IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JANE WILNER, TRUDO LETSCHERT,
ROBERT RUDNICK and RUSSELL SCHMEISER,
individually and on behalf of all others
similarly situated,

Plaintiffs,

v. 1:16-cv-02999-RBJ

BEHRINGER HARVARD CORDILLERA, LLC,
BEHRINGER HARVARD HOLDINGS, LLC,
ROBERT M. BEHRINGER, MICHAEL D. COHEN,
and CCG MANAGEMENT, LLC,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Introduction and Summary

Plaintiffs Jane Wilner, Trudo Letschert, Robert Rudnick, and Russell Schmeiser (collectively, the "Cordillera Plaintiffs") urgently require a preliminary injunction to maintain the *status quo* at their community in Cordillera, Eagle County, Colorado, and to hold defendant Behringer Harvard Cordillera, LLC ("BH") to solemn promises and representations BH made in 2009 and upon which the Cordillera property owners relied. Without a preliminary injunction either pending the outcome of a final determination on the merits or for at least 60 days to enable the Cordillera Plaintiffs to obtain discovery and establish their entitlement to summary judgment, BH will achieve a *fait accompli* by eviscerating the Cordillera Plaintiffs' legal right to enforce

those promises and by jeopardizing the existence of Lodge and Spa at Cordillera (the "Lodge"), a central amenity of the Cordillera community.[1]

In 2009, BH proposed to modify the existing Planned Unit Development ("PUD") document that governed all land use in Cordillera. BH had purchased the Lodge two years before and announced plans to invest substantial money to expand the Lodge and build casitas on the property. To implement these plans, BH had to be able to transfer allowable uses and densities to the Lodge Parcel, on which the Lodge is situated, from the adjacent Village Center Parcel, which BH also owned. Accordingly, BH proposed to amend the PUD to combine the uses and densities of those two parcels into a single parcel for development purposes. The PUD required that the Cordillera Property Owners Association ("CPOA"), of which the Cordillera Plaintiffs are members, approve the proposed modification, along with the Board of County Commissioners of Eagle County, Colorado ("Eagle County").

To win the approval of the CPOA, BH made a number of promises and representations. BH promised that its proposed modification would only "clean-up" some minor errors and ambiguities in the existing PUD and allow the Lodge Parcel and the Village Center Parcel to be treated as one parcel for development purposes, would not introduce new or additional density or uses, would not substantively change the existing PUD, and would not have any effect on adjacent property owners. BH represented that the proposed modification would benefit the entire Cordillera community and not confer any special benefit on any one individual.

Relying on BH's promises, both the CPOA and Eagle County approved BH's proposed modification. The CPOA and its members were pleased with BH's plans to invest in and expand

[1] In accordance with D.C. Colo. LCivR Rule 7.1(a), counsel for the parties conferred before the Cordillera Plaintiffs filed this motion, and defendants do not agree to be subject to a preliminary injunction. Plaintiffs respectfully requested oral argument in support of this Motion. The Court granted that request on January 13, 2017 and scheduled oral argument for February 16, 2017.

the Lodge and Spa, to the benefit of the entire Cordillera community. The CPOA saw no downside to BH's proposed modification, given BH's promises that, aside from combining the Lodge Parcel and the Village Center Parcel for development purposes, it would make no substantive change to the existing PUD and would not affect adjoining property owners.

But in naked breach of its promises, BH now claims that the 2009 modification ***did*** make a major substantive change to the existing PUD, allowing BH or any buyer to eliminate the Lodge and replace it with any of 33 other listed "standalone" uses, completely walled off from the Cordillera community. Under the then-existing PUD, such a radical change would have required approval by the CPOA because of its significant impact on adjacent property owners and its deviation from then-existing PUD restrictions. Yet, during the months-long process leading up to the adoption of the 2009 modification, BH never once represented, suggested, or implied that this modification could allow the Lodge to be eliminated and replaced by any of the listed uses, to the exclusion of Cordillera residents, and it never described those uses as "standalone" uses. If BH's current claims are to be believed, BH defrauded the CPOA and its members in 2009, and it unlawfully deprived them of their right to vote on a substantive change to the then-existing PUD.

In furtherance of its broken promises and current claims, BH has entered into a purchase agreement with CCG Management, LLC ("CCG") to eliminate the Lodge and replace it with a drug treatment facility. BH has refused to reveal when this agreement will close, except to say that it will not close before February 17, 2017. The Cordillera Plaintiffs are asking the Court to enjoin BH from closing on this purchase agreement, pending either a final determination on the merits or at least for 60 days to enable the Cordillera Plaintiffs to obtain discovery and establish

their entitlement to summary judgment. Otherwise, the Cordillera Plaintiffs and the Cordillera community will lose the ability to enforce the promises that BH made to preserve the Lodge.

As shown below, the Cordillera Plaintiffs satisfy the four-part test for the grant of a preliminary injunction. They are likely to succeed on the merits of their claims, and they will be irreparably harmed without a preliminary injunction, while BH will suffer little or no harm at all from its grant, and injunctive relief is in the public interest.

STATEMENT[2]

The Cordillera community is designated as a "resort residential community." It was constructed around the Lodge, which is a central amenity to home ownership at Cordillera. The Lodge contains a high-end hotel, a restaurant, indoor and outdoor swimming pools and whirlpools, steam baths and saunas, a gymnasium, and a spa offering a variety of beauty and health services. The Lodge is included in the Cordillera land plats and designated as a lodge. It sits on its own parcel of land in Cordillera, designated the "Lodge Parcel." The Lodge always has been accessible to Cordillera property owners upon their compliance with the terms and conditions of its use set by its private owner.

BH, a subsidiary of defendant Behringer Harvard Holdings, LLC ("BH Holdings"), purchased the Lodge in 2007. BH had full knowledge and understanding that the Lodge is an integral attribute of home ownership in Cordillera. Indeed, as a "resort," the Lodge helps define Cordillera as a "resort residential community," and the existence of the Lodge was critical to the decisions of many residents to purchase homes in Cordillera. Sales brochures, marketing media,

[2] The facts in this Statement are supported by the annexed declarations of Jane Wilner, Jeffrey Harman, and Elise Micati, although they are not yet signed. The Cordillera Plaintiffs intend to file signed declarations from these individuals on or before January 23, 2017, as permitted by the briefing and hearing schedule approved by the Court.

tours, and the land plat all referencing the Lodge confirmed that the Lodge would remain available to the Cordillera community as its "centerpiece" and "crowning jewel."

In 2009, BH proposed a modification to the Cordillera Subdivision Tenth Amended and Restated Planned Unit Development Guide (the "10th Cordillera PUD"), which governed development and land use for all Cordillera properties. BH had announced plans to invest substantial money to expand the Lodge and build additional casitas. To implement these plans, BH wanted to be able to transfer allowable uses and densities between the Lodge Parcel and the adjacent Village Center Parcel, which BH also owns. Accordingly, BH proposed to modify the 10th Cordillera PUD to allow the Lodge Parcel and the Village Center Parcel to be treated for development purposes as a single planning parcel.[3] The 10th Cordillera PUD required BH to obtain the approval of both Eagle County and the CPOA for its proposed modification.

To win the CPOA's approval, BH promised and represented that its proposed modification would only "clean-up" some language in the 10th Cordillera PUD and allow the parcels for the Lodge and Village Center to be treated as one parcel, consistent with "the contemplated completion of the Lodge at Cordillera."[4] BH explicitly promised that its proposed modification "does not introduce new or additional density or uses to the Existing PUD or substantively change the Existing PUD."[5] BH also promised that its proposed modification "will not have any effect on adjacent properties because it does not change the overall uses or densities," and that it "will not confer a special benefit upon any particular person" but "will

[3] *See* Land Use Application Form, annexed to Letter dated November 11, 2009, by Amanda L. Smith, annexed as Exhibit 1.
[4] *Id.*, Application at 2, 7, and Letter at 1.
[5] *Id.*, Letter at 1.

benefit the entire Cordillera PUD and surrounding areas, as it will make the development contemplated by the Existing PUD more efficient."[6]

BH's proposed modification listed 34 identical uses on the Lodge Parcel and the Village Center Parcel, including athletic and recreation facilities; restaurant and bar; meeting rooms; lounge; offices for subdivision administration; lodge and club; employee dwellings; storage; retail; amphitheater for concerts and performances; playground; parking areas and structures; day care facilities; educational facilities; utility facilities; and certain medical offices/facilities relating to cosmetic surgery. BH never represented, suggested, or implied that its proposed modification could allow the Lodge to be eliminated and replaced by any of those listed uses. BH never referred to or described those uses as "standalone" uses. Rather, "the other listed uses were intended to support the Lodge in attracting and serving guests and residents."[7]

In reliance on BH's representations and promises, the CPOA approved BH's proposed modification. As the CPOA saw it, BH's plans to invest in and expand the Lodge and its Spa would strengthen them and benefit the entire Cordillera community. There was no downside to the proposed modification because BH had assured the CPOA that, aside from combining the Lodge Parcel and the Village Center Parcel for development purposes, the amendment made no substantive change to the existing PUD and had no effect on adjacent property owners.

Eagle County approved the modification and incorporated it into the current Cordillera Subdivision Eleventh Amended and Restated PUD (the "11th Cordillera PUD"). Eagle County noted that, "all material representation[s] made by [BH] on this application and in public meetings must be adhered to and considered conditions of approval." In its resolution adopting

[6] *Id*., Letter at 3.
[7] Declaration of Jeffrey Hartman, ¶ 7.

the amendment, Eagle County also emphasized that the only uses permitted after the amendment were those permitted prior to the amendment, and that no new or additional uses were permitted.

However, in the teeth of its prior promises and representations, BH now claims the opposite of what it promised in 2009. BH now says its 2009 modification ***did*** substantively change the 10th Cordillera PUD, allowing it to eliminate the Lodge from the Cordillera community and replace it with any of 33 other "standalone" uses, including uses totally unrelated to the Cordillera community.[8] In particular, BH claims that, as a result of the modification, it may close on a purchase agreement with CCG to eliminate the Lodge and replace it with a treatment facility to which plaintiffs and other Cordillera residents will have no access. BH's statements in 2009 cannot be reconciled with the promises and representations it made in 2016.

BH refuses to say when its purchase agreement with CCG will close. However, BH has stated on the record in this case that the agreement will not close before February 17, 2017.

ARGUMENT

The United States Court of Appeals for the Tenth Circuit requires a plaintiff seeking a preliminary injunction to "establish the following factors: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016). *See also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The Cordillera Plaintiffs satisfy all four prongs of this standard.

[8] *See* Memorandum of Otten Johnson, dated September 12, 2016, by counsel for CCG, annexed as Exhibit 2, and Letter dated July 7, 2016, by Thomas P. Kennedy, President of BH, stating that CCG and its representative "act as our agents" and speak "on our behalf and with our approval," annexed as Exhibit 3.

A. Plaintiffs are Likely to Succeed on the Merits of Their Claims

The Cordillera Plaintiffs state five counts for the relief they seek under governing Colorado common law: (i) promissory estoppel; (ii) fraudulent misrepresentation; (iii) fraudulent concealment; (iv) aiding and abetting fraudulent conduct; and (v) breach of implied restrictive covenant.[9] Plaintiffs are likely to prevail on the merits of those claims. The claim based on promissory estoppel, without more, clearly demonstrates why preliminary injunctive relief is appropriate in this case.

1. Promissory Estoppel

In recognizing a cause of action for promissory estoppel, Colorado courts have stated that: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900, 905 (Colo. 1982) (internal quotations omitted); *see also Nicol v. Nelson*, 776 P.2d 1144, 1146-47 (Colo. App. 1989) (in which the court relied on the doctrine of promissory estoppel to enjoin developers from building on a tract of land that they had orally promised homebuyers at the time of sale would remain undeveloped). The Cordillera Plaintiffs are likely to prevail on their promissory estoppel claim against BH.

As shown above, BH made explicit promises and representations to the members of the CPOA, including two of the Cordillera Plaintiffs, regarding the purpose and intent of BH's proposed modification in 2009. The CPOA relied on those promises and representations in approving that amendment. As Elise Micati, the President of the CPOA at the time, states:

[9] The Cordillera Plaintiffs have invoked this Court's diversity jurisdiction under 28 U.S.C. 1332(d)(2). "A federal court sitting in diversity jurisdiction generally applies the substantive law of the forum state, which in this case is Colorado." *McCammond v. Schwan's Home Service, Inc.*, 791 F.Supp.2d 1010, 1011 (D. Colo. 2011).

> BH planned to invest substantial money to expand the Lodge & Spa and to include fractional/timeshare units. In order to carry out its plans, BH needed the ability to transfer allowable development densities from the Village Center Parcel, which it also owned, to the adjacent Lodge Parcel. We supported the proposal because, in our view, BH's plans to invest in and expand the Lodge & Spa would strengthen the Lodge & Spa and thereby benefit the entire Cordillera community. Moreover, we saw no downside to the proposal because, as BH assured us throughout the amendment process, other than combining the two parcels for development purposes and cleaning up some minor errors and ambiguities in the existing PUD, the amendment would make no substantive changes to the existing PUD and would not affect adjoining property owners because it would not involve any change in uses or affect the overall density that was already permitted. In that regard, the November 11, 2009 letter which BH's lawyers sent to Eagle County explaining its proposed amendment accurately summarizes what it had previously told the CPOA.[10]

BH expressly promised in 2009 that its proposed modification was intended to address certain "clean-up" items and to allow the Lodge Parcel and the Village Center Parcel to be treated as a single parcel for development purposes. BH promised that its proposed modification would not introduce new or additional density or uses to the existing PUD, would not substantively change the existing PUD, and would not have any effect on adjacent property owners because it would not change the existing overall uses or densities. As Ms. Micati states:

> [W]e relied on those assurances by BH in approving the proposed amendment. … There was never any suggestion that the amendment would give BH the authority to eliminate the Lodge & Spa and replace it with a medical facility or with any other use listed in the PUD. That contention is totally inconsistent with what we were told was the central purpose of the amendment – to strengthen the Lodge & Spa, not eliminate it – and with the specific representations BH made at the time that, other than combining the Lodge and Village Center parcels, the amendment made no substantive change to the existing PUD and had no effect on adjacent property owners.[11]

BH simply cannot reconcile its purchase agreement with CCG to eliminate the Lodge and replace it with a treatment facility with the express promises and representations it made to the members of the CPOA, including two of the Cordillera Plaintiffs, in 2009. An amendment that

[10] Declaration of Elise Micati, ¶¶ 4, 6.
[11] *Id*.

authorized the elimination of the Lodge and Spa at Cordillera would have made a major substantive change to the existing PUD and would have had a devastating effect on adjacent property owners and, indeed, on all Cordillera residents. BH never asked the members of the CPOA, including two of the Cordillera Plaintiffs, to approve such an amendment, and they never did approve such an amendment. Therefore, BH's purchase agreement with CCG constitutes a breach of solemn promises by BH upon which it knew and intended that the members of the CPOA, including two of the Cordillera Plaintiffs, would rely. Under the doctrine of promissory estoppel, the Court should prevent BH from closing on that purchase agreement.

In that regard, it makes no difference whether BH contracted with CCG to eliminate the Lodge and replace it with a drug treatment facility or to eliminate the Lodge and replace it with a boarding school or concert hall. The elimination of the Lodge *per se* is a substantial change in the PUD requiring review and approval by the members of the CPOA. Jeffrey Hartman, who served as the Design Review Coordinator for the CPOA at the time and participated on behalf of the CPOA in all the meetings with BH regarding its proposed modification, underscores this point:

> BH never suggested that the amendment would authorize the owner of the property to eliminate the Lodge and replace it by other uses listed in the PUD. To the contrary, it represented just the opposite … The entire purpose [of the amendment] was to expand and enhance the Lodge for the good of both the owner of the property and the community, not to eliminate it. …
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> The idea that the amendment was intended to allow the Lodge to be eliminated is directly inconsistent with the central purpose of the amendment and with the express representations BH made at the time. The Lodge is central to the Cordillera community. It was intended to be and has always been the required use on the "Lodge Parcel." An amendment that authorized the Lodge to be eliminated and replaced with another use would have been a major change to the Cordillera PUD. …
>
> I recommended that the CPOA approve the 2009 amendment because that amendment would … [allow] the expansion and enhancement of the Lodge and

its services, and because, as BH consistently said, the amendment would make no other substantive change to the 10th Cordillera PUD.[12]

In sum, BH has broken its promises by contracting with CCG to eliminate the Lodge and replace it with a treatment facility to which plaintiffs would have no access. Equity and justice require that BH be estopped from breaching its promises and enjoined from implementing BH's contract with CCG to eliminate the Lodge from the Cordillera community.[13]

2. Fraudulent Misrepresentation and Fraudulent Concealment

Under Colorado law, a claim for fraudulent misrepresentation has the following elements: (i) a representation regarding a material fact; (ii) defendant's knowledge that the representation is false or its reckless disregard as to its truth or falsity (or the concealment of a material fact); (iii) plaintiff's ignorance of the misrepresentation; (iv) defendant's intent that plaintiff rely upon the representation; (v) plaintiff's reliance on the misrepresentation; and (vi) resulting damages. A claim for fraudulent concealment has the following elements: "(i) concealment of a material existing fact that in equity and good conscience should be disclosed; (ii) knowledge on the part of the party against whom the claim is asserted that such a fact is being concealed; (iii) ignorance of that fact on the part of the one from whom the fact is concealed; (iv) the intention that the concealment be acted upon; and (v) action on the concealment resulting in damages." *Kopeikin v. Merchants Mortg. and Trust Corp.*, 679 P.2d 599, 601-02 (Colo. 1984). *See Ackmann v.*

[12] Declaration of Jeffrey Hartman, ¶¶ 6-8.

[13] Promises regarding land use that induce purchases can support claims for both promissory estoppel and enforcement of an implied restrictive covenant. *See*, *e.g.*, *Cree Meadows, Inc. v. Palmer*, 68 N.M. 479, 484-85 (1961) ("private rights to the use of a park are created by implied grant, implied covenant, or estoppel. It makes very little difference upon which of the above three theories the holding is based. … [T]he Cree Meadows golf course is a place equivalent to a park or other open area, and the right to have the same continue in existence as it was at the time of dedication and after sales were made is a valuable one and must be protected by the courts. It is obvious that the golf course as shown by the plat was an essentially constituent and integral part of the larger enterprise, namely, the subdivision itself.").

Merchants Mortgage & Trust Corp., 645 P.2d 7, 13 (Colo. 1982); *Morrison v. Goodspeed*, 100 Colo. 470, 477-78, 68 P.2d 458, 462 (1937).

Here, the Cordillera Plaintiffs have stated *prima facie* claims against BH and its principals for fraudulent misrepresentation and fraudulent concealment. If BH truly intended that its proposed 2009 modification give it and subsequent purchasers the authority to eliminate the Lodge and replace it with any of the other uses listed in the PUD, then it fraudulently misrepresented that intent to, and fraudulently concealed its true purpose from, the members of the CPOA and Eagle County. If the purchase agreement between BH and CCG closes, and the Lodge is eliminated, BH should be liable to the Cordillera Plaintiffs for the substantial damages it has caused by its fraudulent misrepresentations and fraudulent concealment. Those damages can be measured by the negative impact of BH's actions on property values in Cordillera. But damages are not an adequate remedy for the Cordillera Plaintiffs. If BH's deal with CCG is consummated and the Lodge is eliminated, the Cordillera Plaintiffs will have lost the Lodge and their ability to enforce the promises that BH made not to alter the PUD or change the uses. Preserving the Lodge is the Cordillera Plaintiffs' primary goal, and enforcing BH's promises by enjoining BH from breaching them is necessary to achieve that goal.

3. Aiding and Abetting

Defendants BH Holdings (a real estate investment firm and ultimate parent company of BH), Robert M. Behringer (founder, chairman emeritus, and controlling owner of BH Holdings), and Michael D. Cohen (president and CEO of BH Holdings) were and are authorized to make decisions and otherwise act on behalf of BH in the ordinary course of business. On information and belief, the Cordillera Plaintiffs have alleged that, by virtue of their positions, BH Holdings, Behringer, and Cohen aided and abetted BH's fraudulent misrepresentations and concealment

described above. These defendants acted with the common objective of obtaining CPOA approval for the 2009 modifications to the 10th Cordillera PUD (and are now directing BH's sale of the Lodge to CCG) and directed BH's conduct. *See Sender v. Mann*, 423 F.Supp.2d 1155, 1175 (D. Colo. 2006) ("aiding and abetting fraud is a cognizable claim in Colorado"); *Holmes v. Young*, 885 P.2d 305, 308 (Colo. Ct. App. 1994). Consequently, the Cordillera Plaintiffs' aiding and abetting claim against BH Holdings, Behringer, and Cohen is likely to succeed.

4. Breach of Implied Restrictive Covenant

Finally, and completely independent of the reasons stated above, the Court should temporarily enjoin BH from closing on its purchase agreement with CCG because implementation of that agreement would violate an implied restrictive covenant governing the Lodge that is enforceable under Colorado law.[14] That implied restrictive covenant requires that the Lodge remain in existence as a lodge, offering resort amenities to the Cordillera Plaintiffs and other Cordillera property owners upon their compliance with the terms and conditions of its use as set by the owner of the Lodge.

Indeed, a general plan exists with respect to Cordillera's development and improvement that includes its functioning as a residential resort community. The plan incorporates the Lodge as its centerpiece offering resort amenities and gives rise to an implied restrictive covenant regarding its existence and permissible uses – that is, that the Lodge would be preserved as a

[14] The covenant satisfies the elements required by Colorado law because: (i) a general scheme or plan for the development and improvement of property existed; (ii) the plan was adopted and made public by the developer or owner; (iii) the plan contemplated restrictions regarding land use; (iv) the covenants were entered into for the benefit of the Cordillera Plaintiffs and other Cordillera property owners; (v) the Cordillera Plaintiffs had actual or constructive knowledge of the covenants; (vi) the covenants entered into the consideration of the Cordillera Plaintiffs' purchase of property at Cordillera; and (vii) the original plan has not been abandoned without dissent or its purpose defeated by changed circumstances. *See*, *e.g.*, *Taylor v. Melton*, 130 Colo. 280, 286-87, 274 P.2d 977, 981 (1954); *Seeger's Estate v. Puckett*, 115 Colo. 185, 188, 171 P.2d 415, 416 (1946); *Judd v. Robinson*, 41 Colo. 222, 228, 92 P. 724, 726 (1907). Even an unwritten covenant can be enforced against subsequent purchasers who take with actual or constructive notice of the general plan. *See Pagel v. Gisi*, 132 Colo. 181, 184-85, 286 P.2d 636, 638 (1955); *Seeger's Estate*, 115 Colo. at 188

lodge accessible for use by Cordillera property owners upon their compliance with the terms and conditions for its use set by the owner. *See Bolinger v. Neal*, 259 P.3d 1259, 1264-65 (Col. App. 2010) (where a plat shows spaces for streets, parks, or other common uses, "the conveyee of the land acquires an easement with respect to the street or the areas shown on the map").

Cordillera's developer adopted the general development plan, and BH purchased the Lodge with knowledge of the plan and continued to publicize it. Likewise, the Cordillera Plaintiffs were aware of the general plan for development and the resulting restrictive covenant governing the Lodge. Their awareness was based on their examinations of the 2002 plat; marketing materials, sales brochures, and representations in the media that touted the Lodge and its world-class amenities and awards, emphasized properties' proximity to the Lodge, and described the Lodge as the focal point of the community and its crowning jewel; and the 10th and 11th Cordillera PUD; as well as tours of the property and Lodge.[15] The Cordillera Plaintiffs relied on these representations regarding the Lodge and reasonably believed that it would remain a central amenity. The presence of the Lodge at Cordillera, and the accessibility of its services and amenities, motivated the purchases of property in Cordillera by the Cordillera Plaintiffs and others. They would not have bought their properties at Cordillera had they known the Lodge would be replaced. Indeed, the implied restrictive covenant governing the Lodge exists for the benefit of the Cordillera Plaintiffs and their property. The presence of the Lodge makes the Cordillera community more desirable and the Cordillera Plaintiffs' property more valuable.[16]

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[15] *See Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co.*, 77 N.M. 730, 735-37 (1967) (a covenant existed where the developer used a plat showing a golf course in making sales and made other representations about the course).

[16] *See Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 38-39, 45 (Ariz. Ct. App. 1984) (even where no land use restriction was ever recorded, a golf course was subject to an implied covenant enforceable against the new owner of the course who took with notice of the restriction, where the previous owner's representations regarding the golf course in plat and sales materials induced homeowners to buy property and pay a premium for lots closer to the course); *Skyline Woods Homeowners Ass'n, Inc. v. Broekmeier*, 276 Neb. 792, 810-12 (2008) (an implied covenant existed with respect to a golf course, where the developer had a common scheme to build the subdivision

Finally, the original development plan with respect to the Lodge has not been abandoned and its purpose has not been defeated. BH is bound by the implied restrictive covenant that requires that the Lodge remain in existence, accessible as a Lodge to the Cordillera Plaintiffs and other similarly situated Cordillera property owners upon their compliance with the terms and conditions of its use set by the owner of the Lodge. The Cordillera Plaintiffs and others similarly situated, who purchased property in Cordillera in reliance on this implied restrictive covenant, have a right to enforce this covenant through injunctive relief.

The Cordillera Plaintiffs' right to a preliminary injunction is not overcome by documents[17] providing that access to the Lodge is subject to the terms and conditions of its private owner and that no Cordillera property owner has an unfettered right to enter or use the Lodge by virtue of that owner's CPOA membership or occupancy of a unit in the Cordillera community. However, the Cordillera Plaintiffs do not claim they have an unfettered right to enter or use the Lodge. Rather, they claim the implied restrictive covenant running in their favor preserves the existence of the Lodge and its accessibility to them and other Cordillera property owners upon their compliance with the terms and conditions of its use set by the Lodge owner.

A case in point is *Knight v. City of Albuquerque*, 794 P.2d 739 (N.M. App. 2014). Plaintiffs in *Knight* were owners of property in a subdivision named Paradise Hills Country Club Estates. They brought suit against a number of defendants to prevent the development of property at Paradise Hills that was part of a golf course. The Court of Appeals of New Mexico, in affirming the trial court's grant of summary judgment in favor of the plaintiff, noted that the

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specifically with a golf course to make it more valuable and touted the course in advertisements as the "center and heart" of the development).

[17] Namely, the Declaration of Protections, Covenants, Conditions, and Restrictions for Cordillera, recorded on May 12, 1993, in the Eagle County real property records at Reception No. 504866, as amended in September 2016 and recorded at Reception 201614815, or by the filings by the developer of Cordillera with the Office of Land Sales of the U.S. Department of Housing and Urban Development.

original developers used the golf course as a selling tool and the subdivision plat denominated the territory the golf course would occupy. The plaintiff property owners relied on the continued existence of the golf course in purchasing their properties at Paradise Hills.

The appellant argued that the original developer of Paradise Hills "specifically reserved the right to build hotels, cottages, or other facilities on any tract shown on the Paradise Hills Country Club Estates plat without the permission of the owners of any lot located within the subdivision." *Knight*, 794 P.2d at 740. Moreover, "[t]his reservation was contained in provision 20 of the recorded conditions and restrictions on development filed by the developer and incorporated into the purchasers' warranty deeds." *Id*. The appellant contended that, "any rights created by the sale of subdivision property with reference to the plat are merely implied rights, and that provision 20's specific reservation of rights takes precedence over those implied rights." *Id*. In essence, the appellant argued that, "a developer may simultaneously use a subdivision plat showing open space areas as a selling tool, yet retain the right to unilaterally change the character of the open space." *Id*.

The Court of Appeals of New Mexico emphatically rejected the appellant's argument. It said: "Such a result is patently unfair and violative of public policy." *Knight*, 794 P.2d at 740. The Court held: "A developer may not induce buyers to purchase lots by pointing to the present or planned existence of a park or golf course, while retaining the power to alter the use of the park or golf course." *Id.* Here, too, the implied covenant running in favor of the Cordillera Plaintiffs that the Lodge would remain in existence, accessible to them and other Cordillera property owners upon their compliance with the terms and conditions of its use set by the owner of the Lodge, which derives from the Cordillera land plats and the other materials cited above,

supersedes the reservations in the documents recorded by the developer of Cordillera. Those documents should not block the grant of the preliminary injunction plaintiffs seek.

B. Plaintiffs will Suffer Irreparable Harm Without a Preliminary Injunction

The Cordillera Plaintiffs will suffer irreparable harm unless the Court grants their motion for a preliminary injunction. Without a preliminary injunction, BH will achieve a *fait accompli* by eviscerating the Cordillera Plaintiffs' legal right to enforce the solemn promises BH made in 2009 and by jeopardizing the existence of the Lodge, a central amenity at Cordillera. Although BH has refused to disclose the date its purchase agreement with CCG will close, the Court should assume that the closing is imminent.

"[W]hen interests involving real property are at stake, preliminary injunctive relief can be particularly appropriate because of the unique nature of the property interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (internal quotation omitted). Defendants are likely to move forward with the sale and reconstruction of the Lodge before the Court can decide this case. If they do so, the Lodge could be altered beyond the point of restoration, causing plaintiffs harm that cannot be compensated after the fact by money damages. *Id.*; *see also Colorado Wild Inc. v. U.S. Forest Service*, 523 F.Supp.2d 1213, 1220 (D. Colo. 2007) (allowing construction before case is decided would cause irreparable injury).

The Cordillera Plaintiffs seek only to maintain the *status quo* – that is, to prevent the closing of BH's sale of the Lodge to CCG and to prevent the elimination and reconstruction of the Lodge by CCG – pending the outcome of this litigation. *See Tri-State Generation and Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 356 (10th Cir. 1986) (enjoining sale of assets would prevent irreparable harm). The preservation of the *status quo* is a "favored" ground on which a preliminary injunction can be granted to prevent irreparable harm

to the movant. "The main purpose of a preliminary injunction is simply to preserve the *status quo* pending the outcome of the case. … In issuing a preliminary injunction, a court is primarily attempting to preserve the power to render a meaningful decision on the merits." *Id.* at 355. At the very least, the Cordillera Plaintiffs request the grant of a preliminary injunction for 60 days to enable them to take discovery and demonstrate their entitlement to summary judgment.

C. The Balance of Hardships Favors the Cordillera Plaintiffs

Because the Cordillera Plaintiffs seek only to preserve the *status quo*, the balance of hardships favors them. *See Port-a-Pour, Inc. v. Peak Innovations, Inc.*, 49 F.Supp.3d 841, 859 (D. Colo. 2014) (quoting *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) ("The limited purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). As described above, the Cordillera Plaintiffs face irreparable injury if BH is permitted to close on its purchase agreement with CCG. In contrast, a preliminary injunction would impose no or very limited hardship on BH.[18] "[A]ny injury incurred by [defendants] from mere postponement of the sale is neither exceptional nor uncompensable with a money award." *Tri-State*, 805 F.2d at 357 (any harm that could result from maintaining status quo is less than harm that would flow from immediate sale of assets).

D. Injunctive Relief Will Serve the Public Interest

Moreover, because it merely would preserve the *status quo*, the preliminary injunction that the Cordillera Plaintiffs seek would not adversely affect the public interest. *See Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny*, 115 F.Supp.2d 1210, 1231 (D. Colo. 2000). In

[18] Two lawsuits are pending in Colorado state court challenging Eagle County's decision to allow CCG to use the Lodge and Village Center Parcels for a drug treatment facility (Case Nos. 2016CV30363 and 2016CV30361 in Eagle County District Court). Presumably, the pendency of those lawsuits is an impediment to the closing of the purchase agreement between BH and CCG.

addition, injunctive relief would serve the public's interest in ensuring that covenants regarding property are upheld and reasonable expectations enforced.

E. A Security Bond is Unnecessary and Not Required

Finally, the Cordillera Plaintiffs should not be required to post a bond in support of the preliminary injunction. Although Fed. R. Civ. P. 65(c) contemplates security for a preliminary injunction "in an amount that the court considers proper," courts have wide discretion in determining whether to require a bond at all. *RoDa Drilling*, 552 F.3d at 1215. For two reasons, the "proper" amount here should be zero. First, the Cordillera Plaintiffs are individuals and unable to afford a large bond. "The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Colorado Wild*, 523 F.Supp.2d at 1230-31 (plaintiff not required to post a bond where imposing bond would preclude plaintiff's ability to proceed with case). Second, the Court need not require a bond where there is no likelihood that defendants will suffer harm if they are wrongfully enjoined. *Port-a-Pour, Inc.*, 49 F.Supp.3d at 874. As stated above, BH will not be harmed by the maintenance of the *status quo*.

CONCLUSION

For the foregoing reasons, the Cordillera Plaintiffs respectfully request that the Court grant their motion and issue a preliminary injunction preventing BH from closing its purchase agreement with CCG or otherwise moving forward with the sale or reconstruction of the Lodge pending the resolution of this litigation or, in the alternative, for 60 days to enable the Cordillera Plaintiffs to take discovery and demonstrate their entitlement to summary judgment.

Dated: January 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that today, January 17, 2017, I caused the foregoing Plaintiffs' Motion for Preliminary Injunction to be filed with and served upon on all counsel of record by the Court's electronic case filing system.

/s/ Neil H. Koslowe
Neil H. Koslowe
Attorney.