Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

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LARRY S. FRANKEL AS LEGAL GUARDIAN FOR JEROME FRANKEL, LILLIAN COWAN, BARBARA BROWN, JAY THALMEIN, BONNIE HILLES, IRIS KAPLAN AS EXECUTOR FOR THE ESTATE OF EVA MOSKOWITZ, MARVIN BALSAM AS EXECUTOR FOR THE ESTATE OF PHILIP BLITZER, BERNARD GELB, UNCLAIMED PROPERTY RECOVERY SERVICE INC.,

Plaintiff(s)

-against-

J.P. MORGAN CHASE & CO., THE CHASE MANHATTAN BANK, N.A., CHASE MANHATTAN CORPORATION, CHASE BANK OF TEXAS, N.A., and CHASE SECURITIES PROCESSING CORPORATION.

Defendant(s)

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Index Number 709241 2016

Motion Date July 11, 2017

Motion Cal. No.: 2

Motion Seq. No.: 8

The following papers numbered 1 to 8 read on this motion by the plaintiffs for an Order: (1) pursuant to CPLR §2221(d) and CPLR §2221(e), rearguing and renewing the prior motion (Motion Seq. Numbers "4", "5" and "7") and recalling the Orders granted therein, and upon such reargument and renewal, denying the defendants' motion to dismiss the Second Amended Complaint and denying the defendants' motion to strike the Note of Issue on the merits or alternatively, (2) pursuant to CPLR §5015(a)(1), vacating the Order of this Court dated April 5, 2017 (Motion Sequence Number "4") and (3) pursuant to CPLR 5015(a)(1), vacating the Order of this Court dated April 12, 2017 (Motion Sequence Number "5").

Papers	Numbered
Order to Show Cause- Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5
Reply Affidavits.....	
Memoranda of Law	6-8

Upon the foregoing papers it is ordered that this motion is determined as follows:

The branch of the motion which is for an order vacating the Order dated April 5, 2017 and the order dated April 12, 2017 rendered on motion sequence "4" and motion sequence "5" respectively is granted.

The branch of motion sequence "4" which is for an Order dismissing the complaint for lack of standing is granted as to the first cause of action, the second cause of action, the third cause of action, that part of the fourth cause of action asserted on behalf of the first class, that part of the fifth cause of action which is asserted on behalf of the first class, the sixth cause of action, the seventh cause of action, and the eighth cause of action (mislabeled as the ninth claim).

The branch of motion sequence "4" is for an Order dismissing the complaint for failure to state a cause of action is granted as to that part of the fourth cause of action which is asserted on behalf of the second class, that part of the fifth cause of action which is asserted on behalf of the second class, that part of the sixth cause of action which is asserted on behalf of the second class, the ninth cause of action (mislabeled as the tenth claim), and the tenth cause of action (mislabeled as the "eleventh claim").

The remaining branches of motion sequence no "4" are denied as moot.

Motion sequence number "5" is denied as moot.

I. Background

In the 1990's, defendant JP Morgan Chase & Co. acted as the transfer and paying agent for some issuers of municipal and corporate bonds. As time passed, Chase consolidated its transfer agent processing operations by, among other things, the installation of a single automated bond-processing system known as Bondmaster. After the conversion of its transfer records to Bondmaster, in March 1998, Chase found numerous apparent record keeping discrepancies between the dollar value of unpresented bonds ($46.8 billion) and the cash available to pay those bonds (the unpresented difference). Nevertheless, in August of 1998 and August of 1999, Chase filed two Form TA-2's with the Securities and Exchange Commission (SEC) showing that the value of the unrepresented difference was "0." Moreover, in October of 1999, Chase filed an amended TA-2 form indicating that while there was an unpresented difference, it only amounted to $16,273,000.

The SEC began an administrative proceeding against Chase in 1999 for violations of record keeping and reporting requirements. On November 8, 1999, Chase filed a 10-Q for

the period ending September 30, 1999, showing that it had found discrepancies in the computerized bond record keeping system. On November 9, 1999, several large newspapers, including the Wall Street Journal, published articles informing the public for the first time of the large amount of the unpresented difference.

The SEC subsequently determined that the unpresented difference did not "reflect an actual liability owed by Chase because Chase had cash management systems in place that, for the most part, were accurate." After its investigation, the SEC did not accuse Chase of fraud or concealment, and the agency concluded that "[n]o bondholders were shortchanged by Chase's faulty records."

In September of 2001, Chase reached a settlement with the SEC pursuant to which the agency filed a complaint against the bank in federal court which alleged, *inter alia*, that Chase had committed record keeping and reporting violations, that Chase identified but did not reconcile the discrepancies in its system, and that Chase did not reconcile the discrepancy until June 2000. In compliance with the settlement agreement, Chase paid the SEC a $1 million civil penalty and agreed to cease and desist committing or causing further violations of the securities laws.

On January 31, 2006, plaintiffs, purporting to represent a class of bond purchasers and two subclasses, brought an action in the United States District Court for the Eastern District of New York against Chase and related entities, alleging violations of sections of the Racketeering Influenced and Corrupt Organizations Act ("RICO") (18 USC § 1962[c] and [d]), and various state laws (*Frankel v. Cole*, No. 06-CV-439 CBA). The plaintiffs alleged, *inter alia*, that the defendants engaged in a scheme to fraudulently conceal that they did not have enough available cash to pay outstanding bonds by improperly deleting records of bond accounts from their computers. The defendants filed a motion for an order dismissing the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and on December 6, 2006, the Honorable Carol B. Amon referred the motion to Magistrate Judge Ramon E. Reyes, Jr. for a Report and Recommendation (R & R). On April 20, 2007, Magistrate Judge Reyes rendered an R & R, recommending that the complaint be dismissed in its entirety as untimely, or, in the alternative, as not adequately pled. (*Frankel v. Cole*, 2007 WL 5091074, report and recommendation adopted, No. 06-CV-439 CBA, 2007 WL 2683673 , vacated and remanded, 313 F. App'x 418). Magistrate Judge Reyes found that the plaintiffs were put on inquiry notice of the fraudulent scheme as early as November 1999, when newspapers published articles about the unpresented difference, and certainly no later than September, 2001 when Chase's settlement with the SEC was made public.

On May 4, 2007, the plaintiffs filed objections to the R & R, but the District Court found that the objections pertaining to the timeliness of the causes of action based on RICO

were without merit, and, adopting that part of the R & R recommending dismissal as untimely as the decision of the court, dismissed the RICO claims as untimely. However, the District Court declined to exercise supplemental jurisdiction over the state law claims because all of the claims that the federal court had original jurisdiction over had been dismissed (*see*, 28 U.S.C. §1367[c])[3]; (*Frankel v. Cole,* 2007 WL 2683673, vacated and remanded, 313 F. App'x 418).

Certain parties appealed the decision rendered by the District Court, and the Court of Appeals vacated and remanded this matter to District Court on March 4, 2009. The Appellate Court held that the civil RICO claims could not be dismissed at the pleading stage, as allegedly filed outside the relevant four-year statute of limitations, because it was unclear from the face of the complaint when the investors first sustained or discovered their injury (*Frankel v. Cole*, 313 F. App'x 418).

On March 3, 2008, plaintiff Unclaimed Property Recovery Service, Inc. and plaintiff Bernard Gelb, the vice-president of the company, (sometimes collectively UPRS) began the instant action against Chase and related entities by the filing of a summons and complaint which is similar to the complaint filed in the federal District Court. The defendants moved for a stay based on the pending litigation in federal court, and the plaintiffs cross moved for a default judgment. Pursuant to an Order dated January 3, 2011, the Court granted the defendants' motion for a stay and denied the plaintiffs' cross motion for a default judgment "with leave to renew, if warranted, upon the determination of the federal action".

On July 26, 2011, the federal judge rendered a memorandum in *Frankel* v. *Cole* (1) denying a motion to intervene made by Bernard Gelb and Unclaimed Property Recovery Services, Inc., (2) granting class certification; (3) approving a class settlement agreement; (4) awarding class counsel attorneys' fee; (5) awarding incentive payments to class representatives; and (6) dismissing the complaint with prejudice. Gelb and UPRS appealed without success (*Frankel v. Cole*, 490 F. App'x 407 [2013]). The class settlement did not include Gelb and UPRS.

In April, 2016, the court lifted the stay in the instant action, and on June 20, 2016 the plaintiffs served a second amended complaint which is similar to the complaint in the federal action.

II. The Allegations of the Second Amended Complaint (NYCEF Doc. No. 31)

The basic allegations of the plaintiffs' 99 page complaint are summarized as follows:

The remaining plaintiffs in this action are UPRS and Bernard Gelb (the company vice-president) who purport to represent bond issuers such as states and corporations which entered into bond paying agreements with Chase and related entities. Chase obligated itself to act as, *inter alia*, the bond paying and transferring agent of the bond issuers. The bond issuers were victimized by Chase's scheme to "delete" $48.6 billion worth of unpresented items (i.e., matured, redeemed, and called bonds and past due bearer coupons that had not been presented for payment) from its accounting records. Gelb and UPRS also purport to represent, a class of, *inter alia*, "asset locators" and unclaimed property recovery services who were deprived of the ability to assist the public in finding and redeeming unclaimed bonds.

After Chase discovered the unpresented difference, it purported to reconcile the discrepancy by deleting $46.8 billion worth of unpresented items from its accounting records in a process known as "force" balancing. Chase knew, however, that not all of the unpresented bonds that had been called or matured had been paid and also knew that not all of the bondholders had received call notices. During its investigation, the SEC determined that Chase had filed false reports concerning the unpresented difference. Moreover, Chase engaged in a scheme to keep $1.2 billion of trust funds (i.e, payments received from bond issuers to be made to bondholders), which involved, *inter alia*, not notifying bondholders when issuers called or redeemed the bonds.

The specific causes of action start on page 77 of the complaint.

The first cause of action, which is for breach of contract and which is asserted on behalf of the first class (bond issuers), alleges that Chase beached its bond paying agreements with bond issuers by failing to perform the services required of it.

The second cause of action, which is also for breach of contract and which is also asserted on behalf of the first class, alleges, *inter alia*, that Chase breached the covenant of good faith and fair dealing implied in the bond paying agreements with bond issuers.

The third cause of action, which is for breach of fiduciary duties and which is also asserted on behalf of the first class, alleges, *inter alia*, that Chase breached its duty to act in good faith and prudent care as a paying agent.

The fourth cause of action, which is for negligent misrepresentation and which is asserted on behalf of the first class and second class (lost property finders), alleges, *inter alia*, that Chase falsely represented its financial standing and concealed its conduct.

The fifth cause of action, which is for negligence and which is asserted on behalf of both classes, alleges, *inter alia*, that Chase breached a duty of care as a paying agent.

The sixth cause of action, which is for fraudulent concealment and which is asserted on behalf of both classes, alleges, *inter alia*, that Chase engaged in a fraudulent scheme in which it concealed that it was not performing the services required of a paying agent.

The seventh cause of action, which is for "intentional deceit or fraud" alleges , *inter alia*, that Chase knowingly and intentionally filed false reports with the SEC and mailed false reports to investors.

The eighth cause of action (mislabeled as the ninth claim), which is for breach of contract and which is brought on behalf of both classes, alleges, *inter alia,* that Chase breached its contractual duties with certain issuers of bonds.

The ninth cause of action (mislabeled as the tenth claim) which is for breach of contract and which is brought on behalf of plaintiff Gelb and plaintiff UPRS, alleges, inter alia, that Chase breached an agreement with those plaintiffs to issue unclaimed property listings

The tenth cause of action (mislabeled as the "eleventh claim") which is for promissory estoppel and which is brought on behalf of plaintiff Gelb and plaintiff UPRS alleges, *inter alia*, that Chase repeatedly promised that it would issue bond listings to them, but did not do so.

III.The Plaintiffs' Default

The defendants served a motion dated August 31, 2016 for an order pursuant to CPLR §3211(a) (3), (5) and (7) dismissing the second amended complaint, and the motion was designated as motion sequence number "4". The plaintiffs electronically filed their opposition to motion sequence number "4", and the defendants electronically filed their reply papers. On December 15, 2016 , motion sequence number "4" was submitted , and pursuant to an Order dated April 5, 2017, this Court granted the motion, finding that there was no opposition.

On November15, 2016, the plaintiffs filed a note of issue and certificate of readiness. On November 29, 2016, the defendants moved to vacate the note of issue and certificate of readiness (motion sequence number "5"), but the attorneys for the parties entered into a stipulation dated December 13, 2016 adjourning its return date from December 15, 2016 to January 26, 2017. The attorney for the defendants allegedly informed the plaintiffs' attorney

that the Centralized Motion Part (CMP) rules required personal appearances on motions to vacate, but the plaintiffs' attorney allegedly stated that he believed that no such appearance was required. On December 15, 2016, the attorney for the defendants allegedly informed CMP staff about the plaintiffs' request for an adjournment, but the staff replied that personal appearances were mandatory on a motion to dismiss and on a motion to vacate, and the staff deemed the motions fully submitted without opposition. Motion sequence numbers "4" and 5"" were marked fully submitted on December 15, 2016.

On April 4, 2017, the plaintiffs submitted an order to show cause (designated as motion sequence number "6") for the purpose of having motion sequence numbers "4" and "5" restored to the calendar because they had been "inadvertently" submitted without opposition on December 15, 2017. However, pursuant to orders dated April 5, 2017 and April 7, 2017, this Court granted motion sequence number "4" and motion sequence number "5", respectively, finding that there was no opposition. Pursuant to an order dated April 12, 2017, motion sequence number "6" was denied as moot since the Court had already dismissed the second amended complaint.

On this motion to vacate their defaults, the plaintiffs had the burden of demonstrating a reasonable excuse for their defaults and the existence of a potentially meritorious opposition to the defendant's prior motions (*see*, CPLR §5015[a][1]; *Gross v. Johnson*, 102 AD3d 921; *Infante v. Breslin Realty Dev. Corp.*, 95 AD3d 107). The plaintiffs successfully carried this burden. The plaintiffs' attorney believed that he had obtained the consent of the defendants' attorney to adjourn motion sequence number "4" and motion sequence number "5" , and they entered into a written stipulation as to at least motion sequence number "5" . The plaintiffs' attorney had also electronically filed opposition to motion sequence number "5". The default arose from the misunderstanding of CMP rules by the plaintiffs' attorney; the default was not willful, and there was no prejudice to the defendants. "Whether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits ***" (*Harcztark v. Drive Variety, Inc.*, 21 AD3d 876, 876–77). Upon consideration of these factors, the Court finds that the plaintiffs' defaults on motion sequence number "4" and "5", are excusable, and, since the complaint contains at least potentially meritorious causes of action, the orders rendered on those motions should be vacated.

In regard to the branch of the motion which pertains to the vacatur of the defaults, the court notes that the plaintiffs do not seek to vacate the order dated April 12, 2017 which denied as moot motion number "6", an attempt by the plaintiffs to have the prior motions re-

calendared. The plaintiffs also do not seek to vacate the order on motion number "7" which denied as moot the defendants' application for sanctions.

IV. Discussion

A. The Motion to Dismiss The Second Amended Complaint

1. The Statement of the Causes of Action

Concerning the fourth cause of action, the elements of a claim for negligent misrepresentation include: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information***" (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 NY3d 144, 148). UPRS failed to adequately plead these elements in regard to the second class (lost property finders and the like).

Concerning the fifth cause of action, the elements of a claim for negligence include "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom ***" (*Solomon v. City of New York,* 66 NY2d 1026, 1027; *Montanez v. N.Y. State Elec. & Gas*, 144 AD3d 1241; *Murray v. New York City Housing Authority*, 269 AD2d 288). The defendants did not owe a duty of care to the second class.

The sixth cause of action, which is for fraudulent concealment, is not adequately stated as to the second class. In order to prove a cause of action for fraud, a plaintiff must show: (1) that the defendant made material representations that were false or concealed a material existing fact; (2) that the defendant knew the representations were false and made them with the intent to deceive the plaintiff; (3) that the plaintiff was deceived; (4) that the plaintiff justifiably relied on the defendant's representations, and (5) that the plaintiff was injured as a result of the defendant's representations (*see, Lama Holding Co. v. Smith Barney,* 88 NY2d 413; *New York Univ. v. Continental Ins. Co.*, 87 NY2d 308; *Watson v. Pascal,* 27 AD3d 459; *Cerabono v. Price*, 7 AD3d 479; *New York City Transit Authority* v. *Morris J. Eisen, P.C.*, 276 AD2d 78; *American Home Assur. Co. v. Gemma Const. Co., Inc.*, 275 AD2d 616; *Swersky v. Dreyer & Traub*, 219 AD2d 321). The complaint does not adequately allege that Chase made statements or concealed matters with an intent to deceive the second class.UPRS cannot sue here for fraud on the basis of statements made to third parties (*see, Wildenstein v. 5H & Co, Inc.*, 97 AD3d 488, 490 ["Generally, however, a plaintiff cannot claim reliance on misrepresentations a defendant made to third parties ***"]). Moreover, the claim that the second class lost income because of the alleged fraud is too speculative to be recognized an injury (*see, Evatz v. Chanel, Inc.*, - AD3d - , 61 NYS3d 231; *Connaughton v. Chipotle Mexican Grill, Inc.*, 135 AD3d 535, aff'd, 29 NY3d 137) and, moreover,

"damages are calculated to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained in the absence of fraud ***" (*Connaughton v. Chipotle Mexican Grill, Inc.*, *supra*, 538).

The ninth cause of action (mislabeled as the tenth claim) which is for breach of contract and which is brought on behalf of plaintiff Gelb and plaintiff UPRS, alleges, *inter alia*, that Chase breached an agreement with those plaintiffs to issue a "Third List" of unredeemed bonds. "To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound ***" (*Kowalchuk v. Stroup*, 61 AD3d 118, 121; *Civil Serv. Employees Ass'n, Inc.* v. *Baldwin Union Free Sch. Dist.*, 84 AD3d 1232). Although UPRS alleges as consideration for Chase's sending it the third list a promise to pay a "reasonable fee", there are no allegations that the alleged consideration was made sufficiently definite or that Chase accepted the offer of such consideration. As further consideration, the complaint alleges that UPRS agreed to "help bondholders recover their outstanding and unclaimed bonds from Chase". There is no allegation that Chase accepted this offer, and the complaint does not permit the reasonable inference that Chase intended to be bound in contract with UPRS. "Vague allegations suggesting that there may have been an agreement do not suffice ***" (*Theaprin Pharm., Inc. v. Conway*, 137 AD3d 1254).

The tenth cause of action (mislabeled as the "eleventh claim") which is for promissory estoppel and which is brought on behalf of plaintiff Gelb and plaintiff UPRS alleges, *inter alia*, that Chase repeatedly promised that it would issue bond listings to them, but did not do so. The elements of a cause of action sounding in promissory estoppel include: " (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise ***" (*Rogers v. Town of Islip*, 230 AD2d 727; *Vassenelli v. City of Syracuse*, 138 AD3d 1471; *Fleet Bank v. Pine Knoll Corp.*, 290 AD2d 792; *Freedman & Son v. A.I. Credit Corp.*, 226 AD2d 1002). UPRS failed to adequately plead a detrimental reliance on the promise to provide the third list (*see, Rosenberg v. Home Box Office, Inc.*, 33 AD3d 550). "Detrimental reliance is an indispensable element of a promissory estoppel claim ***, and a failure to adequately plead that element requires dismissal ***" (*Schroeder v. Pinterest Inc.*, 133 AD3d 12, 32).

2. Standing

A cause of action asserted by a party without the legal capacity to do so or without the standing to do so is subject to dismissal pursuant to CPLR §3211(a)(3) (*see, Security Pacific Nat. Bank v Evans*, 31 AD3d 278) or 3211(a)(7); *Parker & Waichman v Napoli*, 29 AD3d 396; *Truty v Federal Bakers Supply Corp.*, 217 AD2d 951). "Standing to sue requires an interest in the claim at issue in the lawsuit that the law will recognize as a

sufficient predicate for determining the issue at the litigant's request ..." (*Caprer v Nussbaum*, 36 AD3d 176, 182). "The most critical requirement of standing *** is the presence of 'injury in fact --an actual legal stake in the matter being adjudicated" (*Security Pacific Nat. Bank v Evans* , *supra*, 279, quoting *Society of the Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 772).

"The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution." (*Silver v. Pataki*, 96 NY2d 532, 539 [internal quotations marks and citation omitted].)

In the case at bar, the plaintiffs' claim of standing is based on the argument that: (1) bond issuers may have cancelled their bond paying agreements with Chase if they had known of the magnitude of the unpresented difference; (2) there may be a bondholder with an interest in an unclaimed bond; (3) the plaintiffs may locate the bondholder; (4) the plaintiffs may enter into a contract with the bondholder to assist in recovering the unclaimed bond; (5) the plaintiffs would have succeeded in locating the bondholder and recovering the unpaid bond if Chase had not engaged in a fraudulent scheme and other wrongdoing in connection with the unpresented difference, and (6) the plaintiffs may have recovered a fee.

The plaintiffs' argument regarding standing is unpersuasive. Lost property finders lack standing to bring many of the causes of action alleged in the instant complaint. "The alleged harm cannot be 'too speculative and conjectural to demonstrate an actual and specific injury-in-fact " (*Shapiro v. Torres*, 153 AD3d 835; *Jacob v. Conway*, 150 AD3d 973). The loss of fees, commissions and the like, and the actual percentage division of the fees among several property finding companies, is too speculative to confer standing on lost property finders (*see, Hecht v. Commerce Clearing House, Inc.*, 897 F2d 21), and the plaintiffs merely engage in speculation about what bond issuers would have done if they had known of the magnitude of the unpresented difference.

Moreover, "the procedural device of a class action may not be used to bootstrap a plaintiff into standing which is otherwise lacking ***," (*Murray v. Empire Ins. Co.*, 175 AD2d 693, 694). The class representative must have "individual standing," meaning that he " must have a cause of action against the same defendant against whom the members of the class have the same claim ***" (*Raske v. Next Mgmt., LLC*, 40 Misc3d 1240[A] [Table], 2013 WL 5033149 [Text], quoting Weinstein- Korn- Miller, § 901.056). UPRS does not meet this requirement for the causes of action it asserts on behalf of bond issuers.

UPRS does not have standing to assert breach of contract claims based on the agreements between Chase and bond issuers since UPRS is neither a party to those agreements (*see*, *Simmons v. Berkshire Equity, LLC*, 149 AD3d 1119; *Bremond Houses, Inc. v. Lemle & Wolfe, Inc.*, 129 AD3d 584) nor a third party beneficiary of the agreements between bond issuers and Chase (*see, Tokhtaman v. Human Care, LLC*, 149 AD3d 476; *2470 Cadillac Res., Inc. v. DHL Exp. (USA), Inc.*, 84 AD3d 697. The first, second, and eighth causes of action are dismissible for lack of standing.

The third cause of action, which is for breach of fiduciary duties and which is also asserted on behalf of the first class, alleges, *inter alia*, that Chase breached its duty to act in good faith and prudent care as a paying agent. UPRS does not have standing to assert a cause of action for breach of fiduciary duty on behalf of bond issuers (*see*, *African Diaspora Mar. Corp. v. Golden Gate Yacht Club*, 109 AD3d 204).

The fourth cause of action is for negligent misrepresentation. UPRS lacks standing to assert this cause of action on behalf of the class of bond issuers since it is not a member of the class and did not sustain injury from any negligent misrepresentations made to that class.

The fifth cause of action is for negligence. UPRS does not have standing to assert a cause of action for negligence on behalf of the first class (*see*, *Freeland v. Erie Cty.*, 122 AD3d 1348; *Wild v. Hayes*, 68 AD3d 1412).

The sixth cause of action is for fraudulent concealment. UPRS lacks standing to assert a cause of action on behalf of both the first class and the second class because the alleged false statements were not made to UPRS and the alleged acts of concealment were not directed at UPRS (*see*, *Kuiters v. Kukulka,* 57 AD3d 1469, 1470 ["The allegedly fraudulent misrepresentations were not made to plaintiffs, and plaintiffs thus lack standing to assert a fraud cause of action against defendants"]; *Aymes v. Gateway Demolition Inc.*, 30 AD3d 196, 197 ["To the extent plaintiff asserts a fraud claim, he lacks standing because the alleged misrepresentations were made to the City, not to plaintiff or the previous property owner ***"]).

UPRS lacks standing to assert the seventh cause of action which is for "intentional deceit or fraud" (see, *Kuiters v. Kukulka*, supra, *Aymes v. Gateway Demolition Inc.*, *supra*).

3. Res Judicata, Collateral Estoppel, and Statute of Limitations

The defendants are entitled to the dismissal of all of the causes of action for failure to state a cause of action and/or lack of standing. The Court need not reach those branches of the motion which concern res judicata, collateral estoppel, and the statute of limitations.

B. The Motion to Vacate the Note of Issue (SN 5)

The motion to vacate the note of issue is denied as moot.

Dated: NOV 0 2 2017

J.S.C.

FILED
NOV 17 2017
COUNTY CLERK
QUEENS COUNTY