APPENDIX

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APPENDIX A

State of Minnesota

In Supreme Court

A18-1488

Streambend Properties II, LLC, et. al.,
Petitioners

vs.

Ivy Tower Minneapolis LLC, et. al., Respondents,

Wischermann Holdings LLC, et. al., Respondents,

Commonwealth Land Title Insurance Company,
Respondents,

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Jerald Hammann for further review be, and the same is, denied.

Dated: August 20, 2019 BY THE COURT:

/s/ Lorie S. Gildea

Lorie S. Gildea

Chief Judge

APPENDIX B

STATE OF MINNESOTA

IN COURT OF APPEALS

A18-1488

Streambend Properties II, LLC, et al.,
Appellants,

vs.

Ivy Tower Minneapolis LLC, et al. Respondents,

Wischermann Holdings, LLC, et al., Respondents,

Commonwealth Land Title Insurance Company, LLC, Respondent.

Filed June 3, 2019

Affirmed motion denied

Schellhas, Judge

Hennepin County District Court File No. 27-CV-17-18938

Rachel K. Nelson, Law Offices of Rachel K. Nelson, PLLC, St. Paul, Minnesota (for appellants)

Kerry A. Trapp, Borgelt, Powell, Peterson & Frauen, S.C., Oakdale, Minnesota (for respondent Commonwealth Land Title Insurance Company)

Thomas W. Pahl, Jamae A. Pennings, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondents Ivy Tower Minneapolis, LLC, et al.)

D. Charles MacDonald, Faegre Baker Daniels, LLP, Minneapolis, Minnesota (for respondents Wischermann Holdings, LLC, et al.)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellants challenge the rule 12.02(e) dismissal of their claims related to their condominium purchase agreements, and move to strike portions of respondents' briefs. We affirm and deny the motion to strike.

FACTS

This appeal arises out of the Ivy Tower condominium development in Minneapolis. On October 23, 2004, on behalf of appellant Streambend Properties II, LLC (Streambend II), appellant Jerald Hammann[1] entered into a purchase agreement with

[1] Hammann is a frequent litigator in Minnesota state and federal courts. A Minnesota district court has previously determined Hammann to be a "frivolous litigant." Hammann v.

respondent Ivy Tower Minneapolis, LLC (Ivy Tower), for a to-be-constructed condominium unit in Ivy Tower. On October 24, on behalf of appellant Streambend Properties VIII, LLC, (Streambend VIII), Hammann's sister entered into a similar purchase agreement with Ivy Tower for a to-be-constructed Ivy Tower condominium. But Hammann did not file articles of organization for Streambend II until October 29, 2004, and he did not file articles of organization for Streambend VIII until November 2, 2004. (Hammann, Streambend II, and Streambend VIII are collectively referred to as "appellants.") Appellants paid earnest money on each purchase agreement for deposit in a trust account maintained by respondent

Commonwealth Land Title Insurance Company, LLC (Commonwealth) to cover construction costs. In November 2007, through amended purchase agreements and the payment of additional earnest money, appellants requested construction upgrades.

As alleged in their complaint in paragraphs 199, 201, 203, by letters on March 13, April 6, and April 16, 2009, appellants requested return of their earnest money.[2] In response, Ivy Tower cancelled appellants' purchase agreements on April 23, 2009, by service of two separate notices of declaratory cancellation under Minn. Stat. § 559.217, subd. 4 (cancellation notices). Ivy Tower stated in the cancellation notices that appellants defaulted under

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Donald Deyo, No. A08-2185, 2010 WL 154212, at *8 (Minn. App. Jan. 19, 2010), review denied (Minn. Mar. 30, 2010).

[2] None of these letters is included in an attachment to appellants' complaint.

the terms of specific provisions in the purchase agreements, including, but not limited to, the following defaults: (1) "Buyer[s] never intended to reside at the property" in violation of paragraph 17; (2) "During Year 2007, Buyer signed several upgrade addendums . . . intentionally causing Seller damages" in violation of paragraph 5; and (3) "Buyer[s] never applied for financing" in violation of paragraph 4. The cancellation notices provided that unless appellants, within the 15-day notice period, secured a court order suspending cancellation, cancellation of the purchase agreements would be final at the end of the notice period. The cancellation notices also warned appellants that upon final cancellation, under Minn. Stat. § 559.217, they would "lose all earnest money . . . paid on the purchase agreement" and "may lose [their] right to assert any claims for defenses that [they] might have."

During their 15-day notice period, appellants neither sought nor obtained a court order suspending cancellation of their purchase agreements. Instead, in October 2010, appellants sued various parties in federal district court, including many of the respondents in this action. In the 11-count complaint, appellants sought the return of earnest money, claimed damages under the Interstate Land Sales Full Disclosure Act (ILSA) and the Minnesota Common Interest Ownership Act (MCIOA), and asserted claims for fraud, declaratory judgment, wrongful cancellation, breach of contract, unjust enrichment, conversion of trust-account funds, negligent misrepresentation, and breach of fiduciary duty. The federal court dismissed appellants' ILSA claims for failing to plead the

requirements of an ISLA claim, declined to exercise supplemental jurisdiction over appellants' state law claims, and dismissed the remaining state-law claims without prejudice. Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, Civ. No. 10-4257 (JNE/AJB), 2011 WL 1447579, at *1–2 (D. Minn. Apr. 14, 2011). The Eighth Circuit Court of Appeals reversed the dismissal of appellants' ILSA claims and remanded for "further proceedings." Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 451 Fed. App'x 627, 627–28 (8th Cir. 2012).

On remand, appellants filed a first and second amended complaint. Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, Civ. No. 10-4257 (JNE/AJB), 2013 WL 3465277, at *1 (D. Minn. July 10, 2013). The second amended complaint alleged the same claims, including violations of ILSA and MCIOA, as well as claims for wrongful cancellation, breach of contract, unjust enrichment, conversion, breach of fiduciary duty, and negligent misrepresentation. Id. Appellants later sought to add respondents Wischermann Partners, Inc. and Paul Wischermann as defendants under the same theories. Streambend Props. II, LLC v. Ivy Tower Minneapolis, 781 F.3d 1003, 1009 (8th Cir. 2015). The federal district court concluded that this amendment was "futile" because appellants had "not adequately pleaded any theory under which Wischermann Partners, Inc. or Paul Wischermann could be liable merely by their association with respondent Wischermann Holdings, LLC."[3] Id. at 1015. The court also struck the ILSA claims with

[3] 3 Wischermann Partners, Inc. and Paul Wischermann will hereinafter be collectively referred to as "Wischermann."

prejudice for failure to plead fraud with the required particularity, and the court dismissed the state-law claims without prejudice, declining to exercise jurisdiction over them. Id. at 1009–10. The court affirmed a magistrate's denial of appellants' motions for leave to file a third and fourth amended complaint. Id. at 1009.

On March 30, 2015, the Eighth Circuit Court of Appeals affirmed the dismissal of appellants' ILSA claims and the federal district court's denial of appellants' motion for leave to add Wischermann as parties. Id. at 1017. In the meantime, the Eighth Circuit Court of Appeals summarily affirmed, in an unpublished order, a federal district court's denial of Hammann's motion to join or take the place of the Streambend II as plaintiff. Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 701 Fed. App'x 544, 544 (8th Cir. 2017). The Eighth Circuit Court of Appeals also affirmed the denial of subsequent motions by Hammann for substitution of parties and relief from judgment. Id. at 545. And appellants filed three petitions for a writ of certiorari, which were denied in 2015, 2016, and 2018, respectively. Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 136 S. Ct. 287 (2015); Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 137 S. Ct 262 (2016); Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 139 S. Ct. 126 (2018).

In December 2017, appellants filed in state court, a ten-count, 68-page complaint, plus 100 pages of attached exhibits, against Ivy Tower, respondents Ivy Tower Development, LLC; Moody Group, LLC; Goben Enterprises, LP; Jeffrey Laux; Gary Benson,

Wischermann, and Commonwealth, seeking return of their earnest money and alleging damages under the MCIOA. Appellants also sought damages for wrongful cancellation, breach of contract, unjust enrichment, a declaratory judgment, conversion, violation of Minn. Stat. § 82.75, negligent misrepresentation, and breach of fiduciary duty. Respondents moved to dismiss all counts of appellants' complaint under Minn. R. Civ. P. 12.02(e). The district court concluded that all counts of appellants' complaint "are either barred by claim and issue preclusion, time barred, or fail to state a claim upon which relief can be granted," and that appellants failed to plead their claim of negligent misrepresentation with particularity under Minn. R. Civ. P. 9.02. The court granted respondents' motions, dismissed all of appellants' claims with prejudice, and denied appellants leave to file a motion for reconsideration.

This appeal follows.

DECISION

I. Appellants' motion to strike

Shortly before oral arguments, appellants filed a motion to strike "portions" of Ivy Tower's and Wischermann's briefs under rule Minn. R. Civ. App. P. 128.02, subd. 1(c), which provides that the statement of the case and the facts contained in the formal brief "must be stated fairly, with complete candor, and as concisely as possible." In their motion, appellants dispute the "fairness" and "candor" of respondents' characterization of the letters sent by appellants in March and April 2009,

which appellants now claim in their motion to strike cancelled the purchase agreements. But the rules of appellate procedure provide that "[n]o further briefs may be filed except with leave of the appellate court." Minn. R. Civ. App. P. 128.02, subd. 5. As asserted in the response by Wischermann, "[a]ppellants' motion is argument masquerading as a motion to strike." Because appellants' motion is essentially additional briefing without leave of this court, we deny the motion to strike.

II. Dismissal of appellants' claims under Minn. R. Civ. P. 12.02(e)

Appellants challenge the district court's dismissal of all of their claims under Minn. R. Civ. P. 12.02(e) against (A) "Developers," and (B) Commonwealth.[4] A district court may dismiss a complaint when a plaintiff fails to state a claim upon which relief can be granted. Minn. R. Civ. P. 12.02(e). On appeal from such a dismissal, this court reviews de novo whether the complaint sets forth a sufficient claim for relief. Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014). We accept the facts alleged in the complaint as true and draw inferences in favor of the nonmoving party. Id. And "a court may consider documents referenced in a complaint without converting the motion to dismiss to one for summary judgment." N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485, 490 (Minn. 2004) (emphasis omitted).

[4] Appellants' complaint refers to all of the respondents, except Commonwealth, as "Developers," and we do also.

A. Claims against Developers

Appellants asserted claims against some or all of the Developers for (1) violation of the MCIOA; (2) wrongful cancellation; (3) breach of contract; (4) unjust enrichment; (5) declaratory judgment; (6) conversion; and (7) negligent misrepresentation. These claims against Developers stem from the purchase agreements that were entered into between Streambend II and VIII and Ivy Tower "on behalf of" the other Developers. But Minnesota law does not recognize the de facto corporation doctrine. See Stone v. Jetmar Props., LLC, 733 N.W.2d 480, 485 (Minn. App. 2007) (recognizing that the de facto corporation doctrine is not "viable in the context of business corporations"). The district court therefore determined that "[b]ecause the Streambend entities were not yet formed at the time the purchase agreements were signed, the agreements are void and unenforceable and any claims for damages flowing from those agreements are without merit."

Appellants argue that the district court's decision is erroneous because, after their formation, Streambend II and VIII adopted the purchase agreements through various amendments to the purchase agreements, including upgrade options and payment of additional earnest money. Indeed, "a voidable contract can be ratified or confirmed." Logan v. Panuska, 293 N.W.2d 359, 362 (Minn. 1980). But here, assuming, without deciding, that Streambend II and VIII ratified the purchase agreements through their amendments, the record clearly shows that Ivy Tower later cancelled the purchase agreements under Minn. Stat. § 559.217, subd. 4.

Minnesota Statute section 559.217, subdivision 4 (2018), provides:

> (a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of the 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:
>
> (1) specifying the residential real property that is the subject of the purchase agreement, including the legal description;
>
> (2) specifying the purchase agreement by date and the names of parties, and the unfulfilled condition; and
>
> (3) stating that the purchase agreement has been cancelled.
>
> ... .
>
> (c) The cancellation of the purchase agreement is complete, unless within 15 days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.

Subdivision 7(a) of section 559.217 provides that:

> After a cancellation under . . . subdivision 4, the purchase agreement is void and of no further force or effect, and, except as provided in subdivision 2, any earnest money held under the purchase agreement must be distributed to, and become the sole property of, the party completing the cancellation of the purchase agreement.

Minn. Stat. § 559.217, subd. 7(a) (2018).

Our supreme court has long recognized the finality of statutory cancellation. See Olson v. N. Pac. Ry. Co., 148 N.W. 67, 68 (Minn. 1914) (holding that contract vendee attempting to sue for damages caused by vendor's misrepresentations "has no contract upon which to predicate damages" after cancellation of the contract for deed has occurred). Once statutory notice has been served and cancellation effected, all rights under a contract for deed are terminated. In re Butler, 552 N.W.2d 226, 230 (Minn. 1996); West v. Walker, 231 N.W. 826, 827 (Minn. 1930); Olson, 148 N.W. at 68. This rule, known as the Olson rule, "applies to cancelled purchase agreements." 25 Eileen M. Roberts, Minnesota Practice, § 6.21 (2018-2019 ed. 2018); see Romain v. Pebble Creek Partners, 310 N.W.2d 118, 122–23 (Minn. 1981) (holding that finality of statutory cancellation applies to purchase agreements except where purchase agreement was not finally binding on both parties in all its essential terms; agreement was nullified pursuant to its own terms because parties failed to reach agreement on security for note upon which completion of contract

was contingent). But the Olson rule is not applicable to claims against a party who is not a party to a purchase agreement. See Doerr v. Clayson, 375 N.W.2d 488, 491 (Minn. 1985) (noting that "the cancellation of the contract for deed had no effect on the real estate agents because they were not parties to the contract").

Here, Commonwealth was not a party to the purchase agreements with appellants, and appellants have not asserted anything to the contrary. As such, the Olson rule is not applicable to Commonwealth. But appellants have asserted in their complaint that Ivy Tower entered into the purchase agreements "on behalf of" the other Developers. Consequently, appellants' complaint treats the Developers as parties to the purchase agreements and, for purposes of our rule 12.02(e) analysis, we are required to accept the allegations in appellants' complaint as true. See Bodah v. Lakeville Motors Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003) (stating that in reviewing a rule 12.02 motion to dismiss, the reviewing court accepts the facts alleged in the complaint as true). Because, in their complaint, appellants treat the Developers as parties to the purchase agreement, and because we are required to accept the allegations in appellants' complaint as true, we apply the Olson rule to the Developers, which is defined in footnote 4 of the complaint to exclude Commonwealth. But see Doerr, 375 N.W.2d at 491 (noting that "the cancellation of the contract for deed had no effect on the real estate agents because they were not parties to the contract").

As noted above, "[o]n behalf of" Developers, Ivy Tower served appellants with notices of cancellation of their purchase agreements under Minn. Stat. § 559.217, subd. 4. Appellants failed to seek an order within the 15-day notice period to suspend cancellation, consequently, the purchase agreements were deemed cancelled by law at the end of the notice period. The earnest monies therefore became the "sole property" of Developers under Minn. Stat. § 559.217, subd. 7(a), as "the party completing the cancellation of the purchase agreement." Because the purchase agreements were cancelled, appellants' claims arising from the purchase agreements were extinguished. See Olson, 148 N.W. at 69 (holding that statutory termination precluded any recovery in an action arising out of the contract because statutory termination terminates the contract itself). This included appellants' claim against Developers for negligent misrepresentation. See West, 231 N.W.2d at 827 (stating that after cancellation of a contract for deed, the vendee cannot bring an action for fraudulent misrepresentation on the contract against the vendor).

Characterizing their letters of March 13, April 6 and 16, 2009, as statutory notices of cancellation, appellants argue that the district court erred by dismissing their claims because the court failed to "consider Streambend II's and VIII's statutory Notices of Cancellation." In other words, appellants contend that their letters requesting the return of their earnest money constituted notices of cancellation to Ivy Tower under Minn. Stat. § 559.217, subd. 2. But appellants did not specifically make this argument to the district court, and the court did not treat appellants' letters as statutory

notices of cancellation. Appellants' argument that their letters constitute statutory notices of cancellation therefore is not properly before us.[5] See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally do not consider issues that were not presented to and decided by the district court). Moreover, even if the subject letters statutorily cancelled the purchase agreements, appellants' claims against Developers are precluded by the Olson rule. See Olson, 148 N.W. at 69 (holding that statutory termination precluded any recovery in action arising out of contract because statutory termination terminates contract).

We acknowledge that the statutory cancellation process is "one of the harshest forfeitures known to American law," but it is "enforced routinely in Minnesota." 25 Eileen M. Roberts, Minnesota Practice § 6:16 (2018-2019 ed. 2018). And although Olson suggested that a cancelled purchaser may maintain a fraud action for "money had and received," for rescission, 148 N.W. at 69, Minnesota courts have "[w]ith one exception, . . . managed to avoid finding a situation that justifies application of the exception," 25 Minnesota Practice § 6:21. The only decision allowing postcancellation rescission based upon fraud involved a "widow with no business training or experience and unfamiliar with

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[5] We note that appellants raised this issue in their request for reconsideration under Minn. R. Gen. Prac. 115.11. But the comment to rule 115.11 states that "[m]otions for reconsideration will not be allowed to expand or supplement the record on appeal." Minn. R. Gen. Prac. 115.11 1997 comm. cmt. (internal quotation marks omitted). Therefore, raising the issue in the request for reconsideration does not preserve the argument for appeal.

real estate values," who had traded her home to a real-estate broker as a down payment. Gable v. Niles Holding Co., 296 N.W. 525, 526 (Minn. 1941). The supreme court determined that the case was "not like" Olson, and allowed the case to proceed as an unjust- enrichment claim. Id. at 527–28.

As Minnesota Practice recognized, Gable "cried for equity, not law, and the [supreme] court responded." 25 Minnesota Practice § 6:21. In contrast, this case does not cry out for equity. Unlike the widow in Gable, Hammann admits that he is a licensed real- estate broker who has extensive business training and experience and is clearly very familiar with real-estate value. The unjust-enrichment exception to the Olson rule discussed in Gable is therefore not applicable here, and all of appellants' claims against Developers are precluded by the Olson rule. See Nowicki v. Benson Props., 402 N.W.2d 205, 206–08 (Minn. App. 1987) (holding that district court properly granted summary judgment, dismissing plaintiff's claims for breach-of-contract, fraudulent misrepresentation, and rescission, following cancellation of a purchase agreement, because all of plaintiff's claims depend "on the existence of a contract" and "[i]t is longstanding law in Minnesota that once statutory notice has been served and cancellation effected, all rights under a contract for deed are terminated").

Moreover, we conclude that even if appellants' unjust-enrichment claim against Developers was not precluded by the Olson rule, the complaint fails to state a claim for unjust enrichment upon which relief can be granted. To establish an unjust-enrichment claim, the claimant must show that the

defendant has knowingly received or obtained something of value for which the defendant "in equity and good conscience" should pay. Klass v. Twin City Fed. Sav. & Loan Ass'n, 190 N.W.2d 493, 494–95 (Minn. 1971). "Unjust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully." ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn. 1996) (quotation omitted). "It is well settled in Minnesota that one may not seek a remedy in equity when there is an adequate remedy at law." Southtown Plumbing, Inc. v. Har-Ned Lumber Co., 493 N.W.2d 137, 140 (Minn. App. 1992); see U.S. Fire Ins. Co. v. Minn. State Zoological Bd., 307 N.W.2d 490, 497 (Minn. 1981) (stating that if equitable relief were granted, statutory restrictions would be circumvented).

Appellants argue that the district court erred by dismissing their unjust-enrichment claim because Developers' use of the escrow money was both "unlawful and immoral." We disagree. The court aptly found that appellants "had an adequate remedy at law: seek a 15-day suspension of the declaratory cancellation under Minn. Stat. § 559.217, subd. 4(c)." Because appellants had an adequate remedy available at law, which they failed to pursue, appellants' unjust-enrichment claim fails. We conclude that the court did not err by dismissing appellants' claims against Developers under rule 12.02(e).

Finally, although our above analysis demonstrates that the district court properly dismissed appellants' claims against all Developers under rule 12.02(e), we also note that the court properly dismissed appellants' claims against Wischermann as barred by res judicata. The doctrine of res judicata seeks to avoid wasteful litigation so "that a party may not be twice vexed for the same cause." Breaker v. Bemidji State Univ., 899 N.W.2d 515, 518–19 (Minn. App. 2017) (quotation omitted). Res judicata bars a subsequent claim if: (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter. Rucker v. Schmidt, 794 N.W.2d 114, 117 (Minn. 2011). Res judicata applies to claims actually litigated and to claims that could have been litigated in the prior action. Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., 732 N.W.2d 209, 220 (Minn. 2007). Res judicata should not be rigidly applied. Hauschildt v. Beckingham, 686 N.W.2d 829, 837 (Minn. 2004). Instead, the court should consider whether applying the doctrine against a party would work an injustice. Id.

Here, the district court determined that appellants' claims against Wischermann were barred by res judicata because the Eighth Circuit Court of Appeals affirmed the decision of the federal district court that denied as "futile" appellants' request to add the Wischermann respondents as defendants. See Streambend Props., 781 F.3d at 1015 (affirming federal district court's denial to add Wischermann as defendants because appellants "have not adequately

pleaded any theory under which [the Wischermann respondents] could be liable" (quotation omitted)). We agree that all of the elements of res judicata are satisfied. Both claims clearly involve the same set of facts and circumstances, and both cases involve the same parties. Moreover, judgment on the matter was final, as the Eighth Circuit affirmed the federal district court's denial of the request to add Wischermann as defendants. And appellants clearly have had full and fair opportunity to litigate the matter. Under these circumstances, we conclude that the court properly determined that appellants' claims against Wischermann are barred by res judicata. See Breaker, 899 N.W.2d at 518–19 (stating that doctrine of res judicata seeks to avoid wasteful litigation so "that a party may not be twice vexed for the same cause").

B. Claims against Commonwealth

Appellants also brought several claims against Commonwealth, including for (1) violation of the MCIOA; (2) declaratory judgment; (3) conversion; (4) violation of Minn. Stat. § 82.75; (5) negligent misrepresentation; and (6) breach of fiduciary duty. Appellants contend that the district court erred by dismissing these claims under rule 12.02(e). We disagree.

1. MCIOA claims

MCIOA "is based upon the Uniform Common Interest Ownership Act (UCIOA) (1982) and codifies the rights of a homeowners' association in a common interest community to bring causes of action against the declarant for engineering and construction

defects." 650 N. Main Ass'n v. Frauenshuh, Inc., 885 N.W.2d 478, 486–87 (Minn. App. 2016), review denied (Minn. Nov. 23, 2016). In dismissing appellants' MCIOA claims against Commonwealth, the district court determined that Commonwealth had "no duty to [appellants] under the MCIOA" because Commonwealth "is not an affiliate of the declarant" and there "was no contract between Commonwealth and [appellants]."

Appellants argue that the district court's determination is erroneous because, as a title agent, Commonwealth owed a duty to appellants under Minn. Stat. § 515B.4-109. But that statute provides:

> All earnest money paid or deposits made in connection with the purchase or reservation of units from or with a declarant shall be deposited in an escrow account controlled jointly by the declarant and the purchaser, or controlled by a licensed title insurer or agent thereof, . . . [and] held in the escrow account until . . . delivered for payment of construction costs pursuant to a written agreement between the declarant and the purchaser.

Minn. Stat. § 515B.4-109 (2018). As Commonwealth points out, the only duty of the title agent under that statute "is to comply with the terms of a written agreement."

Here, the written agreement between appellants and the declarant, Ivy Tower, which was attached as Exhibit C to appellants' complaint, specifically states:

> In consideration of Seller's Agreement on this day to sell a certain Unit in Ivy Residence to Buyer, together with a Parking Easement in the parking ramp to be constructed beneath the Condominium building, in order to lower Seller's costs of financing the construction of the project, and as permitted by Minnesota Statutes § 515B.4-109, Buyer agrees that, upon request by Seller, all earnest money previously paid shall be released to Seller and used for the payment of construction costs.

The plain language of Exhibit C specifically allows Commonwealth to release escrow money for construction costs upon the Seller's request. There is no additional step requiring appellants to agree to release the funds. If appellants wanted such an additional step, they should have included it in the written agreement. And the written agreement between appellants and Ivy Tower that allows escrow money to be released for construction costs upon Ivy Tower's request is consistent with Minn. Stat. § 515B.4-109, which allows a seller to use funds for construction costs as long as there is a written agreement between the parties.

Appellants argue that the language in Exhibit C is "reasonably susceptible to more than one interpretation," and that its "more natural interpretation" is that "upon request by Seller to Buyer," all earnest money previously paid shall be released to Seller for construction costs. But we will not read such a requirement into a contract when the language, on its face, does not contain such an obligation. See Telex Corp. v. Data Prods. Corp., 135

N.W.2d 681, 686–87 (Minn. 1965) (stating that "where the written language of an instrument applied to the subject is clear, whether it be a statute, constitution, or contract, it is neither necessary nor proper in construing it to go beyond the wording of the instrument itself"). Appellants' argument here reads into the contract language that does not appear on the face of Exhibit C. Moreover, such a requirement that Sellers obtain permission from the Buyers to use earnest monies for construction costs is unnecessary based on the plain language of the instrument itself. Exhibit C specifically states that "[i]n consideration of Seller's agreement . . . Buyer agrees." To add another step that Seller first request from Buyer to use earnest monies for construction costs ignores the plain language of the agreement that Buyer has already agreed to the use of earnest monies for construction costs. Thus, appellants' argument that Exhibit C is ambiguous is without merit.

Appellants further contend that Commonwealth violated the MCIOA because Commonwealth had a duty to act in good faith, which included notifying appellants that monies would be removed and later that they had been removed from the escrow account.

To support their claim, appellants cite Minn. Stat. § 515B.1-113 (2018), which provides that "[e]very contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement." But as the district court found, Minn. Stat. § 515B.1- 113 does not apply because there was no contract between appellants and Commonwealth. Moreover, based

upon Exhibit C, the only duty imposed upon Commonwealth was to release the escrow monies for construction costs upon the request of Ivy Tower. The court therefore properly dismissed appellants' MCIOA claims against Commonwealth.

2. Declaratory-judgment claim

Appellants sought an unspecified declaratory judgment against Commonwealth under Minnesota Statutes chapter 555, which permits "[a]ny person . . . whose rights, status, or other legal relations are affected by a statute" to "have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." Minn. Stat. § 555.02 (2018). But a court does not have jurisdiction over a declaratory-judgment claim unless there is a justiciable controversy, which exists if the claim "(1) involves definite and concrete assertions of right that emanate from a legal source, (2) involves a genuine conflict in tangible interests between parties with adverse interests, and (3) is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion." Onvoy, Inc. v. ALLETE, Inc., 736 N.W.2d 611, 617–18 (Minn. 2007).

Here, the district court determined that "a party seeking a declaratory judgment must have an independent, underlying cause of action based on a common law or statutory right," but that "[b]ecause the court has dismissed with prejudice all of [appellant]s' claims in this case, no such underlying cause of action exists, and [appellant]s' claim for declaratory judgment is dismissed as well." Because

the court properly dismissed appellants' underlying causes of action, it did not err by dismissing appellants' declaratory- judgment claim.

3. Conversion claim

Appellants also challenge the dismissal of their conversion claim. Conversion is "an act of willful interference with the personal property of another, done, without lawful justification, by which any person entitled thereto is deprived of use and possession." Christensen v. Milbank Ins. Co., 658 N.W.2d 580, 585 (Minn. 2003) (quotation marks omitted). Recently, this court provided a thorough analysis about whether money, in its intangible form, constitutes property for conversion purposes. TCI Bus. Capital Inc. v. Five Star Am. Die Casting, LLC, 890 N.W.2d 423, 428–30 (Minn. App. 2017). This court reasoned that "the premise that money in an intangible form is property . . . is without precedent in Minnesota law." Id. at 428. A conversion claim "is viable with respect to money only if the money is in a tangible form (such as a particular roll of coins or a particular stack of bills) and is kept separate from other money." Id. at 429.

Here, appellants' complaint alleges that their earnest money and upgrade deposits were intermingled in the Commonwealth trust account with earnest money and upgrade deposits for "various parties pursuant to purchase agreements for units" in the Ivy Hotel and Tower Development. Because this case involves only money in an intangible form, appellants' claim fails as a matter of law under TCI. The district court therefore did not err by dismissing appellants' conversion claim.

4. Claim under Minn. Stat. § 82.75 (2018)

In Count VII of their complaint, appellants allege violations of Minn. Stat. § 82.75, but the statute does not create a private cause of action. Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 532 (Minn. 1992). Although the legislature was aware of the method by which it could create a private right of action, section 82.75 only grants enforcement powers to the commissioner of commerce. Id. Moreover, the penalty provision of the statute makes a violation a gross misdemeanor but contains no reference to civil liability. Minn. Stat. § 82.83 (2018). Instead, any civil actions contemplated by the statute are limited to claims made by licensed brokers seeking compensation and unpaid commissions. Minn. Stat. § 82.85 (2018). The district court dismissed appellants' claim under Minn. Stat. § 82.75 because the statute does not create a private cause of action and because appellants' complaint does not assert claims under Minn. Stat. § 82.85. Appellants present no argument explaining how or why the court's decision is erroneous. Accordingly, we conclude that the court did not err by dismissing appellants' claim under Minn. Stat. § 82.75.

5. Negligent-misrepresentation claim

Appellants also challenge the district court's dismissal of their negligent- misrepresentation claim against Commonwealth. To establish negligent misrepresentation, a plaintiff must demonstrate that a duty of care existed, the defendant supplied false information to the plaintiff, the plaintiff justifiably relied on the information, and the defendant failed to exercise reasonable care in communicating the

information. Williams v. Smith, 820 N.W.2d 807, 815 (Minn. 2012).

Here, as the district court determined, appellants are unable to establish a duty owed to them by Commonwealth. As discussed above, MCIOA does not apply to Commonwealth because Commonwealth and appellants had no contract. And, as discussed above, Minn. Stat. § 82.75 is not available to support a private cause of action. Finally, appellants fail to establish a common-law duty owed to them by Commonwealth. The district court therefore did not err by dismissing appellants' negligent-misrepresentation claim against Commonwealth. See M.H. v. Caritas Family Servs., 488 N.W.2d 282, 288– 89 (Minn. 1992) (stating that omission is actionable as negligent misrepresentation, but such a claim is actionable only if a duty to disclose exists); see also Smith v. Woodwind Homes, Inc., 605 N.W.2d 418, 424 (Minn. App. 2000) (stating that "[a]n essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information").

6. Breach-of-fiduciary-duty claim

Appellants also challenge the dismissal of their breach-of-fiduciary-duty claim against Commonwealth. To prevail on such a claim, appellants must prove four elements: duty, breach, causation, and damages. TCI Bus. Capital, Inc., 890 N.W.2d at 434. But, as we concluded above, Commonwealth owed no duty to appellants, and they cite no published Minnesota caselaw supporting a contrary conclusion. Accordingly, appellants are

unable to establish that the district court erred by dismissing their breach-of-fiduciary- duty claim against Commonwealth.

III. Constitutional right to a jury trial

"The right of trial by jury shall remain inviolate, and shall extend to all cases without regard to the amount in controversy." Minn. Const. art. 1, § 4. The right to a trial by jury is accommodated by the rules of civil procedure, which provide, "[i]n actions for the recovery of money only, or of specific real property or personal property, the issues of fact shall be tried by a jury, unless a jury trial is waived . . . ." Minn. R. Civ. P. 38.01. "This rule defines the scope of the right to a jury trial in Minnesota, but it does not enlarge or diminish the historical right to a jury trial guaranteed by the Minnesota Constitution." Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 153 (Minn. 2001).

Appellants argue that by granting respondents' motions to dismiss, the district court denied them their constitutional right to have a jury decide the case on the merits. To support their claim, appellants argue at length that jury trials are the foundation of this nation's constitution, and they cite statistics showing that jury trials in civil cases are sparse. But none of appellants' assertions demonstrates that the district court improperly denied them their right to a jury trial. To the contrary, by dismissing appellants' claims under rule 12.02(e), the court did not violate appellants' right to a jury trial because appellants' no longer had pending claims on which a jury could make findings. See Onvoy, Inc., 736 N.W.2d at 617 (stating that

constitutional jury-trial right in civil suit protects jury's findings—and right to make findings—on all facts material to legal claim).

IV. Alleged violations of due process and equal protection

Appellants argue that the district court denied them their constitutional right to due process and equal protection. But appellants fail to establish how the court denied their due-process or equal-protection rights. Moreover, the court did not consider these issues, and appellate courts generally do not consider issues that were not presented to and decided by the district court. Thiele, 425 N.W.2d at 582. Appellants' due-process and equal- protection claims therefore are not properly before this court.

Affirmed; motion denied.

APPENDIX C

State of Minnesota District Court

County of Hennepin Fourth Judicial District

Streambend Properties II, LLC, Streambend Properties VIII, LLC and Jerald Hammann,

Plaintiffs,

vs.

Ivy Tower Minneapolis, LLC, Ivy Tower Development, LLC, Moody Group, LLC, Goben Enterprises, LP, Wischermann Holdings, LLC, Wischermann Partners, Inc., Jeffrey Laux, Gary Benson, Paul Wischermann, and Commonwealth Land Title Insurance Company, LLC,

Defendants.

Court File No. 27-CV-17-18938

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

The above-captioned matter came duly on before the Honorable Joseph R. Klein on February 18, 2018 in District Court, Division I, Hennepin County Government Center, Minneapolis, Minnesota. The parties appeared for Defendants' Motions to Dismiss. Attorney Rachel Nelson appeared for and on behalf of Plaintiffs. Attorney Thomas Pahl appeared for and

on behalf of the Ivy Tower Defendants. Attorney Kerry Trapp appeared for and on behalf of Defendant Commonwealth Land Title Insurance Company, LLC. Attorney Donald Macdonald appeared for and on behalf of the Wischermann Defendants. Based upon the evidence adduced, the arguments of counsel, and all the files, records, and proceedings herein, the court makes the following:

ORDER

1. The Motion to Dismiss brought by Defendant Ivy Tower Minneapolis, Inc. and associated parties is hereby GRANTED.

2. The Motion to Dismiss brought by Defendant Wischermann Holdings, LLC and associated parties is hereby GRANTED.

3. The Motion to Dismiss brought by Defendant Commonwealth Land Title Insurance Company, LLC is hereby GRANTED.

4. Plaintiffs' claims in this matter are dismissed with prejudice.

5. The attached memorandum of law is incorporated herein.

Let Judgment Be Entered Accordingly.

BY THE COURT:

Dated: July 12, 2018 /s/ Joseph R. Klein

Joseph R. Klein

Judge of District Court

FACTUAL BACKGROUND[6]

In October 2004, Plaintiffs Streambend Properties II and Streambend Properties VIII (owned by Plaintiff Jerald Hammann) each signed a purchase agreement with Defendant Ivy Tower Minneapolis for an Ivy Tower condominium. Defendant Hammann signed an agreement on behalf of Streambend II on October 23, 2004. Defendant's sister, Kristine Hammann, signed an agreement on behalf of Streambend VIII on October 24, 2004. Earnest money was deposited into a trust account with Defendant Commonwealth. The articles of organization for Streambend II and Streambend VIII were filed on October 29, 2004 and November 2, 2004, respectively.

In April 2009, Defendant Ivy Tower Minneapolis cancelled Plaintiffs' purchase agreement by service of two separate Notices of Declaratory Cancellation pursuant to Minnesota Statutes § 559.217, subd. 4. The Notices claimed that the purchasers intentionally misrepresented terms of the purchase agreement, never applied for financing, and never intended to purchase the condo units. Accompanying the notices was an affidavit of Patrick C. Smith

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[6] For the purposes of this motion, the court takes the facts alleged in Plaintiff's Complaint as true and relies on those pleadings as well as attached exhibits for the factual background of this motion. The court also takes judicial notice of previous court decisions related to these parties and the circumstances from which these claims arise.

which outlined the alleged defaults and unfulfilled conditions in more detail. The Notices provided that unless the purchaser secured a court order that the cancellation be suspended, then the cancellation would be final at the end of the notice period. The notice period was to last 15 days. The Notices stated that once the notice period expired and the cancellation was final, then pursuant to Minnesota Statutes § 559.217, subd. 5, Plaintiffs would "lose all earnest money...paid on the purchase agreement[s]," and may "lose [the] right to assert any claims or defenses that [Plaintiffs] might have."

Plaintiffs did not seek a court order suspending the cancellation during the notice period. In October 2010, Plaintiffs filed a federal lawsuit against Ivy Tower Minneapolis, LLC among other defendants, some of which are present in this case. Plaintiffs sought the return of the earnest money they had deposited and alleged claims for damages under the Interstate Land Sales Full Disclosure Act (ILSA), the Minnesota Common Interest Ownership Act (MCIOA), and claims for fraud, declaratory judgment, wrongful cancellation, breach of contract, unjust enrichment, wrongful conversion of trust account funds, negligent misrepresentation, and breach of fiduciary duty. The District Court dismissed the ILSA claim and declined to exercise supplemental jurisdiction over the state law claims, dismissing them without prejudice. Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC, No. CIV. 10-4257, 2011 WL 1447579, at *2 (D. Minn. Apr. 14, 2011). Plaintiffs appealed the District Court's dismissal of the ILSA claim, and the decision was reversed and remanded. On remand, Plaintiffs filed a first and second amended complaint in 2012,

and in doing so sought to add the Wischermann parties to the law suit. The District Court ruled that Plaintiffs' proposed amendment to add Wischermann Partners and Paul Wischermann was futile and again dismissed the ILSA claim and declined jurisdiction over the remaining state law claims. This dismissal, including the denial of Plaintiffs' motion to add Wischermann Partners and Paul Wischermann, was affirmed by the Eighth Circuit Court of Appeals. Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC, 781 F.3d 1003, 1017 (8th Cir. 2015). Subsequent writs of certiorari to the United States Supreme Court were also denied.

ANALYSIS

I. Standard of Review under Rule 12.02(e)

Defendants bring motions to dismiss all counts against them for failure to state a claim under Rule 12.02(e) of the Minnesota Rules of Civil Procedure. The focus of a motion to dismiss for failure to state a claim is the adequacy of the pleadings. Group Health Plan, Inc. v. Phillip Morris Incorporated, 621 N.W. 2d 2, 14 (Minn. 2001). In deciding whether Defendants' motions can be granted, the court must limit itself to facts asserted in the pleadings and attached to the Complaint, interpreted in a light most favorable to Plaintiffs. Stephenson v. Plastics Corp. of America, 150 N.W.2d 668, 671 (Minn. 1967). The court must accept Plaintiffs' allegations as true, and the only question is whether the Complaint sets forth a legally sufficient claim for relief. Marquette Nat'l Bank of Mpls. V. Norris, 270 N.W.2d 290, 292 (Minn. 1978); Elzie v. Commissioner of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980). The court must

construe all reasonable inferences in favor of Plaintiffs. In re Individual 35W Bridge Litig., 756 N.W.2d 890, 893 (Minn. Ct. App. 2010). The Complaint will survive a motion to dismiss if it is possible on any evidence that could be produced, consistent with Plaintiffs' theory, to grant the relief demanded. See Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014). The motions to dismiss will be granted only if it appears unequivocally from the face of the Complaint and attached exhibits that there is no legal basis for asserting the claims. See Pederson v. American Lutheran Church, 404 N.W.2d 887, 889 (Minn. Ct. App. 1987). However, the court is not bound by legal conclusions stated in the Complaint when determining if the Complaint survives a motion to dismiss. Finn v. Alliance Bank, 860 N.W.2d 638, 653-54 (Minn. 2015).

In this case, the Defendants' motions to dismiss are granted because, even when taking all the facts in the Complaint as true, the claims in Counts I-X are either barred by claim and issue preclusion, time barred, or fail to state a claim upon which relief can be granted. Additionally, in considering Defendants' motion the court must consider the pleading requirements of Minnesota Rule of Civil Procedure 9.02, which requires negligent misrepresentation to be pleaded with particularity. With respect to the heightened standards of Rule 9.02, pleading fraud "with particularity" requires a party to plead facts underlying each element of the fraud claim. Hardin Cty. Sav. Bank v. Housing & Redevelopment Auth. of the City of Brainerd, 821 N.W.2d 184, 191 (Minn. 2012). Plaintiffs have failed to meet this standard with their Complaint.

II. Plaintiffs' Claims Against Wischermann Partners, Inc. and Paul Wischermann Are Barred by Res Judicata.

Plaintiffs brought the same claims they assert in this case in a previous federal case in 2010. In 2012 and on remand, Plaintiffs filed a second amended complaint in the federal case and sought to add Wischermann Partners, Inc. and Paul Wischermann to the lawsuit. In the amended complaint, Plaintiffs named these two parties and asserted the same six claims against them as they are now asserting in this case. In response to this proposed amended complaint, the federal District Court held that Plaintiff had not set forth any factual allegations that would warrant setting aside the legal separation between Wischermann Holdings, LLC, Wischermann Partners, Inc., and Paul Wischermann. See Streambend Properties II, LLC v. Ivy Tower Minneapolis, LLC, 7781 F.3d 1003, 1015 (8th Cir. 2015). The Court held that Plaintiffs had not pleaded any theory that could hold Wischermann Partners, Inc. or Paul Wischermann liable merely by their association with Wischermann Holdings, LLC. Finding that there were no allegations in the proposed second amended complaint regarding these two parties, and no argument to support their addition as defendants, the District Court denied as futile the motion to add Wischermann Partners, Inc. and Paul Wischermann to the federal lawsuit. Id.

Res judicata bars relitigation of a claim where: 1) the earlier claim involved the same set of factual circumstances; 2) the earlier claim involved the same parties or their privies; 3) there was a final judgment on the merits; and 4) the estopped party had a full

and fair opportunity to litigate the matter. Ashanti v. City of Golden Valley, 666 F.3d 1148, 1151-52 (8th Cir. 2012) (citing Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). The federal District Court's denial of Plaintiffs' motion to amend on the grounds of futility was a final judgment on the merits. King v. Hoover Group, Inc., 958 F.2d 219, 222–23 (8th Cir. 1992) (citing Carter v. Money Tree Co., 532 F.2d 113, 115 (8th Cir. 1976)) ("It is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were subject of the proposed amended pleading."). The parties were heard, the District Court denied leave to amend on the ground that the proposed amendment was futile, and the decision was ultimately appealable because the case proceeded to a judgment on the merits, and was in fact appealed by Plaintiffs. On appeal, the Eighth Circuit affirmed the District Court's decision. Streambend Props. II v. Ivy Tower Minneapolis, 781 F.3d at 1015 ("the district court did not err in affirming Judge Boylan's denial of leave to amend."). As a result, Plaintiffs' claims against Wischermann Partners and Paul Wischermann, already adjudicated once in the federal lawsuit, are barred by res judicata.

Plaintiffs argue that the state law claims are the subject of this case, and because those claims were dismissed without prejudice in the federal lawsuit, there is no claim preclusion.

However, while it is true that the state law claims were not adjudicated on the merits in the federal action, the issue of whether such claims could be brought against Wischermann Partners, Inc. and Paul Wischermann was disposed of on the

merits. Dismissal without prejudice of the state law claims against the other Defendants is separate and apart from the District Court's holding that Plaintiffs' motion to add Wischermann Partners, Inc. and Paul Wischermann was futile. The latter constituted a final judgment on the merits, and therefore claim preclusion applies. The motion to dismiss the claims against Wischermann Partners, Inc. and Paul Wischermann is granted.

III. Plaintiffs' Claims Against Wischermann Partners, Inc. and Paul Wischermann Are Barred by the Statute of Limitations.

An untimely claim must be dismissed under Rule 12.02(e). See Jacobson v. Board of Tr. of the Teachers Ret. Ass'n, 627 N.W.2d 106, 109-113 (Minn. Ct. App. 2001) (affirming dismissal of claim under Rule 12.02(e) as untimely). Plaintiffs' claims in this case are subject to, at most, a six-year statute of limitations. Minn. Stat. § 541.05. The Complaint is dated December 11, 2017. While it is unclear when the Complaint was served, based on the date of the Complaint, the earliest that timely claims could have accrued is December 11, 2011. Plaintiff filed the exact claims it asserts here in a federal action commenced in October 2010. It follows that claims brought in an October 2010 lawsuit accrued prior to December 2011. It appears therefore that the claims in this case are barred by the statute of limitations.

However, in their Complaint Plaintiffs assert that the statute of limitations was tolled by the earlier federal action in accordance with 28 U.S. Code § 1367(d). Yet, these tolling arguments cannot apply to Wischermann Partners, Inc. and Paul

Wischermann because they were not named in the federal lawsuit until June and July of 2012, and the motion to add them at that time was denied. Wischermann Partners, Inc. and Paul Wischermann were never parties to the federal lawsuit; no action against them was commenced until December 2017. Therefore, there was no tolling of the statute of limitations on claims asserted against these two Defendants and the claims are also dismissed as untimely.

IV. Plaintiffs' Claims Against Wischermann Holdings, LLC, Wischermann Partners, LLC, and Paul Wischermann Are Barred by Collateral Estoppel.

Collateral estoppel, or issue preclusion, arises when: (1) the issues in prior and present adjudications are identical; (2) there has been a final adjudication on the merits; (3) the estopped party was a party or was in privity with a party to the prior adjudication; and (4) the estopped party has been given a full and fair opportunity to be heard on the adjudicated issue. See Haavisto v. Perpich, 520 N.W. 2d 727, 731 (Minn. 1994). A party may not pursue defendants one after another on a discredited claim, and argue that it is not bound by a prior judgment solely because it is now suing a new party. See Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990) (even though the defendant in the proceeding was not a party to the earlier proceeding, Minnesota law permits a defendant to invoke collateral estoppel in subsequent litigation). Plaintiff's claims against all Wischermann Defendants are barred by collateral estoppel because purchase agreements signed by similarly situated

Streambend entities have been ruled void in other litigation pursued by Plaintiff Hammann.

In June 2006, Plaintiff Jerald Hammann, the sole owner of the Streambend entities, brought an action in state court to suspend the cancellation of purchase agreements for two units in another Minneapolis condominium development called Sexton Lofts. Jerald Alan Hammann v. Sexton Lofts, LLC, 27-CV-06-1224. Alleged in that case were the same state law claims that Plaintiffs allege here: unjust enrichment, fraud, misrepresentation, and violation of the MCIOA. On November 26, 2007, the state district court issued an Order declaring the Sexton Lofts purchase agreements to be void as the Streambend entities (in that case Streambend III and IV) did not exist at the time they purportedly signed the agreements. Similarly, in this case the articles of organization for Streambend II and VIII were not filed until October 29, 2004 and November 2, 2004, respectively. Yet, those entities purported to enter into purchase agreements on October 23 and 24, 2004, before the entities were actually formed. In the Sexton Lofts dispute, Plaintiff Hammann and the Streambend entities commenced a subsequent federal action, and the state court's decision was the grounds on which the claims were dismissed. Streambend Properties III, LLC v. Sexton Lofts, LLC, 2013 WL 673854 *8-9 (D. Minn., Jan. 28, 2013). The Eighth Circuit Court of Appeals later affirmed that dismissal. Streambend Properties III, LLC v. Sexton Lofts, LLC, 587 Fed.Appx. 350, 351 (8th Cir. 2014).

Here, just like the purchase agreements signed by the Streambend entities in the Sexton Lofts

matter, the purchase agreements were signed before the entities were actually formed. The Sexton Lofts court has already ruled that such purchase agreements purportedly signed by unformed entities are void, and collateral estoppel precludes Plaintiffs from relitigating the same exact issue in front of this court. The elements of issue preclusion are satisfied. The issues in the prior and present adjudications are identical in that both address whether Plaintiff Hammann's purchase agreements are void as a result of being signed before the Streambend entities were formed. There was a final adjudication on the merits in which judgment was entered. The estopped party (Plaintiff Hammann) was a party to the prior adjudication. And finally, the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. The federal District Court and Eighth Circuit have already found that the state court's decision may be appropriately used as collateral estoppel. Therefore, the court finds that the purchase agreements in this case are void because the Streambend entities did not exist at the time they were purportedly executed. See also, Stone v. Jetmar Properties, LLC, 733 N.W.2d 480, 485 (Minn. Ct. App. 2007) (holding that the de facto corporation doctrine, which applies to limited liability companies, "has been abolished in the context of business corporation law."). The process for incorporating is so simple that it is not possible for one to make a "colorable attempt" to incorporate and fail. Id. "Articles of organization are effective and limited liability company existence begins when the articles of organization are filed with the secretary of state." Minn. Stat. § 322.B.175. Accordingly, the claims against the Wischermann Defendants are dismissed with prejudice.

V. Plaintiffs' Claims for Declaratory Judgment and Breach of Contract Against Ivy Tower Minneapolis Are Subject to Dismissal Because the Purchase Agreements Are Void.

The claims for declaratory judgment and breach of contract against the Ivy Tower Defendants are subject to dismissal with prejudice under the same issue preclusion analysis that applied to the Wischermann Defendants. Because the Streambend entities were not yet formed at the time the purchase agreements were signed, the agreements are void and unenforceable and any claims for damages flowing from those agreements are without merit.

Plaintiffs raise arguments based on adoption of the contracts on a corporate promoter theory. They claim that Streambend VIII adopted the purchase agreement signed by Kristine Hammann who was a promoter. However, the Complaint does not contain facts showing that Kristine Hammann was a promoter for Streambend VIII. A promoter can enter a contract for the purpose of promoting and organizing an unformed corporation and act on its behalf, and the corporation (or LLC) can thereafter adopt a contract entered into by the promoter. See McArthur v. Times Printing Co., 48 Minn. 319, 319, 51 N.W. 216, 216 (1892). Promoter status of an individual may exist where a promoter states her intention to form a corporate entity for a specific contract or project, commits time to the procurement of the contract or project, and holds herself out as a "point man" on the contract or project. See Kilstofte Assocs., Inc. v. Wayzata Bayview Ltd. P'ship, No. C2-93-856, 1994 WL 11254, at *2 (Minn. Ct. App.

Jan. 18, 1994). Here, Ms. Hammann simply signed the purchase agreement purportedly on behalf of the nonexistent Streambend VIII. There is nothing in the pleadings to indicate that she was a promoter for the unformed entity. Thus, the Streambend VIII could not adopt the contract and the purchase agreement between Streambend VIII and Ivory Tower Minneapolis is void.

Plaintiffs further claim that Streambend II adopted the purchase agreement signed by Defendant Hammann. While the Complaint does allege facts that could establish Mr. Hammann as a promoter, the Complaint demonstrates that Streambend II did not adopt the purchase agreement. Rather, it objected to it and demanded return of its earnest money. There is no explicit adoption by Streambend II of the purchase agreement in the record. A purchase agreement may be implicitly adopted when a corporation accepts the benefits and pays on it without objection. See Kilstofte, C2-93-856, 1994 WL 11254, at *2 (citing 3 Zolman Cavitch, Business Organizations § 56.02[2] n. 10). Here, Streambend II did object to the agreement and demanded the return of its earnest money. Streambend VIII did the same. Thus, neither organization "adopted" its respective purchase agreement and the agreements are void because they were signed prior to the formation of the entities. Plaintiffs' claims for breach of contract and declaratory judgment are therefore dismissed with prejudice.

VI. Plaintiffs' MCIOA Claims Fail Because Plaintiffs Are Not "Purchasers."

Plaintiffs' claims under the MCIOA fail because only purchasers may bring such a claim, and Plaintiffs are not "purchasers" as defined by the statute. The MCIOA defines "purchaser" as an individual "other than a declarant, who by means of voluntary transfer acquires legal or equitable interest in a unit." Minn. Stat. § 515B.1-103. Streambend II and VIII are not "purchasers" as defined by the Act because neither entity actually made a "voluntary transfer [to acquire] a legal or equitable interest in a unit." As discussed above, Streambend II and VIII did not exist at the time of signing, thus each purchase agreement was void before any such transaction occurred. This determination was found to be true by federal courts in virtually identical circumstances. See Streambend Properties III, LLC v. Sexton Lofts, LLC, 2013 WL 673854, at *11 (D. Minn. Jan. 28, 2013), report and recommendation adopted sub nom. Streambend Properties III, LLC v. Sexton Lofts, LLC, No. CIV. 10-4745 MJD/SER, 2013 WL 674014 (D. Minn. Feb. 25, 2013), aff'd, 587 F. App'x 350 (8th Cir. 2014). Again, Minnesota law does not recognize the de facto corporation doctrine. To recognize business transactions purportedly made before an LLC came into existence would lead to "a form of future interest to vest in unorganized entities and be inconsistent with public policy." Jetmar Props., 733 N.W.2d at 487. Plaintiffs' claims under MCIOA are based on their status as purchasers, and therefore these claims are dismissed.

VII. Plaintiffs' Claims for Wrongful Cancellation and Return of Earnest Money Fail Because Plaintiffs Did not Avail Themselves of the Statutory and Contractual Remedies During the Notice Period.

Plaintiffs' claims for wrongful cancellation and request for return of earnest money fail because Plaintiffs did not seek a suspension of the cancellation within the notice period provided by both the statute and the Notice of Cancellation issued by Ivy Tower Minneapolis. Plaintiffs argue that the purchase agreements were wrongfully cancelled because Defendant Ivy Tower did not identify any default or unfulfilled condition which cancelled the agreements. Such identification of unfulfilled conditions and defaults in a notice of cancellation is required by § 559.217, subd. 4(a)(2). See Dimke v. Farr, 802 N.W.2d 860, 863 (Minn. Ct. App. 2011). In this case, the Notices of Cancellation that were attached to the Complaint as exhibits do identify multiple defaults and unfulfilled conditions. These include never intending to reside in the property in violation of Purchase Agreement section 17, intentionally causing damage to seller by signing several upgrade addendums in violation of Purchase Agreement section 5, and never applying for financing in violation of Purchase Agreement section 4(a).

More importantly, when Defendant Ivy Tower noticed its intent to cancel the purchase agreement, it triggered a statutory notice period of 15 days in which Plaintiffs had the opportunity to seek an order suspending the cancellation. "The cancellation of a purchase agreement is complete, unless, within 15

days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation." § 559.217 subd. 4(c). Plaintiffs' never sought such a suspension in this case. After a "confirmation of cancellation under subdivision 4, the purchase agreement is void and of no further force or effect, and . . . any earnest money held under the purchase agreement[s] must be distributed to, and become the sole property of, the party completing the cancellation of the purchase agreement[s]." § 559.217 subd. 7(a). In the Sexton Lofts case, the court ruled that the purchase agreements were void but that the Streambend entities were entitled to the return of their earnest money. This case is distinguishable because unlike in Sexton Lofts, Plaintiffs here never sought an order suspending the cancellation of the purchase agreements. As clearly stated in the statute and the purchase agreements themselves, such failure resulted in the loss of earnest money and the loss of claims and defenses that Plaintiffs may have. Therefore, Plaintiffs' claims for wrongful cancellation and return of earnest money are dismissed.

VIII. Plaintiffs Fail to State a Claim for Wrongful Conversion.

Plaintiffs' claim for wrongful conversion fails as a matter of law. "Because cash is liquid and designed to be transferred, it is a subject of conversion only when it is capable of being identified and described in a specific chattel." TCI Business Capital, Inc. v. Five Star American Die Casting, LLC, 890 N.W.2d 423, 429 (Minn. Ct. App. 2017). Thus, a conversion

claim is only viable with respect to money if the money is in a tangible form and is kept separate from other money. Id. "That understanding is consistent with the traditional common-law rule that an electronic financial transaction cannot be the basis of a conversion claim." Id. The Complaint alleges that earnest monies were deposited in trust accounts maintained by Commonwealth for various parties pursuant to purchase agreements. Such funds are not monies in a tangible form kept separate from other money. The cases cited by Plaintiffs in opposition to the aforementioned rule do not specifically deal with the transfer of money in an intangible form, and therefore do not refute TCI Business Capital. These cases also predate TCI Business Capital, and thus are not persuasive. See World Bus. Lenders, LLC, Plaintiff, v. Joseph F. Palen, & Robert Carlson, Defendants, 2017 WL 2560918, at *6 (D. Minn. June 13, 2017) citing TCI Business Capital, 890 N.W.2d 423 (finding that the Court of Appeals' conclusions regarding intangible money is good law, and stating "the court of appeals went to great lengths to discuss this issue, researching all of the Minnesota Supreme Court cases on conversion and analyzing the two cases concerning a conversion claim based on a transfer of money in an intangible form."). Plaintiffs' fail to state a claim for wrongful conversion and this claim is dismissed.

Additionally, the claim for conversion of the funds released from the escrow account on December 20, 2005 is time barred by the six-year statute of limitations. The potential claim arose when the funds were removed from the escrow account. See Leisure Dynamics, Inc. v. Falstaff Brewing Corp.,

298 N.W.2d 33, 37 (Minn. 1980) (holding that the statute of limitations runs from the time an action can be commenced). The statute of limitations was tolled by the federal case brought by Plaintiffs on October 15, 2010. At that point, approximately four years and ten months had passed. The Eighth Circuit's opinion affirming dismissal of the federal case was issued March 30, 2015. Adding 30 days on to that date in accordance with 28 U.S. Code Section 1367(a) leaves a gap of approximately two years and eight months before this state court action was commenced. This gap is added to the time that passed previously before tolling, giving a total of approximately seven and a half years of applicable time since the claim arose in December 20, 2005. This exceeds the six-year statute of limitations, and the claim for conversion is barred.

IX. Plaintiffs Fail to State a Claim for Unjust Enrichment.

Plaintiffs have failed to state a claim for unjust enrichment. "It is well settled in Minnesota that one may not seek a remedy in equity when there is an adequate remedy at law." Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc., 493 N.W.2d 137, 140 (Minn. App. 1992) (affirming a directed verdict for defendant that was not a party to the contract where plaintiff had an adequate remedy at law to recover damages). Here, Plaintiffs had an adequate remedy at law: seek a 15 day suspension of the declaratory cancellation under Minn. Stat. § 559.217 subd. 4(c). However, plaintiffs failed to pursue this remedy. The Complaint incorporates and attaches the very contracts governing the relationship between Plaintiffs and Defendants. Where there is a

contractual relationship there can be no equitable remedy such as unjust enrichment. The contracts and statutory scheme provided the framework under which Plaintiffs could bring their claims, but Plaintiffs failed to do so in a manner that can survive a motion to dismiss.

Moreover, to establish an unjust-enrichment claim, a plaintiff must show: (1) a party has knowingly received something of value; (2) the party is not entitled to the benefit; and (3) it would be unjust for the party to retain it. Id. "[U]njust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others, but instead it must be shown that a party was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn. 1996). Plaintiffs do not plead any factual allegations that could raise an inference of illegal or unlawful activity on the part of Defendants. Rather, Plaintiffs explicitly allowed the escrow funds to be used by the Sellers in connection with construction. Thus, the unjust enrichment claim is dismissed.

X. Plaintiffs Claim for Declaratory Judgment Fails Because no Underlying Claim Remains.

Plaintiffs' claim for declaratory judgment under Minnesota Statutes § 555.01 fails because a party seeking declaratory judgment must have an independent, underlying cause of action based on a common law or statutory right. Because the court has dismissed with prejudice all of Plaintiffs' claim

in this case, no such underlying cause of action exists, and Plaintiffs' claim for declaratory judgment is dismissed as well.

XI. Plaintiffs' Claim for Negligent Misrepresentation Against Developers Is Not Pleaded with Sufficient Particularity.

Plaintiffs also assert a claim against "developers" for negligent misrepresentation. Under Minnesota Law:

> [A] person makes a negligent misrepresentation when (1) in the course of his or her business, profession, or employment, or in a transaction in which he or she has a pecuniary interest, (2) the person supplies false information for the guidance of others in their business transactions, (3) another justifiably relies on the information, and (4) the person making the representation has failed to exercise reasonable care in obtaining or communicating the information.

Valspar Refinish, Inc. v. Gaylord's, Inc., 764 N.W.2d 359, 369 (Minn. 2009). Any allegation of negligent misrepresentation is considered an allegation of fraud which a party must plead with particularity. See Juster Steel Co. v. Carlson Companies, 366 N.W.2d 616, 618-19 (Minn. App. 1985). In their Complaint, Plaintiffs allege only that misrepresentations were made by "developers," without identifying which developers made the misrepresentations or what specifically the misrepresentations were. The Complaint makes a

group allegation of negligent misrepresentation and then repeats that allegation for each Defendant. In effect, Plaintiffs simply allege that all developers made all misrepresentations. Minnesota law requires that these claims be pleaded with particularity, and that the material facts underlying each claim be specifically alleged. Parrish v. Peoples, 214 Minn. 589, 9 N.W.2d 225, 227 (Minn.1943). Such material facts are not present here. The court notes that Plaintiffs have previously faced dismissal for failure to plead negligent misrepresentation with sufficient particularity in prior cases related to this transaction. See Streambend Props. II v. Ivy Tower Minneapolis, LLC, 781 F.3d 1003, 1013 (8th Cir. 2015) (affirming dismissal of claims and finding that Plaintiffs' Complaint attributed fraudulent misrepresentations and conduct to multiple defendants generally, in a group pleading fashion). Plaintiffs have failed to plead these claims in accordance with Rule 9.02, and therefore the claims for negligent misrepresentation are dismissed.

XII. Plaintiffs' MCIOA Claims Against Commonwealth Fail Because Commonwealth

The court's previous holding that Plaintiffs' MCIOA claims fail because Plaintiffs are not purchasers also applies to Plaintiffs' MCIOA claims against Defendant Commonwealth. Additionally, the court will address Plaintiffs' MICOA claims as they apply specifically to Defendant Commonwealth.

Under the MCIOA, "all earnest money paid or deposits made in connection with the purchase or reservation of units from or with a declarant shall be deposited in an escrow account controlled jointly by

the declarant and the purchaser, or controlled by a licensed title insurance company or agent thereof." Minn. Stat. § 515B.3-109. This imposes a duty on the declarant to deposit the funds with the title agent. The title agent must then hold the deposit in the escrow account until it is "delivered for payment of construction costs pursuant to written agreement between the declarant and the purchaser." Id. at (iv).

In this case, the purchase agreement between Defendant Ivy Tower Minneapolis and Plaintiffs is the earnest money agreement which expressly authorized Commonwealth to deliver the escrow deposits for construction costs. Thus, any claims by Plaintiff that Defendant Commonwealth violated the MCIOA by removing earnest monies without a written agreement is meritless. The purchase agreements provide at Exhibit C-1:

In consideration of Seller's Agreement on this day to sell a certain Unit in Ivy Residence to Buyer, together with a Parking Easement in the parking ramp to be constructed beneath the Condominium building, in order to lower Seller's costs of financing the construction of the project, and as permitted by Minnesota Statutes § 515B.4-109, Buyer agrees that upon request by Seller, all earnest money previously paid shall be released to Seller and used for the payment of construction costs.

Upon request by seller, the funds are to be released. In other words, upon Ivy Tower's request to the title agent, the funds are to be released for construction costs. This is consistent with the MCIOA in that the statute allows a seller to use funds for construction costs as long as there is an

agreement. Minn. Stat. § 515B.4-109. Plaintiffs' argument that this language requires a seller to obtain a separate writing for each and every disbursement of escrow funds from each and every unit purchaser is not reasonable and not consistent with the plain language of the agreement and the statute.

Plaintiffs also argue that Defendant Commonwealth owed a duty to Plaintiffs to notify them that funds would be removed from the escrow account, as well as when such funds had been removed. To support this assertion, Plaintiffs rely on Minnesota Statutes § 515B.1-113 which provides that every contract or duty governed by the MCIOA imposes an obligation of good faith in its performance or enforcement. It is unclear how this section applies to Commonwealth however, since there are no facts alleged that establish a contract between Plaintiffs and Commonwealth. The primary persons subject to the statutory requirements are the "Declarant," which the statute mandates must be identified in the recorded declarations, and any "Affiliate of a Declarant" who is defined as a person who controls the declarant, or is under the control of the declarant. Minn. Stat. § 515B.1-103(2) and (15). A person controls the declarant if the person is a general partner or officer of the declarant, holds substantial voting interest in declarant, controls the election of a majority of the declarant's directors, or has contributed more than 20 percent of declarant's capital. Id. at (2)(A). A person is controlled by a declarant if the reverse is true and the declarant holds a position relative to the person (or entity) with the power and authority previously mentioned. Id. at (2)(B). Defendant Commonwealth was not a

declarant as it was not identified as a declarant in the recorded declarations pursuant to the statute. Additionally, Commonwealth neither controlled a declarant nor was controlled by a declarant. Therefore, under the statue, Commonwealth is not an affiliate of the declarant. There was no contract between Commonwealth and Plaintiffs, and Commonwealth had no duty to Plaintiffs under the MCIOA. Accordingly, Plaintiffs' claim against Commonwealth under the MCIOA fails for this reason as well as the reasons indicated above.

XIII. Plaintiffs Fail to State a Claim for Wrongful Conversion Against Commonwealth.

The court's above analysis concerning wrongful conversion applies to the claim against Commonwealth as well. Additionally, the court will address the claim as it is specifically made against Commonwealth. Plaintiffs' assert claims against Defendant Commonwealth for wrongful conversion of trust account funds. To constitute conversion, there must be an exercise of dominion over the good which is inconsistent with and in repudiation of the owner's rights to the goods or some act done which destroys or changes their character or deprives the owner of possession permanently or for an indefinite length of time. See Hildegarde, Inc. v. Wright, 244 Minn. 410, 413, 70 N.W.2d 257, 259 (1955). Conversion must involve an interference with the plaintiff's right to control his property. Inland Construction Corp. v. Continental Casualty Co., 258 N.W.2d 881, 884 (Minn. 1977). "Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it, is a conversion." McDonald v. Bayha, 100 N.W. 679, 680

(1904). In this case, Plaintiffs purported to execute purchase agreements that included an "Earnest Money Agreement" approving the Seller's right to use those funds for the costs of construction. This agreement authorized Defendant Commonwealth to disburse earnest money deposits for construction expenses. There are no facts alleged that show Defendant Commonwealth wrongfully exerted dominion over Plaintiffs' funds.

XIV. No Private Cause of Action is Available to Plaintiffs Under Minn. Stat. § 82.75.

Plaintiffs' claim under Minnesota Statutes § 82.75 fails because there is no private cause of action provided for within Chapter 82. See Semrad v. Edina Realty, Inc., 493 N.W.2d 528, 532 (Minn. 1992). The chapter expressly grants enforcement powers to the commissioner of commerce and state prosecutors, with violation of the statute constituting a gross misdemeanor. Id.; Minn. Stat. 82.82; Minn. Stat. 82.83. The regulatory scheme precludes actions by those not licensed as real estate brokers. See Minn. Stat. § 82.85. Any civil actions contemplated by the act are limited to claims made by licensed brokers seeking compensation and unpaid commissions. Id. Such facts are not alleged here. Plaintiffs' claim against Defendant Commonwealth under Section 82.75 is therefore dismissed.

XV. Plaintiffs Fail to State a Claim for Negligent Misrepresentation Against Commonwealth.

In Counts IX and X, Plaintiffs bring separate claims against Defendant Commonwealth for

negligent misrepresentation and breach of fiduciary duty. Plaintiffs do not allege any express false statements, rather they claim a failure to disclose information which they claim was statutorily required to be disclosed under ILSA, Minnesota Statutes Chapter 515B, or Minnesota Statutes § 82.75. The ILSA claim was disposed of with prejudice in the federal action and will not be considered here. Further, as discussed above, Defendant Commonwealth role as a title insurance company is not within the scope of Chapter 515B, and Section 82.75 is not available to Plaintiffs to support a private cause of action. "An essential element of negligent misrepresentation is that the alleged misrepresenter owes a duty of care to the person to whom they are providing information." Smith v. Woodwind Homes, Inc., 605 N.W.2d 418, 424 (Minn. App. 2000) (citation omitted). In the absence of a legal duty to disclose facts, the negligent misrepresentation claim against Commonwealth fails. Similarly, Plaintiffs' claim for breach of fiduciary duty also fails as there is no applicable duty identified. "A defendant will not be bound to conform its conduct to a standard of care unless a legally recognized duty exists." Rasmussen v. Prudential Ins. Co., 277 Minn. 266, 268–69, 152 N.W.2d 359, 362 (1967); ServiceMaster of St. Cloud v. GAB Bus. Services, Inc., 544 N.W.2d 302, 307 (Minn. 1996). Here, Defendant Commonwealth was required to hold and disburse earnest money pursuant to the purchase agreement. Plaintiffs' arguments regarding how a hypothetical "impartial third party" would act are unpersuasive. Similarly, Plaintiffs' unsupported assertions that "Commonwealth clearly assumed a duty of care" are unavailing. The claims for negligent

misrepresentation and breach of fiduciary duty are dismissed.

Finally, to the extent that Plaintiffs are alleging negligent misrepresentation based on express false statements, they fail to plead such a claim with the particularity required by the Rules. See Minn. R. Civ. P. 9.02. Claims of express fraud or misrepresentation require a party to state with particularity the circumstances constituting fraud or mistake. Here, the Complaint does not identify any person or entity within Commonwealth who made an allegedly false statement. Nor does it identify the actual statement or statements that were allegedly false. Therefore, the claims for negligent misrepresentation are dismissed with prejudice.

JRK