**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION**

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| CHICAGO TRANSIT AUTHORITY RETIREE HEALTH CARE TRUST and THE BOARD OF TRUSTEES FOR THE CHICAGO TRANSIT AUTHORITY RETIREE HEALTH CARE TRUST, | ) | Case No. 19-cv-07570 |
| Plaintiffs, | ) | Hon. Mary M. Rowland |
| v. | ) | |
| DILWORTH PAXSON, LLP; TIMOTHY ANDERSON; and GREENBERG TRAURIG, LLP; | ) | |
| Defendants. | ) | |

**GREENBERG TRAURIG, LLP'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS**

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Greenberg Traurig, LLP ("GT") moves to dismiss the single count of the complaint asserted against GT (Count V) by the Chicago Transit Authority Retiree Health Care Trust and the Board of Trustees for the Chicago Transit Authority Retiree Health Care Trust (collectively, "RHCT" or "Plaintiffs"). Over several years, RHCT has sued 23 defendants in an effort to recover its losses from a bond purchase that was stolen by criminals. For some reason, RHCT has dismissed its claims against most of these defendants, including claims against criminals who pled guilty or were convicted of stealing the money. RHCT has now sued the law firms that worked on the deal — GT and Dilworth Paxson ("Dilworth") — with most of the complaint directed at Dilworth (Counts I-IV). RHCT asserted its sole count against GT not because it has a legitimate claim, but because it sees GT as a potential deep pocket. GT ***never*** represented RHCT or interacted with RHCT in any way, shape, or form before, during, or after the bond issuance. Rather, GT represented the bond issuer, Wakpamni Lake Community Corporation ("WLCC"). WLCC was not a wrongdoer — it was a ***victim***. *United States v. Galanis*, 366 F. Supp. 3d 477, 481 (S.D.N.Y. 2018). RHCT's negligence claim in Count V is a late attempt to blame GT for crimes by people with no connection to GT whatsoever. The Court should dismiss Count V with prejudice because it is time-barred and does not (and cannot) state a claim upon which relief can be granted.

Part I of this memorandum reviews the relevant factual background. Part II outlines the legal standard. Part III demonstrates that Count V is time-barred. Part IV shows that Count V should also be dismissed with prejudice because it fails to state a claim.

## I. Relevant Factual Background And Allegations Of The Complaint.

The Complaint purports to assert a single claim against GT, for negligence. For the purposes of this Motion only, GT accepts as true all well-pleaded factual allegations, but if it ever becomes necessary, GT will demonstrate that the numerous allegations in the complaint are inaccurate. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

**A. The Bonds**. The Wakpamni Lake Community (the "Community") is a subdivision of the Wakpamni Lake District, itself a subdivision of the Oglala Sioux Tribe. (Compl. ¶¶ 37-38.) WLCC is the Community's tribally-chartered corporate entity. (Id.) The Community is "financially distressed" (Compl. ¶ 60). In March 2014, before GT was involved, Jason and John Galanis convinced WLCC to issue bonds as a financing option (Compl. ¶¶ 39-40, 42). The Galanises said the proceeds would be invested in a high-yield annuity (provided by Wealth Assurance Private Client Corporation ("WAPCC")) that would generate interest to pay back bond principal and provide funds for development projects. (Compl. ¶¶ 39-40, 43.) Burnham Securities was hired as the placement agent for the bonds before GT was engaged. (*See* Compl. ¶ 53.)

The Galanises recruited others, including Devon Archer, Bevan Cooney, Hugh Dunkerley, Gary Hirst, Michelle Morton, and Richard Deary, to effectuate their scheme. (Compl. ¶¶ 45-48, 143-49, 247, 301, 312.) In August 2014, Galanis took over Hughes Capital Management ("Hughes") to gain access to investors, including RHCT. (Compl. ¶¶ 142-149.) Hughes purchased the first tranche of bonds on behalf of eight clients, including RHCT. (Compl. ¶ 172, 175.)

**B. RHCT Learns Of The Bond Purchase**. RHCT learned that it had invested in the bonds when Hughes sent RHCT a letter dated September 2, 2014 describing the purchase and also informing RHCT that Hughes had been sold. (Compl. ¶ 283 and Ex. 1[1].) In addition, RHCT received financial reports from Hughes reflecting the purchase of "Wakpamni Lake Community Corp." bonds and valuing them on September 17, 2014. (Compl. ¶ 285 and Ex. 2.)

**C. GT's Role as Bond Counsel to WLCC**. GT never represented or interacted with RHCT. Rather, WLCC retained GT as bond counsel after Burnham and WLCC had worked out the general terms of the bond deal. (See Compl. ¶¶ 55-58.) Plaintiffs' sole allegation against GT

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[1] These exhibits are referenced in, and central to, the complaint, and so they may be considered here. *See Citadel Grp. Ltd. v. Washington Reg'l Med. Ctr.*, 692 F.3d 580, 591 (7th Cir. 2012).

is that GT provided an opinion letter (standard in bond transactions) that was relied upon by U.S. Bank (the Indenture Trustee), and that letter somehow "caused" the diversion of RHCT's funds because it allowed the deal to proceed. (Compl. ¶¶ 6, 380.) Plaintiffs do not allege that the opinion letter was addressed to them (it was not), or that they saw it, knew of it, or ever communicated with GT. Plaintiffs contend that the opinion letter contained the following statements: (1) the bonds would be used to purchase an annuity (Compl. ¶ 201); (2) the bonds would be used to fund tribal development projects (Compl. ¶ 203); and (3) the bonds were duly authorized (Compl. ¶ 207). Plaintiffs allege that GT knew or should have known that these statements were false when the letter was drafted. (*See* Compl. ¶¶ 202-210.) However, none of GT's statements were false, and they cannot form a basis for RHCT's claims as a matter of law.

**D. The Galanis Scheme Unravels**. Rather than use the funds paid by the bondholders to purchase an annuity as intended and create an endowment for the Community, the Galanises stole them. (Compl. ¶¶ 300, 307, 312; *accord* ***Galanis***, 366 F. Supp. 3d at 480.) In November 2015, the SEC began investigating. (Compl. ¶ 293.) In May 2016, the United States filed a criminal complaint in the Southern District of New York against the Galanises, Dunkerley, Morton, Hirst, Cooney, and Archer. (Compl. ¶ 301.) The SEC filed a parallel civil action. (Compl. ¶ 303.) Plaintiffs allege that at this time, they first "learned the proceeds and security for the Wakpamni Bonds were invested into a fake annuity and had been compromised, making the representations in the opinion letters seemingly false." (Compl. ¶ 304.)

As described in the complaint, "[t]he Bonds have been the subject of criminal, SEC and civil litigation in various jurisdictions throughout the country." (Compl. ¶ 3.) GT and RHCT have already been parties to a civil lawsuit in the United States District Court for the District of South Carolina ("South Carolina Litigation"), where RHCT was an intervenor-plaintiff. (Compl. ¶ 309.) Prior to the filing of a motion to dismiss in that suit, RHCT dismissed its claims against GT and

entered into a tolling agreement that excluded the period of February 9, 2017 until October 3, 2019 from any statute of limitations defense. (Compl. ¶ 314.) RHCT is also currently suing U.S. Bank in the United States District Court for the District of South Dakota ("South Dakota Litigation").

RHCT has pursued, and dismissed, claims against the wrongdoers. RHCT took the sworn position that RHCT's "investment adviser, Hughes Capital Management, Inc., misappropriated [RHCT's] funds that it managed" in order to buy WLCC bonds. Case No. 17-cv-6855 (S.D.N.Y.), Dkt. 57-5 ¶ 5 (Ex. 3). Yet RHCT is not pursuing claims against Hughes, the Galanises, or their associates. Instead, it has voluntarily dismissed its claims, as shown in Appendix A.

## II. Legal Standards.

A complaint should be dismissed if it does not assert factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp.*, 550 at 555. A "formulaic recitation of the elements of a cause of action" does not meet the standard. *Id.* A complaint should be dismissed with prejudice when amendment would be futile. *Bogie v. Rosenberg*, 705 F.3d 603, 608 (7th Cir. 2013). A time-barred claim is appropriately dismissed on a motion to dismiss if "the allegations of the complaint itself set forth everything necessary to satisfy the affirmative defense." *United States v. Lewis*, 411 F.3d 838, 842 (7th Cir. 2005).

## III. Count V Should Be Dismissed With Prejudice Because It Is Time-Barred.

RHCT's complaint is tardy and must be dismissed as time-barred. RHCT learned of its potential claims when it found out about the unauthorized bond purchase in September 2014, and certainly by the time that it fired its investment advisor and moved its assets "on an emergency basis" in October 2014. 10/23/14 Minutes of RHCT Board (Ex. 4).[2] Despite being on notice of its claims, it waited more than two years after those events to sue, and its claims expired.

[2] The Court may consider RHCT's Board minutes, which are posted on its website, because the contents of government websites are an appropriate subject for judicial notice, which "may be

This Court should apply the Illinois statute of limitations. *Ennenga v. Starns*, 677 F.3d 766, 774 (7th Cir. 2012); *ABF Capital Corp. v. McLauchlan*, 167 F. Supp. 2d 1011, 1014 (N.D. Ill. 2001). The Illinois statute of limitations for actions arising out of the provision of legal services is two years from the time the person bringing the action knew or should have known about the injury. 735 ILCS 5/13–214.3(b)-(c). This statute of limitations applies to any claim arising from the provision of legal services, including claims by non-clients. *800 S. Wells Commercial, LLC v. Horwood Marcus & Berk Chartered*, 995 N.E.2d 472, 476-77 (Ill. App. Ct. 1st Dist. 2013) (lessee's claim against lessor's attorney for aiding and abetting breach of fiduciary duty was time barred under two-year statute of limitations for claims arising from performance of legal services).

Claims arising from the provision of legal services accrue at the time "an injured party becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Steinmetz v. Wolgamot*, 995 N.E.2d 338, 346 (Ill. App. Ct. 1st Dist. 2013) (internal quotations omitted). For example, a plaintiff who receives an IRS deficiency notice may not evade the limitations period by saying that his lawyers told him that his tax strategies were fine — the letter would prompt a reasonable person to "inquire further to determine whether an actionable wrong was committed." *Id.* Similarly, a client who does not receive a tax return to sign before the deadline is on inquiry notice that his attorney may have failed to file it, and has "an obligation to inquire further, starting the clock" for professional negligence. *Kadlec v. Sumner*, 1 N.E.3d 1124, 1131 (Ill. App. Ct. 1st Dist. 2013).

In the investment context, courts have recognized that investment documents and account statements may put a reasonable person on inquiry notice and begin the running of the applicable limitations period. In *Jackson Nat. Life Ins. Co. v. Merrill Lynch & Co.*, the Second Circuit upheld

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taken at any time." *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003); *Brooks v. City of Chicago*, 2012 WL 13570, at *3 n.2 (N.D. Ill. Jan. 4, 2012).

the grant of a motion to dismiss on statute of limitations grounds because a prospectus and Offering Memorandum regarding an investment would "alert a person of ordinary intelligence that fraud was potentially afoot" because of various inconsistencies that would make a reasonable investor question whether the underwriting process was being performed as described. 32 F.3d 697, 702 (2d Cir. 1994). *See also Freundt-Alberti v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F. Supp. 2d 1298, 1302 (S.D. Fla. 2001), *aff'd sub nom. Freundt-Alberti v. Lynch*, 31 F. App'x 930 (11th Cir. 2002) (account statement indicating that money was invested in mutual funds rather than United States bonds as agreed put investor on inquiry notice); *Travis v. The Vanguard Grp., Inc.*, 2008 WL 2073372, at *4 (E.D. Pa. May 15, 2008) (granting motion to dismiss because "[h]ad Plaintiff exercised reasonable diligence and reviewed her account statements, she would have learned far sooner that her account was not being managed in a manner consistent with her conservative financial goals"); *Rohland v. Syn-Fuel Assocs.-1982 Ltd. P'ship*, 879 F. Supp. 322, 330 (S.D.N.Y. 1995) (granting motion to dismiss because opinion letters and memoranda put investors on inquiry notice, where investors alleged that the risks of their investments were not disclosed, but documents described "high degree of risk").

Here, based on this established case law, RHCT has pled itself out of court because it admits that it was informed of the unauthorized purchase of WLCC bonds within weeks after their acquisition through both a letter and a financial report advising RHCT of the bond purchase. (Compl. ¶¶ 283, 285 and Exs. 2, 3.) Specifically, RHCT received the letter from Hughes on September 2, 2014, and therefore, the statute of limitations ran on September 2, 2016 (and certainly by October 23, 2016, which is two years after the date when the RHCT terminated Hughes based on "concerns about changes in management and ownership" and placed assets from the Hughes account "in an index fund on an emergency basis") (Ex. 4). This notice was more than two years before the tolling agreement period described in the complaint, which started on February 9, 2017.

(Compl. ¶ 314.) RHCT further admits that this transaction was obviously unauthorized: RHCT alleges that Hughes was prohibited from "investing in high-risk or speculative securities, such as private equity investments." (Compl. ¶ 21.) RHCT alleges that the bond purchase was "outside of the investment guidelines" for Hughes' "pension fund clients based on the amount of the holding and the fact that bond proceeds were to be invested in private equity, which is not a fixed-income investment." (Compl. ¶ 147.) RHCT alleges that it was "not surprising[]" that "the annuity company turned out to be fake" and that the transaction was "an obvious financial crime." (Compl. ¶¶ 2, 4.) Thus, when RHCT learned of the transaction, which was clearly outside its investment guidelines, as well as Hughes's sale, it had enough information to follow up. In fact, RHCT did follow up, developed serious concerns about Hughes, and quickly terminated Hughes. Yet RHCT allowed more than two years to elapse before asserting a claim against GT, and its claim expired.

## IV. Count V Should Be Dismissed With Prejudice Because It Fails To State A Claim.

Count V should also be dismissed because RHCT does not plead the elements of a negligence claim.[3] For a plaintiff to state a negligence claim, it must allege facts that establish a duty of care, a breach of that duty, and an injury proximately caused by the breach. *Lewis v. Heartland Food Corp.*, 17 N.E.3d 219, 221 (Ill. App. Ct. 1st Dist. 2014). In the context of negligent opinion letters, to establish a duty, a client must allege that the lawyer was "aware of the nonclient [and] intend[ed] that the nonclient rely on the information." Ronald E. Mallen, 1 Legal

[3] For the purpose of this motion, the Court should apply Illinois law. In diversity cases, the forum state's conflict-of-law rules apply. *Hinc v. Lime–O–Sol Co.*, 382 F.3d 716, 719 (7th Cir. 2004). Illinois follows the Second Restatement approach, and conducts a choice-of-law analysis only when it is outcome-determinative. *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 898, 901 (2007). Here, significant differences in the negligence law of other potentially-applicable jurisdictions have not been identified. Further, where, as here, the Second Restatement test does not counsel strongly toward the application of a particular law, "Illinois courts have an interest in not being burdened with applying foreign law." *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 920 (Ill. 2007). Accordingly, the Court should apply Illinois law.

Malpractice § 7:36 (2019 ed.). Here, the elements of a negligence claim are not satisfied for four reasons: (1) GT did not owe RHCT a duty; (2) RHCT cannot allege a breach because GT's opinion letter does not contain any misrepresentations; (3) there is no causation because RHCT did not rely on GT's opinion letter — RHCT did not even know it existed; and (4) there is no causation because the Galanises' criminal scheme, rather than GT's opinion letter, caused the loss.

### A. RHCT's Complaint Should Be Dismissed With Prejudice Because It Fails To Allege That GT Owed It A Duty.

"There is no tort of negligence without a breach of a duty owed the victim by the tortfeasor." *Glade ex rel. Lundskow v. United States*, 692 F.3d 718, 721–22 (7th Cir. 2012). An attorney's duties are typically only to the client and directly intended third-party beneficiaries — any broader rule would interfere with the attorney's duty to "represent his [or her] client with undivided fidelity." *Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982). While the recipient of an opinion letter may in certain cases have standing to sue an attorney as an intended third-party beneficiary of the attorney's advice, that situation is limited and applies only to ***intended*** recipients of the letter. Ronald E. Mallen, 1 Legal Malpractice § 7:36 (2017 ed.) (In order for there to be any liability for a misrepresentation in an opinion letter, a lawyer "must be aware of the nonclient [and] intend[] that the nonclient rely on the information."). Thus, the Seventh Circuit affirmed the dismissal of a lawsuit by a bond investor against bond counsel in a lawsuit closely analogous to this one. *First Interstate Bank of Nevada, N.A. v. Chapman & Cutler*, 837 F.2d 775, 778-80 (7th Cir. 1988). In *First Interstate*, the plaintiffs alleged that Chapman and Cutler issued a legal opinion in connection with a bond issue, opining that the bond would be tax exempt. *Id.* at 777. However, the law firm allegedly knew that the bonds would not be tax exempt. *Id.* Because the bonds turned out ***not*** to be tax exempt, they had to be refunded through a second bond issue. *Id.* After the second bond issue, criminals stole the funds. *Id.* The investors sued bond counsel. *Id.* The Seventh Circuit affirmed the dismissal of the complaint because "[t]he misuse of the McCormick

B bond proceeds can in no way be said to be the inevitable result of Chapman and Cutler's prior allegedly false opinions." *Id.* at 779. Further, the Court stated that bond counsel could not be liable in the absence of a "duty to disclose" to the investors. *Id.* at 780 n.4.

Counsel to a bond issuer do not owe duties to bondholders and are generally "accountable only to their clients." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1124 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914 (1989). In regard to opinion letters, multiple courts have confirmed that opinion letter writers are liable only to specifically intended beneficiaries. *E.g. Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1199 (5th Cir. 1995) (law firm opinion letter created no duty to individual investors and disclaimer language was sufficient to alert investors to that fact); *In re Munford, Inc.*, 172 B.R. 404, 413 (Bankr. N.D. Ga. 1993), *subsequently aff'd sub nom. Matter of Munford, Inc.*, 97 F.3d 449 (11th Cir. 1996) (opinion letter writers are liable only to "the limited class of persons who the professional is actually aware will rely upon the information [they] prepared" and "such liability may be disclaimed" on face of letter) (citations omitted); *Cusack v. Greenberg Traurig, LLP*, 109 A.D.3d 747, 747–48 (N.Y. App. Div. 2013) (affirming order granting motion to dismiss because "the parties contemplated only that BNY Mellon, not plaintiff, would rely on the letter"). *See also Zenkel v. Comm'r*, 72 T.C.M. (CCH) 499, at * 21-22 (T.C. 1996) ("the tax opinion letters expressly indicate that prospective investors such as petitioners were not to rely upon the tax opinion letters"); *Mirotznick v. Sensney, Davis & McCormick*, 658 F. Supp. 932, 940 (W.D. Wash. 1986) (counsel who wrote opinion letters for entities that later participated in bonding project were not liable to investors; relationship between counsel and investors was indirect at best).

Here, GT's opinion letter was directed to a limited group of recipients who did not include RHCT, and plaintiffs do not allege that GT intended for RHCT to rely on the opinion letter. To the contrary, the opinion letter limited who could rely on the letter and states that "[w]e render this

opinion to the parties named above and it may not be relied on in any manner by any other person or entity without our prior written consent." (Compl. Ex. I, 8/25/14 Letter.)

RHCT tries to circumvent this dispositive fact by alleging that U.S. Bank was its agent (*see* Compl. ¶ 325). This allegation is not legally or factually accurate. In fact, U.S. Bank was Indenture Trustee (*see* Compl. ¶¶ 100-112 and Ex. D). As Indenture Trustee, it held funds "for the benefit of the Registered Owners" (Compl. Ex. D at 22), but there is no indication or allegation that it made investment decisions for or otherwise acted at the direction of or as an agent for the bondholders with regard to the transaction in which the funds were stolen. *See, e.g., In re Covenant at S. Hills, Inc.*, 410 B.R. 426, 433 (Bankr. W.D. Pa. 2009) ("The documents of record provide that the Indenture Trustee acts *for the benefit of* Madison and the Bondholders. Acting for an entity's benefit does not render the actor the beneficiary's agent for all purposes.") U.S. Bank's non-agent status is further confirmed by the fact that RHCT is suing U.S. Bank in South Dakota, and in that case, RHCT does not allege that U.S. Bank was its agent. *See* Case No. 4:17-cv-04113 (D.S.D.), Dkt. 68. Rather, it alleges that U.S. Bank was obligated to perform ministerial activities in accordance with the terms of the Indenture (*id.* ¶¶ 16, 17) and is liable because it "improperly released the net proceeds of the August 2014 Offering to the wrong entity." *Id.* ¶ 2.

Finally, this issue has already been litigated in related litigation arising from the bond transaction and it was resolved against RHCT. In the South Carolina Litigation, the Magistrate Judge presiding over this matter concluded that there was no duty owed by bond counsel to the bondholders in a Report & Recommendation on the Dilworth defendants' motion to dismiss claims of the Michelin Retirement Plan. *Michelin Ret. Plan v. Chicago Transit Auth. Retiree Health Care Tr.*, 2019 WL 487565, at *1 (D.S.C. Jan. 28, 2019) (attached as Ex. 5), *aff'd on other grounds* 2019 WL 2098843, at *1 (D.S.C. May 13, 2019). The Magistrate Judge held that the connection that the Dilworth lawyers (who were, if anything, more closely connected to RHCT than GT was)

"allegedly had to the injury that the Plan suffered is extremely tenuous." *Id.*, at *10. The Magistrate Judge noted the absence of "case[s] in which, on similar facts, an attorney was held liable for failing to discover a plan to harm a nonclient." *Id.*, at *11. None of the limited exceptions under which an attorney could be held liable to a nonclient for professional negligence were applicable. *Id.*, at *10. Accordingly, Count V should be dismissed with prejudice.

**B. RHCT Has Not Alleged A Breach, Because The Opinion Letter Contains No Misrepresentations, As A Matter Of Law.**

RHCT also fails to allege a breach, because none of the "misrepresentations" described in the Complaint are false statements, as a matter of law. The following statements are at issue:

- "The Bonds are being issued in order to: (a) finance the purchase of a certain Annuity Investment (as described in the Indenture). . . ." (Compl. ¶ 201).
- The bonds would be used to "finance economic development projects for the benefit of the Wakpamni Lake Community, without limitation projects near the junction of Routes 18 and 391. . ." (Compl. ¶ 203.)
- The "Bonds have been duly authorized, executed and delivered and constitute the legal, valid and binding limited obligation of the Issuer . . ." (Compl. ¶ 207.)

The first two statements are not actionable because they are statements about future events. The last statement is accurate based on documents that may be judicially noticed.

As to the first two statements about how bond funds would be used, these statements of future events cannot be the basis for liability. "[A]ssurances as to future events are generally not considered misrepresentations of fact." *Merrilees v. Merrilees*, 998 N.E.2d 147, 160 (Ill. App. Ct. 1st Dist. 2013). Instead, "statements…which concern future or contingent events, expectations, or probabilities, rather than present or pre-existing facts, are not actionable." *Wilde v. First Fed. Sav. & Loan Ass'n of Wilmette*, 480 N.E.2d 1236, 1243 (Ill App. Ct. 1st Dist. 1985) (citations omitted).

In *Pearson v. Garrett-Evangelical Theological Seminary, Inc.*, the court explained that "the alleged misrepresentation must be one of present or preexisting fact, not an expression

of opinion" and that "statements regarding future events are considered opinions, not statements of fact." 790 F. Supp. 2d 759, 768 (N.D. Ill. 2011). The defendant's statements of future events could not "form the basis for claims of fraudulent or negligent misrepresentation." *Id.* Likewise, in *Abazari v. Rosalind Franklin University*, the court held that "projections of future performance are generally not actionable as false statements, because they are considered opinions rather than statements of present or preexisting fact." 40 N.E.3d 264, 273 (Ill. App. Ct. 2015). Here, GT's first two alleged misstatements are, at most, predictions about how the bonds would be used in the future. As a matter of law, these statements about future events cannot be misrepresentations. Moreover, GT believed the statements to be true at the time they were made based on the bond documents and they would have been true if the criminals did not breach the agreements and steal the money.

As to the last statement, RHCT contends that the statement that WLCC had the authority to issue the bonds was false for two reasons: (1) "the OST Tribal Council had not approved the proposed resolution" specifically authorizing the bond transaction (*e.g.* Compl. ¶¶124-127) and (2) "OST had acted to limit the authority of Raycen Raines to act on tribal economic development matters" (Compl. ¶ 211). However, RHCT's allegations are contradicted by documents referenced in the complaint or that may be judicially noticed.[4] Moreover, these allegations are irrelevant because the criminals who stole the bond proceeds were not influenced by GT's statements.

***First,*** the lack of an OST resolution confirming WLCC's authority to issue the bonds is a red herring because WLCC already had bond-issuing authority. As RHCT acknowledges, "the OST is similar to the federal level of government; the Community is similar to a municipal level

[4] Tribal governmental documents may be judicially noticed. *E.g. Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F. Supp. 3d 867, 872 n. 1 (W.D. Wis. 2017); *accord United States v. Mancha*, 773 F. App'x 447, 448 n.1 (9th Cir. 2019). Moreover, the documents are referenced in Exhibit I to the Complaint. *Supra* n.1.

of government; and WLCC is similar to a municipal corporation." (Compl. ¶ 38.) Communities like WLCC have authority to engage in community economic development, among many other governmental activities, subject to the limits of the OST Constitution (Ex. 6).[5] *See also* excerpt from 6/11/18 testimony of Raycen Raines in Case No. 16 Cr. 371 (S.D.N.Y.) (Ex. 11)[6] ("Under Article 6 of the Constitution that was drafted in 1934 it allows districts and communities to pursue economic development for the benefit of its membership.") RHCT's argument is that the local municipality (WLCC) needs the federal government (OST) to approve its bond issuance. That is nonsense. OST Legal Counsel directly contradicted RHCT's argument when it confirmed that "communities can already engage in this activity without advice and consent of the Tribal Council." (Ex. 12.)[7]

***Second***, Raines had authority to act as WLCC's CEO. *See* 4/1/2012 Articles of Incorporation for WLCC (Ex. 13; Compl. ¶ 36.) While RHCT attempts to muddy the waters again by improperly blurring the lines between the OST and WLCC and pointing to political disputes between Raines and certain OST members (*e.g.* Compl. ¶¶ 60, 64)[8], RHCT does not and cannot

[5] *See* 6/23/1978 OST Resolution confirming Wakpamni Community (Ex. 7); 3/20/1985 OST Resolution (Ex. 8) ( "the Oglala Sioux Tribal Council is in strong support of self-determination which is the intentions of Wakpamni District" and "the Executive Committee [is] authorized to negotiate with any government or agency . . . for resources for support in Wakpamni Districts' short and long range planning"); 3/4/2012 Community Constitution and By-Laws (Ex. 9) ("The Wakpamni Lake Community organization shall exercise the following powers . . . (e) To manage the economic affairs and enterprises . . . (l) To set up for economic development programs, corporations, associations, and other business and non-profit enterprises . . ."); 3/4/2012 Community Resolution (Ex. 10) (authorizing WLCC).

[6] RHCT repeatedly cites testimony from the criminal trial in its complaint (*e.g.* Compl. ¶¶ 31, 42, 94, 238), and that testimony is central to its complaint, so the Court may consider it. *Supra* n.1.

[7] RHCT repeatedly references GT's communications with the OST regarding tribal authority in its complaint (*e.g.* Compl. ¶¶62-64, 124-27), and that issue is central to its complaint, so this letter may also be judicially noticed. *Supra* n.1.

[8] The TED Bonds referred to at Compl. ¶ 64 are totally unrelated to the bonds in this Complaint, and plaintiffs do not allege that the TED Bonds had any relationship to the bonds at issue here. *See generally* Treasury Department Fact Sheet: Tribal Development Bonds, https://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/

allege that these Tribal-level issues affected Raines's authority to act at the Community level. WLCC is a different entity at a different level of government from the OST (Compl. ¶ 38), and RHCT did not (and cannot) allege that tribal-level resolutions from the OST impact Community-level governance. WLCC had the authority to engage in economic development generally and in the bond issuance in particular, and Raines had the authority to act as CEO.

Finally, WLCC's power to issue the bonds was never called into question during the transaction[9] and, importantly, had no impact on the criminals' actions. The criminals had obtained control of Hughes and purchased the bonds in violation of RHCT's investment guidelines. Clearly, GT's opinions about tribal authority were not a factor in the criminals' actions.

### C. RHCT Has Not Alleged That GT's Opinion Letter Was A Legal Cause of Its Injury.

Count V also fails, as a matter of law, for two independent reasons relating to causation. ***First,*** GT's opinion letter did nothing to increase the risk of the actual harm RHCT suffered — the theft of its money by criminals. ***Second,*** it is beyond dispute that RHCT did not rely on the opinion letter. For both of these independent reasons, the opinion letter is not a legal cause of the injury.

***First,*** GT's opinion letter did not increase the risk of the harm that RHCT suffered — that its money would be misappropriated. As a result, GT cannot be liable. A tortfeasor is not liable for subsequent harm that "results from an outside force the risk of which is not increased by the defendant's act." *Hibma v. Odegaard*, 769 F.2d 1147, 1155 (7th Cir. 1985) (quoting Restatement (Second) of Torts § 435A (1965)). Under this principle, deputies who wrongfully arrested a man were not liable for his injuries after a jail assault. *Id.* Regardless of the connection between the arrest and the assault, "the defendant's act did not increase the risk of harm through the means by

Tribal%20Economic%20Development%20Bonds%20Fact%20sheet%202014.pdf (describing TED Bonds).

[9] Dilworth's opinion letter also confirms WLCC's authority to issue the bonds. (Compl. Ex. H).

which it occurred" because the arresting deputies were not responsible for what the criminals did in the jail. *Id.* Here, any losses were the result of unforeseeable criminal acts. "Generally, where between the defendant's negligence and the plaintiff's injury an independent, illegal act of a third person has intervened which causes the plaintiff's injury, and without which it would not have occurred, the criminal act is a superseding cause of injury relieving the originally negligent party of liability." *Rowe v. State Bank of Lombard*, 531 N.E.2d 1358, 1368 (Ill. 1988); *accord* Restatement (Second) of Torts § 448.

***Second***, because RHCT did not rely on the opinion letter, there can be no causation. *See, e.g., Leibowitz v. Great Am. Grp., Inc.*, 559 F.3d 644, 648 (7th Cir. 2009) ("A legal remedy, whether rescission or damages, does not follow automatically from the existence of a false statement or material omission. There must be reliance, which is often called transaction causation, and injury, which is often called loss causation."); *Zekman v. Direct Am. Marketers, Inc.*, 695 N.E.2d 853, 861 (Ill. 1998) (plaintiff who "did not read or pay the bills himself" could not have been misled by allegedly deceptive statements in bills).

In its complaint, RHCT alleges that its assets were invested into the Bonds by criminals without its knowledge or consent. (*E.g.* Compl. ¶¶ 2-3, 165). Accordingly, it is beyond dispute that RHCT did not rely on GT's opinion letter for any purpose because RHCT never made a decision to invest in the bonds. Rather, the investment decision was made by criminals uninfluenced by GT's opinion letter. Accordingly, GT's opinion letter cannot be a cause of RHCT's loss.

**CONCLUSION**

WHEREFORE, defendant Greenberg Traurig LLP requests that the Court dismiss Count V of the complaint with prejudice.

Dated: December 23, 2019

Respectfully submitted,

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## APPENDIX A – RHCT'S LAWSUITS INVOLVING WLCC BONDS

| Defendant | Where Sued | Current Status |
|---|---|---|
| U.S. Bank National Association | Case No. 16-cv-3604 (D.S.C.)<br><br>Case No. 17-cv-4113 (D.S.D.) | Voluntary dismissal (Dkt. 303)<br><br>Pending |
| Greenberg Traurig, LLP | Case No. 16-cv-3604 (D.S.C.)<br><br>Case No. 19-cv-7570 (N.D. Ill.) | Voluntary dismissal (Dkt. 317)<br><br>Pending |
| Frankie Hughes | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 326) |
| Bevan Cooney | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 327) |
| Gary Hirst | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 390) |
| Devon Archer<br>COR Fund Advisors, LLC<br>Jon M. Burnham<br>Valor Group Ltd.<br>Wakpamni Lake Community Corporation | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 407) |
| Wealth Assurance AG | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 465) |
| Dilworth Paxson, LLP<br>Timothy Anderson | Case No. 16-cv-3604 (D.S.C.)<br><br>Case No. 19-cv-7570 (N.D. Ill.) | Dismissed for lack of personal jurisdiction (Dkt. 489)<br><br>Pending |
| Michelle Morton | Case No. 16-cv-3604 (D.S.C.) | Stipulation of dismissal without prejudice (Dkt. 507) |
| John Galanis<br>Jason Galanis<br>Hugh Dunkerley<br>Burnham Financial Group<br>Burnham Securities, Inc.<br>BFG Socially Responsible Investments, Ltd.<br>GMT Duncan, LLC<br>Thorsdale Fiduciary and Guaranty Corporation, Ltd.<br>Wealth Assurance Private Client Corporation | Case No. 16-cv-3604 (D.S.C.) | Voluntary dismissal (Dkt. 508) |

**CERTIFICATE OF SERVICE**

I, John R. Storino, an attorney, hereby certify that on December 23, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a Notice of Electronic Filing to all counsel of record.

By: /s/ *John R. Storino*
*Attorney for Greenberg Traurig, LLP*