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<tr><td>DISTRICT COURT, EAGLE COUNTY, COLORADO
885 Chambers Ave.; P.O. Box 597
Eagle, CO 81631
Phone: (970) 328-6373</td><td rowspan="2">DATE FILED: March 16, 2018
CASE NUMBER: 2017CV30114

▲COURT USE ONLY▲</td></tr>
<tr><td rowspan="2">Plaintiff(s): BEHRINGER HARVARD CORDILLERA, LLC; STRATERA HOLDINGS, LLC, f/k/a BEHRINGER HARVARD HOLDINGS, LLC; ROBERT M. BEHRINGER; and MICHAEL D. COHEN

v.

Defendant(s): JANE EILNER; TRUDO LETSCHERT; ROBERT RUDNICK; and RUSSELL SCHMEISER</td></tr>
<tr><td>Case No.: 17CV30114

Div.: 4</td></tr>
<tr><td colspan="2">ORDER GRANTING PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' AMENDED COUNTERCLAIMS PURSUANT TO C.R.C.P. 12</td></tr>
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THIS MATTER comes before the Court on the Motion to Dismiss Defendants' Amended Counterclaims pursuant to C.R.C.P. 12(b)(5) and 9(b) (the "Motion") filed by Plaintiffs Behringer Harvard Cordillera, LLC ("BHC"); Stratera Holdings, LLC, f/k/a Behringer Harvard Holdings, LLC ("BHH"); Robert Behringer ("Behringer"); and Michael D. Cohen ("Cohen") (collectively, the "Plaintiffs") on August 24, 2017. Defendants Jane Wilner, Trudo Letschert, Robert Rudnick and Russell Schmeiser (individually denoted by last name and collectively as the "Defendants") filed their Opposition to the Motion on September 14, 2017. Plaintiffs filed their Reply on September 21, 2017.

The Court, having reviewed the Record, the parties' briefs and related pleadings and being sufficiently apprised of the merits, makes the following CONCLUSIONS OF LAW AND ORDER.

I. INTRODUCTION

Defendants' Amended Counterclaims related to BHC's 2009 application ("Re-zoning Application") for an amendment to the Cordillera Planned Unit Development Control Document (the "Cordillera PUD"). Following customary public notice and public hearings, the Eagle County Board of County Commissioners ("BOCC") approved BHC's Re-zoning Application on January 5, 2010. Upon its approval, the Cordillera Subdivision's Eleventh Amended and Restated Planned Unit Development Control Document dated December 21, 2009, (the "11th PUD") became the controlling written zoning law applicable to the parcel on which the former

Lodge & Spa at Cordillera ("Lodge") was situated. The plain language of the 11th PUD identifies thirty-four separate uses – all of which are permitted and none of which are required – for the Lodge Parcel.

Plaintiffs argue that Defendants' Amended Counterclaims must be dismissed for failure to state a claim pursuant to C.R.C.P. sections 12(b)(5) and 9(b) (the "Rule(s)") as a matter of law. After first setting out the relevant facts from the Amended Counterclaims and related materials included in the pleadings by the parties, the Court sets out the applicable standard for analyzing this Motion, and then analyzes the parties' arguments pursuant to these standards. The Court then makes the following CONCLUSIONS OF LAW and ORDER.

II. FACTS FROM AMENDED COUNTERCLAIM

Select provisions of the Declaration of Protective Covenants, Conditions and Restrictions for Cordillera (the "Declaration") are attached to the pleadings. The Declaration provides that the Lodge ownership may change without consent of Cordillera property owners or the Cordillera Property Owners Association (the "CPOA"). According to the Declaration, Defendants do not have rights to use the Lodge by virtue of being a Cordillera property owner or CPOA member. The Declaration also provides that any property owner's use of the Lodge is expressly subject to compliance with terms and conditions set by Lodge owners, which Lodge owners in their sole discretion may amend/change. Importantly, Lodge owners have the right to terminate Cordillera property owner's use of the Lodge altogether.

The development and land use standards, restrictions and regulations for all properties in Cordillera, including the Lodge and the Village Center Parcels, must comply with a Planned Unit Development (the "PUD") document approved by the BOCC. The first Cordillera PUD was approved by the BOCC in 1987. It has been amended a total of 11 times since. The 11th PUD constitutes the current zoning law for properties in Cordillera and establishes land use standards, restrictions and regulations. The 11th PUD is part of the record and speaks for itself.

BHC was the owner of the Lodge property in 2009. As owner of the Lodge, BHC had the right to sell the Lodge and did so, consistent with the provisions of the Cordillera PUD. In 2009, BHC applied to the BOCC to amend the Cordillera PUD. BHC submitted a clean copy of the 11th Amendment to the BOCC with the Re-zoning Application, as well as a "blacklined copy" of the proposed 11th Amendment, marked to show changes against the existing 10th PUD.

Notice of the public hearings held on the Re-zoning Application was published and mailed to all Cordillera property owners. Public notice of the Re-zoning Application and request for approval of the 11th PUD was published in The Eagle Valley Enterprise on November 19, 2009. The notice provided that "Copies of the aforementioned application and related documents may be examined in the Office of the Eagle County Department of Community Development."

After this notice, the Re-zoning Application for the 11th PUD was considered at a public hearing before the BOCC in December 2009. After hearing, the BOCC approved the Re-zoning Application for the 11th PUD. Its' provisions are recited in the real property records of the Clerk and Recorder's Office of Eagle County, Colorado ("Recorder") on January 11, 2010, at Reception No. 201000508.

On October 18, 2016, the BOCC issued Resolution No. 2016-079, ratifying, with changes, the Eagle County Manager's July 7, 2016, interpretation that the 11th PUD allowed as a use by right the replacement of the former Lodge functions with a residential facility and outpatient drug addiction clinic. On June 29, 2017, the Defendants filed in another division of this court two unsuccessful and later consolidated state suits against the BOCC seeking judicial review of, and relief from, the 11th PUD.

On December 7, 2016, Defendants also filed suit against Plaintiffs in the United States District Court of Colorado requesting a preliminary injunction against implementation of the PUD. Every one of these legal challenges was unsuccessful.

Following the resolution of the litigation and BHC's sale of the Lodge, Plaintiffs filed the instant lawsuit requesting damages for malicious prosecution and abuse of process due to the delay and additional costs to accomplish their ultimate sale of the property. On August 10, 2017, Defendants filed these Amended Counterclaims, seeking compensatory damages. The Amended Counterclaims allege promissory estoppel, fraudulent misrepresentation, fraudulent concealment and aiding and abetting fraudulent acts.

III. STANDARD OF REVIEW FOR MOTIONS TO DISMISS (12(b)(5))

The purpose of a motion to dismiss under Rule 12(b)(5) is "to test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996); *see also Public Service Co. of Colorado v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). While motions to dismiss have historically been viewed with disfavor by the Colorado courts "only a complaint that states

a plausible claim for relief survives a motion to dismiss." *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

In *Warne v. Hall*, the Colorado Supreme Court adopted the "plausibility" standard articulated by the Unites States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when its factual allegations "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, by allowing a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678.

Since *Warne*, a court reviewing a Rule 12(b)(5) motion accepts only plausible allegations in the complaint as true and in the light most favorable to the non-moving party. *See Semler v. Hellerstein*, No. 15-CA-0206, 2016 WL 6087893 at *4 (Colo. App. 2016). *Id.* A court need not accept as true legal conclusions stated as facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A claim continues to be insufficient if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *See e.g., W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). During review the court may consider plausible facts alleged in the pleadings, documents attached as exhibits or incorporated by reference, and matters proper for judicial notice, such as records of a public agency and real property records, without converting the motion into one for summary judgment. *See Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006); *Ryan Ranch Cnty. Ass'n v. Kelley*, 380 P.3d 137, 142 (Colo. 2016). Having established the relevant standards for adjudicating the Motion at bar, the Court now analyzes the parties' arguments.

IV. ANALYSIS

A. Defendants' Amended Counterclaim for Promissory Estoppel Fails to State a Plausible Claim Against Plaintiffs

Defendants argue that BHC made representations regarding the meaning of the 11th PUD that constitute the grounds for its allegations of promissory estoppel. In the Amended Counterclaim, Defendants allege four representations were made to the CPOA members in 2009, regarding the amendment of the existing Cordillera 10th PUD:

1) The 11th PUD was not proposed as a substantive change from the existing 10th PUD;

2) The 11th PUD instead was proposed to combine the Lodge and Village Center Parcels in to single parcel for development purposes, so that existing densities and uses (29) could be transferred from one parcel to the other;
3) The 11th PUD was proposed to correct some minor errors in the existing PUD; and
4) The 11th PUD was proposed to allow for the completion of the Lodge.

The Court analyzes the parties' arguments below in line with the principal that "allegations supporting a claim are insufficient if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief." *See e.g., W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). Further, the Court is mindful that only a complaint that states a plausible claim for relief survives a motion to dismiss. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016). As *Warne* makes clear, only plausible allegations contained in a complaint are accepted as true and are construed in a light most favorable to the non-moving party. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See Semler v. Hellerstein*, No. 15-CA-0206, 2016 WL 6087893 at *4 (Colo. App. 2016).

1. Amended Counterclaim Allegations Regarding Promissory Estoppel Fails as to Rudnick and Schmeiser as any Purported Promises were Stated Only to CPOA Defendants, Wilner and Letschert

The elements of promissory estoppel are: 1) the receipt of a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise; 2) action or forbearance by the promise induced by that promise; and 3) the existence of circumstances such that injustice can be avoided only by the enforcement of the promise. *Nelson v. Elway*, 908 P.2d 203, 220 (Colo. 1995). The Court finds that none of these elements apply to Rudnick and Schmeiser as set out by the factual allegations in the Amended Counterclaim.

The Amended Counterclaim recites that Wilner and Letschert were the only defendants to whom Plaintiffs allegedly made any promises or representations about the legal or planned effect of the 10th PUD amendment. Defendants Rudnick and Schmeiser are not named as members of the CPOA or as persons with whom Plaintiffs conferred or made assurances to in 2009. Therefore, only Wilner and Letschert could have been given a "promise" upon which such allegations could be grounded. However, both Wilner and Letschert are deemed to have had constructive notice of the PUD in January 2010, when the PUD was adopted and recorded.

Defendant Rudnick is alleged to have purchased property in Cordillera in 2010. He was not directly promised anything at all; nor was Defendant Schmeiser, who received constructive notice when he purchased his property in Cordillera in 2014.

The Amended Counterclaim also alleges that development and land use standards, restrictions and regulations for all properties in Cordillera including the Lodge and the Village Center Parcels must comply with a PUD document approved by the BOCC. A property owner is deemed to have knowledge of the provisions of a PUD on the date it is adopted if he is already a property owner, and on the date he buys the property, if he becomes an owner after the adoption date. This is similar to the way a property owner is deemed to have knowledge of applicable zoning laws upon assuming ownership. *See South Creek Associates v. Bixby & Associates, Inc.*, 781 P.2d 1027, 1030 (Colo. 1989).

Thus, as a matter of law, Defendants Wilner and Letschert had constructive notice of the governing PUD in January 2010, the date the Amended Counterclaim cites as the date the promise was made. There is no allegation that Plaintiffs directly made any promises to Defendants Rudnick and Schmeiser upon which promissory estoppel could be premised. Further, even if there had been, both also gained constructive notice of the governing PUD at the time they purchased their property in 2010, and 2014, respectively. A claim is insufficient if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *See e.g., W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). Therefore, the Court finds the allegations regarding the necessary elements for promissory estoppel claims fail as a matter of law with regard to all Defendants.

2. Promissory Estoppel Allegations are Barred as a Matter of Law Against all Defendants Since Written Development and Land Use Regulations Govern

The Amended Counterclaim recites several binding provisions in Section 1.05.4 of the Declaration and from parts of the PUD alleged to be applicable to the Lodge Parcel. These provisions supersede zoning provision for the Lodge in Cordillera that is the subject of these Amended Counterclaims. Plaintiffs further argue that Defendants' claim for promissory estoppel fails as to all Defendants because the underlying rationale for such a claim – a promise not technically enforceable as a contract – is inapplicable; instead, a written PUD governing development and land use governs. The Court agrees.

A claim continues to be insufficient if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief. *See e.g., W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). A promissory estoppel claim based on promises contradicted by a written document that controls is not legally supportable. *Id.*

Defendants respond that this argument constitutes a defense rather than proof of insufficient pleading, and therefore cannot be considered on a motion to dismiss. The Court disagrees.

Promissory estoppel cannot be applied to the Wilner and Letschert Defendants because even if such promises were made, the written declaration, covenants and PUD provisions govern and contradict those promises. Promissory estoppel is likewise inapplicable to the Rudnick and Schmeiser Defendants because the Amended Counterclaim doesn't contain any plausible allegations that specific promises were actually made to them

3. Defendants Wilner, Rudnick and Letschert Claims of Promissory Estoppel are also Barred by the Applicable Statute of Limitations

Plaintiffs argue that Promissory Estoppel claims brought by Defendants Wilner and Letschert are barred by the applicable statute of limitation that had already run prior to this suit being filed. The Court agrees.

Importantly, the Court finds these allegations purportedly made to Wilner, Letschert and Rudnick are barred by the statute of limitations as their constructive notice of the PUD in 2010[1] triggered the running of the statute of limitations on this claim. Constructive notice is a legal inference from established facts, and like other legal presumptions can't be disputed. When a party is charged with constructive notice of a fact, it creates an irrefutable presumption of actual notice. *See Davis v. Pursel*, 55 Colo. 287, 300, 134 P.107, 111-112 (Colo. 1913).

With actual notice on January 5, 2010, the statute of limitations began to run and gave the Defendants knowledge that the Plaintiffs' purported promise regarding the PUD was different from the statements they purport are grounds for their reasonable expectation or that allegedly induced action or forbearance. The relevant statute of limitation governing promissory estoppel is two years. C.R.S. § 13-80-101(a). For Defendants Wilner and Letschert, that time limit expired no later than January 5, 2012. For Defendants Schmeiser and Rudnick, the latest date

[1] The PUD went into effect January 5, 2010. They were recorded January 11, 2010.

was January 11, 2012, as both apparently rely on the knowledge of the Wilner and Letschert Defendants, whose constructive knowledge of the provisions of the PUD upon enactment was reinforced by the PUD's subsequent recording prior to Schmeiser and Rudnick's purchases. Since the Amended Counterclaim wasn't filed until August 10, 2017, it was filed long after the expiration of the time limit.

Statutes of limitations are enacted to promote justice, prevent unnecessary delay and preclude stale claims. While this is generally a factual matter, if the undisputed facts clearly show that a plaintiff discovered, or reasonably should have discovered, the negligent conduct as of a particular date, the issue may be decided as a matter of law. *Winkler v. Rocky Mountain Conference of United Methodist Church*, 923 P.2d 152, 158-59 (Colo. App. 1995), *as modified on denial of reh'g* (Jan. 18, 1996). The critical inquiry of when an action accrues is knowledge of the facts essential to the cause of action, not knowledge of the legal theory upon which the action may be brought. *Morris v. Geer*, 720 P.2d 994 (Colo. App. 1986).

The statute of limitations begins to run the instant a claimant knew or should have known she was injured by the wrongful conduct of another, and further, that date of accrual must appear on the face of the complaint. C.R.S. § 13-80-101; *Cf. Wasinger v. Reid*, 705 P.2d 533, 534 (Colo. App. 1985) ("a complaint which fails to specify time so that the statutory period may be computed may properly be dismissed pursuant to a C.R.C.P. 12(b)(5) motion").

Accordingly, Defendants Wilner, Letschert and Rudnick's counterclaims against Plaintiffs are dismissed, since they failed to file their counterclaims against Plaintiffs until August 10, 2017, which is more than four years after the applicable limitations period had run.

B. Defendants' Equal Access to 11th PUD Provisions Prior to Purchase Mean Allegations of Fraudulent Misrepresentation and Fraudulent Concealment as Against Plaintiffs Fail to State a Claim

Defendants Rudnick and Schmeiser couch their claims as fraudulent misrepresentation and fraudulent concealment. Common to each claim is the element of justifiable reliance on an alleged promise, misrepresentation, or omission. *See Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008); *Nielson v. Scott*, 53 P.3d 777, 780 (Colo. App. 2002); *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983). Plaintiffs contend that their constructive knowledge of the precise provisions of the 11th PUD, as well as the fact that no representations were made to them,

mean that the Amended Counterclaim fails to state facts that would support a claim for fraud as to these Defendants. The Court agrees.

Where a party claiming fraud has access to information that was equally available to both parties and that information reveals the facts at issue, that party has no right to rely on the allegedly false promise or representation. *See Vinton v. Virzi*, 269 P.3d 1242, 1247 (Colo. 2012); *M.D.C./Wood, Inc. v. Mortimer*, 866 P.2d 1380, 1382 (Colo. 1994); *Nielson*, 53 P.3d at 780; *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 749 (Colo. App. 2002); *In re Marriage of Smith*, 7 P.3d 1012 (Colo. App. 1999).

Given Defendants had access to and could have reviewed the Re-zoning Application and its proposed 11th PUD and discovered what the 11th PUD permits as uses-by-right on the Lodge Parcel prior to closing, they have no right to rely upon allegedly false promises or representations and cannot state a claim for fraudulent misrepresentation or concealment.

C. Defendants Wilner and Letschert's Claims of Fraudulent Misrepresentation and Fraudulent Concealment Against Plaintiffs Fail as Matter of Law Since Barred by the Statute of Limitations

The statute of limitations begins to run the moment a claimant knew or should have known he was injured by the wrongful conduct of another. Further, that date of accrual must appear on the face of the complaint. *Wasinger v. Reid*, 705 P.2d 533, 534 (Colo. App. 1985) ("a complaint which fails to specify time so that the statutory period may be computed may properly be dismissed pursuant to a C.R.C.P. 12(b)(5) motion").

Accordingly, these Defendants' counterclaims for fraudulent misrepresentation and fraudulent concealment against Plaintiffs are dismissed, since they were not asserted as counterclaims against Plaintiffs until August 10, 2017, which is well past the three-year limitations period for frauds. *See* C.R.S. § 13-80-101(1)(c) and 108(3). "Statutes of limitations are enacted to promote justice, prevent unnecessary delay, and preclude stale claims. If undisputed facts demonstrate that the plaintiff had the requisite information as of a particular date, then the issue of whether the statute of limitations bars a particular claim may be decided as a matter of law." *See Winkler, id.*

Since Defendants have pled the date the claim accrued, this Motion may be determined under Rule 12(b)(5). The Court notes that Defendants do not argue that the Amended

Counterclaim relates back. Since it does not, C.R.C.P. 12(b)(5) (failure to state a claim) governs a motion to dismiss predicated on applicable limitations periods.

D. Claims of Aiding and Abetting Fraud Against Plaintiffs Fail to State a Claim Since Fraudulent Claims Against all Defendants Inadequately Pled

The only cause of action asserted against BHC, Behringer and Cohen is aiding and abetting. "Liability for aiding or abetting a tortious act will be found if the party whom the defendant aids performs a wrongful act that causes an injury, the [liable party] is generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance, and [he] knowingly and substantially assists the principal violation." *Holmes v. Young*, 885 P.2d 305, 308 (Colo. App. 1994). Defendants' Amended Counterclaims for aiding and abetting can survive only if one of the Defendants' fraud claims survived this Motion. None do. As explained above, Defendants have not alleged any facts that would state a claim of fraud against Behringer. In 2009 Behringer assumed no duty of candor to Schmeiser, and in fact, made no representation to him at all.

Additionally, given the requirement of an underlying wrongful act, the heightened fraud pleading standard of Rule 9(b) applies to this claim. *See Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 986 (10th Cir. 1992) (citing the federal version of an almost verbatim Colorado Rule 9). C.R.C.P. 9(b) states: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The rule also requires allegations such as the time, place, content, and consequences of the actions to be particularly alleged. Only malice, intent, knowledge, and other conditions of a person's mind may be averred generally." *Id*.

The Court notes that aiding and abetting is not a pure fraud claim. Fraud, however, is an essential element of an aiding and abetting claim. Therefore, the fraud underlying the aiding and abetting claim must be pled with particularity. See C.R.C.P. 9(b). Since the court has already ruled that the allegations of fraudulent misrepresentation and/or concealment fail, Defendants' allegations of an aiding and abetting claim also fail. *Baker v. Wood, Ris & Hames, PC*, 2016 CO 5, ¶ 1, 364 P.3d 872, 883 (Colo. 2016) (*reh'g denied* (Feb. 8, 2016)) (the "strict privity rule" precludes non-client liability).

Plaintiffs argue that the aiding and abetting fraudulent misrepresentation and concealment cannot stand if no fraudulent acts are properly pled. The Court agrees. Since the fraudulent

misrepresentation and concealment claims against all Plaintiffs have been dismissed, the Court **GRANTS** dismissal of the aiding and abetting claims made by these Defendants against Behringer.

E. The Court Declines to Address Plaintiffs' Argument Regarding Schmeiser's Standing Since Schmeiser's Allegations Against Behringer Necessarily Fail

The Amended Counterclaim alleges that Defendant Schmeiser was damaged because he wouldn't have paid the price he did when he bought the property in 2014, if he had known about BHC's alleged fraud and deceit. Plaintiffs argue that since Defendant Schmeiser sold his property he doesn't have standing to bring any claims for damages. Yet, Plaintiffs do not respond to Schmeiser's argument that his counterclaim against BHC, and his claim against BHH, Behringer and Cohen for abetting fraud are premised on injuries he suffered by overpaying for his purchased property at Cordillera in 2014. Indeed, their arguments fail to address any other basis of standing.

That said, however, in light of the resolution of this Motion, the Court is not required to, and declines to address this argument since under the analysis above Schmeiser fails to state a claim against the Plaintiffs. Defendants failed to allege any facts that would suggest that in 2009, BHC assumed any duty of candor toward Schmeiser, or indeed, made any representations to him. Therefore, Defendant Schmeiser's standing is irrelevant, and the Court declines to address it further.

V. CONCLUSIONS OF LAW AND ORDER

The Court makes the following **CONCLUSIONS OF LAW AND ORDER**:

1. Defendants Wilner and Letschert's allegations with regard to Promissory Estoppel fail to state a claim for which relief may be granted. Their claims on that ground against Plaintiffs are also barred by the Statute of Limitations. Therefore, the Court **DISMISSES with Prejudice** Defendants Wilner and Letschert's allegations against the Plaintiffs in the Amended Counterclaims for Promissory Estoppel.

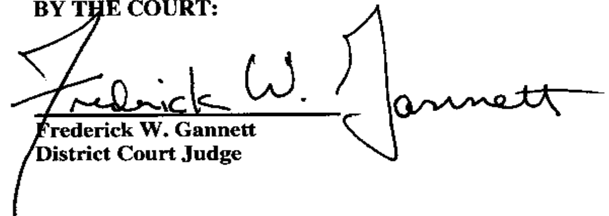
2. Defendants Wilner and Letschert also are barred by the applicable Statute of Limitations from bringing claims against these Plaintiffs for Fraudulent Misrepresentation and Fraudulent Concealment. Therefore the Court **DISMISSES with Prejudice** Defendants Wilner and Letschert's allegations against the Plaintiffs in the Amended Counterclaims for Fraudulent Misrepresentation and Concealment.

3. Because Wilner and Letschert are unable to sustain fraud claims against Plaintiffs, their allegations of Plaintiff's Aiding and Abetting Fraudulent Conduct also fail as a matter of law and are **DISMISSED with Prejudice**.

4. Defendants Rudnick and Schmeiser also fail to state a claim for which relief may be granted against the Plaintiffs for Promissory Estoppel because of the existence of a written agreement (the 11th PUD). Therefore their claims of Promissory Estoppel against the Plaintiffs are **DISMISSED with Prejudice in their entirety**.

5. Defendants Rudnick and Schmeiser's claims of detrimental reliance are implausible, and therefore are not accepted as true. However, even if accepted as true, they fail to state a claim for which relief may be granted. Therefore, the Court **DISMISSES** Defendants Rudnick and Schmeiser's claims against the Plaintiffs for fraudulent misrepresentation, fraudulent concealment and for aiding and abetting such fraud. Since the Court has already dismissed these same claims made by Wilner and Letschert, these claims against Plaintiffs are **DISMISSED with Prejudice in their entirety**.

IT IS SO ORDERED on this 16th day of March, 2018.



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