NO. 19-____

IN THE

SUPREME COURT OF THE UNITED STATES

Streambend Properties II LLC et. al.,

Petitioners,

v.

Ivy Tower Minneapolis, LLC et. al.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Minnesota

PETITION FOR A WRIT OF CERTIORARI

RACHEL K. NELSON
Law Offices of Rachel K. Nelson, PLLC
PO Box 120670
St. Paul, MN 55112
(763) 234-0447
Petitioners

QUESTIONS PRESENTED

The **first** question presented is whether the lower court erred in dismissing with prejudice Petitioners' claims for failing to state a claim for which relief may be granted.

The **second** question presented is whether dismissals with prejudice should ordinarily apply for allegedly failing to state a claim for which relief may be granted.

The **third** question presented is whether the lower court erred in declining to address Petitioners' claims for violation of its jury trial, equal protection, and due process rights.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all parties to the proceeding in the court whose judgment is sought to be reviewed:

The plaintiffs/appellants below were Streambend Properties II LLC, Streambend Properties VIII LLC, and Jerald Hammann ("Streambend"). Both Streambend Properties II LLC and Streambend Properties VIII LLC are owned by GoalAssist Corporation, a non-publicly held company owned by Jerald Hammann ("Hammann").

The respondents here and defendants/respondents below are Ivy Tower Minneapolis, LLC ("Ivy Tower" or "Ivy Minneapolis), Ivy Tower Development, LLC, Moody Group, LLC, Goben Enterprises, LP, Wischermann Holdings, LLC, Jeffrey Laux, Gary Benson, (the above persons and entities, collectively the "Developers") and Commonwealth Land Title Insurance Company, LLC ("Commonwealth").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION

I. PRELIMINARY STATEMENT 11

II. COURT ERRED IN DISMISSING CLAIMS WITH PREJUDICE 12

A. Streambend Provided With No Notice or Opportunity For Hearing Relative to *Sua Sponte* Appellate Arguments 13

B. Complaint Did Not Fail to State a Claim Upon Which Relief Could be Granted 15

III. DISMISSALS WITH PREJUDICE FOR FAILURE TO STATE A CLAIM SHOULD ONLY APPLY TO UNUSUAL CIRCUMSTANCES 18

IV. COURT ERRED BY NOT ADDRESSING CONSTITUTIONAL CLAIMS 23

CONCLUSION 25

APPENDIX

Appendix A: Supreme Court Denial of Certiorari (Aug. 20, 2019) 1a
Appendix B: Appellate Opinion Granting Dismissal (Jun. 3, 2019) 2a
Appendix C: District Court Order Granting Dismissal (Jul. 12, 2018) 29a

TABLE OF AUTHORITIES

Constitutional Provisions

Fifth Amendment to the U.S. Constitution 15

Seventh Amendment to the U.S. Constitution..... 21

Fourteenth Amendment to the U.S. Constitution . 15

Cases

Ashcroft v. Iqbal,
129 S.Ct. 1937, 1940 (2009) 17

Boddie v. Connecticut,
401 US 371, 378 (1971) 14

Caperton v. A.T. Massey Coal Co.,
129 S.Ct. 2252, 2259 (2009) 24

Cheney v. U.S. Dist. Court,
541 U.S. 913, 924 (2004) 23

Cleveland Bd. of Ed. v. Loudermill,
470 US 532, 542 (1985) 13

Dimke v. Farr,
802 N.W.2d 860, 863 (Minn. Ct. App. 2011) 15

Gladstone, Realtors v. Village of Bellwood,
441 U. S. 91, 109 (1979) 20

In re 3D Resorts-Bluegrass, LLC,
Administrative File No. 2013-CFPB-0002,
Document 28 7

In re Jacobs,
802 NW 2d 748, 753 (Minn. 2011) 23

Microsoft Corp. v. United States,
530 U.S. 1301, 1302 (2000) 23

Olson v. N. Pac. Ry. Co.,
148 N.W. 67, 68 (Minn. 1914) 11

Tumey v. Ohio,
273 U.S. 510, 532 (1927) 12

Warth v. Seldin,
422 U. S. 490, 501 (1975) 20

Statutes, Rules, and Regulations

15 U.S.C. § 1701 et. seq. 6

Code of Judicial Conduct 24

Fed. R. Civ. P. 8(a)(2) 15

Fed. R. Civ. P. 12(b)(6) 13

Minn. R. Civ. P. 8.01 15

Minn. R. Civ. P. 12.02(e) 13

Minn. Stat. §559.217(4) 15

Scholarly and Other Authorities

Administrative Office of the U.S. Courts Caseload Statistics Data Tables, Table C-4A (Jun. 30, 2019) 21

Burbank, Stephen B., "Keeping our Ambitions Under Control: The limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court. 1 J. Empirical Legal Stud. 571, 575 (2004) 21

Grundman, Luke, et. al. "In eviction proceedings, lawyers equal better outcomes." Bench & Bar of Minnesota (February 2019) 24

Ostrom, Brian J., Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782, Figs. 11, 13 21

Lahav, Alexandra D. and Siegelman, Peter, The Curious Incident of the Falling Win Rate (July 7, 2017) 22

R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, eds. Court Statistics Project DataViewer 22

US Courts Civil Terminations dataset (1980-2009)11

PETITION FOR A WRIT OF CERTIORARI

Petitioners Streambend Properties II LLC, Streambend Properties VIII LLC, and Hammann (collectively, "Streambend" or "Petitioner") respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Minnesota.

OPINIONS BELOW

The opinions and orders of the lower courts are unpublished. These documents are produced in the Appendix.

JURISDICTION

The Supreme Court of Minnesota denied Petitioner's petition for supreme court review on August 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the United States Constitution provides that:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment to the United States Constitution provides that:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The court has seen this case before. Respondents were developers (collectively, "Developers") of a failed residential condominium development in Minneapolis, MN (the "Development") and their escrow and disbursing agent ("Commonwealth").

Developers made numerous misrepresentations and omissions to Petitioner and other purchasers in the Development. One example relates to the date of delivery of the units, which was represented would be on or around the end of 2006. This representation assumed an unrealistic construction schedule (which was off by more than 12 months even with highly-favorable weather speeding it up) and assumed that construction could begin only 2-3 months after purchasers signed purchase agreements, when Developers had not yet obtained the land underlying the Development, city approval for the Development, financing for the Development or contracted with a commercial builder to construct the Development. These latter steps took 12-14 months rather than the 2-3 months assumed (even with highly-favorable outcomes relative to obtaining the land). Developers and their agents knew at the time they represented the delivery dates of the units that the representations were not possible to achieve.

Developers then compounded these initial material misrepresentations and omissions by adding two additional floors to the Development, further delaying the start of construction and further extending its completion date. Ultimately, these delays and the enlarged construction plan resulted in cost overruns that subjected the Development to mechanic's liens that Developers were unwilling to

pay. Developers made other material representations which were not true and omitted material facts regarding the development.

Commonwealth, Developers' escrow and disbursing agent, accepted Streambend's earnest monies relating to the Development, but then disbursed them without Streambend's permission. The initial earnest monies, along with the earnest monies of others, were used as part of Developers' initial contribution to secure their construction loan, thereby increasing the proportion of other people's money in the Development transaction. These monies funded Developers' loan closing costs when an agreement between Developers' contracting shell company Ivy Minneapolis and Streambend only permitted them to be spent on construction costs and then only if a disbursement request was made to Streambend.

Streambend's second earnest money deposits, paid in 2007 coincident with the amendment of the purchase agreements, were used in 2008 to pay off filed mechanic's liens the Developers themselves were unwilling to pay. Streambend's total earnest monies totaled $63,867.45 and, when combined with other purchasers' earnest monies, exceeded $2.8 million. Ultimately, Developers ran out of other people's money and refused to invest their own to complete the Development. Eighteen mechanic's liens were filed against the Development. Therefore, when the 2008 raiding of the purchasers' earnest money accounts occurred, there was little to no hope that the purchasers could receive their units free from liens on the Development.

Streambend became aware of the mechanic's liens filed against the Development, but was unaware that its earnest monies had already been removed from the trust accounts. To protect its earnest monies under these high-risk circumstances (i.e., Developments with large numbers of mechanic's liens are rarely completed by their Developers), Streambend completed the process established in the purchase agreements for cancellation of the purchase agreements. That process was to result in the return of earnest monies to Streambend. When this did not occur, Streambend initiated statutory cancellation of the purchase agreements. Ivy Minneapolis responded by attempting to cross-cancel the purchase agreements pursuant to the statute. However, because Streambend had fully performed under the purchase agreements, the bases stated for cross-cancellation were pretextual.

Streambend first brought action against Developers in federal court, citing as its basis for federal jurisdiction the Interstate Land Sales Full Disclosure Act ("ILSFDA", 15 U.S.C. §1701 et. seq.). All respondent parties moved to dismiss.

On July 10, 2013, the federal district court concluded that "[s]ection 1703(a)(2)(A)-(C) proscribes fraudulent conduct" and that the complaint failed to plead this fraud with particularity. The federal claims were dismissed with prejudice and Streambend's remaining state law claims were dismissed without prejudice based on the district court's election not to exercise supplemental jurisdiction.

Less than one month later, on August 7, 2013, the Consumer Financial Protection Bureau ("CFPB") concluded that "[s]cienter is not required to establish

a violation of §1703(a)(2)(A), (B), or (C)."(see *In re 3D Resorts-Bluegrass, LLC*, Administrative File No. 2013-CFPB-0002 at 10 fn.7). On December 2, 2013 the Director of the CFPB concurred with the determination of the Enforcement Director.

Streambend appealed to the Eighth Circuit. The Eighth Circuit found that:

> "Subsections (A) and (C), like Rule 10b-5(a) and (c), are explicitly grounded in fraud. They prohibit the seller of property from "employ[ing] any device, scheme, or artifice to defraud," or "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser."
>
> . . . . and . . . .
>
> "There also were no allegations of intentional wrongdoing (scienter) by any defendant."
>
> . . . and . . . (regarding Subsection (B))
>
> "Unlike § 1703(a)(2)(A) & (C), this provision [i.e., subsection B] is not explicitly grounded in fraud."
>
> . . . . and . . . .
>
> "In avoiding averments of fraud, Streambend failed to allege that the Developers never intended to fulfill their contractual promises to perform future undertakings. Absent an allegation defendants made promises they did not intend to keep, these allegations sound in

> breach of contract, not tortious misrepresentation."

Yes, you read that correctly. While the Eighth Circuit admitted that subsection (B) did not require allegations of fraud, it nonetheless dismissed the claims because it found no allegations of fraud were made. Streambend's petition for a writ of certiorari was denied.

Streambend next brought action against Developers and its agent in state court, alleging the state law causes of action the federal court dismissed without prejudice. All respondent parties again moved to dismiss.

The state district court committed a host of egregious errors. It found that the purchase agreements were void even though the complaint alleged their adoption in 2007 coincident with the amendment of the purchase agreements and the deposit of additional earnest monies. App. 10a, 38a-40a. It also found that Ivy Minneapolis' cross-cancellation was actually a statutory cancellation to which Streambend did not respond. It therefore concluded that Streambend was not entitled to the return of its earnest monies App. 10a-15a, 17a, 44a-45a. Yes, you read that correctly.

However, the complaint alleged facts establishing Streambend's contractual cancellation and initiation of statutory cancellation prior to Developers' cross-cancellation and supported these allegations with an affidavit prepared by Developers' attorney affirming the same. Complaint ¶198-203 and its Exhibit 11. Streambend expressly addressed the implication of the affidavit in its response to the dismissal motions:

> "The April 23rd, 2009 Affidavit of Patrick C. Smith, stated that Plaintiffs' letters did not comply with the requirements of Minn. Stat. § 549.217. Complaint ¶207 and its Exhibit 11. To find favorably to Ivy Parties, the court would also have to find that Mr. Smith's affidavit statement is true. Since the documents about which Mr. Smith made these statements are not part of the record on dismissal, any finding relative to Mr. Smith's statement would be premature."
>
> Streambend's Response to Ivy Parties' Motion to Dismiss at 12.

To test whether the district court errors were made in good faith, Streambend wrote a letter request seeking to bring a motion for reconsideration. In the letter request, Streambend demonstrated how, under the alleged facts and the law, the district court finding regarding statutory cancellation could not possibly be correct at the dismissal stage. Declining to address the allegations in the complaint and its attached affidavit a second time, the district court judge declined to permit further briefing and denied Streambend's request to bring a motion for reconsideration.

On appeal, Streambend described the errors in fact and law present in the district court findings and further argued:

> "One cannot read the account above of the district court's conduct in relation to the present case and not be keenly aware that the court is intentionally committing judicial error in an effort to end the case to avoid a 'fair and equitable resolution of factual issues,' which is

> the very thing a jury trial is designed to protect."
>
> Streambend's Appellate Brief at 55.

Streambend supported this jury trial right argument with federal and state court statistics showing the effective elimination of jury trial rights in Minnesota courts (i.e., a 0.15% rate for calendar year 2016). *Id.* at 57. Streambend also argued that the dramatic decline in plaintiff win rates in the federal courts represented clear evidence of equal protection and due process violations that had been adopted by the Minnesota courts (i.e., a 70% plaintiff win rate in 1986 dropped to 30% in just 10 years). Id. at 59.

The appellate court expressed its opinion regarding "the inappropriateness of impugning the integrity of the court. We here are members of the judiciary which you are harshly criticizing." Mar. 28, 2019, A18-1488 Appellate Hearing Audio at 7:34-9:00. Less than one minute later, the judge stated: "I am going to interrupt you because I am really not interested in what might be fodder for a law review article. . . . I just think you should move on . . ." Id. at 9:50-10:15.

The subsequent appellate court opinion was littered with errors, notable among them, the following two.

First, it found that Streambend did not assert argument relating to its own Notices of Cancellation before the district court. App. 14a-15a.

Second, the Opinion *sua sponte* at 10 referenced the "Olson rule," which it admitted "is not applicable to claims against a party who is not a party to a purchase agreement." App. 12a-13a. *Olson v. N. Pac.*

Ry. Co., 148 N.W. 67, 68 (Minn. 1914). Claiming that it is "required" to accept the allegations in the complaint as true, it concluded that the complaint "treat[s] Developers as parties to the purchase agreement," thereby protecting them from liability under the Olson rule. App. 13a-14a.

On these bases, it affirmed dismissal of the claims against the Developers. Claims against the Developers' agent were dismissed on these and other bases. The Minnesota Supreme Court declined review on August 20, 2019. App. 1a.

REASONS FOR GRANTING THE PETITION

I. PRELIMINARY STATEMENT

Something's gotta give. Streambend did everything it was supposed to do to obtain the return of its nearly $64,000 in earnest monies. When liens clouded title to the Development and made it unlikely that it would receive the residential condominium units it bargained for, Streambend began and completed the contractual cancellation process outlined in the purchase agreements. When its earnest monies were not returned pursuant to the contract, it initiated statutory cancellation procedures to which Developers ultimately responded with a pretextual cross-cancellation. While Developers' attorney argued via affidavit that Streambend's initiating statutory cancellation notice was defective, no one otherwise denies these facts and no one denies that the complaint alleges these facts.

But similarly before the Eighth Circuit Court of Appeals, the court did not deny that 15 U.S.C. §1703(a)(2)(B) did not require proof of fraud, and yet

it still found Streambend's (B) claims defective for failing to allege fraud.

Something's gotta give. In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), this court stated:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to [prevail], or which might lead him not to hold the balance nice, clear and true between the [parties], denies the [parties] due process of law.

One procedure which offers this temptation is Rule 12(b)(6) of the Federal Rules of Civil Procedure ("failure to state a claim upon which relief can be granted") and the identical Rule 12.02(e) of the Minnesota Rules of Civil Procedure. The "temptation" exists for a judge to use a "with prejudice" dismissal to terminate a valid cause of action before it even begins.

Something's gotta give. Either this subsection of Rule 12 must be modified, how it is applied must be modified, or alternate procedures must be available to combat when this subsection of Rule 12 leads the average judge into temptation.

II. COURT ERRED IN DISMISSING CLAIMS WITH PREJUDICE

The Court erred in dismissing Streambend's claims with prejudice. Fed. R. Civ. P. 12(b)(6) states in relevant part:

> "**How to Present Defenses**. Every defense to a claim for relief in any pleading must be

> asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> . . .
>
> (6) failure to state a claim upon which relief can be granted; …
>
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

Minnesota Rule of Civil Procedure 12.02(e) reads substantially similarly. While the Rule itself does not state this, the most common disposition for a failure to state a claim upon which relief allegedly cannot be granted is a dismissal with prejudice of the claim.

A. Streambend Provided With No Notice or Opportunity For Hearing Relative to *Sua Sponte* Appellate Arguments

> "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case. We have described the root requirement of the Due Process Clause as being that an individual be given an opportunity for a hearing before he is deprived of any significant property interest."

Cleveland Bd. of Ed. v. Loudermill, 470 US 532, 542 (1985) (internal quotations and citations omitted).

"What the Constitution does require is an opportunity granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the

nature of the case." *Boddie v. Connecticut*, 401 US 371, 378 (1971) (internal quotations and citations omitted).

Conspicuous among the details of this case and its predecessor before the federal courts is the use of *sua sponte* findings by the appellate courts.

In the federal action, the appellate court upheld dismissal of the case with prejudice based on its *sua sponte* finding that, while 15 U.S.C. §1703(a)(2)(B) "is not explicitly grounded in fraud, . . . [a]bsent an allegation defendants made promises they did not intend to keep, these allegations sound in breach of contract, not tortious misrepresentation."

In the current state action, the appellate court upheld dismissal of the case with prejudice based on its *sua sponte* finding that it was "required" to accept the allegations in the complaint as true, which it found "treat[s] [all] Developers as parties to the purchase agreement," thereby protecting them under the Olson rule.

But when these *sua sponte* arguments are made after briefing and arguments before both the district and appellate courts, what notice or opportunity for hearing is ever provided to rebut these new findings before a deprivation of a litigant's property right in their claims is extinguished? None. There is no automatic right of review before the Minnesota or United States Supreme Courts. Therefore, without such automatic right, the "meaningful time" to have such arguments heard has already passed and an appellate court violates the due process clause of the Fifth and Fourteenth Amendments when it dismisses a claim with prejudice without providing notice and an opportunity to be heard on a *sua sponte* argument.

B. Complaint Did Not Fail to State a Claim Upon Which Relief Could be Granted

The purpose of the notice pleading requirement of Rule 8 is to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Minn. R. Civ. P. 8.01.

To determine whether the complaint stated a claim upon which relief could be granted, first, it is necessary to test whether the Notices of Declaratory Counter-Cancellation served by Ivy Minneapolis satisfy the statutory requirements to effect a cancellation. The Opinion at 12 acknowledges that "the statutory cancellation process is 'one of the harshest forfeitures known to American law.'" Therefore, cancellation or cross-cancellation requires strict compliance with the cancellation statute. See *Dimke v. Farr*, 802 N.W.2d 860, 863 (Minn. Ct. App. 2011). The cancellation statute states in relevant part:

> Subd. 4. **Declaratory cancellation**. (a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either the purchaser or the seller may confirm the cancellation by serving upon the other party to the purchase agreement and any third party that is holding earnest money under the purchase agreement a notice.

Minn. Stat. §559.217(4).

There are five provisions in the Purchase Agreements in the present dispute "which by the

terms of the purchase agreement cancels the purchase agreement." These five provisions are: ¶4 (Contingencies), ¶8 (Title Matters), ¶11 (Buyer's Cancellation Right), ¶18 (Destruction), and ¶19 (Default). Ivy Minneapolis cited only ¶4(a). Complaint ¶204-212, Ex. 9-10 ¶4.

The Complaint alleged that "[t]he Notices of Declaratory Cancellation did not identify any default or unfulfilled condition which canceled the Ivy II Purchase Agreement or the Ivy VIII Purchase Agreement (Exhibits 9 and 10 at ¶4)." Complaint ¶28. It supported this allegation with more specific allegations later as to each allegation contained in the Notices. For example, in relation to ¶4(a), the Complaint stated:

> 272. Defendants' Notice of Declaratory Cancellation further stated: "Buyer never applied for financing [PA @ 4(a)]."
>
> 273. Paragraph 4(a) of the Purchase Agreements provided for Plaintiffs to "furnish to Seller on or before November 23rd, 2004, a copy of a written approval for financing . . ." and, if said written approval was not provided, allowed for termination of the Purchase Agreement by "written notice by Seller within 10 days after the deadline date in subparagraph (a)." In this event, "upon written notice of termination the Earnest Money paid by Buyer shall be returned to Buyer in exchange for a signed termination agreement."
>
> 274. Even if true, the exercise window relating to this allegation expired on December 3, 2004, and does not presently represent a default or unfulfilled condition in the Purchase Agreements.

> 275. Moreover, even if true, Defendants are then obligated to return to Plaintiffs their earnest monies, which they have refused to do.

"Detailed factual allegations are not required, but the Rule does call for sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009) (internal quotations and citations omitted).

Neither the district nor the appellate courts accepted these allegations in the complaint as true as is required when testing the sufficiency of the complaint. Instead, the courts simply ignored these allegations and refused to test whether the Notices of Declaratory Counter-Cancellation served by Ivy Minneapolis satisfy the statutory requirements to effect a cancellation.

Second, had the district or appellate court (for whatever reason) elected to not accept these allegations in the complaint as true, it would then be necessary to test whether the Notices of Declaratory Cancellation served by Streambend satisfy the statutory requirements to effect a cancellation.

The Affidavit of Patrick C. Smith, one of which was attached to the Complaint, attested in relevant part:

> "I submit this Affidavit in compliance with Minnesota Statute section 559.217, subdivision 7(e).
>
> By way of letter dated April 16, 2000, Jerald A. Hammann, as Buyer and a licensed Minnesota real estate broker (also known as, and attempting to do business as, 'Streambend Properties II, LLC), allegedly served a statutory

> Notice of Cancellation upon Ivy Tower Minneapolis, LLC as Seller, and allegedly upon LandAmerica Commonwealth as alleged escrow agent, pursuant to Minnesota Statute section 559.217 (Exhibit 'A').
>
> The purported cancellation does not comply with Minnesota Statute section 559.217.
>
> On April 23, 2009 Ivy Tower Minneapolis, LLC as Seller personally caused to be served upon Jerald A. Hammann both individually and as agent for Streambend Properties II, LLC, a Counter-Cancellation Notice pursuant to Minnesota Statute section 559.217, subdivision 2 (Exhibit 'B')."
>
> Complaint Exhibit 11.

In addition to the affidavit being attached to the Complaint, the above facts were also alleged directly in the Complaint at ¶203-207. Notably, however, while both "Exhibit B"s were attached to the Complaint (as Exhibits 9-10), neither of the two "Exhibit A"s were. Streambend argued that, because neither of the initiating Notices of Declaratory Cancellation served by Streambend were part of the record, it is not possible at the dismissal stage to test whether they satisfy the statutory requirements to effect a cancellation.

> "The April 23rd, 2009 Affidavit of Patrick C. Smith, stated that Plaintiffs' letters did not comply with the requirements of Minn. Stat. § 549.217. Complaint ¶207 and its Exhibit 11. To find favorably to Ivy Parties, the court would also have to find that Mr. Smith's affidavit statement is true. Since the documents about

> which Mr. Smith made these statements are not part of the record on dismissal, any finding relative to Mr. Smith's statement would be premature."
>
> Streambend's Response to Ivy Parties' Motion to Dismiss at 12.

The dismissal standard requires that "factual matters [be] accepted as true" and does not require "detailed factual allegations." *Ashcroft* at 1940. However, rather than defer this test to the summary judgment stage, the district and appellate court elected to treat Streambend's statutory Notices of Cancellation – which Ivy Minnepolis' attorney already attested exist – as if these documents did not exist. The claim of the appellate court (Opinion at 12) that Streambend failed to make this argument to the district court is contradicted by the clear evidence that it did. Compare Streambend's Response to Ivy Parties' Motion to Dismiss at 12 to Streambend's Appellate Brief at 19, fn. 4; also at 10-12, 17-20.

Third, had the district or appellate court (for whatever reason) elected to not accept the allegations in the complaint as true that "[t]he Notices of Declaratory Cancellation did not identify any default or unfulfilled condition which canceled the Ivy II Purchase Agreement or the Ivy VIII Purchase Agreement (Exhibits 9 and 10 at ¶4)" (Complaint ¶28), and further had it elected (for whatever reason) to require not simply "detailed factual allegations," but actual documentary evidence at the dismissal stage of Streambend's Notices of Cancellation, it would then be necessary to evaluate the impact of whichever (or both) of the Notices of Declaratory Cancellation the court considered.

Here, the appellate court *sua sponte* found at 10-11 that it is "required" to accept the allegations in the complaint as true, and concluded that the complaint "treat[s] Developers as parties to the purchase agreement," thereby protecting them from liability under the Olson rule. The appellate court acknowledges that "the Olson rule is not applicable to claims against a party who is not a party to a purchase agreement." App. 13a.

Attached to the complaint are the two purchase agreements signed between Ivy Minneapolis and the Streambend entities and the two Notices of Cancellation served by Ivy Minneapolis upon the Streambend entities. Complaint Ex. 1-2, 9-10. These attached documents make clear that only Ivy Minneapolis (and not all of the Developer parties) is a party to the purchase agreements. Moreover, the complaint contains a claim for breach of contract (Count III), which is alleged only against Ivy Minneapolis. Complaint ¶280-284.

The dismissal standard is based upon "reasonable inference[s]" from the complaint. *Ashcroft* at 1940. The court must "construe the complaint in favor of the complaining party." *Gladstone Realtors v. Village of Bellwood*, 441 U. S. 91, 109 (1979) (quoting *Warth v. Seldin*, 422 U. S. 490, 501 (1975)). Construed in Streambend's favor as the complaining party, the only reasonable inference that could be construed from the complaint is that Ivy Minneapolis is the only defendant party to the purchase agreements and that none of the other Developer parties are party to the purchase agreements. Therefore, the Olson Rule was not applicable to the other Developer parties.

As demonstrated above, the complaint did not fail to state a claim upon which relief could be granted. For the above reasons, the lower courts erred in dismissing Streambend's claims with prejudice.

III. DISMISSALS WITH PREJUDICE FOR FAILURE TO STATE A CLAIM SHOULD ONLY APPLY TO UNUSUAL CIRCUMSTANCES

Dismissals with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) or Minn. R. Civ. P. 12.02(e) should be the exception rather than the common practice it is today.

Using real or contrived pleading slip-ups as a basis for dismissing otherwise valid claims does not satisfy due process of law. Nor does failing to address the allegations in the complaint in accordance with settled law.

In 1938, the civil trial rate was 18.16% for all federal court cases. Burbank, Stephen B., "Keeping our Ambitions Under Control: The limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court. 1 J. Empirical Legal Stud. 571, 575 (2004). Today, it is 0.7%. Administrative Office of the U.S. Courts, Caseload Statistics Data Tables, Table C-4 (Jun. 30, 2019) (https://www.uscourts.gov/data-table-numbers/c-4).

In 1992, the Minnesota State Court civil jury trial rate was approximately 6.8%. At that time, the average bench trial rate for 10 reporting states (including Minnesota) was 4.3%. Ostrom, Brian J., Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002,"

Journal of Empirical Legal Studies 1, no. 3 (November 2004): 755-782, Figs. 11, 13. Today, the civil jury trial rate is less than 0.1% and the civil trial rate is less than 1.0%. R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, eds. Court Statistics Project DataViewer (2018) (www.courtstatistics.org).

In the third quarter of 1985, plaintiffs won almost 70% of federal cases that were adjudicated to completion. By 2009, the plaintiffs' win rate had dropped to 33%. Lahav, Alexandra D. and Siegelman, Peter, The Curious Incident of the Falling Win Rate (July 7, 2017); relying upon the Administrative Office of the US Courts Civil Terminations dataset (1980-2009).

In *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), this court stated:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to [prevail], or which might lead him not to hold the balance nice, clear and true between the [parties], denies the [parties] due process of law.

Some portion of this decline in federal and state trial and jury trial rates and some portion of this decline in plaintiff win rates is attributable to the use of real or contrived pleading slip-ups as a basis for dismissing with prejudice otherwise valid claims.

Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e) offer the possible temptation to the average judge to forget the dismissal standard. Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e) offer the

possible temptation to the average judge to lead him or her not to hold the balance nice, clear and true between the parties. Therefore, Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e), when resulting in a dismissal with prejudice, often deny the parties due process of law.

If Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e) are going to continue to be part of our rules of civil procedure, the Supreme Court must ensure that dismissals with prejudice occur with a relatively low frequency relative to other curative outcomes, limiting the with prejudice designation to when a plaintiff actually has no claim upon which relief can be granted rather than when a judge subjectively determines the plaintiff has failed to state such a claim. For too long, judges have been claiming no relief can be granted for claims which are clearly validly plead. The temptation inherent in Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e) is simply too high to satisfy due process of law.

IV. COURT ERRED BY NOT ADDRESSING CONSTITUTIONAL CLAIMS

The appellate court erred by not addressing Streambend's constitutional claims. The reasons described above were not the only objections made by the district or appellate court to Streambend's claims. These additional objections similarly lacked merit.

It must be recognized that a party may have a right to a hearing, to an appeal, and to seek further review and still have their constitutional rights to trial, jury trial, equal protection, or due process violated. If this were not true, federal and state trial

and jury trial rates would not be as low as they currently are.

"It is axiomatic that a fair trial in a fair tribunal is a basic requirement of [Fifth Amendment] due process [rights]." *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2259 (2009) (quotations omitted). In *Caperton*, this court describes a prospective recusal standard. "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' " Id. at 2255. This inquiry is "made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances" *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 924 (2004) (quoting Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000)) The reasonable mind is not a judge or even an attorney, but instead a layperson. See *In re Jacobs*, 802 NW 2d 748, 753 (Minn. 2011) (compiling state rulings). Streambend argues that this standard not only has application prospectively, but also retrospectively.

Considering the entirety of the present case, it would be clear to a reasonable mind that, at each stage, the courts intentionally suppressed Streambend's constitutional rights. For example, the district court found:

> "Accompanying the notices was an affidavit of Patrick C. Smith which outlined the alleged defaults and unfulfilled conditions in more detail."
>
> App. 31a-32a.

However, as shown above at 17-18, this finding does not merely mischaracterize the contents of the Affidavit(s) of Patrick C. Smith, it outright misstates the content. Moreover, it outright misstates the content specifically in a manner which permits the court to ignore Streambend's own Notices of Cancellation, which are the central focus of the actual Affidavits. The reasonable mind possessing full knowledge of the facts and circumstances would more likely than not recoil in shock at this finding. And this was just one of an enormous number of errors in the district court order.

As another example, the appellate court claimed that it is "required" to accept the allegations in the complaint as true, and concluded that the complaint "treat[s] Developers as parties to the purchase agreement," thereby protecting them from liability under the Olson rule. App. 13a.

However, as shown above at 20, this finding ignores the two purchase agreements signed between Ivy Minneapolis and the Streambend entities and the two Notices of Cancellation served by Ivy Minneapolis upon the Streambend entities attached to the Complaint and also ignores the breach of contract (Count III) claim within the complaint, which is alleged only against Ivy Minneapolis.

The reasonable mind possessing full knowledge of the facts and circumstances would know that the appellate court was obligated to "construe the complaint in favor of the complaining party." (*Gladstone Realtors* at 109) and would therefore more likely than not recoil in shock at this finding because the court is doing the exact opposite, instead construing the complaint in favor of the non-

complaining party. And again, this was just one of an enormous number of errors in the appellate court order.

A fundamental problem with the current process as it relates to protecting individual constitutional rights is institutional defensiveness. On appeal, Streambend described the errors in fact and law present in the district court findings and further argued that:

> "One cannot read the account above of the district court's conduct in relation to the present case and not be keenly aware that the court is intentionally committing judicial error in an effort to end the case to avoid a 'fair and equitable resolution of factual issues,' which is the very thing a jury trial is designed to protect."
>
> Streambend's Appellate Brief at 55.

Rather than considering Streambend's constitutional arguments, the appellate court expressed its opinion regarding "the inappropriateness of impugning the integrity of the court. We here are members of the judiciary which you are harshly criticizing." Mar. 28, 2019, A18-1488 Appellate Hearing Audio at 7:34-9:00. Less than one minute later, the judge stated: "I am going to interrupt you because I am really not interested in what might be fodder for a law review article. . . . I just think you should move on . . ." Id. at 9:50-10:15.

But the preservation of trial, jury trial, equal protection and due process rights is not merely fodder for a law review article. It is instead among the foundational requirements of our system of justice.

Further, it is appropriate to impugn the integrity of the court when circumstances merit it. Indeed, under the Code of Judicial Conduct, compliance with the law is Rule 1.1. Systemic failures to comply with the law should be impugned.

Streambend's owner and other researchers have discovered additional evidence of equal protection failures by the Minnesota state courts, including: a) unrepresented litigants are only half as likely to receive a positive outcome in eviction actions as represented litigants (Grundman, Luke, et. al. "In eviction proceedings, lawyers equal better outcomes." Bench & Bar of Minnesota (February 2019)); and, b) although mammoth financial institution Wells Fargo participated in 4,765 cases as a first-named plaintiff or first-named defendant during the five-year period from 2014-2018, there is no evidence that it lost even one contested case. Hennepin County District Court Docket No. 27-CV-19-10382 Index #38, Facts and Circumstances ¶19-41. These equal protection violations add additional weight to the constitutional violations raised by Streambend because they demonstrate that the Minnesota Judiciary frequently picks winners and losers not based on the merits of the case, but instead on the perceived merits of the parties.

By refusing Streambend the opportunity to be heard on its constitutional claims, the court violated Streambend's right to due process of law. There must be new ways for litigants to preserve their constitutional rights to trial, jury trial, equal protection, and due process. The current ways have clearly fallen short of reliably securing these rights to individual litigants.

Streambend argues that the *Caperton* standard not only has application prospectively, but also retrospectively. However, for this retrospective application to be effective, it must necessarily be removed from determination by judges, who are too defensive of their colleagues and are prone to perceive every action against a particular judge as also an action against both the judiciary as a whole and them personally.

Tumey 532 instructs:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to [prevail], or which might lead him not to hold the balance nice, clear and true between the [parties], denies the [parties] due process of law.

Applying the *Caperton* standard retrospectively requires that it be performed by reasonable minds in the form of laypersons, not reasonable minds in the form of judges. A party should be able to request a *Caperton* standard review by reasonable laypersons of a district court or appellate court order in the court in which it was issued and, if judicial prejudice is found, have that order stricken from the record. This *Caperton* review should stay the time for further review while a decision is pending.

CONCLUSION

Streambend did everything it was supposed to do under the contract and under the law to obtain the return of its earnest monies once the Development in which it was to purchase residential units became

mired in mechanics liens. The courts refuse to acknowledge this and instead wish Developers and their agents to avoid liability to Streambend. However, the manner in which the courts carried out this wish violates the law and denies Streambend important constitutional rights.

Moreover, if Fed. R. Civ. P. 12(b)(6) and Minn. R. Civ. P. 12.02(e) are going to continue to be part of our rules of civil procedure, the Supreme Court must ensure that dismissals with prejudice occur with a relatively low frequency relative to other curative outcomes, limiting the with prejudice designation to when a plaintiff actually has no claim upon which relief can be granted rather than when a judge subjectively determines the plaintiff has failed to state such a claim. Additionally or in the alternate, additional procedures must exist to strike biased orders before further review.

Petitioner respectfully prays that the Court grant this petition.

Respectfully submitted,

RACHEL K. NELSON
Law Offices of Rachel K. Nelson, PLLC
PO Box 120670
St. Paul, MN 55112
(763) 234-0447
attorney.rnelson@live.com
Attorneys for Streambend Petitioner