December 1, 2017, the date the action was commenced, is December 1, 2012.

31. When considering whether criminal activity that is time-barred can be used as a predicate act for a COCCA violation, the Colorado Court of Appeals has held that a defendant may be held liable under COCCA so long as he committed at least *one* predicate act within its 5-year limitations period. *See People v. Davis*, 296 P.3d 219, 228-29 (Colo. App. 2012). "Thus, if one predicate act of racketeering activity is not time-barred, additional predicate acts, regardless of whether they could be brought as substantive claims, 'are simply elements of the [COCCA] violation.'" *Id.* at 228 (quoting *United States v. Field*, 432 F.Supp. 55, 59 (S.D.N.Y. 1977)).

32. Here, the FAC alleges that WBA committed the following predicate acts within the five-year limitations period:

    a. Mail/wire frauds with respect to annual reports sent to the Town of Snowmass every year between 2013 and 2016.[2]
    b. Securities fraud in 2016 in connection with the refinancing.
    c. Defrauding a secured creditor/debtor in 2016 in connection with the movement of property from District 2 to District 1.

33. The FAC additionally alleges the following predicate acts that are outside the five-year statute of limitations, and therefore constitute "simply elements of the [COCCA] violation." *Davis*, 296 P.3d at 228.

    a. Mail/wire frauds with respect to annual reports sent to the Town of Snowmass every year from 2008 to 2012.
    b. Securities fraud in 2008 in connection with the bond issuance.

34. The parties do not cite any Colorado case law directly on point regarding continuing crimes that encompass both a time period covered by an arbitration agreement and a time period prior to its execution, but several cases from other jurisdictions are instructive.

35. In *Bolsa*, an attorney moved to dismiss claims related to his performance of legal services. 2011 WL 6370409 at *6. The court found that the arbitration clause in that case

[2] The alleged mail/wire fraud in 2013, which occurred within the COCCA statute of limitations, likely also occurred prior to the execution of the first arbitration agreement in November of 2013. The FAC does not specify the date that the 2012 annual report was sent to the Town of Snowmass, but it was likely in March or April of 2013. *See* FAC, ¶232 (2009 annual report sent on March 23, 2010); ¶234 (2010 annual report sent on April 1, 2011); ¶236 (2011 annual report submitted on March 14, 2012).

was narrow, because it applied only to disputes "concerning the interpretation of the terms" of the agreement. *Id.* at *6-9. The court explained that when an arbitration clause is broad, "there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it." *Id.* at *7. However, when an arbitration clause is narrow, "a dispute is subject to arbitration only if it relates to an issue that is on its face within the purview of the clause, and collateral matters will generally be beyond its purview." *Id.*; *see also Coffman*, 161 F.Supp.2d at 725 (reaching similar conclusion); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 488-89 (Miss. 2005) (same). Applying this rule, the *Bolsa* court found that certain claims were outside the scope of the arbitration agreement because they were based on duties imposed by law, not by the contract. *Bolsa*, 2011 WL 6370409 at *9. The court then stated, in addition, that "these claims are based *in part* on events that occurred before the execution of the letter agreement," with "no indication that the parties intended the arbitration agreement to apply retroactively." *Id.* (emphasis added). In *Kenworth of Dothan, Inc. v. Bruner-Wells Trucking, Inc.*, 745 So.2d 271, 276 (Ala. 1999), the Supreme Court of Alabama similarly held that if an arbitration clause contains broad language either encompassing "all transactions" between the parties or specifically making the agreement retroactive, it must be applied to past events. However, if the agreement contains no such language, it cannot be applied retroactively. *Kenworth*, 745 So.2d at 276.

36. Here, the arbitration agreement does not purport to apply retroactively. Although the language of the agreement is broad with respect to the subject matter of the issues subject to arbitration, it is temporally narrow, as WBA concedes. "The narrow [temporal] provision that the parties chose to use in their agreements evidences the parties' intent to limit the [temporal] scope of arbitration." *Coffman*, 161 F.Supp.2d at 727. Under these circumstances, the Court concludes that the parties would not have "reasonably expected" the agreement to encompass claims based on actions that began prior to its execution. *Breaker*, 23 P.3d at 1283; *Eychner*, 870 P.2d at 490; *cf. Coffman*, 161 F.Supp.2d at 727; *Wedgeworth*, 911 So.2d at 488. Therefore, the COCCA claim, which is based on actions beginning prior to the execution of the agreement, is not governed by the arbitration agreement.

37. Unlike the COCCA claim, which alleges a continuing association with an enterprise through a pattern of racketeering, Plaintiff's breach of fiduciary duty, aiding and abetting, conspiracy, unjust enrichment, and accounting claims involve separate acts during distinct time periods. For example, WBA allegedly breached a fiduciary duty to the District in 2008 when it approved Related's issuance of the 2008 bonds based on an inflated projected value for the Base Village Project, knowing that District 2 could not reasonably be expected to repay its debt. In 2012, WBA allegedly breached a duty to the

District by facilitating the transfer of the Base Village project back to the Related Defendants, knowing they were "unfriendly to the District." In 2013, WBA allegedly breached a duty by advising Related how to restructure the District's debt to Related's benefit and the District's detriment. In 2016, WBA allegedly breached a duty by assisting Related and Snowmass Village in moving taxable property out of District 2 into District 1, in violation of the service agreement. These are each separate alleged breaches of fiduciary duty. They are separate acts and are not dependent on one another for their proof.

38. As such, any claims for breach of fiduciary duty, aiding and abetting, civil conspiracy, unjust enrichment, and accounting based on WBA's conduct on or after November 13, 2013 are subject to arbitration. The motion to dismiss those claims is GRANTED. Plaintiff should litigate those claims in arbitration pursuant to the arbitration agreement. The claims based on WBA's conduct prior to November 13, 2013 are not subject to the arbitration clause, and the Rule 12(b)(1) motion to dismiss those claims on that basis is DENIED. This Court addresses below the timeliness of the remaining claims for breach of fiduciary duty, aiding and abetting, civil conspiracy, unjust enrichment, and accounting based on WBA's actions prior to November 13, 2013.

B. Statute of Limitations

39. Defendants argue that Plaintiff's claims are barred by the statute of limitations.

40. "A statute of limitations defense may be considered on a motion to dismiss where the bare allegations of the complaint reveal that the action was not brought within the required statutory period." *SMLL, LLC v. Peak Nat. Bank*, 111 P.3d 563, 564 (Colo. App. 2005); *Meyerstein v. City of Aspen*, 282 P.3d 456, 470-71 (Colo. App. 2011). In other words, the FAC would have to reveal on its face that the action accrued outside the statute of limitations for each claim. "Where the complaint shows on its face that the claim was brought outside the statute of limitations, a party who contends that the statute of limitations should be tolled has the burden to establish a basis for such tolling." *SMLL*, 111 P.3d at 565.

41. Limitations periods are calculated with reference to when an action is "commenced." *See, generally*, §13-80-102, C.R.S.; §13-80-103, C.R.S.; *Malm v. Villegas*, 342 P.3d 422, 425 (Colo. 2015). "A civil action is commenced (1) by filing a complaint with the court, or (2) by service of a summons and complaint" which hasn't yet been filed with the court. C.R.C.P. 3(a). This action was commenced when the complaint was filed on December 1, 2017. The complaint was served on February 14, 2018, twelve days after the deadline imposed by C.R.C.P. 4(m).

42. The Related Defendants argue that the limitations period should be calculated from the date of service, not the date of filing, because late service was unexcused. In *Malm*, the Court held that service of process can be effected, under certain circumstances, even after the applicable statute of limitations has run, so long as the action was commenced within the limitations period. *Malm*, 342 P.3d at 425. "Because the statute of limitations merely bars the *commencement* of an action after a designated point in time, in and of itself it imposes no direct limitation on the time for service following commencement by filing." *Id.* (emphasis added).

43. The Court noted that "although the statute of limitations for commencing an action may itself be complied with upon the filing of a complaint, the policy considerations supporting a specific limitations period for the particular type of action at issue and those requiring service of process within a reasonable time after filing are largely identical and would be entirely defeated if service could be delayed indefinitely by filing a complaint within the statutory limitations period." *Id.* Thus, the Court concluded that "a delay between the filing and service of a complaint which actually extends beyond the applicable statute of limitations can be considered reasonable only to the extent that it is the product of either wrongful conduct by the defendant or some formal impediment to service." *Id.* at 426.

44. In other words, *Malm* does not change the date used to determine whether the action was filed within the statute of limitations. The action must still be commenced/filed prior to the expiration of the statute of limitations. However, if the case was filed within the statute of limitations but unreasonably served on the Defendants after its expiration, Defendants may move for dismissal under C.R.C.P. 4(m) and *Malm*. Defendants have effectively done so here, but both *Malm* and *Curry v. Zag Built*, LLC, 433 P.3d 125, 134 (Colo. App. 2018) hold that the amount of delay at issue here is presumptively reasonable. The Court, moreover, finds nothing sufficient to overcome that presumption and thus declines to dismiss on this basis.

45. The relevant limitations periods are discussed below. Section 13-80-108, C.R.S. (2017) governs accrual. In general, claims accrue when the injured person had knowledge of facts that would put a reasonable person on notice of the nature and extent of the injury, and that the injury was caused by wrongful conduct. *Colburn v. Kopit*, 59 P.3d 295, 296-97 (Colo. App. 2002); §13-80-108(1), C.R.S. "A cause of action for fraud, misrepresentation, concealment, or deceit shall be considered to accrue on the date such fraud, misrepresentation, concealment, or deceit is discovered or should have been discovered by the exercise of reasonable diligence." §13-80-108(3), C.R.S. A breach of fiduciary duty claim accrues when the injury and its cause are known or should have been known by the exercise of reasonable diligence. *Prospect*, 443 P.3d at 152. This standard is objective, and focuses on the plaintiff's knowledge of facts that would put a

reasonable person on notice of the general nature of damage and that the damage was caused by the defendant's conduct. *Colburn*, 59 P.3d at 297. "The plaintiff need only know or have reason to know the facts that underlie or are essential to the cause of action, but need not know the precise legal theory upon which the action may be brought." *Id.*; *Prospect*, 443 P.3d at 152. "In the context of a fiduciary relationship, facts which would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required." *Hansen v. Lederman*, 759 P.2d 810, 812 (Colo. App. 1988).

46. "[W]hen a particular claim accrues and whether [it] is time-barred … ordinarily are questions of fact for a jury to resolve." *Sterenbuch v. Goss*, 266 P.3d 428, 432 (Colo. App. 2011); *Colburn*, 59 P.3d at 297.

1. The CSPSA's 30-day time limit

47. Defendants argue that the 30-day time limit in the CSPSA bars Plaintiff's claims. It is undisputed that the district elected to adopt the CSPSA, including Section 212's 30-day statute of limitations, in its Bond resolutions.[3] However, Plaintiff argues that the CSPSA is inapplicable here because "the plain language and legislative history" of the act indicate that its limitations period applies only to challenges to the "official acts involved in authorizing municipal bonds," such as whether all the board members were duly qualified, or whether there was a quorum at the meeting authorizing the bonds.

48. In construing statutes, the Court looks first to the plain language of the statute and construes it according to its ordinary meaning in order to determine the legislature's intent. *Perfect Place, LLC v. Semler*, 426 P.3d 325, 332 (Colo. 2018). Each statute must be read in context, reading the statutes as a whole and "construing each provision consistently and in harmony with the overall statutory design, if possible." *Id.*; *People v. Frazier*, 77 P.3d 838, 839 (Colo. App. 2003). If the statutory language is ambiguous (*i.e.*, it lends itself to alternative constructions or its intended scope is unclear), or if it is in conflict with other provisions, the Court may look to legislative history, prior law, the consequences of a given construction, and the goal of the statutory scheme. *Frazier*, 77 P.3d at 839.

49. The CSPSA states: "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." §11-57-212, C.R.S. (emphasis added).

[3] Districts issuing securities may elect to apply the provisions of the CSPSA to the issuance. §11-57-204, C.R.S.

50. The phrase "by a public entity" could be read to modify only the phrase "the authorization or issuance of securities," or it could be read to modify, in addition, the phrase "any legislative acts or proceedings." The latter is the more logical and internally consistent reading. It is only public entities or their agents that can engage in "legislative acts or proceedings in connection with the authorization or issuance of securities by a public entity." An act of issuance is defined as "an ordinance, resolution, or decision to issue a security pursuant to delegated authority *adopted by the issuing authority or officer of a public entity* for the purpose of issuing a security …." §11-57-203(1), C.R.S. (emphasis added).

51. Further, a claim with respect to any "legislative act or proceeding" by a public entity appears to refer to procedural challenges, not substantive ones. *Cf.* §11-51-501(1),(5), & 11-51-604(8), C.R.S. (three year statute of limitations for actions claiming fraud in relation to the offer, sale or purchase of securities); §11-57-204(1), C.R.S. (nothing in the Supplemental Public Securities Act limits the provisions of Title 11, Article 51).

52. It would make little sense to read "proceedings" broadly to include any "actions" by *any entity* in connection with the authorization or issuance of securities by a public entity. This reading would give broad immunity to every entity involved in such a transaction after 30 days, while limiting the District's own power to seek redress of wrongs.[4]

53. The legislative declaration states that the CSPSA's purpose is to provide *public entities* with the option to elect to apply the provisions of the statute when issuing securities, due to changes in the public securities market and recent technological advances. §11-57-202, C.R.S. The statute was intended to serve a public purpose and "promote the health, safety, security, and general welfare of the people of the state of Colorado." §11-57-202, C.R.S. Reducing the statute of limitations against public entities based on alleged procedural irregularities would accomplish this goal and provide certainty. *See, e.g.,* Rule 106(b), C.R.C.P. Reducing the statute of limitations against private actors who commit fraud—or abuse public entities under their control—in order to profit at the expense of taxpayers would not.

54. While no appellate court has addressed this issue, the Court of Appeals has previously construed the statute narrowly, concluding that it applies only to "the authorization or issuance of securities," and holding that it did not bar claims that challenged the creation of the district and the taxes levied against the plaintiffs to pay off the bonds issued by

[4] In general, the statute of limitations in relation to securities transactions is 2 or 3 years. §11-51-604(8), C.R.S. The Supplemental Public Securities Act, which contains the 30-day provision, states that it shall not be construed to limit the provisions of Title 11, Article 51. §11-57-204(1), C.R.S.

the district. *Landmark Towers Association, Inc. by EWG-GV, LLC v. UMB Bank, N.A.*, 436 P.3d 1139, ¶22 (Colo. App. 2018).

55. Reading this statute narrowly, in conjunction with the statutory scheme as a whole, the Court concludes it is intended to limit lawsuits seeking to invalidate acts of public entities, and does not extend to actions of private individuals or entities involved in a securities transaction.[5]

56. Here, the first cause of action (COCCA), is predicated on the actions of the alleged Enterprise to fraudulently "manufacture self-serving financial transactions in the name of District 2 that benefited Related and other members of the COCCA Enterprise and harmed District 2." FAC, ¶263(a). "These transactions included, but are not limited to, the 2008 bond issuance, the 2013 refinancing, the 2016 refinancing and improperly moving property from District 2 to District 1." FAC, ¶263(a). Likewise the other claims in the FAC involve the same alleged fraud and misuse of the district by the same private individuals and entities for personal gain.

57. Assuming, for purposes of this motion, that each of the factual allegations in the FAC are true, the claims are not challenging "legislative acts or proceedings in connection with the authorization or issuance of securities by a public entity." §11-57-212, C.R.S. Although the wrongs alleged were perpetrated "in connection with the authorization or issuance of securities by a public entity," the statute does not apply to every act of every actor relating to such transactions. §11-57-203(1), C.R.S.; §11-57-212, C.R.S. It applies, instead, to acts of the public entities involved.

58. The Court accordingly concludes the CSPSA statute of limitations does not apply. The motion to dismiss based on the CSPSA is DENIED.

2. 3-year statute of limitations for breach of fiduciary duty, securities fraud, civil conspiracy, unjust enrichment, and accounting

59. The purpose of the statutes of limitations is to promote justice, discourage unnecessary delay, and forestall prosecution of stale claims. *Dean Witter Reynolds Inc. v. Hartman*, 911 P.2d 1094, 1096 (Colo. 1996). A statute of limitations may be equitably tolled when flexibility is required to accomplish the goals of justice. *Id.* For example, courts have applied the doctrine of equitable tolling when the defendant's wrongful conduct

[5] As Plaintiff notes, the legislative history also supports this narrow reading of the law as intended to limit actions against public entities that challenge the procedure involved and thereby affect the validity of the bonds issued. Thus, even if the Court found the statutory language ambiguous, it would reach the same result.

prevented the plaintiff from asserting his claims in a timely manner. *Id.* The underlying principle in these cases is "that a person should not be permitted to benefit from his … own wrongdoing." *Id.* at 1096-97. Further, courts have found that it is unfair to penalize a plaintiff for "circumstances outside his … control, so long as the plaintiff makes good faith efforts to pursue the claims when possible." *Id.* at 1097-98; *see also Neuromonitoring Associates v. Centura Health Corp.*, 351 P.3d 486, 490 (Colo. App. 2012) ("Equitable tolling of a statute of limitations is limited to circumstances in which either a defendant wrongfully impedes a plaintiff's ability to bring the claim, or truly extraordinary circumstances prevent a plaintiff from filing the claim despite diligent efforts.").

60. The statute of limitations is three years for breach of fiduciary duty claims under §13-80-101(1)(a), (c) & (f) and securities fraud claims under §11-51-604(8), C.R.S. The civil conspiracy claim is governed by the underlying causes of action (three years), and the unjust enrichment claim is subject to a three-year statute of limitations. *See Sterenbuch*, 266 P.3d at 432, 435-37. An accounting is an equitable claim subject to laches, but the basis of this claim is the alleged breach of fiduciary duty and unjust enrichment, which are subject to a three-year statute of limitations. Plaintiff does not dispute that this claim is also subject to a three-year statute of limitations.

61. Working backwards, the action here was commenced on December 1, 2017. Thus, Plaintiff's breach of fiduciary duty, securities fraud, civil conspiracy, and unjust enrichment claims are within the statute of limitations if they accrued on or after December 1, 2014. If these claims accrued *before* December 1, 2014, the action is untimely absent tolling.

a. <u>The Related Defendants</u>

62. The FAC's allegations based on the Related Defendants' actions in 2016 are within the statute of limitations. FAC, ¶¶209, 211(b), 213-14, 217, 226-27, 278, 280(c), 286(d), 287, 289, 291(a),(c).[6] The FAC does not reveal on its face that they are untimely. *SMLL*, 111 P.3d at 564; *Meyerstein*, 282 P.3d at 470-71. The motion to dismiss these claims is DENIED.

63. The remaining allegations of securities fraud, breach of fiduciary duty, aiding and abetting, civil conspiracy, unjust enrichment, and accounting against Related occurring prior to December 1, 2014, would be barred unless the FAC plausibly alleges that Plaintiff did not become aware of its injuries or their cause until at least December 1,

[6] This Court addresses Defendants' arguments about the plausibility of these claims elsewhere.

2014, or establishes a basis for equitable tolling. *SMLL*, 111 P.3d at 564-65; *Colburn*, 59 P.3d at 296-97; *Prospect*, 443 P.3d at 152; *Hartman*, 911 P.2d at 1096; §13-80-108(3), C.R.S.

64. The Related Defendants argue Plaintiff knew about the conduct supporting its claims before 2013 because "the District itself issued the bonds, spent and accounted for the bond proceeds, and refinanced the debt." Plaintiff does not dispute this, but argues that the statute of limitations should be equitably tolled because the Related Defendants made it impossible for District 2 to file suit against it by controlling District 2's board of directors until 2017.

65. In support of this position, Plaintiff invokes the doctrine of adverse domination. Colorado's appellate bench has not had occasion to adopt this doctrine, but a majority of federal circuits—including the Tenth—have done so in the course of applying the law of other states. *See, e.g., FDIC v. Appling*, 992 F.2d 1109, 1115-16 (10th Cir. 1993) (control of a corporation by culpable directors precludes the possibility of filing suit because they cannot be expected to sue themselves or initiate an action contrary to their own interests); *Wing v. Dockstader*, 482 Fed.Appx. 361, 364-65 (10th Cir. 2012) ("as long as a corporation is controlled … by the 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. Buchanan*, 533 Fed.Appx. 807, 810-11 (10th Cir. 2013) (same). While Colorado has not explicitly adopted the doctrine, it does provide for equitable tolling when the defendant wrongfully impedes the Plaintiff's ability to file its claims. *See Hartman*, 911 P.2d at 1096-97 (equitable tolling a proper remedy where Defendant's wrongful conduct prevented Plaintiff from asserting its claims in a timely manner); *Neuromonitoring Associates*, 351 P.3d at 490 (same).

66. Whether this doctrine should apply to public entities as well as private corporations is an issue of some concern. Even the most casual observer of American politics recognizes that officeholders come and go, and often act in ways that directly repudiate the actions of prior officeholders. The proposition that this sort of normal political change would suffice to toll the statute of limitations strikes the Court as sufficiently absurd to answer itself. The average local government—even if nominally a "corporation" for purposes of state law—is easily distinguished from a private corporation for this and a variety of other reasons, and the doctrine correspondingly inapplicable.

67. Special districts, however—particularly those like District 2 at the outset of a development project—are not so obviously exempted from the doctrine. The decisions in *Landmark* and *Tallman Gulch* recognize that the equities in such cases may differ from the typical local government scenario, because the special district may well be

wholly or substantially controlled by the developer. Those decisions also recognize how developers in such positions of control can exploit special districts for the developer's gain, and at the expense of future taxpayers.

68. This situation strikes the Court as analogous to that of a declarant who establishes a condominium association. The legislature has expressly provided for tolling the statute of limitations in such circumstances. *See* § 38-33.3-311, C.R.S. (2019) ("Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates.") The Court is persuaded, in light of these various authorities, to apply the adverse domination doctrine here.

69. Thus, with respect to Related's alleged acts of securities fraud, breach of fiduciary duty, aiding and abetting, and unjust enrichment that occurred prior to December 1, 2014, Plaintiff has plausibly alleged facts sufficient to establish a basis for equitable tolling during the time that Related controlled the Board. The limitations issue is therefore for the trier of fact.

70. However, Related was not in control of the District's Board during the entire period from 2008 to 2017. Related allegedly controlled the Board from 2008 to 2010, and again from September 28, 2012 to December 23, 2016, by handpicking its own employees and placing them on the Board. FAC, ¶¶4, 6-7, 11, 15, 19, 21, 76-77, 81-82, 85 & n.4, 120, 124-25, 155-158, 172-73, 181, 209.[7] Hypo and the Lowe Defendants controlled the Board from July 9, 2010 – September 28, 2012, and are not Related subsidiaries. FAC, ¶¶158-161, 174. Further, the FAC alleges that Snowmass Ventures bought the Base Village project on December 23, 2016 and controlled the board until February of 2017, when the Board allegedly became independent for the first time. FAC, ¶9, 77-78, 209. Snowmass Ventures is not a Related subsidiary. FAC, ¶¶49-56, 66-67.

71. There is no basis for tolling claims against Related while Hypo controlled the board. Hypo, the Lowe Defendants, and Defendant WBA were adverse to Related from at least July 9, 2010 until the Spring of 2012, and were not alleged to be colluding with Related during that time. FAC, ¶¶156-161, 174; *see also* FAC ¶158 (Hypo sued Related over the Base Village project); FAC ¶¶162-170, 172 (Hypo sued Related after Related allegedly improperly objected to an extension of the letter of credit on the 2008 bonds, which resulted in the issuance of the Guarantor Bonds); FAC ¶¶177-178 (prior to settlement, James DeFrancia of Lowe Enterprises, who served on the Board, had described Related as unfriendly to the District, and considered a number of ways in 2011 to prevent Related

[7] While this fact is disputed by Defendants, the Court must accept the factual allegations in the complaint as true for purposes of deciding the motions to dismiss, and may not go outside the FAC in ruling on the statute of limitations issue.

from acquiring the Guarantor Bonds).[8] Thus, Plaintiff was not precluded from filing its earlier claims against Related from July 9, 2010 to the Spring of 2012, while Hypo/Lowe controlled the District and were adverse to Related. *Cf. Hartman*, 911 P.2d at 1098-99 (equitable tolling may not be employed when the Plaintiff was not precluded from filing claims in a timely manner); *Brodeur v. American Home Assurance Company*, 169 P.3d 139, 149-50 (Colo. 2007) (statute of limitations was not equitably tolled where plaintiff was not truly prevented from bringing a claim by circumstances outside of his control).

72. In the Spring of 2012, Hypo allegedly conspired with Related to give back control of the District and the Guarantor Bonds as part of a settlement. However, Plaintiff must plausibly plead that the Defendant in question here, (Related) unlawfully impeded its ability to file its claims. *Neuromonitoring Associates*, 351 P.3d at 490. Plaintiff has not alleged that Related had any such ability to impede Plaintiff from filing while Hypo/Lowe controlled the Board. Thus, the period of equitable tolling did not begin again until September 28, 2012, when Related reacquired the Base Village project and allegedly took control of the Board.

73. Related lost control of the Board again on December 23, 2016, when Snowmass Ventures acquired the Base Village project. FAC, ¶9, 77-78, 209. Plaintiff has not plausibly alleged that Related precluded it from filing its earlier claims against Related from December 2016 on, and therefore has not established a basis for equitable tolling during that time.

74. In sum, taking the allegations in the FAC as true for purposes of this motion, Plaintiff has plausibly alleged that the statute of limitations on the claims against Related was tolled from 2008 until July 9, 2010, ran from July 9, 2010 to September 28, 2012, and was tolled again from the September 28, 2012 to December 23, 2016.

75. The complaint was filed on December 1, 2017. A total of 343 days ran from December 23, 2016 to December 1, 2017, leaving 752 days in the 3-year statute of limitations. Going backwards from September 28, 2012, subtracting the remaining 752 days results in a date of September 7, 2010. Therefore, the Court concludes that, taken as true, the complaint provides sufficiently plausible allegations to avoid dismissal under Rule 12(b)(6) on statute of limitations grounds of any claims accruing on or after September 7, 2010. Any allegations of securities fraud, breach of fiduciary duty, aiding and abetting, civil conspiracy, and unjust enrichment against Related accruing prior to September 7, 2010 are untimely.

[8] Plaintiff's Omnibus Opposition acknowledges that Hypo and its board-appointees were "temporarily adverse to Related." Opposition, p.61.

76. Therefore, the Court DENIES the Related Defendants' motion to dismiss all claims of securities fraud, breach of fiduciary duty, aiding and abetting, civil conspiracy, and unjust enrichment occurring on or after September 7, 2010, and the derivative accounting claim. The Court GRANTS Related's motion to dismiss all claims of securities fraud, breach of fiduciary duty, aiding and abetting, civil conspiracy, and unjust enrichment occurring prior to September 7, 2010, and the derivative accounting claim. To the extent that the dates discussed above, Plaintiff's actual knowledge about the injury and its cause, or Related's actual control of the Board during the relevant times are in dispute with respect to the remaining claims, those are issues of fact for the jury.

b. Hypo and the Lowe Defendants

77. With respect to Hypo and the Lowe Defendants, Plaintiff alleges that they engaged in breach of fiduciary duty, aiding and abetting, civil conspiracy, and unjust enrichment. Their first alleged involvement occurred in the Spring of 2012, and their last alleged involvement occurred on September 28, 2012, when Related retook control of the Board. FAC ¶21, 75, 161, 172-75.[9]

78. As discussed above, Hypo was initially adverse to Related because the Related Defendants had defaulted on their loans from Hypo, and there were a "spate of lawsuits" between them resulting in the foreclosure, with a Lowe subsidiary selected as the receiver, the issuance of the guarantor bonds, and Hypo's loss of millions of dollars. FAC, ¶¶158-59, 162-169. "After at least four lawsuits between Related affiliates and [Hypo] – including a suit that HRECC filed against Related WestPac and Base Village Owner for illicit acquisition of the Guarantor Bonds – Related settled all claims with [Hypo] and agreed to repurchase the Base Village project for $90 million as part of the settlement." FAC, ¶172. Ownership of the Base Village project returned to Related, and Guarantor Bonds were transferred to a subsidiary of Hypo, and pledged to Related WestPac as collateral during the Spring and Summer of 2012. FAC, ¶¶172-73. Hypo allegedly breached its fiduciary duty to Plaintiff in reaching this settlement, and conspired with Related, using the "illicit debt as a bargaining chip in the larger set of negotiations." FAC, ¶¶174-75. Once control of the District returned to Related, Hypo and the Lowe Defendants had no further involvement.

[9] Although Plaintiff's Opposition argues that Hypo and the Lowe Defendants were part of an "ongoing conspiracy," the factual allegations in the complaint do not support that argument. Rather, the FAC alleges their discreet involvement in a single alleged conspiracy to return control of the district to Related, which began in the Spring of 2012 and was completed on September 28, 2012.

79. Defendant has not explained how the later control of its board by the Related Defendants prevented it from discovering the information about the foreclosure and receivership proceedings, or the transfers of the Guarantor Bonds. In fact, the FAC establishes that the District was aware of these events, since it was controlled by Hypo and the Lowe Defendants at the time that Hypo sued Related over its actions triggering the issuance of the Guarantor bonds, and Board members at the time described Related as "unfriendly" to the District and tried to prevent it from acquiring the bonds. FAC, ¶¶172, 176-78. Similarly, the District was aware of the settlement between Hypo and Related that transferred its ownership back to Related and shifted control of the Board from Hypo to Related. FAC, ¶¶173-74, 180.

80. The FAC plausibly alleges that the Hypo/Lowe-controlled board prevented the District from objecting to the transfer of the Guarantor Bonds as part of its own settlement with Related. FAC, ¶180.

81. However, to establish a basis for tolling, Plaintiff must plausibly plead that the Defendant in question here, (Hypo/Lowe) unlawfully impeded its ability to file its claims. *Neuromonitoring Associates*, 351 P.3d at 490. Plaintiff has not alleged that Hypo/Lowe had any such ability once Related controlled the Board. Thus, the breach of fiduciary duty, aiding and abetting, unjust enrichment, and civil conspiracy claims against Hypo and Lowe began to run on September 28, 2012, when Related took over control of the Board, and ran on September 28, 2015. The Complaint was filed more than two years later.

82. Hypo's and Lowe's motions to dismiss the breach of fiduciary duty, aiding and abetting, unjust enrichment, conspiracy, and accounting claims on statute of limitations grounds are therefore GRANTED.

c. Snowmass Ventures and North Slope

83. Defendants Snowmass Ventures and North Slope join in Related's arguments regarding the statute of limitations, but the allegations against Snowmass Ventures and North Slope all took place in 2016, approximately 1 year before the complaint was filed. FAC, ¶¶9, 33-34, 36-37, 40-42, 63, 77, 215-24. Therefore, the FAC does not reveal on its face that Plaintiff's claims against Snowmass Ventures and North Slope are untimely. Their motions to dismiss on statute of limitations grounds are DENIED.

d. CLA

84. Defendant CLA allegedly provided accounting services to the District from 2006 to 2016. FAC, ¶¶62, 146, 243. CLA concedes that the claims concerning the 2016 Budget are timely, but argues that the other claims are time barred.

85. The first allegation of wrongdoing against CLA is based on its cost certification in 2008. FAC, ¶146. The FAC also claims that CLA wrongly failed to disclose material changes in the Districts' financial status when it authored annual reports between 2009 and 2016. FAC, ¶¶243-44.

86. The breach of fiduciary duty, aiding and abetting, conspiracy, unjust enrichment, and derivative accounting claims against CLA based on its actions from December 1, 2014 to December 1, 2017 are timely because they were filed within three years. The claims against CLA based on its actions prior to December 1, 2014 are untimely absent equitable tolling.

87. As explained above, Plaintiff must plausibly plead that the Defendant in question (here, CLA) unlawfully impeded its ability to file its claims. *Neuromonitoring Associates*, 351 P.3d at 490. Plaintiff has not alleged that CLA ever controlled the Board or had any ability to impede Plaintiff from filing any claims against it.

88. Therefore, accepting the allegations in the FAC as true, CLA's motion to dismiss is GRANTED as to the breach of fiduciary duty, aiding and abetting, conspiracy, unjust enrichment, and derivative accounting claims based on actions occurring prior to December 1, 2014.

e. Davidson

89. The allegations against Davidson stem from the 2008 bond issuance, the 2013 refinancing, and the 2016 refinancing. FAC, ¶¶15, 26-28, 36-37, 263(f), 267(a)(iii),(c).

90. The breach of fiduciary duty, aiding and abetting, securities fraud, conspiracy, unjust enrichment, and accounting claims against Davidson based on 2016 refinancing are timely because they were filed within three years. The claims against Davidson based on its actions in 2008 and 2013 are untimely absent equitable tolling.

91. As explained above, Plaintiff must plausibly plead that the Defendant in question here, (Davidson) unlawfully impeded its ability to file its claims. *Neuromonitoring Associates*, 351 P.3d at 490. Plaintiff has not alleged that Davidson ever controlled the Board or had any such ability to impede Plaintiff from filing any claims against it.

92. Therefore, the motion to dismiss is GRANTED as to the allegations of securities fraud, breach of fiduciary duty, aiding and abetting, conspiracy, unjust enrichment, and accounting based on actions prior to December 1, 2014, including the 2008 bond issuance and the 2013 refinancing. The motion is DENIED as to the 2016 refinancing.

f. WBA

93. WBA allegedly breached its fiduciary duty, aided and abetted a breach of fiduciary duty, engaged in a civil conspiracy, and committed unjust enrichment by acting for the benefit of the Related Defendants rather than the District from 2004 to 2010 and from 2012 to November 13, 2013. The remaining claims have been dismissed pursuant to the arbitration clauses in the 2013, 2014, and 2015 engagement contracts.

94. The allegations prior to November 13, 2013 are untimely on their face, absent tolling. *See supra*. As explained above, to establish equitable tolling, Plaintiff must plausibly plead that the Defendant in question here, (WBA) unlawfully impeded its ability to file its claims. *Neuromonitoring Associates*, 351 P.3d at 490. Plaintiff has not alleged that WBA ever controlled the Board or had any such ability to impede Plaintiff from filing its claims.

95. Therefore, the Court GRANTS the motion to dismiss all remaining claims for breach of fiduciary duty, aiding and abetting, civil conspiracy, unjust enrichment, and accounting because they are based on conduct occurring prior to November 13, 2013, which is outside the statute of limitations.

3. COCCA Statute of Limitations

96. As explained above, the civil COCCA claims are subject to a five-year limitations period, which would bar all claims accruing prior to December 1, 2012, absent equitable tolling. §13-80-103.8(1)(d), C.R.S.; *Clementson*, 464 F. App'x at 712 n.2d; *Todd Holding Co., Inc. v. Super Valu Stores, Inc.*, 874 P.2d 402, 405 (Colo. App. 1993) (the COCCA statute of limitations may be tolled until the time of reasonable discovery of the injurious acts).

97. A defendant may be held liable under the COCCA statute so long as he committed at least one predicate act within its 5-year limitations period. *See Davis*, 296 P.3d at 228-29. "Thus, if one predicate act of racketeering activity is not time-barred, additional predicate acts, regardless of whether they could be brought as substantive claims, 'are simply elements of the [COCCA] violation.'" *Id.* at 228 (quoting *Field*, 432 F.Supp. at 59).

98. The FAC alleges the following predicate acts:

a. Mail/Wire frauds pursuant to 18 U.S.C. § 1341 and 1343 committed annually between 2008 and 2016 by WBA, at the direction of the Related Defendants, and facilitated by CLA (*i.e.*, the alleged sending of fraudulent annual reports to the Town of Snowmass Village).
b. Mail fraud committed by Related WestPac in 2009 when it objected to the extension of the letter of credit issued by U.S. Bank in furtherance of a fraudulent scheme.
c. Wire fraud committed by Davidson in 2013 and 2016 when it sent proposals to District 2's directors with financial advice purportedly meant to benefit the District, which was actually provided to assist the Related Defendants in violation of its obligation not to serve dual roles.
d. Bank fraud pursuant to 18 U.S.C. §1344(2) when the Related Defendants obtained funds from U.S. Bank by means of false or fraudulent representations about their use on public infrastructure in 2008, with the help of CLA.
e. Securities fraud in violation of §11-51-501, C.R.S. committed by the Related Defendants when they commissioned false valuations of the Base Village project in 2008.
f. Securities fraud committed by WBA in 2008 and 2016 when it knowingly authored false legal opinions that "went along with the District's offering statements that no amendments were necessary to the Districts' Service Plan before issuing debt."
g. Securities fraud committed by North Slope when it enabled the 2016 refinancing by issuing a false "straw-man financial report."
h. Securities fraud committed by Davidson by intentionally ignoring and obscuring the self-dealing at the heart of the 2008 and 2016 bond refinancings.
i. Defrauding a secured creditor or debtor pursuant to §18-5-206(1), C.R.S. by the Related Defendants at the behest of Snowmass Ventures, and facilitated by WBA when, in 2016, Related moved property from District 2 to District 1.
j. Defrauding a secured creditor or debtor by the Related Defendants in 2011 when they encumbered the 2008 bonds by fraudulently triggering the default to obtain the guarantor bonds.
k. Honest services fraud pursuant to 18 U.S.C. § 1346 by Snowmass Ventures when it made the 2016 refinancing and the movement of property from District 2 to District 1 a condition of the sale of the Base Village project.

FAC ¶267.

99. Assuming these allegations are adequately pled, which the Court discusses below, the FAC pleads at least one predicate act within the relevant 5-year limitations period for the following Defendants: Snowmass Ventures (2016), WBA (2016), the Related Defendants (2016), CLA (2016), North Slope (2016), and Davidson (2016). Therefore, the complaint against these Defendants, on its face, is filed within the statute of limitations. These Defendants' motions to dismiss the COCCA counts on statute of limitations grounds are DENIED.

100. However, the FAC fails to plead a single predicate act within the 5-year limitations period committed by the following Defendants: the Lowe Defendants (September 28, 2012), and Hypo (September 28, 2012). *Davis*, 296 P.3d 219, 228-29 (complaint must allege that *each* Defendant committed at least one predicate act within the limitations period). Therefore, the COCCA claims against them are time barred, and their motions to dismiss are GRANTED.

C. Standing

101. Defendant Davidson argues that Plaintiff lacks standing to bring the claims on behalf of its taxpayers. Davidson makes its entire argument in a single sentence and a footnote citing two cases, *People v. French*, 762 P.2d 1369, 1372 (Colo. 1988) (the general rule regarding third party standing) and *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 41 (Colo. 1995) (the general rule that special districts possess only those powers that are expressly conferred upon it by the constitution and statutes). This bare-bones argument is not sufficient to properly raise and brief the issue of standing for the Court. C.R.C.P. 7(b). Further, the FAC, on its face brings these claims on behalf of the District, not its taxpayers. Therefore, the motion to dismiss on standing grounds is DENIED.

D. Certificate of Review

1. CLA

102. Defendant CLA argues that the claims against it should be dismissed because Plaintiff failed to file a certificate of review. The claims against CLA in the FAC are based on: (1) CLA's 2008 certification of public costs,[10] and (2) CLA's authoring of misleading budgets from 2004 to 2017. FAC, ¶¶13, 146, 188, 243-44. Plaintiff alleges the following claims which are not time-barred: (1) COCCA and conspiracy to commit COCCA, (2) breach of fiduciary duties occurring on or after December 1, 2014, (3) aiding and abetting occurring on or after December 1, 2014, (4) conspiracy occurring on

[10] Plaintiff alleges that the cost certificate purported to have been based on the review of pay applications and invoices which were either non-existent or fraudulent.

or after December 1, 2014, (5) unjust enrichment occurring on or after December 1, 2014, and (6) accounting based on claims on or after December 1, 2014. FAC, ¶¶259-276, 288, 293-310.

103. Section 13-20-602(1)(a), C.R.S. requires that "[i]n *every action* for damages or indemnity *based upon the alleged professional negligence* of … a licensed professional, the plaintiff's … attorney shall file with the court a certificate of review for each … licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint … against such person unless the court determines that a longer period is necessary for good cause shown." In the event that a certificate of review is not filed and the Defendant believes that an expert is necessary to prove the claim of professional negligence, the defense may move for a court order requiring a certificate to be filed. §13-20-602(2), C.R.S. (emphasis added). The certificate must state that the plaintiff's attorney has consulted an expert who believes, based on a review of the facts, that the claim does not lack substantial justification. §13-20-602(3), C.R.S.; *State v. Nieto*, 993 P.2d 493, 496, 502 (Colo. 2000). The failure to file a certificate of review in accordance with the statute "shall result in the dismissal of the complaint." §13-20-602(4), C.R.S.

104. This statute requires a plaintiff to file a certificate of review within sixty days of service "for any claim based on allegations of professional negligence that require expert testimony to establish a prima facie case." *Shelton v. Penrose St. Francis*, 984 P.2d 623, 626 (Colo. 1999); *Martinez v. Badis*, 842 P.2d 245, 249 (Colo. 1992). It was intended to create a procedural prerequisite, and was written broadly to address "all civil actions for professional negligence." *Nieto*, 993 P.2d at 496, 502-03. It should be read broadly and applied to "all cases based upon the alleged professional negligence of a licensed professional." *Id.*; *Williams v. Boyle*, 72 P.3d 392, 397 (Colo. App. 2003).

105. The statute may apply to claims regardless of their formal designation, so long as they are "based upon" alleged professional negligence. *Nieto*, 993 P.2d at 503; *Martinez*, 842 P.2d at 251. "Negligence claims are based on the premise that persons … have certain legislatively or judicially recognized general duties toward others and are required to act reasonably to fulfill those duties." *Martinez*, 842 P.2d at 251; *see also, e.g., Williams*, 72 P.3d at 399-400 (certificate of review required for fraudulent concealment and fraud claims based on defendant physician's alleged intentional misdiagnoses made to conceal his own negligence, the concealment of material facts relating to plaintiff's injuries, and a defamation claim in connection with the alleged misdiagnosis).

106. If a plaintiff determines no expert is required, no certificate need be filed. *Shelton*, 984 P.2d at 626. If an expert is required, a plaintiff must either file the certificate or

request an extension for good cause within the sixty day time limit. *Id.* In the even that nothing is filed within sixty days, the defendant may move to dismiss the case or to require a certificate. *Id.* "In either context, the plaintiff may demonstrate that no expert testimony is required." *Id.*

107. The trial court has discretion to determine whether a certificate of review is required under the circumstances. *Giron v. Koktavy*, 124 P.3d 821, 825 (Colo. App. 2005). If the Plaintiff provides reasons for not filing the certificate that have "arguable merit," a trial court acts within its discretion by not requiring the certificate. *Shelton*, 984 P.2d at 627; *Martinez*, 842 P.2d at 250-51. "However, failure to file a certificate of review, where required, must result in dismissal of the claim." *Giron*, 124 P.3d at 825.

108. Plaintiff does not contest that CLA is a licensed accountant, or that it did not file a certificate of review as to CLA. However, Plaintiff argues: (1) that CLA doesn't specify which claims are subject to the certificate of review, (2) that it is not required to file a Certificate of Review with respect to CLA because expert testimony would not be necessary to establish a prima facie case against CLA, and (3) that Plaintiff would have good cause for late filing.

a. <u>CLA satisfied the requirements of Rule 7(b)(1)</u>

109. Regarding Plaintiff's first argument, CLA clearly argues that all of the claims against it should be dismissed for failure to comply with the certificate of review statute. *See* CLA Motion to Dismiss p. 8 ("CLA asks that the entire Amended Complaint be dismissed for failure to comply with the certificate of review statute."). This is stated with sufficient particularity as required by C.R.C.P. 7(b)(1).

b. <u>A certificate of review is required for all claims against CLA</u>

110. Second, Plaintiff argues that there are no cases requiring a certificate of review for a COCCA, conspiracy, accounting, or unjust enrichment claim. However, as discussed above, the case law is clear that a certificate of review is required for any claim that is "based upon" alleged professional negligence. *Martinez*, 842 P.2d at 251; *Williams*, 72 P.3d at 399-400. "Expert testimony is required to establish a prima facie case of professional negligence in the great majority of cases." *Williams*, 72 P.3d at 397. "The statute applies to all claims against licensed professionals wherein expert testimony is required to establish the scope of the professional's duty or the failure of the professional to reasonably conduct himself … in compliance with the responsibilities inherent in the assumption of the duty." *Martinez*, 842 P.2d at 252; *see also Williams*, 72 P.3d at 397 ("When a plaintiff's claim requires a showing that the licensed professional breached a

duty of care and that duty of care cannot be understood by a lay person without expert testimony, the claim requires a certificate of review.").

111. Plaintiff argues that no expert is required here as to the COCCA, conspiracy, accounting, and unjust enrichment claims because CLA was either "obviously acting outside the scope of" its professional duties, or its breach was so "nefarious that expert testimony is not required to establish liability." Omnibus Opposition, p.70-71. The Court disagrees.

112. As to the COCCA claim, the only subsection of the statute that appears to apply to CLA states, "[i]t is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity …." §18-17-104(3), C.R.S. The racketeering activities CLA is alleged to have participated in are bank fraud in 2008, and mail/wire frauds annually from 2008-2016.

113. The elements of bank fraud are: (1) knowing, (2) execution or attempted execution of, (3) a scheme or artifice, (4) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises. 18 U.S.C. §1344(2).

114. The FAC alleges that CLA aided and abetted the Related Defendants in committing bank fraud by certifying the construction requisition request to induce U.S. Bank to send money to Related to reimburse it for costs purported to have been for public infrastructure, but actually used for private buildings. FAC, ¶¶146, 267(b). Specifically, the Related Defendants were reimbursed for $20 million allegedly spent on a garage which was originally projected to cost $7 million, and $7.1 million for a roundabout that was originally projected to cost $1 million. FAC, ¶141. The FAC also alleges that the parking garage costs should not have been allocated as public infrastructure because some of the costs included the foundations of buildings 4, 5, and 6, which were private condominiums and hotels. FAC, ¶142. "Costs were also misallocated between the public and private components of the garage by incorrectly measuring and allocating the size and number of parking space[s] that District 2 was required to finance." FAC, ¶141.

115. CLA allegedly stated that it had read and considered the amounts and descriptions of the work performed on pay applications from the contractors, reviewed payments to contractors, and confirmed that the money was spent on public infrastructure. FAC, ¶146. This certification was allegedly false. FAC, ¶146. Further, the certification, "as well as the Engineer's report on which it was based," allegedly failed to include actual

invoices or any identification of the actual costs on which the certification was based. FAC, ¶146.

116. Here, to establish that CLA aided and abetted Related in committing bank fraud, Plaintiff must prove that CLA *knew* the cost certification was false. 18 U.S.C. §1344(2). To do so, Plaintiff must show that CLA's review and its ultimate analysis of the public costs was unreasonable under the circumstances, creating the inference that Defendant knew the cost certification was false. *Cf. Williams*, 72 P.3d at 399. Thus, Plaintiff must show the standard of care for review of an Engineer's report and issuance of a cost certification, in order to establish that CLA's conclusions could not have resulted from adherence to the standard of care for professional accountants. *Cf. id.* For example, Plaintiff must establish that the professional standard of care requires the review of actual invoices, rather than just the Engineer's report, and that CLA should have been able to determine based on those invoices and/or the Engineer's report, for example, whether the overall cost of the garage was properly allocated between public and private expenses. "This showing must be made through expert testimony because a lay person would not be able to determine whether [the cost certification] was reasonable" under the circumstances. *Id.*

117. The elements of mail fraud are: (1) having devised or intended to devise a scheme or artifice to defraud, (2) for the purpose of executing such scheme or artifice or attempting to do so, (3) placed in any post office or authorized depository for mail, (4) any matter or thing whatever to be sent or delivered by the Postal Service. 18 U.S.C. § 1341.

118. The FAC alleges that CLA aided and abetted WBA and the Related Defendants in committing mail fraud by authoring annual budgets which were included in the annual reports sent to the Town of Snowmass Village. FAC, ¶244, 267(a)(i). The annual budgets allegedly omitted a summary of significant accounting policies and failed to include any information on the District's worsening debt situation every year between 2009 and 2016. FAC, ¶243-44, 267(a)(i). In turn, the annual report submitted by WBA allegedly contained material misstatements and omissions about the financial status of the Districts, and were sent by mail to the Town of Snowmass Village with the intention of facilitating the COCCA scheme.

119. As with the alleged bank fraud, to establish the mail fraud, Plaintiff must prove that CLA knew the alleged omissions in the annual budgets were misleading or false. CLA disputes that the annual budgets were misleading or that they actually omitted information about the District's debt. Resolving this dispute will require expert testimony addressing the standard of care and reasonableness of the budgets. *Cf. Williams*, 72 P.3d at 399.

120. The same analysis applies to the conspiracy claims within the statute of limitations, because Plaintiff must show that CLA knew the cost certifications and annual budgets were false/misleading in order to prove that CLA agreed to participate in the scheme to defraud.

121. Similarly, with respect to the unjust enrichment claims within the statute of limitations, Plaintiff must prove that Defendant CLA unlawfully profited at Plaintiff's expense. If Defendant CLA acted reasonably within the standard of care for professional accountants, it cannot have been unjustly enriched by the payment of its standard fees for the services it performed. The same analysis applies to the derivative claims for an accounting, to the extent one would be needed.

122. Therefore, the Court concludes that a certificate of review was required for the timely COCCA, conspiracy, accounting, and unjust enrichment claims.

123. As to the breach of fiduciary duty claims within the statute of limitations (*i.e.*, after December 1, 2014), Plaintiff argues that no expert is needed because CLA's failures, omissions, and inaction in the face of fraud were *per se* violations of its responsibilities under Colorado's statutes and rules governing accountants.

124. When a breach of fiduciary claim is "basically a negligence claim[ ] incorporating particularized and enhanced duty of care concepts," it falls within the purview of the statute. *Martinez*, 842 P.2d at 252. The FAC alleges that CLA breached its fiduciary duties to District 2 by preparing misleading annual financial statements that failed to account for material financial changes to the Districts. FAC, ¶288. This is "basically a negligence claim" incorporating a particularized duty of care.

125. Therefore, the Court concludes that a certificate of review was required for all claims filed against CLA.

c. <u>Plaintiff failed to establish good cause for its failure to file a certificate of review as to CLA</u>

126. Third, Plaintiff argues that the Court should find good cause for late filing of the certificate of review.

127. Whether good cause has been shown is a matter within the sound discretion of the trial court. *Williams*, 72 P.3d at 398. This Court must consider the following factors: (1) whether the neglect was excusable, (2) whether the defendant has alleged a meritorious defense or claim, and (3) whether relief from the challenged order would be consistent with the equitable considerations, such as prejudice to the nonmoving party.

Id.; *RMB Servs., Inc. v. Truhlar*, 151 P.3d 673, 676 (Colo. App. 2006). In deciding whether good cause exists, the Court should be guided by the general rule favoring resolution of disputes on their merits. *RMB*, 151 P.3d at 676.

128. Here, the neglect was not excusable. As discussed above, an expert is required here – as in the vast majority of cases – to establish the professional standard of care. *Martinez*, 842 P.2d at 252; *see also Williams*, 72 P.3d at 397. Further, Plaintiff was on notice prior to filing the FAC that CLA believed an expert was required, because CLA included this argument in its first motion to dismiss. Despite this notice, Plaintiff failed to file a certificate of review with the amended complaint or request an extension of time. *Cf. Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1542 (10th Cir. 1996). Therefore, this factor weighs against finding good cause.

129. As to the second factor, Plaintiff has alleged a vast scheme by the Related Defendants to "fleece District 2," in which CLA allegedly participated. However, the FAC provided little or no plausible motive for CLA to intentionally participate in such a scheme in exchange only for its standard fees. As CLA points out in its motion to dismiss, it has a strong economic incentive to avoid engaging in misconduct. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) ("An accountant's greatest asset is its reputation for honesty, followed closely by its reputation for careful work. Fees … could not approach the losses it would suffer from a perception that it would muffle a client's fraud."); *In re Philip Serv. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 470 (S.D.N.Y. 2004) ("a generalized economic interest in professional fees is insufficient to establish an accounting firm's motive to commit fraud"). Therefore, the Court finds that Plaintiff has not plausibly alleged that CLA intentionally engaged in a scheme to defraud the District solely in exchange for its normal accounting fees. While it may be plausible that CLA acted negligently or breached a fiduciary duty owed to the District by failing to adhere to industry norms in preparing the cost certification and/or budgets, the majority of those allegations are time barred. *See supra*. Therefore, this factor weighs primarily against finding good cause.

130. As to the third factor, Plaintiff will be prejudiced by the dismissal of its claims against CLA. However, many of Plaintiff's claims against CLA would have been dismissed anyway, either because they are barred by the statute of limitations or because they fail to state a plausible claim. On the other hand, Defendant CLA has also been somewhat prejudiced by the delay in filing of the certificate of review. The original complaint was filed on December 1, 2017. The purpose of the statute requiring a certificate of review is to avoid unnecessary time and costs in defending professional negligence claims, and to weed out frivolous claims and put the defendants on notice of the "development of the theory of the case." *Nieto*, 993 P.2d at 496, 502-03. Here CLA has had to defend itself for almost a year and a half without the benefit of a certificate of review. However,

discovery has not yet begun and a trial date has not yet been set. Therefore, this factor is neutral.

131. On balance, the Court does not find good cause exists for the failure to file a timely certificate of review. Accordingly, CLA's motion to dismiss is GRANTED.

2. WBA

132. WBA argues that the breach of fiduciary claims against it should be dismissed because Plaintiff filed an untimely certificate of review. All of these claims against WBA have already been dismissed from this action. WBA does not argue that the COCCA claims required a certificate of review. Therefore, the Court does not address WBA's motion to dismiss on this basis.

E. Whether the Third Amended Complaint states Plausible Claims for Relief

i. COCCA

133. The FAC alleges COCCA claims under §18-17-104(1) - (3), C.R.S. and conspiracy to commit COCCA under §18-17-104(4), C.R.S.

134. Subsection (1)(a) provides that "[i]t is unlawful for any person who knowingly has received any proceeds derived, directly or indirectly, from a pattern of racketeering activity … to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise." §18-17-104(1), C.R.S.

135. Subsection (2) provides that "[i]t is unlawful for any person, through a pattern of racketeering activity … to knowingly acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property." §18-17-104(2), C.R.S.

136. Subsection (3) provides that "[i]t is unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity …." §18-17-104(3), C.R.S.

137. "Racketeering activity" includes a variety of specific criminal acts and related activities. §18-17-103(5), C.R.S.; *People v. Chaussee*, 880 P.2d 749, 754 (Colo. 1994). A "pattern of racketeering activity" means "engaging in *at least two acts of racketeering activity which are related to the conduct of the enterprise*, if at least one of such acts

occurred in this state after July 1, 1981, and if the last of such acts occurred within ten years … after a prior act of racketeering activity." §18-17-103(3), C.R.S. (emphasis added); *Chaussee*, 880 P.2d at 755, 757-58.

138. The FAC alleges Defendants engaged in the following predicate acts, which are listed under the statutory definition of racketeering activity: (1) mail/wire frauds, (2) bank fraud, (3) securities fraud, (4) defrauding a secured creditor or debtor, and (5) honest services fraud. FAC, ¶¶267(a)-(f). *See* §18-17-103(5)(a), (b)(III),(IV), & (XII).

139. These are all species of fraud, and must be pled with particularity. *See* §18-17-103(5)(b)(IV) & (XII); C.R.C.P. 9(b); *New Crawford Valley, Ltd. v. Benedict*, 877 P.2d 1363, 1371 (Colo. App. 1993); *Kinning v. BWM Advisors, LLC*, 2017WL7731222 at *3 (D. Colo. 2017); *Henson v. Bank of America*, 935 F.Supp.2d 1128, 1137 (D. Colo. 2013). When a plaintiff is dealing with multiple defendants, he must specify which defendant told which lie and under what circumstances, and set forth the "who, what, when, where and how" of the alleged fraud. *Kinning*, 2017WL7731222 at *3; *Henson*, 935 F.Supp.2d at 1138 (same); *Seidl v. Greentree Mortg. Co.*, 30 F.Supp.2d 1292, 1305 (D. Colo. 1998) (same).

1. Whether the predicate acts were sufficiently pled

140. To plead a violation of the COCCA statute, Plaintiff must plausibly allege that each Defendant knowingly engaged in a pattern of racketeering activity, which means *each Defendant* must have allegedly committed *two or more predicate acts*. §18-17-103(3), C.R.S.; §18-17-104(1), (2), (3), C.R.S.; *George*, 833 F.3d at 1248, 1251; *Bixler v. Foster*, 596 F.3d 751, 761 (10th Cir. 2010).

a. The Related Defendants

141. The Related Defendants argue that Plaintiff failed to plead the fraudulent predicate acts occurring within the statute of limitations with sufficient particularity.

142. The FAC alleges that WBA and Related engaged in mail/wire fraud when they sent the Town of Snowmass Village "annual reports" between 2012 and 2016 that were "designed to mislead the Town." FAC ¶267(a)(i). The FAC states that Ankele wrote in the 2009 report that there were no material changes in the Districts' financial status, even though the Base Village Owner had defaulted on its construction loan, the project was at a standstill, and there was information indicating that the sales figures and expected tax revenue that had previously been reported would not be achieved. FAC, ¶267(a)(i). Regarding the predicate acts within the statute of limitations (*i.e.*, accruing on or after

12/1/2012), the FAC states that the 2012[11] through 2016 reports had "similar omissions about the financial status of the Districts in regards to the lack of revenue from property taxes owing to the project being at a standstill." FAC, ¶267(a)(i). Earlier paragraphs incorporated by reference into the COCCA claim state that: (1) the 2013 and 2016 annual reports both disclosed the refinancings, but did not disclose that in each of those transactions District 2 assumed greater amounts of senior debt that would not be discharged at maturity, thereby misleading the Town as to the beneficial nature of those transactions, and (2) the 2013 through 2016 annual reports falsely promised to furnish the Districts' audits to the Town upon completion. FAC, ¶¶238, 241. These false statements were allegedly made by WBA "at the direction of Related," as part of an ongoing conspiracy between Related and WBA to conceal the self-dealing at the heart of the bond issuances and refinancings. FAC, ¶¶263(a), 267(a)(i). *See* §18-17-103(5), C.R.S. (racketeering activity includes a conspiracy to commit, or solicitation or coercion to commit a predicate act).

143. The FAC also alleges that the Related Defendants committed securities fraud within the COCCA statute of limitations in 2013 and 2016 when, "with the intent to defraud District 2," they engineered the refinancings to "deceive, manipulate, and defraud Plaintiff District 2, saddle District 2 with untenable debt, and wrongfully profit at the expense of District 2." FAC, ¶280.

144. In 2013, Defendants allegedly used their control of the District's board to manufacture a refinancing that purported to benefit District 2, but actually benefited Related at the District's expense, raising the interest rate on District 2's debt, paying the Related Defendants above market value for the Guarantor Bonds, and paying off a developer's note that it was not in the District's best interest to repay in advance. FAC, ¶¶23-26, 31, 188-203, 280(b). *See* §11-51-501, C.R.S. (elements of securities fraud).

145. In 2016, the Related Defendants allegedly obtained $10 million in cash for the 2013 "junk" bonds which were "wrongfully acquired in the first place," were worth far less, and would have been discharged at maturity. FAC, ¶¶35, 213-14, 280(c). The 2016 refinancing was allegedly marketed and represented as being for the benefit of District 2, when its primary purpose was to benefit the Related Defendants and Snowmass Ventures. FAC, ¶¶36, 216, 280(c). The FAC admits that the debt prior to the 2016 refinancing totaled $63,733,726.00, and the total debt after the refinancing was

[11] As noted previously, the 2012 annual report was likely sent to the Town of Snowmass in March or April of 2013, after Related had retaken control of the board in September of 2012 and within the COCCA statute limitations. *See* FAC, ¶232 (2009 annual report sent on March 23, 2010); ¶234 (2010 annual report sent on April 1, 2011); ¶236 (2011 annual report submitted on March 14, 2012).

$44,590,000.00. FAC, ¶¶211-212. However, Plaintiff alleges the "bulk of the supposed savings" came from forgiveness of obligations from Related that were part of the sale to Snowmass Ventures and shifting debt obligations from District 2 to District 1, and that the refinancing had the "net result of increasing the interest rates on the District's debt." FAC, ¶216. In addition, Plaintiff alleges that the debt forgiveness should not have been viewed as a benefit, since it would not have been repaid, and would have been discharged at maturity. FAC, ¶217. Plaintiff also alleges that $9.2 million in developer obligations were improperly included in District 2's debt calculation to make District 2's debt load appear higher, when in fact these obligations were carried by District 1. FAC, ¶¶211, 220. Finally, in conjunction with the 2016 refinancing, property was allegedly moved out of District 2 into District 1, which decreased District 2's tax revenues and ability to repay its remaining debt. FAC, ¶219.

146. These allegations are sufficiently particular to meet the requirements of C.R.C.P. 9(b) and inform Related of the basis of the fraud allegations, including who allegedly "told which lie and under what circumstances." C.R.C.P. 9(b); *Kinning*, 2017WL7731222 at *3; *Henson*, 935 F.Supp.2d at 1138; *Seidl*, 30 F.Supp.2d at 1305. Because Plaintiff's mail/wire fraud allegation is primarily that Defendants made material omissions, not affirmative false statements, it would be impossible for Plaintiff to provide more specific details about "which statements are supposedly fraudulent." And the securities fraud allegations provide specifics about which statements were false, and why.

147. The Related Defendants also argue that the predicate acts pled in the FAC are implausible. Assuming the non-conclusory facts pled in the FAC are true, as the Court must at this stage, the Court does not find it implausible that a developer would fraudulently seek to benefit financially at the expense of a special district. *Cf., e.g.*, *Landmark Towers*, 436 P.3d 1139 (describing extensive fraud committed by a developer in order to secure bonds from a special district and misappropriate the funds); *Tallman Gulch Metropolitan District v. Natureview Development, LLC*, 399 P.3d 792 (Colo. App. 2017) (describing a scheme by a developer to obtain funds from a district bond issuance for public infrastructure which was never actually constructed, resulting in claims of securities fraud, among others); *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095 (Colo. 1995) (holding that plaintiffs sufficiently stated a securities fraud claim against a special district's board, its developer, underwriter, bond counsel, and disclosure counsel, alleging that they conspired to give material misstatements in connection with the issuance of municipal bonds).

148. The factual allegations against the Related Defendants here are certainly not conclusory. Whether they are "equally consistent with non-tortious conduct" depends on the deference owed to the pleader. *Warne*, 373 P.3d at 596. The FAC makes certain

allegations concerning the state of the economy and real estate market that are far from unassailable; indeed, they strike the Court as being at odds with evidence the Court has heard in other cases concerning the state of the Pitkin County real estate market in the time period leading up to the 2008 financial crisis and great recession. While the FAC assumes the real estate market was already collapsing in the first half of 2008, the Court's understanding from other cases is that the opposite may have actually been true. Indeed, the FAC also appears to assume that the gravity of the financial crisis was widely understood well in advance of the collapse of Lehman Brothers, which again strikes the Court as counterfactual. Unless you were Nouriel Roubini, a protagonist of *The Big Short*, or someone similarly situated to those choice few, chances are you lacked such insight during that timeframe. Similarly, the FAC essentially alleges that defaulting on bonds is something a local government like the District shouldn't hesitate to do. It strikes the Court as fairly obvious that arguments to the contrary—maintaining continued access to credit markets, for example—exist. Furthermore, if the District can simply default without care, why not just pursue that course of action today? It therefore seems likely to the Court that non-tortious explanations exist for much of the activity the District attacks in the FAC.

149. At least some allegations, however, seem less easily explained away. *See, e.g.*, FAC, ¶¶10-15, 83-87, 116-132, 135-147 (alleging that Related overleveraged the District at a time when it knew the real estate market was collapsing—a questionable allegation—but also that it used millions in funds from the 2008 bond issuance to reimburse itself for private expenses rather than public infrastructure, and never completed other public projects that were supposed to be funded by the bonds); ¶¶230-242 (alleging that, to cover up acts of self-dealing, the Related Defendants conspired with WBA and others to hide the District's deepening debt crisis from the Town of Snowmass).

150. The Related Defendants argue that the 2013 and 2016 refinancings benefited the District. The facts alleged in the FAC, taken as true and viewed in the light most favorable to plaintiff, take the other view. *See, e.g.*, ¶¶23-26, 31, 188-203 (alleging that the 2013 refinancing included payments to Related at far above the bonds' market value, paid off a note that bore no interest and would not mature for 25 years, and decreased junior debt which would be discharged at maturity in favor of senior debt, which was not dischargeable at maturity and included a balloon payment); ¶¶214, 216-20 (alleging that 2016 refinancing included payments to Related at above market value, increased the District's loan interest rates, and forgave only debt that would not have been paid anyway). The FAC does sufficiently allege that Defendant's conduct in using its control over the board to refinance the District's debt harmed the District. FAC, ¶¶23-26, 31, 188-203, 216, 227, 280(b); *Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 505 (Colo. App. 2009) (to establish securities fraud claim, plaintiff must show either that plaintiff relied on defendant's conduct to his detriment *or* that defendant's conduct

caused plaintiff's injury); *see also Rosenthal*, 908 P.2d at 1100-1101 (securities fraud statute does not require plaintiff to allege direct reliance so long as complaint sufficiently alleges causation). In the end, while the District's allegations inspire no small amount of skepticism, the actual impact of the refinancings on the District's financial health—and the overall reasonableness of those transactions—presents a factual dispute which will require expert testimony to resolve.

151. Thus, although the Court is not without misgivings on the issue, under *Warne* it cannot conclude that the FAC fails altogether to state at least a plausible claim against the Related Defendants. Their motion to dismiss the COCCA claim on this basis is therefore DENIED.[12]

b. Davidson

152. Davidson argues that the FAC fails to state a sufficiently particularized or plausible claim against it.

153. Taken as a whole, the FAC alleges that in 2013 and 2016, Davidson provided financial advice ostensibly intended to benefit the District, which was in fact intended to benefit Related and itself. FAC, ¶¶37, 205-06, 208, 224-25, 263(f), 267(a)(iii), 280(b) & (c), 289. The FAC also alleges that Davidson improperly played multiple roles as underwriter and financial advisor. FAC, ¶¶28, 37, 205, 224, 263(f), 267(a)(iii). The FAC alleges that Davidson "was aware of the conflict-of-interest at the heart of the [2008] bond issuance, namely Related's control of the board of directors and Related's intention to use the bond proceeds to pay itself for past development costs." FAC, ¶¶134, 206. The FAC alleges that Davidson committed securities fraud by "intentionally ignoring and obscuring the self-dealing at the heart of the 2008 and 2016 bond refinancings to prospective purchasers," and by omitting from its offering statements that the purpose of the bond issuance and refinancing was to benefit Related, not the District. FAC, ¶¶267(c), 280(a),(c).

154. Rule 9(b) provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." C.R.C.P. 9(b); *Pinon Sun Condominium Assoc., Inc. v. Atain Specialty Ins. Co.*, 2018WL3209116 (D. Colo. 2018).

[12] Because these allegation are sufficiently pled, fall within the statute of limitations, and make out more than one predicate act, the Court need not address Related's arguments that the FAC fails to sufficiently allege the other predicate acts.

155. Davidson argues that an underwriter cannot commit securities fraud against the issuer (here, the District), because the issuer provides the financial projections and "knows" the material facts it failed to disclose. Plaintiff counters that Davidson knew the District was under Related's control and the transactions were intended to benefit Related. Plaintiff also argues that the purpose of the Colorado Securities Act is to both "protect investors" and "maintain public confidence" in the securities market. §11-51-101(2), C.R.S.

156. An underwriter has a duty to investigate and disclose material facts that are known or "reasonably ascertainable." *See, e.g.*, *Dolphin and Bradbury, Inc. v. S.E.C.*, 512 F.3d 634, 641-42 (D.C. Cir. 2008) (duties of underwriter); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 167-68 (1994) (underwriter sued by bond purchaser for securities fraud); *see also* Municipal Securities Rulemaking Board, Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities, Davidson Motion Exh. E at 3 ("Under Rule G-17 …, brokers, dealers, and municipal securities dealers must deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice," including in their interactions with municipal issuers). An underwriter "must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal issuer." MSRB, Interpretive Notice Concerning the Application of MSRB Rule G-17, Davidson Motion Exh. E at 3-4.

157. However, neither party has cited a case explicitly addressing the question of whether, and under what circumstances, an underwriter can be sued for securities fraud by the issuer of the security.

158. To state a claim for securities fraud a plaintiff must allege that: (1) the plaintiff is a *purchaser or seller* of a security, (2) the security is a "security," (3) the defendant acted with the requisite scienter, (4) the defendant's conduct was *in connection with the purchase or sale* of a security, (5) the defendant's conduct was in violation of section 11-51-501, C.R.S., and (6) the plaintiff relied on the defendant's conduct to his detriment or that defendant's conduct caused plaintiff's injury. *Rosenthal*, 908 P.2d at 1101; *Huffman*, 205 P.3d at 505.

159. Here, Plaintiff, as the issuer, is the seller of a security. The complaint alleges that the security is a security, and that Davidson acted knowingly in connection with the purchase of the security from the district and the sale of the security to the Related Defendants. *See* §11-51-604(2.5), C.R.S. ("Any person who recklessly, knowingly, or with an intent to defraud sells or buys a security in violation of section 11-51-501(1) or provides investment advisory services to another person in violation of section 11-51-

501(5) … is liable to the person buying or selling such security or receiving such services in connection with the violation….").

160. The difficult question is whether Plaintiff sufficiently alleged (1) a violation of section 11-51-501, C.R.S. and (2) that the District relied on Davidson's conduct to its detriment, or Davidson's actions caused the District's injury.

161. Plaintiff alleges that Davidson "committed securities fraud by intentionally ignoring and obscuring the self-dealing at the heart of the 2008 and 2016 bond refinancings *to prospective purchasers,* whereby Related and its affiliates made millions of dollars through their control of the boards of the Districts." FAC, ¶267(c) (emphasis added); *see also* FAC, ¶280(a) ("Davidson committed securities fraud by omitting from its 2008 *offering statement* that the purpose of the bond issuance was to benefit Related and its affiliates and not the District."); FAC, ¶280(c) ("Davidson committed securities fraud by omitting from its 2016 *offering statement* that the purpose of the bond issuance was to benefit Related and its affiliates, and not the District."). Plaintiff alleges that these allegations fall under §11-51-501(1), C.R.S. FAC, ¶282; §11-51-501(1), C.R.S. ("It is unlawful for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly: (a) to employ any device, scheme, or artifice to defraud; (b) to … omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.").

162. Davidson's actions could not have deceived the District's board members at the time, given that they were agents of an alleged co-conspirator. And there is no plausible claim that Davidson defrauded the purchasers (the Related Defendants), who again were allegedly co-conspirators.[13] The caselaw Plaintiffs cite all relates to duties underwriters owe to purchasers of securities, not issuers. Plaintiffs take the position that the District was an entity separate from its board members, who allegedly controlled it on behalf of the Related Defendants at that time. As underwriter, Davidson certainly made the transactions possible; Related could not have completed its alleged scheme without an underwriter.

163. The problem with Plaintiff's securities fraud theory is that it asks the Court to impose, without any supporting legal authority other than a nod to the overall purposes of Colorado securities law, duties on underwriters to essentially supervise the

[13] As seller, the District could not maintain a securities fraud claim on behalf of the purchasers in any event, because it must allege that Defendant's actions caused Plaintiff harm, not that they harmed someone else.

governmental boards with which they do business. Underwriters should, according to Plaintiffs, decline to underwrite a transaction whenever they doubt the integrity of a board's motives surrounding an issuance, and the outcome of the issuance for the issuer. How exactly the underwriter is supposed to ensure it has exercised sufficient diligence in its capacity as local government overseer is not explained. But according to Plaintiffs this duty exists to protect the governmental *issuers* themselves—not the purchasers of the securities.

164. This proposed paternal duty strikes the Court as significantly overbroad, unworkable and likely to frustrate the operation of municipal securities markets. Governments are supervised through the electoral process, and in limited circumstances by judicial review. Imposing such a duty on a private third-party financial institution who is a transaction counterparty or adviser is not an approach the Court can remember encountering. Perhaps an appellate Court will think otherwise, but this Court declines to fashion a rule with such potentially far-reaching consequences.

165. Without such a duty, there can be no reasonable reliance by Plaintiff or causal link to its injury. The securities fraud claim against Davidson therefore fails.

166. Plaintiffs also allege wire fraud as an additional potential predicate act against Davidson, but they do not do so with sufficient particularity to render their claim sufficient under either Rule 8 or 9. *See, e.g., Queen Uno Ltd. P'ship v. Coeur D'Alene Mines Corp.*, 2 F. Supp. 2d 1345, 1360 (D. Colo. 1998), *abrogated on other grounds by Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083 (10th Cir. 2003) (collecting cases and finding claim that professional firm committed fraud simply to ensure continued receipt of fees absurd and implausible, and disregarding such claim in its entirety).

167. The Court therefore dismisses the COCCA claim against Davidson.

c. North Slope

168. North Slope argues that Plaintiff did not state a valid COCCA claim against it because it does not allege facts establishing that North Slope engaged in a "pattern" of racketeering. The Court agrees.

169. The FAC only alleges that North Slope committed a single act of securities fraud. FAC, ¶¶280(c). Assuming this allegation is adequately pled, a single alleged act of racketeering would be insufficient to sustain a COCCA claim against North Slope. §18-17-103(3), C.R.S.; §18-17-104(1), (2), (3), C.R.S.; *see George*, 833 F.3d at 1248, 1251; *Foster*, 596 F.3d at 761. This court will not "infer" a mail or wire fraud or other predicate act that is not specifically pled in the FAC. Omnibus Opposition, p.40; C.R.C.P. 9(b).

170. Therefore, North Slope's motion to dismiss the COCCA claim is GRANTED.

d. Snowmass Ventures

171. Snowmass Ventures similarly argues that the FAC fails to plead that it engaged in a "pattern" of racketeering activity.

172. The FAC alleges that Snowmass Ventures required, as a condition of the sale of the Base Village project from the Related Defendants to Snowmass Ventures in 2016, that certain boundaries be adjusted so that taxable property would be moved from District 2 into District 1 in order to benefit Snowmass Ventures financially. FAC, ¶¶39-42, 226-27, 252-258, 263(h). In consideration, Snowmass Ventures allegedly also required the 2016 refinancing as a condition of the sale, which financially benefitted the Related Defendants. FAC, ¶¶36, 209-214, 263(f). The FAC alleges that this constituted honest services fraud in violation of 18 U.S.C. §1346. FAC, ¶267(f), which Snowmass Ventures disputes.

173. As both parties agree, honest services fraud is a sub-species of mail or wire fraud, which involves using the mail or wires to carry out a scheme or artifice to defraud another of the intangible right of honest services. *See* 18 U.S.C. §1341 (the elements of mail fraud are: (1) having devised or intended to devise a scheme or artifice to defraud, (2) for the purpose of executing such scheme or artifice or attempting to do so, (3) placed in any post office or authorized depository for mail, (4) any matter or thing whatever to be sent or delivered by the Postal Service); 18 U.S.C. §1343 (the elements of wire fraud are: (1) having devised or intended to devise any or artifice to defraud, (2) transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, (3) any writings, signs, signals, pictures, or sounds, (4) for the purpose of executing such scheme or artifice); 18 U.S.C. §1346 (the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services); *Skilling v. United States*, 130 S.Ct. 2896, 2904 (2010); *United States v. Halloran*, 821 F.3d 321, 337 (2d Cir. 2016).

174. Honest services fraud encompasses only bribery and kickback schemes. *Skilling*, 130 S.Ct. at 2904-05. "Unlike traditional fraud, in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services doctrine targeted corruption that lacked similar symmetry." *Id.* at 2904. "While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment." *Id.* While these cases most often involved bribery of public officials, courts have also recognized honest services fraud in cases where a private employee breached his

fiduciary duty to his employer by accepting bribes or kickbacks. *Id.* at 2904-05. It does not include mere "non-disclosure of a conflicting financial interest." *Id.* at 2905. Honest services fraud also requires the existence of a fiduciary relationship between the plaintiff and the defendant. *Halloran*, 821 F.3d at 337-39.

175. Here, the FAC never alleges that Snowmass Ventures engaged in mail or wire fraud in connection with the sale of the Base Village in 2016. There are no allegations in the FAC that Snowmass Ventures used the mails or wires at all, much less to carry out a scheme to defraud. Further, the FAC does not allege that Snowmass Ventures engaged in a bribery or kickback scheme. The FAC alleges that Snowmass Ventures engaged in a contract to purchase the Base Village project from the Related Defendants. As part of that purchase, Snowmass Ventures allegedly required the adjustment of the Districts' boundaries and a refinancing that benefitted both Snowmass Ventures and Related, at the expense of District 2. FAC, ¶¶39-42, 226-27, 252-258, 263(h). However, the FAC never alleges that Snowmass Ventures "solicited or accepted side payments from a third party in exchange" for making these conditions part of the sale. *Skilling*, 130 S.Ct. at 2906.

176. Therefore, the Court concludes that the FAC fails to state a claim against Snowmass Ventures as to the predicate act of honest services fraud.

177. The FAC also alleges that the Snowmass Ventures committed defrauding a secured creditor or debtor under §18-5-206(1), C.R.S. when it required the Related Defendants to move property from District 2 to District 1 as part of the sale. FAC, ¶267(d). Racketeering activity includes a conspiracy to commit, or solicitation or coercion to commit a predicate act. §18-17-103(5), C.R.S. However, even if this constitutes one predicate act of racketeering, the FAC must plausibly allege that Snowmass Ventures engaged in *two* predicate acts in order to avoid dismissal of its COCCA claim against Snowmass Ventures.

178. Because the FAC fails to plausibly allege two predicate acts of racketeering activity by Snowmass Ventures, the motion to dismiss the COCCA claim against Snowmass Ventures is GRANTED.

2. Unclean Hands

179. WBA argues that the COCCA claims against it are barred by the doctrine of unclean hands and the defense of *in pari delicto*.

180. The common law defense of *in pari delicto* is grounded on two premises: (1) courts should not mediate disputes among wrongdoers, and (2) denying judicial relief to an

admitted wrongdoer is an effective deterrent. *McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 756 (3d Cir. 1990). It is unclear whether the doctrine of unclean hands, or *in pari delicto*, would apply to a civil COCCA action in Colorado, especially at the motion to dismiss stage. *See McCann v. Jackson*, 429 P.2d 265, 266 (Colo. 1967) (application of defense is generally a question of fact); *Smithfield Foods, Inc. v. United Food and Commercial Workers Intern. Union*, 593 F.Supp.2d 840, 847-48 (E.D. VA 2008) (federal courts split on whether the defense applies to RICO claims). In any event, in order to bar recovery, the Plaintiff must be an *active and voluntary participant* in the unlawful activity that is the subject of the suit. *McAdam*, 896 F.2d at 756-57.

181. Here, the FAC alleges that the District was *not* a voluntary participant in the unlawful activity, because its board was controlled by the Related Defendants. *See, e.g.*, FAC, ¶¶5-7. This Court must accept that allegation as true for purposes of deciding this motion. Therefore, the Court DENIES WBA's motion to dismiss the COCCA action on this basis under Rule 12(b)(5).

3. Political Question

182. WBA also argues that this case is barred by the political question doctrine.

183. This Court does not find that the political question doctrine applies here, because none of the following characteristics are present:

a. A textually demonstrable constitutional commitment of the issue to a coordinate political department;
b. Lack of judicially discoverable and manageable standards for resolving the issue;
c. The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;
d. The impossibility of a court's underrating independent resolution without expressing lack of the respect due coordinate branches of government;
e. An unusual need for unquestioning adherence to a political decision already made; or
f. The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Colorado Common Cause v. Bledsoe, 810 P.2d 201, 205 (Colo. 1991) (*quoting Baker v. Carr*, 369 U.S. 186, 217 (1962)).

184. WBA has cited no caselaw suggesting that the question presented in this case – whether WBA's actions violated the COCCA statute – is a "nonjusticiable political question." *Bledsoe*, 810 P.2d at 206. To the contrary, it is traditionally within the role of the judiciary to interpret statutes and say what the law is, and whether a defendant's

alleged conduct falls within its proscriptions. *Id.* Therefore, the motion to dismiss on this basis is DENIED.

ii. Conspiracy or endeavor to violate COCCA statute under subsection (4)

185. Subsection (4) of the COCCA statute provides that "[i]t is unlawful for any person to *conspire or endeavor to* violate any of the provisions of subsection (1), (2), or (3) of this section." §18-17-104(4), C.R.S. (emphasis added). To plead a violation of (4), Plaintiff must plausibly allege that there was a conspiracy or an "endeavor" (attempt) to violate subsection (3).

186. "[T]here need be no completed violation of [subsection (3)] in order for there to be a violation of [subsection (4)]." *Benedict*, 877 P.2d at 1373; *Boyle*, 556 U.S. at 949-50; *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300, 372-73 (3rd Cir. 2010). A conspiracy is "an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy." *Boyle*, 556 U.S. at 950. "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense," and does not personally commit two predicate acts. *Salinas v. United States*, 522 U.S. 52, 63 (1997); *United States v. Kamahele*, 748 F.3d 984, 1006 (10th Cir. 2014). "If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Salinas*, 522 U.S. at 64. However, the complaint must adequately allege that a conspirator intended to further "an endeavor which, if completed, would satisfy all of the elements of a substantive [violation]." *Id.* at 65; *In re Insurance*, 618 F.3d at 372-73.

187. Plaintiff must plausibly plead that each Defendant was aware of the Enterprise's fraudulent activity *and* agreed to facilitate the scheme (*i.e.*, agreed to participate in a pattern of racketeering activity through the operation of the enterprise). *Salinas*, 522 U.S. at 66; *United States v. Hampton*, 786 F.2d 977, 978-79 (10th Cir. 1986); *FDIC v. Refco Group, Ltd.*, 989 F.Supp. 1052, 1077-78 (D. Colo. 1997); *Sender*, 423 F.Supp.2d at 1178; *Converdyn v. Blue*, 2007 WL 4570556, *5 (D. Colo. 2007) (to establish conspiracy to commit COCCA, plaintiff must show that the conspiring defendants knew of the corrupt enterprise's activities and agreed to facilitate them).

188. The secretive nature of a criminal conspiracy means that direct proof is seldom available. *Hampton*, 786 F.2d at 979. Thus, the unlawful agreement may be inferred from circumstantial evidence, including the conduct of other participants, so long as it amounts to evidence that each defendant necessarily knew the others were conspiring to participate in the same enterprise through a pattern of racketeering. *Id.*; *Kamahele*, 748 F.3d at 1006. However, mere association with other conspirators – even with knowledge

of their involvement in a crime – is insufficient. *Sender*, 423 F.Supp.2d at 1178; *Brooks v. Bank of Boulder*, 891 F.Supp. 1469, 1479 (D. Colo. 1995). Conspiracies involving fraud must be pled with particularity. *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 989-90 (10th Cir. 1992); *Brooks*, 891 F.Supp. at 1479. "[S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made," or enough facts to "raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). "[L]awful parallel conduct fails to bespeak unlawful agreement," and a conclusory allegation of agreement at an unspecified point does not supply enough facts to show illegality. *Id.* at 556-57.

1. Related

189. The Related Defendants argue that the FAC fails to plead a sufficiently particularized claim against them, and that the allegations against it in the FAC are not plausible because the FAC does not suggest a plausible motive for the majority of alleged co-conspirators. Related Motion, p.12-17.

190. As discussed above, the COCCA claim against Related is adequately pled. The same allegations support the COCCA conspiracy/attempt claim. *Benedict*, 877 P.2d at 1373-74 ("the allegation of a completed act under [subsection 3] necessarily includes an allegation of an attempt to violate the pertinent subsection under §18-17-104(4).").

191. Therefore, the Related Defendants' motion to dismiss the COCCA Conspiracy claim is DENIED.

2. WBA

192. WBA argues that the FAC fails to establish a conspiracy because it doesn't allege sufficient facts to prove a meeting of the minds. "Rather than allege any facts establishing an agreement existed, the Amended Complaint merely alleges that WBA performed the services requested of it at the direction of District 2." WBA Motion, p.17.

193. The FAC alleges more than parallel conduct, or mere conduct "at the direction of District 2." It alleges that WBA was intimately involved in conceiving of and pitching the Districts' structure, with the explicit purpose of taking power away from taxpayers and putting it in the hands of the Developers it would later serve. *See* FAC ¶¶6, 8, 15, 60, 89, 94-106 & n.5-7, 150-53, 263(b), 267(a)(i),(c),(d). WBA was allegedly an expert in municipal law, and used that knowledge to actively counsel and assist the Related Defendants on how to take financial advantage of District 2. FAC, ¶¶15, 22, 27, 29-30,

39, 42, 94-106 & n.5-7, 133, 150-53, 177-179, 185, 204, 207-208, 228-29, 231-42, 267(a)(i),(c),(d). The FAC also alleges specific facts supporting the allegation that WBA knew Related was "unfriendly" to the Districts. *See, e.g.*, FAC, ¶¶177-79, 185-86, 245-50.

194. These allegations are sufficient to plausibly plead WBA's participation in a COCCA conspiracy. Therefore, the motion to dismiss the subsection (4) COCCA claim against WBA is DENIED.

3. Davidson

195. As discussed above, the substantive COCCA claim against Davidson is not adequately pled. The inherent implausibility of the fraud claims against Davidson also doom the COCCA conspiracy claim against it. *See Queen Uno*, 2 F. Supp. 2d at 1360.

196. Therefore, Davidson's motion to dismiss the (4) conspiracy to commit COCCA count is GRANTED.

4. North Slope

197. The COCCA conspiracy claim against North Slope alleges generally that they agreed by words or actions to participate in the COCCA scheme through a pattern of racketeering activity and run the affairs of District 2 for private gain. Although a completed crime is not necessary to sustain a claim of COCCA conspiracy, Plaintiff must plausibly plead that North Slope was aware of the Enterprise's fraudulent activity *and* agreed to facilitate the scheme by participating in a pattern of racketeering activity through the operation of the enterprise. *Salinas*, 522 U.S. at 66; *Hampton*, 786 F.2d at 978-79; *Refco Group, Ltd.*, 989 F.Supp. at 1077-78; *Sender*, 423 F.Supp.2d at 1178.

198. Here, North Slope's alleged involvement in the COCCA enterprise is limited to the 2016 refinancing. North Slope authored a financial report, allegedly based on Davidson's analysis and projections, which incorrectly characterized the refinancing as beneficial to the District in order to facilitate the refinancing and the sale of the Base Village Project to Snowmass Ventures. FAC, ¶¶37, 215-224, 263(g). Assuming these allegations are true, nothing in the FAC supports the supposition that North Slope was aware of the existence of an Enterprise or agreed to facilitate its scheme by participating in a pattern of racketeering. *Twombly*, 550 U.S. at 556; *Blue*, 2007 WL 4570556 at *5.

199. Therefore, North Slope's motion to dismiss the (4) COCCA conspiracy claim is GRANTED.

5. Snowmass Ventures

200. As with North Slope, the only allegations against Snowmass Ventures relate to the 2016 transfer of the Base Village project. The FAC alleges that Snowmass Ventures conditioned the sale on the refinancing (which was intended to benefit the Related Defendants) and the property transfers (which were intended to benefit Snowmass Ventures). FAC, ¶¶36, 39-42, 209-214, 226-27, 252-258, 263(f),(h).

201. Assuming these allegations are true, they do not plausibly support the conclusion that Snowmass Ventures was aware of the existence of the alleged enterprise or agreed to facilitate its scheme by participating in a pattern of racketeering. *Twombly*, 550 U.S. at 556; *Blue*, 2007 WL 4570556 at *5. Rather, the more plausible explanation – which is equally consistent with non-tortious conduct – is that Snowmass Ventures simply negotiated for the best possible deal it could in purchasing the Base Village project.

202. Therefore, Snowmass Ventures' motion to dismiss the (4) COCCA conspiracy claim is GRANTED.

iii. Securities Fraud

203. The securities fraud statute prohibits any person, in connection with the offer, sale, or purchase of any security, from directly or indirectly: (a) employing any device, scheme, or artifice to defraud; (b) making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (c) engaging in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. §11-51-501(1), C.R.S. It also prohibits any person who receives, directly or indirectly, any consideration from advising another person as to the value of securities or any purchase or sale of securities, from: (1) employing any device, scheme, or artifice to defraud, (2) making an untrue statement of a material fact to any client or prospective client, or omitting to state any material fact necessary to make the statements not misleading, or (3) engaging in any transaction, act, practice, or course of business that operates as a fraud or deceit on any client or prospective client, or that is fraudulent, deceptive, or manipulative. §11-51-501(5), C.R.S.

1. Related

204. The Related Defendants argue that the FAC fails to plead a sufficiently particularized claim against them, and that the allegations against it in the FAC are not plausible.

205. The securities fraud claim based on the 2008 bond issuance is untimely and has already been dismissed on that basis.

206. The securities fraud allegation with respect to the guarantor bonds is timely, because they were issued after 9/7/2010. However, the FAC does not explain how Related's actions triggering the issuance of the Guarantor bonds met the elements of securities fraud. FAC, ¶¶267(c); 277-284. Therefore, the securities fraud claim with respect to the issuance of the guarantor bonds is dismissed for failure to state a claim.

207. As explained above, the securities fraud allegation regarding the 2013 and 2016 refinancings are both timely and sufficiently pled.

208. Therefore, the Related Defendants' motion to dismiss the securities fraud claim is DENIED as to the 2013 and 2016 securities fraud allegations and GRANTED as to the 2008 and 2011 allegations.

2. Davidson

209. The remaining securities fraud claim against Davidson is based on the 2016 refinancing.[14] The Court has explained above why it fails.

210. Therefore, Davidson's motion to dismiss this claim is GRANTED.

3. North Slope

211. North Slope argues that civil remedies for a violation of §11-51-501 are provided under §11-51-604, C.R.S., and that it cannot be liable under §604 because it is not a buyer or seller of securities. Section 11-51-604(3) & (4), C.R.S. provides civil liability for a seller or buyer who violates section 11-51-501. The statute also provides: "Any person who knows that another person liable under subsection (3) or (4) of this section is engaged in conduct which constitutes a violation of section 11-51-501 and who gives substantial assistance to such conduct is jointly and severally liable to the same extent as the other person." §11-51-604(5)(c), C.R.S.

212. Here, the FAC alleges that North Slope committed securities fraud by authoring a misleading financial analysis in December 2016, which wrongly characterized the refinancing as beneficial to District 2. FAC, ¶¶36-37, 42, 215-224, 263(g), 277-284.

[14] As explained above, the statute of limitations bars the securities fraud claims based on the 2008 and 2013 transactions.

North Slope allegedly knew that the 2016 refinancing benefitted the Related Defendants and Snowmass Ventures, not the District, and intentionally mischaracterized it as beneficial in order to facilitate the refinancing. FAC, ¶¶214-23, 263(g), 280(c). These allegations are sufficient to state a claim under sections 11-51-501(1), C.R.S. and 11-51-604(5)(c), C.R.S. The fact that Plaintiffs have plausibly pled that North Slope owed fiduciary duties distinguishes North Slope from Davidson in this regard.

213. Therefore, North Slope's motion to dismiss the securities fraud claim is DENIED.

iv. Breach of Fiduciary Duty

214. In order to recover for a claim of breach of fiduciary duty, a plaintiff must prove: (1) that the defendant was acting as a fiduciary of the plaintiff, (2) that he breached a fiduciary duty to the plaintiff, (3) that the plaintiff incurred damages, and (4) that the defendant's breach of fiduciary duty was a cause of the plaintiff's damages. *See Graphic Directions, Inc. v. Bush*, 862 P.2d 1020, 1022 (Colo. App. 1993) (citing CJI-Civ.2d 26:1); *see also Sewell v. Great N. Ins. Co.*, 535 F.3d 1166, 1172 (10th Cir. 2008) (same, citing *Graphic Directions*).

215. Whether a party owes a fiduciary duty to another is a mixed question of law and fact. *Accident & Injury Medical Specialists, P.C. v. Mintz*, 279 P.3d 658, 662 (Colo. 2012).

216. A fiduciary relationship exists when one person is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relationship. *Brodeur*, 169 P.3d at 151; *Mintz*, 279 P.3d at 663. A fiduciary relationship may exist as a matter of law or may arise in the context of a relationship between the parties, such as where one party occupies a superior position relative to the other. *Brodeur*, 169 P.3d at 151; *Mintz*, 279 P.3d at 663. Duties based upon the relationship between the parties sometimes arise when one party occupies a superior position or has extensive influence and control over the other's interests. *Mintz*, 279 P.3d at 663. "However, an unequal relationship does not automatically create a fiduciary duty. In order to be liable, the superior party must assume a duty to act in the dependent party's best interest." *Brodeur*, 169 P.3d at 151. "Fiduciary relationships that derive from a special relationship of trust, reliance, influence, and control are distinguishable from business relationships … dealing at arm's length for mutual benefits." *Mintz*, 279 P.3d at 663.

217. A fiduciary relationship imposes on one party a duty of care, including the duty to act with utmost loyalty on behalf of, and for the benefit of, the other party. *Mintz*, 279 P.3d at 663. Whether a fiduciary duty has been breached is generally a factual

question. *Bush*, 862 P.2d at 1022; *see also, e.g.*, *Mintz v. Accident & Injury Med. Specialists, PC*, 284 P.3d 62, 68 (Colo. App. 2010), *aff'd Mintz*, 279 P.3d 658.

1. Related

218. The remaining timely breach of fiduciary duty allegations against the Related Defendants are that Related controlled District 2's board from 2012 until 2016, through employees who served on the board. FAC, ¶286. "From this position, they owed fiduciary duties to District 2, including the duties of loyalty and full-disclosure," which they breached through a "long-standing pattern … of self-dealing, by running the affairs of District 2 for their benefit, and not for the benefit of District 2." FAC, ¶286. The alleged breaches include: (1) refinancing District 2's debt in 2013 for its own benefit, and (2) refinancing the District's debt in 2016 for its own benefit.

219. The Related Defendants do not dispute that a fiduciary relationship existed during this time, but Related argues that the FAC fails to plead this claim with sufficient particularity, and that the allegations against it are not plausible. This claim is adequately particular, and (as explained above with respect to the COCCA allegations) the FAC meets the plausibility standard and adequately alleges for Rule 12 purposes that the Related Defendants' conduct harmed the District.

220. Therefore, the Related Defendants' motion to dismiss the breach of fiduciary duty claims related to its conduct in 2013 and 2016 is DENIED.

2. Davidson

221. The timely breach of fiduciary duty claim against Davidson involves the 2016 refinancing. The FAC alleges that Davidson assumed a fiduciary duty to the District which it breached by providing financial advice that benefited itself and Related, rather than the District. FAC, ¶289. Davidson argues that it did not owe a fiduciary duty to the District as a matter of law, and that the FAC's allegations on this score are conclusory.

222. The MSRB Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities states that underwriters have a duty to deal fairly with municipal issuers, but they do not owe them any fiduciary duty. Davidson Motion, Exh. E, p.4. An underwriter is required to disclose this to the issuer, and inform the issuer that it is not required to act in the best interests of the issuer or without regard to its own interests. *Id.* Davidson appears to have complied with this disclosure requirement.

223. However, an underwriter may act as a fiduciary if it takes on the role of municipal financial advisor. *See* MSRB Excerpt, Davidson Motion Exh.E, p.3 ("Under the Exchange Act, municipal advisors and their associated persons are deemed to owe a fiduciary duty to their municipal entity clients.").

224. A financial advisory relationship generally exists when a dealer "enters into an agreement to render financial advisory or consultant services to or on behalf of an issuer with respect to the issuance of municipal securities, including advice with respect to the structure, timing terms and other similar matters concerning such issue." MSRB Rule G-23(b), Davidson Motion, Exh.G, p.2; *see also* 15 U.S.C. 78o-4(e)(4)(B); SEC Release No. 70462, Registration of Municipal Advisors at *4 (September 20, 2013). However, a financial advisory relationship does not exist when, in the course of acting as underwriter, the underwriter renders advice to an issuer, including with respect to the structure, timing, terms and other similar matters concerning the issuance of municipal securities. *Id.*; *see also* SEC Release No. 70462 at *4, 16, 35, 66-67; 15 U.S.C. 78o-4(e)(4)(C).

225. The underwriter exclusion is "limited to activities that are within the scope of an underwriting of a particular issuance of municipal securities." SEC Release No. 70462 at *35, 67. "[T]he function of serving as an underwriter on a particular issuance of municipal securities is more circumscribed [than the municipal advisor function] and encompasses services on a particular transaction during a narrower time frame than the overall focus of the municipal advisor definition with respect to advice on the issuance of municipal securities (which involves a broader focus and longer time frame)." *Id.* at *35. This time frame begins upon the municipal issuer's engagement of the underwriter for a particular issuance and ends when the underwriting period for that issuance terminates. *Id.* at *35 n.296. Activities which are outside the scope of the underwriting include: (1) advice on investment strategies, municipal derivatives, or what method of sale a municipal entity should use for an issuance, (2) advice on whether a governing body should approve or authorize an issuance, (3) advice on a bond election campaign, (4) any advice that is not specific to a particular issuance, and that involves analysis about overall financing options, debt portfolio impacts, etc., (5) assisting issuers with competitive sales, (6) preparing financial feasibility analyses or budget planning and analyses, (7) advice on an overall rating strategy that is not related to the particular issuance, (8) advice on overall financial controls, or (9) advice regarding the terms of requests for proposals and matters regarding compensation of underwriters. *Id.* at *67, 70.

226. Here, the parties dispute whether Davidson acted as a municipal financial advisor to the District, or only acted within the scope of its duties as an underwriter. With respect to the 2016 refinancing, the FAC alleges that Davidson "presented several

options to District 2 for a refinancing," and "advised District 2 to adopt the refinancing transaction that it did." FAC, ¶¶37, 224, 263(f), 267(a)(iii), 289.

227. The Court agrees with Davidson that the FAC's allegations it acted as municipal financial advisor are conclusory, and that the remaining allegations are insufficient to support the claim that it acted outside the bounds of the underwriter exclusion. This is particularly true given that the District retained North Slope to do what it now alleges, with no supporting detail, Davidson also did. The allegations on this score are therefore implausible.

228. Consequently, Davidson's motion to dismiss the 2016 breach of fiduciary claim is GRANTED.

3. North Slope

229. The FAC alleges that North Slope conceded it had a fiduciary duty to District 2, but that its 2016 report justifying the refinancing was "based on inflated projections and inaccurate numbers," and was concededly meant to help facilitate the sale of the Base Village Project to Snowmass Ventures. FAC, §287. The FAC alleges that the intent of the report was to benefit the Related Defendants and Snowmass Ventures, not the District. FAC, ¶287.

230. North Slope argues that Plaintiff failed to adequately allege: (1) that it breached a fiduciary duty to the District, and (2) that its breach caused damages.

231. Regarding the alleged breach of fiduciary duty, North Slope argues that its stated desire to "facilitate the planned real estate closing" and the "orderly and complete exit of Related from the [project]" is equally consistent with non-tortious conduct, since the FAC alleges that the Related Defendants were adverse to the District, which leads to the reasonable inference that the "orderly and complete exit of Related" was in the project's best interests. However, the FAC also alleges that, as a condition of the sale, property was moved from District 2 to District 1 in violation of the service agreement, which will cause District 2 to lose millions of dollars in tax revenue. FAC, ¶¶41, 219. Further, the FAC alleges that North Slope intentionally authored a misleading financial analysis, which wrongly characterized the refinancing as beneficial to District 2, when in fact it knew the refinancing was for the benefit of the Related Defendants and Snowmass Ventures. FAC, ¶¶36-37, 42, 214-224, 263(g), 277-284, 287. These allegations are sufficient to plausibly allege a breach of fiduciary duty.

232. Regarding damages, the FAC alleges that the 2016 refinancing caused District 2 to pay above market value for junior debt, which would have been discharged at maturity if not paid. FAC, ¶¶35, 214, 217. It further alleges that the refinancing had the net result of increasing the interest rates on the District's debt. FAC, ¶216. The Court has already noted problems with certain assumptions underlying such allegations, but ultimately concludes they suffice to plausibly allege damages.

233. North Slope also argues that the economic loss rule precludes this claim. The economic loss rule provides that a party suffering only economic losses from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law. *Town of Alma v. AZCO Const., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). The economic loss rule maintains the boundary between contract and tort law, allowing parties to accurately allocate their risks and costs in bargaining situations. *Alma*, 10 P.3d at 1259, 1261-62. "The essential difference between a tort obligation and a contract obligation is the source" of the parties' duties. *Id.* at 1262. The existence and scope of a tort duty is a question of law. *Rhino Fund, LLP v. Hutchins*, 215 P.3d 1186, 1193 (Colo. App. 2008).

234. North Slope's argument is based on the financial report, which is not a contract. The report discloses that there was an "executed Financial Advisory Engagement Letter," but that contract is not referenced in the Complaint, has not been provided to the Court, and is not a proper matter for the Court to consider on a motion to dismiss.

235. Therefore, North Slope's motion to dismiss the breach of fiduciary duty claim is DENIED.

v. Aiding and Abetting Breach of Fiduciary Duty

236. The elements of the tort of aiding and abetting a breach of fiduciary duty claim are: (1) breach by a fiduciary of a duty,[15] (2) a defendant's knowing participation in the breach, (3) substantial assistance, and (4) damages. *Nelson v. Elway (Nelson III)*, 971 P.2d 245, 249-50 (Colo. App. 1998). Proof of a "wrongful intent" is not necessary. *Id.*

237. The FAC employs a "shotgun" pleading approach to this claim, referencing the prior paragraphs of the complaint and stating that "Defendants, and each of them, knowingly aided and abetted and participated in the breaches of fiduciary duties committed by the Defendants named in the Fourth Cause of Action by, inter alia, participating in, enabling,

[15] The elements of breach of fiduciary duty are: (1) the defendant was acting as a fiduciary; (2) he breached a fiduciary duty; (3) causation; and (4) damages.

assisting, aiding, encouraging, and/or facilitating the breaches of fiduciary duties alleged therein." FAC, ¶¶293-296.

238. Given that there are multiple Defendants alleged to have been involved at different times in a fraudulent COCCA scheme over a period of 8 years, this shotgun approach is insufficient to advise the Court or the Defendants who is alleged to have done what to assist whom in breaching their fiduciary duties. C.R.C.P. 9(b); *State Farm Mut. Auto Ins. Co. v. Parrish*, 899 P.2d 285, 289 (Colo. App. 1994) (Rule 9(b) applies to claims "sounding in fraud," including breach of fiduciary duty based on fraud, and failure to comply with Rule 9(b) is a proper grounds for dismissal).

239. Therefore, the Court GRANTS the motions of the Related Defendants, Davidson, Snowmass Ventures, and North Slope, to dismiss the remaining aiding and abetting claims.

vi. Civil Conspiracy

240. A civil conspiracy claim requires: (1) two or more persons, (2) an object to be accomplished, (3) a meeting of the minds on the object or course of action, (4) an unlawful overt act, and (5) damages as the proximate result. *Nelson v. Elway*, 908 P.2d 102, 106 (Colo. 1995); *Nelson III*, 971 P.2d at 250; *Double Oak Construction, LLC, v. Cornerstone Development Int'l, LLC*, 97 P.3d 140, 146 (Colo. App. 2003). "[S]ilent acknowledgement of an unlawful act is insufficient to establish the requisite agreement." *More v. Johnson*, 568 P.2d 437, 494 (Colo. 1977). If the alleged acts constituting the underlying wrong are not actionable, there is no cause of action for the conspiracy. *Vickery v. Evelyn V. Trumble Living Trust*, 277 P.3d 864, 871 (Colo. App. 2011).

241. The civil conspiracy claim here appears to be partially duplicative of the COCCA conspiracy claim. *See* FAC ¶298 ("Defendants, and each of the, conspired with the remaining Defendants and other members of the COCCA Enterprise to commit the fraudulent and unlawful conduct alleged herein."); ¶299 ("Likewise, the effects of the conspiracy were constant and injured the District, which injuries are continuing from the conduct of the COCCA Enterprise and breaches alleged herein."). To the extent this claim alleges a separate conspiracy to commit securities fraud and breach of fiduciary duty, it fails to state with particularity which Defendants conspired to commit which underlying wrongs, or what unlawful overt acts were committed in furtherance of that scheme, or who committed them. C.R.C.P. 9(b); *Parrish*, 899 P.2d at 289 (civil conspiracy claims sounding in fraud must be pled with particularity).

242. Therefore, the Court GRANTS the motions of the Related Defendants, Davidson, Snowmass Ventures, and North Slope, to dismiss the remaining conspiracy claims.

vii. Unjust enrichment

243. The elements of unjust enrichment are: (1) the defendant received a benefit, (2) at the plaintiff's expense, (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation. *Lewis v. Lewis*, 189 P.3d 1134, 1141 (Colo. 2008).

244. The FAC's claim of unjust enrichment merely incorporates the other claims by reference and alleges that the Defendants have unlawfully profited at Plaintiff's expense, and/or received the fruits of the wrongful conduct of other Defendants. As with the aiding and abetting and civil conspiracy claims, this claim lacks sufficient particularity. C.R.C.P. 9(b); *Parrish*, 899 P.2d at 289 (unjust enrichment claims sounding in fraud must be pled with particularity).

245. Therefore, the Court GRANTS the motions of the Related Defendants, Davidson, Snowmass Ventures, and North Slope, to dismiss the remaining unjust enrichment claims.

viii. Accounting

246. An equitable accounting is an "extraordinary remedy" that may be ordered when the plaintiff is unable to determine how much, if any, is owed to him from another. *Andrikopoulos v. Broadmoor Management Co., Inc.*, 670 P.2d 435, 440 (Colo. App. 1983). "Usually, a demand for an accounting and a refusal to comply with the demand are necessary prerequisites to be pleaded and proved." *Am. Woodmen's Life Ins. Co. v. Supreme Camp of Am. Woodmen*, 549 P.2d 423, 427 (Colo. 1976).

247. The FAC merely incorporates the other claims by reference and states: "District 2 has been wrongfully deprived of money, information and documents relevant to its management of public resources. Defendants have improperly derived profits in connection with their control over and concealment of information from District 2. District 2 has a right to an accounting for the profits improperly obtained by the Defendants. Under the circumstances, it is just and equitable to require the defendants to provide an accounting." FAC, ¶¶306-310.

248. The FAC fails to allege that it demanded an accounting from each Defendant, which was refused. It also fails to allege that Plaintiff is unable to determine how much, if any, is owed by each Defendant. To the contrary, the FAC alleges that Davidson received specific professional fees in exchange for its work, as the North Slope presumably did

also. *See, e.g.*, FAC, ¶¶28, 134, 205, 225, 263(f). It is unclear whether there are even any "accounts" between Plaintiff and Snowmass Ventures.

249. Therefore, the Court GRANTS the motions of the Related Defendants, Davidson, Snowmass Ventures, and North Slope, to dismiss the remaining accounting claims.

IV. Conclusion

250. Accordingly, the Court GRANTS WBA's motion to dismiss, pursuant to the arbitration agreement, the breach of fiduciary duty, aiding and abetting, securities fraud, civil conspiracy, unjust enrichment, and accounting claims based on WBA's actions on or after November 13, 2013. Plaintiff must pursue those claims in arbitration. The breach of fiduciary duty, aiding and abetting, securities fraud, civil conspiracy, unjust enrichment, and accounting claims based on actions prior to 11/13/2013 are dismissed on statute of limitations grounds. However, the Court DENIES WBA's motion to dismiss the COCCA and COCCA conspiracy claims pursuant to the arbitration agreement, because those claims are based on actions that began before the arbitration agreement was entered into by the parties, and are outside the temporal scope of the agreement. Further, the COCCA claims against WBA are within the statute of limitations, are sufficiently pled, and are not barred by the doctrines of unclean hands or political question.

251. The Court GRANTS the Hypo and Lowe Defendants' motions to dismiss all the claims against them on statute of limitations grounds. The Hypo and Lowe Defendants' are dismissed from the case.

252. The Court GRANTS CLA's motion to dismiss all claims against it on statute of limitations grounds, and/or for failure to file a certificate of review. CLA is dismissed from the case.

253. The Court GRANTS the Related Defendants' motion to dismiss the breach of fiduciary duty, aiding and abetting, securities fraud, civil conspiracy, unjust enrichment, and accounting claims based on actions occurring prior to 9/7/2010 on statute of limitations grounds, but DENIES the motion to dismiss on statute of limitations grounds with respect to claims based on Related's actions on or after 9/7/2010. The Court further DENIES the Related Defendants' motion to dismiss the COCCA claims, the 2013 and 2016 securities fraud claims, and the 2013 and 2016 breach of fiduciary duty claims for failure to state a claim or plead fraud with particularity. However, the motion to dismiss the aiding and abetting claim, the civil conspiracy claim, the unjust enrichment claim,

the accounting claim, and the securities fraud claim based on the 2011 issuance of the guarantor bonds are GRANTED for failure to state a claim.

254. This Court GRANTS Davidson's motion and dismisses it from the case.

255. This Court DENIES Snowmass Ventures and North Slope's motions to dismiss on statute of limitations grounds, but GRANTS their motions to dismiss the COCCA claims for failure to state a claim. However, the Court DENIES North Slope's motion to dismiss the securities fraud and breach of fiduciary duty claims for failure to state a claim. Snowmass Ventures and North Slope's motions to dismiss the aiding and abetting, civil conspiracy, unjust enrichment, and accounting claims are GRANTED. Snowmass Ventures is dismissed from the case.

256. The instant Motions represent the second round of Motions to Dismiss filed in this case. Plaintiffs in framing the FAC have already had the benefit of addressing shortcomings in their original complaint identified in the first round of briefing. At some point, Rule 12 practice must come to an end. This is that point. Accordingly, the dismissals entered herein are all with prejudice.

SO ORDERED.

Dated this 6th day of September, 2019.

BY THE COURT

Christopher G. Seldin
District Court Judge