No. 22-

IN THE

Supreme Court of the United States

LI, *et al.*,

Petitioners,

v.

COLORADO REGIONAL CENTER I LLC, SOLARIS PROPERTY OWNER I LLC, AND PETER KNOBEL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case falls within Sup. Ct. R. 10(a) which allows the Supreme Court to exercise its supervisory power when a court of appeals has departed from the accepted and usual course of judicial proceedings.

1. May a court of appeals proclaim that it applies an "abuse of discretion" and "de novo" standard of review to lower court awards of attorney fees under state law, then refuse to conduct any appellate review whatsoever of any kind or description, without offering a single word of independent analysis, without applying any standards, without discussing any precedents applied below, and without explaining its silence when confronted twice on motions for rehearing?

2. Under the *Erie* doctrine, may a court of appeals refuse to exercise any review over a district court decision using *federal precedents* on *federal law* to justify attorney fees under *substantive state law*?

3. Is the complete and total failure to exercise any standard of review, coupled with the failure to ensure compliance with the *Erie* doctrine, a "departure from the accepted and usual course of judicial proceedings."

LIST OF PARTIES

Petitioners Jun Li, Qi Qin, Yi Liu, Jie Yang, Yuquan Ni, Zhongzao Shi, Fang Sheng, Shunli Shao, Kaiyuan Wu, Zhijian Wu, Zhongwei Li, Yuwei Dong, Lin Qiao, Jinge Hu, Rujun Liu, Fan Zhang, Lu Li, Sa Wu, Ying Xu, Cao Xiaolong and Hsin-yi Wu were Plaintiffs-Appellants in docket no. 21-1232 and Plaintiffs in docket no. 21-1253 in the U.S. Court of Appeals for the Tenth Circuit below.

Respondents Dianwen Cui, Lei Gu, Sufen Leng, Xue Mei, Zhou Mei, Yan Song, Lu Wang, Yue Wu, Zhou Yang, Jingwen Zhang, Lei Zhang, Ling Zhang, Xiaohong Zhang, Qin Zhou, Xun Zhu and Chunyi Zou were Plaintiffs-Appellants in docket no. 21-1253 and Plaintiffs in docket no. 21-1232 in the U.S. Court of Appeals for the Tenth Circuit below.

Respondents Colorado Regional Center I, LLC, Solaris Property Owner I LLC, and Colorado Regional Center Project Solaris LLLP were Defendants-Appellees in docket nos. 21-1232 and 21-1253 in the U.S. Court of Appeals for the Tenth Circuit below.

Respondent Peter Knobel was Defendant-Appellee in docket no. 21-1232 and Defendant in docket no. 21-1253 in the U.S. Court of Appeals for the Tenth Circuit below.

Respondents Colorado Regional Center LLC, Solaris Property Owner LLC, and Waveland Ventures, LLC were Defendants-Appellees in docket no. 21-1253 in the U.S. Court of Appeals for the Tenth Circuit below.

CORPORATE DISCLOSURE STATEMENT

None of the parties own or control ten percent of any publicly held company. None are owned or controlled by any publicly held company.

RELATED CASES STATEMENT

- *Li, et al v. Colorado Regional Center I, et al*, No. 21-1232, U.S. Court of Appeals for the Tenth Circuit. Judgment entered October 7, 2022.

- *Cui, et al v. Colorado Regional Center, et al*, No. 21-1253, U.S. Court of Appeals for the Tenth Circuit. Judgment entered October 7, 2022.

- *Li et al v. Waveland Ventures LLC et al*, No. 1:19-cv-02443-RM-STV, U.S. District Court for the District of Colorado. Judgment entered November 23, 2021.

- *Cui et al v. Waveland Ventures, LLC et al*, No. 1:19-cv-02637-RM-STV, U.S. District Court for the District of Colorado. Judgment entered November 23, 2021.

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ORDERS ENTERED BELOW

According to Westlaw, there are thirty-seven (37) reported opinions below, but there are only two (2) that are at issue in this Petition:

The District of Colorado ruling at 2021WL5038825 (App. A).

The Tenth Circuit ruling at 2022WL5320135 (App. B).

STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Plaintiffs seek review of an opinion issued October 7, 2022 (App. B), a *Motion for Panel Rehearing* denied on October 14, 2022 (App. C), and a *Motion for Rehearing en Banc* denied on October 24, 2022 (App. D).

STATUTORY PROVISION INVOLVED

Colo. Rev. Stat. § 13-17-201 "Award of Reasonable Attorney Fees in Certain Cases":

> In all actions brought as a result of a death or an injury to person or property occasioned by the tort of any other persons, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action . . .

STATEMENT OF THE CASE

Plaintiffs are among 165 Asian investors who collectively paid $82.5 million dollars for limited partnership units in nominal defendant Colorado Regional Center Project Solaris LLLP ("CRCPS"). CRCPS loaned all $82.5 million dollars in 5-year loan advances to Defendant Solaris Property Owner I LLC ("SPOI"), wholly owned by Defendant Peter Knobel ("Knobel"). The Loan Agreement was governed by Colorado law and contained a clause granting attorney fees to the prevailing party in litigation.

The borrower SPOI did not repay the loan advances at their 5-year maturities. Bizarrely, the general partner of CRCPS refused to call the $82.5 million dollar loan for repayment in cash in years 5-6-7-8, instead letting the borrower SPOI surrender collateral at the end of year 8 when it was worth about $45 million instead of paying back the loan principal in cash, a crushing loss to CRCPS and its investors.

By Fall of 2019, two separate groups of limited partners sued in the District of Colorado to get their investment money back, and the cases were consolidated.

Among the various claims that were brought, of relevance here are two derivative claims: breach of contract against SPOI for nonpayment under the Loan Agreement, and violation of Colorado statutes against SPOI's sole owner Defendant Knobel for submitting overvalued collateral, in violation of Colo. Rev. Stat § 18-4-401 (civil theft) and § 11-51-501 (Colorado Securities Act).

In March 2021, the District Court of Colorado made a ruling under Rule 12(b)(6) upholding the Plaintiffs' claim that SPOI breached the Loan Agreement, but denying the statutory claims against Defendant Knobel.

The Plaintiffs filed a notice of appeal in June 2021. Then in late October 2021, eight months after its 12(b)(6) ruling, the District Court awarded fees against Plaintiffs' counsel, which were stricken on appeal except for the fees subject to this Petition: **$244,020** in attorney fees to Defendant Knobel.[1]

To justify the **$244,020** award, the District Court held that Knobel (who was not even a party to the Loan Agreement) was nevertheless the "prevailing party" under the Loan Agreement. This is a contract interpretation issue of Colorado law. Nevertheless, the District Court ignored Colorado law that a non-party to a contract cannot be a prevailing party under a contractual fee-shifting provision. *Harwig v. Downey*, 56 P.3d 1220, 1222 (Colo. App. 2002)(prevailing party provision in a contract only applies to parties named in the contract, citing the law in multiple states). Ignoring these cases, the District Court determined that Knobel was the "prevailing party" by citing a *federal case construing federal law* that did

1. Actually, this was merely a portion of the more than **$600,000** awarded against Plaintiffs' counsel, with many of the awards imposed on multiple grounds so the actual penalty **far exceeded $1 million dollars**. By way of comparison, the same District (through a different judge) fined two lawyers **$186,922** for a frivolous action to overturn the entire 2020 election, suing the Governors of Michigan and Georgia plus the maker of voting machines and even Mark Zuckerberg and his wife. *O'Rourke v. Dominion Voting Sys. Inc.*, 571 F. Supp. 3d 1190 (D. Colo. 2021).

not even involve a contract, let alone a prevailing party provision. See App. 11a, relying on *Allen v. Lang*, 736 F. App'x 934, 945 (10th Cir. 2018)(construing Fed. R. Civ. P. 54(d)(1)).

In further justification of the **$244,020** award, the District Court held that the two Colorado statutory violations alleged against Knobel were "torts" that triggered Colorado fee-shifting for "tort actions." It ignored that the Colorado Supreme Court had refused to call the civil theft statute a tort: "We need not resolve today whether a claim for civil theft is a claim sounding in tort." *Bermel v. BlueRadios, Inc.*, 440 P.3d 1150, 1157 (Colo. 2019). And as for the Colorado *state* securities statute, the District Court said this statute sounded in tort by citing a **vacated** *federal decision* about *federal securities law* that was not even accurate 50 years ago [See 19-cv-02443 Doc. 414: p. 7, citing *deHaas v. Empire Petroleum Co.*, 302 F. Supp. 647, 649 (D. Colo. 1969), *aff'd in part, remanded in part*, 435 F.2d 1223, 1232 (10th Cir. 1970)]. The District Court ignored the recent determination of its own court that Colorado law is not clear that securities statutes sound in tort. *Estate of Bogue v. Adams*, No. 18-cv-01425-DDD-MEH, 2020 WL 13076908 *3 (D. Colo. Feb. 10, 2020)("No Colorado court has determined whether these statutory claims are torts.")

The District Court's use of federal precedents to determine state law was a blatant and obvious *Erie* violation. *Matter of King Res. Co.*, 651 F.2d 1349, 1353 (10th Cir. 1981) (in diversity cases, "attorney fees are determined by state law").

Appellants were confident that the Tenth Circuit would exercise review.

REASON FOR GRANTING THE APPLICATION

1. The Tenth Circuit Failed to Conduct ***Any*** Review.

On appeal the Tenth Circuit stated that they reviewed state law attorney fee awards for "abuse of discretion," and that they reviewed prevailing party status "de novo." See App. 70a – 71a.

Having announced these standards, they refused to apply them.

The Court's discussion is at App. 70a-73a. It does not contain a shred of review under any standard. It does not contain any independent analysis. It does not review any precedents cited by the District Court.

The Court devotes only a single convoluted footnote to the **$244,020** award (footnote 25 at App. 72a-73a). Footnote 25 says that the Tenth Circuit's reversal of *other* attorney fee awards to *other* defendants (other than Knobel*)* does not thereby nullify Knobel's award. But that is tautologically true and meaningless. Of course a court's review of issue X doesn't constitute a review of issue Y; and neither does a court's review of issue X relieve the court of its independent obligation to review issue Y.

In short, the Tenth Circuit announced standards of review that it should have applied to the **$244,020** award, and then it did NOTHING.

At one point (see App. 40a at footnote 9) they claimed that the Plaintiffs waived review of Colorado fee-shifting on the civil theft claim by supposedly relegating it to a

footnote, but this ignores that the Opening Brief has an entire section on why the fee-shifting statute didn't apply to civil theft. And Plaintiffs submitted Supplemental Authorities on this exact point during the appeal, explaining to the Court multiple times that neither statute was a tort that could trigger fee-shifting under Colorado law. All of this was ignored by the Tenth Circuit. And even when it was stuck in front of their faces twice on motions for rehearing, they went into hiding and refused to give a single word of explanation.

The Tenth Circuit never conducted their promised "de novo" review to determine prevailing party status. In fact, they failed to conduct any review of prevailing party status under any standard. Their 'review' consisted of one sentence repeating what the lower court said (see App. 44a), a blatant violation of *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable").

The Tenth Circuit "review" of the **$244,020** fee award was non-existent, which could be excused as an oversight if they hadn't been reminded of this failure twice.

2. Substantive State Law Attorney Fee Awards must be Reviewed as an "Antecedent Issue"

Dispositive "antecedent issues" must be reviewed by a court of appeals *sua sponte* even if not mentioned or briefed. *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 440 (1993).

The Tenth Circuit recently extended the holding in *U.S. Nat'l Bank* to state-law-based attorney fee awards,

requiring that these be reviewed by a court of appeals even if not mentioned or briefed. *Banner Bank v. Smith*, 30 F.4th 1232, 1238–39 (10th Cir. 2022). In *Banner*, the Tenth Circuit held that in diversity cases when a district court makes *procedural* fee awards under state law (i.e. under a state statute that applies to all civil litigation), such awards are displaced by federal law, but when a district court makes *substantive fee awards* (i.e. as here, under state contract law or under a state statute for tort cases), then the court of appeals must review the legal basis of the award as an "antecedent issue" to ensure it complies with *Erie* and is soundly reasoned:

> It is therefore immaterial that neither party has raised the *Erie* issue. As the Supreme Court has made clear, "a court may consider an issue 'antecedent to ... and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 440 (1993)(quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). Whether the district court's fee award was appropriate under *Erie* is precisely such an antecedent issue.

Banner at 1238-39. There is simply no excuse for the Tenth Circuit to avoid conducting any review of state law attorney fees. The Tenth Circuit violated their own precedent, and they did it knowingly.

CONCLUSION

Certiorari is typically reserved for circuit splits and constitutional issues, but under Sup. Ct. R. 10(a) it also can apply to radical departures from basic judicial proceedings. Here, the Tenth Circuit knowingly and intentionally refused to conduct the review required of it, even after being reminded twice on motions for rehearing. Their failure is a departure from accepted judicial practice, and the case must be remanded.

January 19, 2023 Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, FILED OCTOBER 29, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 19-cv-02443-RM-STV
Consolidated with 19-cv-2637-RM-STV

Derivatively:

HSIN-YI WU, AND QI QIN, IN THEIR CAPACITY AS LIMITED PARTNERS OF COLORADO REGIONAL CENTER PROJECT SOLARIS LLLP,

Plaintiffs,

v.

COLORADO REGIONAL CENTER PROJECT SOLARIS LLLP,

Nominal Defendant,

and

Directly:

HSIN-YI WU, JUN LI, QI QIN, YI LIU, JIE YANG, YUQUAN NI, ZHONGZAO SHI, FANG SHENG, SHUNLI SHAO, KAIYUAN WU, ZHIJIAN WU, ZHONGWEI LI, SA WU, FAN ZHANG, LIN QIAO, JINGE HU, RUJUN LIU, YING XU, LU LI, CAO XIAOLONG, AND YUWEI DONG,

Plaintiffs,

Appendix A

v.

COLORADO REGIONAL CENTER LLC, COLORADO REGIONAL CENTER I, LLC, SOLARIS PROPERTY OWNER LLC, SOLARIS PROPERTY OWNER I LLC, PETER KNOBEL, AND COLORADO REGIONAL CENTER PROJECT SOLARIS LLLP, AND ALL PRINCIPALS AND ULTIMATE OWNERS OF BUSINESS ENTITIES PURSUANT TO PIERCING OF THE LIMITED LIABILITY VEIL,

Defendants.

ORDER ON SPO DEFENDANTS' MOTION FOR ATTORNEY FEES

This matter is before the Court on Defendants Solaris Property Owner, LLC ("SPO"), Solaris Property Owner I, LLC ("SPO I"), and Peter Knobel's ("Knobel") (collectively, "SPO Defendants") Motion for Attorney Fees (the "Motion") (ECF No. 344). The SPO Defendants seek an award of attorney fees under two contracts, Colo. Rev. Stat. § 13-17-201, and 15 U.S.C. § 78-u-4(c). The matter is fully briefed.[1] After reviewing the Motion, relevant parts of the court record, and the applicable law, and being otherwise fully advised, the Court finds and orders as follows.

1. *See* ECF Nos. 354, 363, 361,365, 370, 371, 374.

Appendix A

I. BACKGROUND

This is a consolidated action. For ease of reference, Plaintiffs in Civil Action No. 19-cv-02443 are referred to collectively as the "Li Plaintiffs" and Plaintiffs in Civil Action No. 19-cv-2637 are referred to collectively as the "Cui Plaintiffs" (Li and Cui Plaintiffs, collectively, "Plaintiffs"). As the parties are familiar with the lengthy background which precedes the Motion, only a brief summary is provided here.

Plaintiffs filed their respective actions alleging they purchased limited partnership interests in Colorado Regional Center Project Solaris, LLLP ("CRCPS"). CRCPS (lender) loaned the money ($82.5 million) Plaintiffs (and other limited partners) invested to SPO (borrower). Subsequently, SPO assigned its rights and obligations under the loan to SPO I. At bottom, Plaintiffs alleged that the loan was undercollateralized with inflated valued condos; that SPO I was allowed to "repay" the loan with the overvalued condos (which was allegedly a disguised sale[2]); the limited partners were offered "put options"[3] to "unload" their interests in CRCPS; and the loan is in default but SPO I has not repaid. Plaintiffs

2. According to Li Plaintiffs.

3. According to Li Plaintiffs, these put options allegedly allowed the limited partners to "put" their partnership interests back to CRCPS and be assigned a condo. When the condo is sold, the limited partners who exercised the put options would receive the proceeds from the sale. (ECF No. 222, ¶ 99.) Cui Plaintiffs also made substantially the same allegations. (ECF No. 190, ¶ 22, 79.)

filed numerous federal and state law claims[4] against the various defendants allegedly involved with this deal. Motions to Dismiss were filed by Waveland Ventures, LLC ("Waveland"), Colorado Regional Center, LLC ("CRC"), and Colorado Regional Center I, LLC ("CRC I") (collectively, "CRC Defendants") and by SPO Defendants. Knobel is allegedly the sole equity owner or principal of SPO and/or SPO I.

In its Order on Pending Motions,[5] the Court granted in part and denied in part SPO Defendants' Motion to Dismiss, filed under Fed. R. Civ. P. 12(b)(6), directed against Plaintiffs. SPO Defendants' Motion to Dismiss was granted as to all remaining claims[6] by Plaintiffs except the following: (1) Cui Plaintiffs' Counts VI (derivative against SPO I) and Count VII (derivative against SPO and SPO I for declaratory relief); and (2) Li Plaintiffs' Count III (derivative for breach of contract against SPO I). All claims against Knobel were dismissed; therefore, he was dismissed as a party to this consolidated action.

Because the Court dismissed the federal claims, it also raised *sua sponte* whether diversity jurisdiction exists and, if not, whether the Court should retain supplemental jurisdiction over the three remaining state law claims.

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4. A chart summarizing the claims relevant here is appended to the end of this order.

5. ECF No. 271.

6. Some claims were voluntarily withdrawn or conceded. (*See* ECF No. 271.)

In its Order Regarding Subject Matter Jurisdiction,[7] the Court determined that it did not have diversity jurisdiction and declined to exercise supplemental jurisdiction over the state law claims. Therefore, the three state law claims were dismissed without prejudice. It appears that some Plaintiffs have recently filed a breach of contract claim in state court.[8] At issue now is whether the Court should, or is required to, award attorney fees in favor of any of the SPO Defendants against any Plaintiff based on any claim or "action."

II. LEGAL STANDARD

A. Rule 54(d) of the Federal Rules of Civil Procedure

Under Rule 54(d)(2) of the Federal Rules of Civil Procedure, "[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." "Unless a statute or a court order provides otherwise, the motion must...be filed no later than 14 days after the entry of judgment," and contain specific information to assist with resolving the motion. Fed. R. Civ. P. 54(d)(2)(A) & (B). *See also* D.C.COLO.LCivR 54.3 (Local Rule setting forth additional requirements for attorney fees motion).

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7. ECF No. 334.

8. ECF No. 409.

B. Colorado's Attorney Fee Statute – Colo. Rev. Stat. § 13-17-201

Colorado's attorney fee statute provides:

> In all actions brought as a result of...an injury to person or property occasioned by the tort of any other person, where any such action is dismissed on motion of the defendant prior to trial under rule 12(b) of the Colorado rules of civil procedure, such defendant shall have judgment for his reasonable attorney fees in defending the action.

Colo. Rev. Stat. § 13-17-201. The fee statute applies equally to dismissals under Rule 12(b) of the Federal Rules of Civil Procedure. *See Jones v. Denver Post Corp.*, 203 F.3d 748, 757 n. 6 (10th Cir. 2000) ("[W]e find the [fee] statute applies with equal force when a federal court dismisses a pendent state tort pursuant to Fed. R. Civ. P. 12(b)(6)."); *MacIntyre v. JP Morgan Chase Bank, N.A.*, 827 F. App'x 812, 820 (10th Cir. 2020), cert. denied sub nom., 141 S. Ct. 2660, 209 L. Ed. 2d 772 (2021) (same). The award of reasonable attorney fees is mandatory to a defendant prevailing in a tort action on a Rule 12(b) motion. *Crandall v. City of Denver*, 238 P.3d 659, 660 (Colo. 2010); *Wyles v. Brady*, 822 F. App'x 690, 697 (10th Cir. 2020). The fee statute leaves nothing to the discretion of the district court except to determine what is a reasonable fee. *Crandall*, 238 P.3d at 663.

The fee statute applies separately to each defendant who has an action dismissed against him under Rule

12(b). *See Gagne v. Gagne*, 338 P.3d 1152, 1168, 2014 COA 127, 2014 COA 127 (Colo. App. 2014) (analyzing only those claims brought against counterclaim defendant in determining he may recover under fee statute); *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1245, 2018 COA 92 (Colo. App. 2018) (The fee "statute applies to the claims against each defendant individually."). If the essence of the action against a defendant dismissed under Rule 12(b) is in tort, then the fee statute applies and fees shall be awarded. *Checkley v. Allied Property & Cas. Ins. Co.*, 635 F. App'x 553, 559 (10th Cir. 2016). The fee statute does not apply if the court does not "dismiss all the tort claims against a certain defendant or if an action contains both tort and non-tort claims and the defendant obtains C.R.C.P 12(b) dismissal of only the tort claims." *Falcon Broadband, Inc.*, 474 P.3d at 1244-45 (quotation marks and citation omitted). "In other words, for the statute to apply, the court must've dismissed the entire action pursuant to a Rule 12(b) motion, and that action must be a tort action." *Id.* at 1245. The burden is on the defendant to establish that he is entitled to recover under the fee statute. *Gagne*, 338 P.3d at 1168 (stating that movant had not shown fees were recoverable under fee statute).

C. Private Securities Litigation Reform Act

Under 15 U.S.C. § 78u-4(c) of the Private Securities Litigation Reform Act ("PSLRA"), "in any private action arising under this chapter [Chapter 2B – the Exchange Act], upon final adjudication of the action, the court shall include in the record specific findings regarding compliance

by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." 15 U.S.C. § 78u-4(c)(1). Further, if the court makes a finding that a party or attorney has violated Rule 11(b), "the court shall impose sanctions on such party or attorney in accordance with Rule 11." 15 U.S.C. § 78u-4(c)(2). "[T]here is no requirement that the defendant have asked for the imposition of sanctions." *City of Livonia Emps. Ret. Sys. v. Boeing Co.*, 711 F.3d 754, 761 (7th Cir. 2013). The review is mandatory.

III. DISCUSSION

A. Cui Plaintiffs' Argument regarding "Combining Parties"

Cui Plaintiffs contend that by combining all Plaintiffs into one motion, SPO Defendants have made the issues confusing and that this was intentional and violates the Court's Civil Practice Standards. While the Court agrees the manner in which the Motion was brought may make it more difficult to respond to by the parties, the Court does not find the Motion violates its Standards. Nor does the Court find that the "combining" of the parties in the Motion was done to intentionally confuse anyone.

B. Cui Plaintiffs' Argument regarding "Final Judgment"

Cui Plaintiffs argue SPO Defendants' Motion is premature because there has been no trial or final judgment and SPO Defendants have filed a Motion to

Amend the Judgment ("Motion to Amend").[9] But, with exceptions inapplicable here, Fed. R. Civ. P. 54(d)(2)(B) sets forth the latest date for a motion for fees. And, although the Court has granted SPO Defendants' Motion to Amend, that deals only with attorney fees under the PSLRA which would not render the Motion at bar premature.

C. Recovery of Attorney Fees Under the Loan Agreement

The Loan Agreement is between the borrower (SPO) and lender (CRCPS), and its covenants and agreements are binding on successors and assigns. It is undisputed that, prior to this litigation, the rights and obligations under the Loan Agreement were assigned to SPO I. The Loan Agreement provides, in relevant part:

> In the event of any litigation arising out of this Loan, the prevailing party, in addition to any other rights or remedies to which it may be entitled, shall be awarded its reasonable expenses incurred in enforcing or defending such action. This includes, subject to any limits under applicable law, attorneys' fees and legal expenses, whether or not there is a lawsuit...."

(Paragraph 20(vi).[10]) "Loan" is defined to mean the loan(s) made to Borrower under the Loan Agreement and the

9. ECF No. 341.

10. ECF No. 344-1, p. 10. Unless stated otherwise, the page references are to the numbers assigned to the document by the CM/ECF system, located at the upper right-hand corner of the document.

"Loan Documents" as described in the Deed of Trust ("DOT").[11] "Loan Documents" is defined in the DOT to "include without limitation the Promissory Note, Loan Agreement and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness."[12] "Indebtedness" "means all principal and interest payable under the Note and any amounts expended or advanced by Lender to discharge obligations of Grantor [SPO/SPO I] or expenses incurred by Trustee or Lender to enforce obligations under this" DOT.[13]

SPO Defendants assert the requirements for an award of fees under the Loan Agreement are met. First, while SPO Defendants acknowledge that Knobel is not a party to the Loan Agreement or Agreement Regarding Collateral Unit ("ARCU"),[14] they argue there is no need to distinguish among the SPO Defendants or among the various claims because (1) SPO and SPO I have a contractual obligation to indemnify Knobel and (2) counsel for SPO Defendants treated these clients as one person based on their relationship and the manner in which Plaintiffs have prosecuted the action against SPO Defendants. Thus, Knobel's fees should be encompassed under the Loan Agreement. Next, SPO Defendants contend this litigation arose from the $82.5 million loan – that the loan is ground

11. ECF No. 344-1, p. 2.

12. ECF No. 344-4, p. 2.

13. ECF No. 344-4, pp. 1-2.

14. Discussed below.

zero for this entire litigation. Finally, SPO Defendants assert they are the prevailing parties because the Court dismissed all claims against them.[15]

The Motion as against Li Plaintiffs. Li Plaintiffs do not dispute that Knobel and his fees should be encompassed within the Loan Agreement, that this entire action arises from the Loan Agreement, or that the fees sought are reasonable. Thus, the Court assumes it is so. Li Plaintiffs' sole challenge is that SPO Defendants did not prevail because Li Plaintiffs' one remaining claim against SPO I for breach of the Loan Agreement was dismissed without prejudice, leaving Li Plaintiffs free to file that claim elsewhere. The Court disagrees.

SPO Defendants prevailed in this Court on the claims before it – the claims the Court exercised jurisdiction over and ruled upon – brought by Li Plaintiffs. The Court dismissed claims which Li Plaintiffs sought to voluntarily dismiss, dismissed claims on the merit, and dismissed the one remaining breach of contract claim without prejudice for jurisdictional reasons. The ultimate disposition of that claim is not before this Court. On this record, SPO Defendants are the prevailing parties. *See Allen v. Lang*, 736 F. App'x 934, 945 (10th Cir. 2018) (agreeing that "a defendant is a prevailing party for Rule 54(d)(1) purposes when a district court enters judgment on federal claims and declines to exercise supplemental jurisdiction over state claims, dismissing them without prejudice").

15. The parties do not distinguish between direct and derivative claims in their arguments; therefore, the Court also does not in analyzing the issues.

Accordingly, SPO Defendants' request for an award of fees under the Loan Agreement is granted.

This should end the issue of fees as against the Li Plaintiffs because the Court will not award a party, and SPO Defendants cannot recover,[16] the same fees more than once. Nonetheless, in order to have a complete record, the Court will address the remaining bases for an award of fees as against Li Plaintiffs.

The Motion as Against Cui Plaintiffs. Cui Plaintiffs argue SPO Defendants were not prevailing parties because the Court dismissed Cui Plaintiffs' two contractual claims without prejudice after declining to exercise supplemental jurisdiction. Therefore, they contend attorney's fees may not be awarded as to the contractual claims. As with Li Plaintiffs, Cui Plaintiffs do not challenge whether this litigation "ar[ose] out of this Loan" or whether Knobel is encompassed within the Loan Agreement. Cui Plaintiffs do argue there should be apportionment and challenge the reasonableness of the fees request, which the Court addresses below.

Although unclear, it appears that Cui Plaintiffs do not challenge whether SPO Defendants were the prevailing parties as to the other claims the Court dismissed. Even if they did make this argument, as SPO Defendants argue, SPO Defendants were the prevailing parties on all claims that were dismissed with prejudice.[17] The fact

16. SPO Defendants acknowledge they cannot recover more than once.

17. The Court finds the dismissal of the direct claim for

that the Court dismissed the two contract claims does not dictate a contrary result. *See Allen*, 736 F. App'x at 945. Thus, based on Cui Plaintiffs' argument, SPO Defendants were the prevailing parties before the Court. The Court addresses below the amount of fees recoverable.

D. Recovery of Attorney Fees Under the Agreement Regarding Collateral Unit

The ARCU, and related Transfer Agreement, are between CRCPS (lender) and SPO I (borrower). The Transfer Agreement provides:

> If Borrower or Lender initiates any action to enforce or interpret this [Transfer] Agreement, the party determined by the court...to be the prevailing party in such action will be entitled to receive from the non-prevailing party all reasonable cots and expenses, including all reasonable attorneys' fees incurred by the prevailing party in such action.

(Paragraph 15.[18]) SPO Defendants contend they are entitled to fees under Paragraph 15 because Plaintiffs initiated an action which directly implicated the enforcement of the

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declaratory relief based on standing should have been dismissed without prejudice. *Rural Water Sewer & Solid Waste Mgmt., Dist. No. 1, Logan Cty., Okla. v. City of Guthrie*, 654 F.3d 1058, 1069 (10th Cir. 2011) (dismissal for lack of standing must be without prejudice). But this does not change the analysis here as to who are the prevailing parties.

18. ECF No. 344-2, p. 18.

ARCU. Based on the same arguments made under the Loan Agreement, SPO Defendants contend that Knobel is encompassed within the ARCU and that they are the prevailing parties. The parties' arguments consider the ARCU and Transfer Agreement as if they are one and the same; therefore, the Court does so as well.

Motion against Li Plaintiffs. Li Plaintiffs' single argument is that the Court did not resolve any issues concerning the ARCU and, therefore, no party prevailed. The Court agrees. While the complaint contained allegations about the ARCU (the alleged "secret agreement"), it was Li Plaintiffs' Count III against SPO I which sought to determine the application or interpretation of the ARCU. The Court, however, never resolved that claim in favor of anyone. Thus, there is no prevailing party and no fees may be awarded to SPO Defendants under the ARCU.

Motion against Cui Plaintiffs. Cui Plaintiffs' arguments that SPO Defendants are not the prevailing parties appear to apply to SPO Defendants' request for fees under the ARCU, so the Court will address it here as well. And, here, the Court agrees with Cui Plaintiffs. Only Count VII requested relief based on the ARCU, seeking a determination as to its enforceability. SPO Defendants, however, were not the prevailing parties on the claims for breach of contract or declaratory relief (Counts VI and VII). The Court dismissed those claims without prejudice after declining to exercise supplemental jurisdiction. Accordingly, SPO Defendants are not entitled to recover fees under the ARCU.

E. Recovery of Attorney Fees Under Colo. Rev. Stat. § 13-17-201

To determine if section 13-17-201 applies when a party has pleaded tort and non-tort claims, "a court must determine, as a matter of law," *Gagne*, 338 P.3d at 1167, whether the "essence" of that party's action was one in tort. *Luskin Daughters 1996 Trust v. Young*, 448 P.3d 982, 987, 2019 CO 74 (Colo. 2019). In making its determination, the court "should focus on the manner in which the claims were pleaded," *Young*, 448 P.3d at 987, and "rely on the pleading party's characterization of its claims." *Gagne*, 338 P.3d at 1167. *See also Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 474 P.3d 1231, 1245, 2018 COA 92 (Colo. App. 2018) ("How the plaintiff chose to plead the claim (as a tort or not) controls."). The Court "should not consider what the party should or might have pleaded." *Gagne*, 338 P.3d at 1167.

If the essence of the action against a defendant dismissed under Rule 12(b) is in tort, then the fee statute applies and fees shall be awarded. *Checkley v. Allied Property & Cas. Ins. Co.*, 635 F. App'x 553, 559 (10th Cir. 2016). The fee statute does not apply if the court does not "dismiss all the tort claims against a certain defendant or if an action contains both tort and nontort claims and the defendant obtains C.R.C.P 12(b) dismissal of only the tort claims." *Falcon Broadband, Inc.*, 474 P.3d at 1244-45 (quotation marks and citation omitted). "In other words, for the statute to apply, the court must've dismissed the entire action pursuant to a Rule 12(b) motion, and that action must be a tort action." *Id.* at 1245.

As to the SPO Defendants, the Court only dismissed this action as against Knobel. SPO Defendants argue that all the claims pled against Knobel sound in tort; therefore, he is entitled to recover fees under section 13-17-201. However, SPO Defendants contend they should be awarded all fees expended without allocation between contract and tort claims or among SPO Defendants.

Motion as against Li Plaintiffs. Li Plaintiffs rejoin that the civil theft and Colorado Securities Act counts are not tort claims; that SPO Defendants have affirmatively argued this is a contract action concerning the Loan Agreement; and that because their claims were tied to the underlying Loan Agreement, they are contract-based claims. Thus, they contend the "essence" of this case is a contract and not a tort action. In addition, Li Plaintiffs assert that the entire action against SPO Defendants was not dismissed because Count III may continue in another court; therefore, the attorney fees issue is unripe. Defendants reply that Li Plaintiffs are wrong – they only contend the entire action was dismissed against Knobel. Nonetheless, they assert fees should be awarded for all. The Court finds otherwise.

The Court agrees with Li Plaintiffs that the entire action against SPO Defendants were not dismissed under Rule 12(b). As SPO Defendants acknowledge, the entire action only as to Knobel was dismissed under Rule 12(b). Thus, it follows that only Knobel may recover under the fee statute, assuming he can establish it applies. The Court is not persuaded by SPO Defendants' argument that they should ALL recover fees against Li Plaintiffs when it was only Knobel who prevailed.

The question then is this: was the essence of this action as against Knobel one in tort? After considering the allegations and claims, evaluating the source of the duties breached or violated (were they from promises between the parties or from ones imposed by law[19]), as against Knobel, the Court finds the essence of this action was one in tort.

While this action arises from the loan of the money Plaintiffs invested in CRCPS to SPO/SPO I and the alleged failure to repay the loan, the essence of the action against Knobel is that he was one of the masterminds in creating this allegedly fraudulent deal.[20] For example, the loan was allegedly collateralized with condos that were assigned collateral values by Knobel at inflated prices.[21] The loan was allegedly set up so that "Knobel" could repay the loan with the inflated valued condos rather than with cash. As Li Plaintiffs alleged, "[t]his exposed the fraud at the heart of this Loan"[22] because the sale of these allegedly inflated valued condos would "fetch perhaps $40,000,000 or less," when $82,500,000 was owed under the loan[23] leaving the investors (Plaintiffs) with a more than $40

19. *See Falcon Broadband, Inc.*, 474 P.3d at 1237, 1245 n.18 (differentiating tort versus contract obligations for purposes of the Colorado Governmental Immunity Act ("CGIA") but recognizing difference in context between the fee statute and the CGIA).

20. ECF No. 222, e.g., ¶ 83.

21. ECF No. 222, e.g., ¶¶ 37, 41, 48.

22. ECF No. 222, p. 2.

23. ECF No. 222, pp. 1, 2.

million loss. This was alleged to be "theft with a pen."[24] And to add insult to injury, CRCPS allegedly then hired Knobel's real estate firm to sell these inflated condos – "a massive fraud and a colossal breach of fiduciary duty."[25] Based on such alleged conduct, Li Plaintiffs asserted three claims against Knobel: Count II – civil theft; Count VI – Colorado Securities Act; and Count VII-2 – fraud. As SPO Defendants argue, the claims alleged a tort.

The civil theft claim alleged Knobel "deceptively gave the impression of the Loan being fully collateralized" resulting in the conversion through fraud of about $40 million from CRCPS. That Knobel allegedly deceived CRCPS into making the Loan; allegedly stood to gain the difference between the loan principal and value of the collateral; allegedly converted $40 million through deception, artifice, and overinflating the value of the collateral; and allegedly acted with forethought, scienter, and malice with others. These assertions clearly alleged tortious conduct by Knobel. *See Castro*, 338 P.3d at 1069 (recognizing that the breach of a statutory duty may allege a tort); *Luskin*, 448 P.3d at 987-88 (essence of action sounded in tort where declaratory and injunctive relief claims alleged tortious conduct as bases for claims).

The same holds true for the Colorado Securities Act claim. There, Li Plaintiffs alleged that CRC, in notices to investors, sent misleading and fraudulent valuations to the limited partners in connection with an attempt to get

24. ECF No. 222, p. 3.

25. ECF No. 222, p. 3.

them to exercise a put option offered. Li Plaintiffs alleged that Knobel was aware of the misleading valuations; knew the "entire deal" and CRC's representations about the collateral were lies; and provided the figures for the overvaluation of the condos. Knobel allegedly had a duty to disclose to the limited partners that the loan was not likely to ever get paid back in cash and that CRCPS would be stuck with undervalued collateral. Knobel was allegedly a party to this fraud and involved with structuring the transaction "to deceive, defraud, and deprive the limited partners of their investment."[26] These allegations also clearly alleged tortious conduct.

Finally, the fraud claim sounds in tort.[27] Here, Li Plaintiffs alleged that Knobel knew the marketing materials given to them were false and contained material omissions and misstatements about the loan being safe and fully collateralized. Knobel allegedly knew that the assigned values of the collateral units were wrong and wildly inflated and set up the loan to be deliberately undercollateralized. By his (and others') actions, Knobel (and others) allegedly wrongfully and fraudulently made themselves $40 million.

The quantity and quality of the claims against Knobel establish the essence of Li Plaintiffs' claims against

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26. ECF No. 222, ¶¶ 206-207.

27. This claim was not dismissed under Rule 12(b)(6). Instead, this claim was dismissed by the Court, without objections, after Li Plaintiffs decided to withdraw it. With or without this claim, the action against Knobel sounds in tort.

Knobel sounded in tort. These claims were dismissed under Rule 12(b)(6); therefore, Knobel is statutorily entitled to attorney fees in defending this action. As the Court has already awarded Knobel fees under the Loan Agreement, it need not separate out what reasonable fees may be awarded under the fee statute. Nor are these fees to be awarded again.

Motion as against Cui Plaintiffs. Cui Plaintiffs argue no fees should be awarded for two reasons. First, Cui Plaintiffs argue their Third Amended Complaint was not dismissed on SPO Defendants' Motion to Dismiss as "several claims survived." Second, Cui Plaintiffs argue their claim was in "essence" a contact case as they were in contractual privity with SPO Defendants under the Loan Agreement and ARCU. Cui Plaintiffs assert Count I is for fraudulent inducement to enter into a contract. Cui Plaintiffs further argue the other Counts (III, IV, and V) are also contractual as Cui Plaintiffs invested money into CRCPS with the expectation of profits to be derived from others, i.e., that they entered into investment contracts.

Cui Plaintiffs' first argument is without merit. SPO Defendants already acknowledge in their Motion that only Knobel was dismissed entirely under Rule 12. And they only argue that Knobel is entitled to fees.

Cui Plaintiffs' second argument is also unavailing. Cui Plaintiffs' claims against Knobel were for fraud, violation of the Colorado Consumer Protection Act ("CCPA"), and violation of the federal securities act. The CCPA claim was voluntarily dismissed without objection. The other

two claims were dismissed under Rule 12 on the merits. As SPO Defendants argue, these dismissed claims were tort claims.

In their fraud claim (Count I), Cui Plaintiffs alleged that Knobel (and all other Defendants) made material misrepresentations and omissions and provided false and misleading materials to induced them into investing in CRCPS. And Knobel allegedly continued to provide false and misleading notices after Cui Plaintiffs invested in CRCPS. In their federal securities claim, Cui Plaintiffs alleged that Defendants (which included Knobel[28]) 1) violated 15 U.S.C. § 78o when they "aided and abetted in the use of Agents" to solicit and sell limited partnership interests but they and their agents failed to register as a broker or dealer, and 2) violated 15 U.S.C. § 78j by using manipulative and deceptive devices to induce Cui Plaintiffs into purchasing limited partnership interests in CRCPS. The Court finds these are also tort based claims. The gist of these claims is that Cui Plaintiffs were fraudulently or deceptively induced to purchase their interests in CRCPS and that, while doing so, Knobel was not registered as a broker or dealer. Thus, Knobel is entitled to recover under the fee statute.

As the Court has already awarded Knobel fees under the Loan Agreement, it need not separate out what reasonable fees may be awarded under the fee statute as to Knobel. Nor are these fees to be awarded again.

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28. ECF No. 190, ¶ 49 (defining "Defendants" to include Knobel (misspelled as "Knobbel")).

F. Amount of Reasonable Fees

Li Plaintiffs. Li Plaintiffs were given the opportunity to challenge the amount of fees sought by SPO Defendants but decline to do so. Instead, they chose to rely on limited arguments, such as SPO Defendants were not the prevailing parties, to win the day. The Court has no obligation to do their work. Nonetheless, it has reviewed SPO Defendants' submission, i.e., the rates charged, the experience of the timekeepers, the number of hours expended, and the tasks performed. The Court, having held three hearings, reviewed hundreds of filings, and issued numerous orders, is well aware of the nature and complexity of the case, the type and number of issues raised, the scope and depth of the filings, and what would be a reasonable amount of time required to address such filings, even if they were not addressed directly to SPO Defendants. *See Malloy v. Monahan*, 73 F.3d 1012, 1017-18 (10th Cir. 1996) (setting forth factors court should consider in evaluating reasonableness of fees).

After such review, the Court finds the fees requested were reasonable. In doing so, the Court is mindful that the Supreme Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Therefore, the fees requested of $244,020.68[29] shall be awarded.

Cui Plaintiffs. Cui Plaintiffs raise three arguments here: (1) that SPO Defendants' counsel fails to apportion

29. ECF Nos. 370, 371.

fees among the various Defendants they represent – three different Defendants against whom different claims were made; (2) that Knobel was not a party and therefore fees cannot be awarded in his favor; and (3) that SPO Defendants offered no evidence of the reasonableness of the claimed fees. The Court agrees, in part.

First, where appropriate, the Court agrees that fees should be apportioned. Under Cui Plaintiffs' argument, however, no fees awarded under the Loan Agreement are required to be apportioned. Cui Plaintiffs argument there is that no fees should be awarded because SPO Defendants were not the prevailing parties. But the Court finds otherwise; therefore, no apportionment among the prevailing parties is required.

The Court agrees that apportionment would be required for the dismissal of Knobel under Section 13-17-201. SPO Defendants' proposed grouping of the federal securities fraud-related claims and contract claims[30] separately for recovery of fees under the PSLRA claim shows that it is possible to do so. The Court is not persuaded by SPO Defendants' contrary arguments. However, the Court need not determine what this number may be because it is not necessary to do so here. It has already awarded Knobel fees under the Loan Agreement and fees will not be awarded again.

Second, the Court rejects the argument that Knobel was not a party. Cui Plaintiffs argue that Knobel was

30. Separating the claims into two groups: the federal securities fraud-related claims and contract claims.

added as a party solely for the purpose of alleging alter ego liability; there are no allegations made against him; and he was never served or executed a waiver of service of summons. The Court has already considered and rejected these arguments in its Order of August 11, 2021, addressing SPO Defendants' Motion to Amend.[31] Thus, Knobel was a party for purposes of awarding fees.

Finally, the Court rejects Cui Plaintiffs" argument that SPO Defendants' counsel's declaration is "hearsay" that cannot be considered in determining the amount billed in defense of the Cui Plaintiffs' action or the reasonableness of such fees. Moreover, SPO Defendants have submitted the Declaration of Ryan Smith, general counsel of SPO and SPO I to establish the amount of fees at issue.[32] Cui Plaintiffs do not challenge the reasonableness of the hourly rates charged but apparently challenge the number of hours billed as they complain about the amount of work product that should have been required.

The Court has examined the services billed and the time expended for such services and finds them to be reasonable under the circumstances. While it is true that there were more filings by Li Plaintiffs, and there are other Defendants in the case, it is also true that Cui Plaintiffs' complaint oftentimes grouped Defendants together necessitating an examination of any filing which may otherwise appear to be directed at another party.

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31. ECF No. 377, pp. 13-14. To the extent the Court needs to address them again, it incorporates that part of the Order of August 11, 2021, as if fully set forth herein.

32. ECF No. 344-3.

The Court is also aware of the difficulties encountered in ascertaining which claim was directed against whom and of Cui Plaintiffs' amendments and voluntary "dismissals" or concessions made during this this lawsuit. As the Court stated in discussing the award against Li Plaintiffs, it is well aware of the work required in this case to defend against the filings made. Based on its knowledge, and its review of the supporting documents for the fee request, the Court cannot say that the time expended or the services performed were not reasonable or unnecessary.

G. Recovery of Fees under the PSLRA

SPO Defendants request an award of fees against Cui Plaintiffs and/or their counsel under the PSLRA to the extent any fees are not awarded under the Loan Agreement, the ARCU, and section 13-17-201. The Court addresses this argument in its Order on PSLRA Fees concurrently with this Order on SPO Defendants' Motion for Attorney Fees. As explained in that Order, however, the fees awarded are not cumulative and can be collected only once.

IV. CONCLUSION

Based on the foregoing, it is therefore **ORDERED**

(1) That SPO Defendants' Motion for Attorney Fees (ECF No. 344) is GRANTED as stated herein;

(2) That SPO Defendants are awarded $244,020.68 in attorney fees against Li Plaintiffs; and

(3) That SPO Defendants are awarded $77,376.79 in attorney fees against Cui Plaintiffs.

DATED this 29th day of October, 2021.

BY THE COURT:
/s/ Raymond P. Moore
RAYMOND P. MOORE
United States District Judge

Appendix A

CHART OF CLAIMS

Li Plaintiffs' Counts

Count	Direct/ Derivative	SPO Defendants Named	Basis	Disposition
II	Derivative	SPO, SPO I, & Knobel	Civil Theft	Dismissed on Merits.
III	Derivative	SPO I	Breach of Loan Agreement	Dismissed without prejudice. Court declined to exercise subject matter jurisdiction.
IV	Derivative	SPO I	Transfer of Title to CRCPS	Dismissed as withdrawn.[33]
VI	Derivative	Knobel[34]	Colorado Securities Act – Fraud	Dismissed on merits.

33. "Dismissed as withdrawn," as used herein, refers to the Court's dismissal of these claims after they were voluntarily "withdrawn," "dismissed," or conceded to by Plaintiffs.

34. As relevant here, the parties and Court recognized that Li Plaintiffs' Count VI alleged it is against Knobel but then, in the prayer, sought relief against SPO I. The Court treated that count as directed against Knobel. (ECF No. 271, pp. 7 & n.22, 42; No. 224, p. 21 & n.10.)

VII-2[35]	Direct	Knobel[36]	Fraud	Dismissed as withdrawn.
VII-4	Direct	SPO	Veil Piercing	Dismissed as withdrawn.

Cui Plaintiffs' Counts

Count	Direct/ Derivative	SPO Defendants Named	Basis	Disposition
I	Direct	SPO, SPO I, Knobel	Fraud	Dismissed on merits.
III	Direct	SPO, SPO I, Knobel	Colorado Consumer Protection Act	Dismissed as withdrawn.
V	Direct	SPO, SPO I, Knobel	Federal Securities Exchange Act	Dismissed on merits.

35. Li Plaintiffs' complaint contains four "Count VIIs." (ECF No. 222.)

36. Whether this claim also includes SPO and SPO I is unclear. The count is directed against Knobel but the prayer seeks relief against Knobel and "his SPO/SPOI entities." (ECF No. 222, pp. 49-51.) The Court did not resolve this issue because Li Plaintiffs voluntarily abandoned these claims, which the Court dismissed. (ECF No. 271, p. 7.)

Appendix A

VI	Direct & Derivative	SPOI	Breach of Contract	Direct – dismissed as withdrawn. Derivative – Dismissed without prejudice. Court declined to exercise supplemental jurisdiction.
VII	Direct & Derivative	SPO, SPOI	Declaratory Relief: Enforce-ability of YEA and ARCU	Dismissed without prejudice. Court declined to exercise supplemental jurisdiction.
VIII	Direct	SPOI	Veil Piercing	Dismissed as withdrawn; not a claim but a remedy.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 7, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-1232, No. 21-1253
(D.C. No. 1:19-CV-02443-RM-STV)
(D. Colo.).

JUN LI; QI QIN; YI LIU; JIE YANG; YUQUAN NI; ZHONGZAO SHI; FANG SHENG; SHUNLI SHAO; KAIYUAN WU; ZHIJIAN WU; ZHONGWEI LI; YUWEI DONG; LIN QIAO; JINGE HU; RUJUN LIU; FAN ZHANG; LU LI; SA WU; YING XU; CAO XIAOLONG; HSIN-YI WU,

Plaintiffs - Appellants,

and

DIANWEN CUI; LEI GU; SUFEN LENG; XUE MEI; ZHOU MEI; YAN SONG; LU WANG; YUE WU; ZHOU YANG; JINGWEN ZHANG; LEI ZHANG; LING ZHANG; XIAOHONG ZHANG; QIN ZHOU; XUN ZHU; CHUNYI ZOU,

Plaintiffs,

v.

Appendix B

COLORADO REGIONAL CENTER I, LLC; SOLARIS PROPERTY OWNER I LLC; PETER KNOBEL; COLORADO REGIONAL CENTER PROJECT SOLARIS LLLP, AND ALL PRINCIPALS AND ULTIMATE OWNERS OF BUSINESS ENTITIES PURSUANT TO PIERCING OF THE LIMITED LIABILITY VEIL,

Defendants - Appellees.

XUE MEI; ZHOU MEI; YAN SONG; LU WANG; YUE WU; ZHOU YANG; JINGWEN ZHANG; LEI ZHANG; LING ZHANG; XIAOHONG ZHANG; QIN ZHOU; XUN ZHU; CHUNYI ZOU,

Plaintiffs - Appellants,

and

JUN LI; QI QIN; YI LIU; JIE YANG; YUQUAN NI; ZHONGZAO SHI; FANG SHENG; SHUNLI SHAO; KAIYUAN WU; ZHIJIAN WU; ZHONGWEI LI; LIN QIAO; JINGE HU; RUJUN LIU; FAN ZHANG; LU LI; SA WU; YING XU; CAO XIAOLONG; WU HSIN-YI; YUWEI DONG,

Plaintiffs,

v.

COLORADO REGIONAL CENTER LLC; COLORADO REGIONAL CENTER I, LLC; SOLARIS PROPERTY OWNER LLC; SOLARIS PROPERTY OWNER I LLC; COLORADO REGIONAL CENTER PROJECT SOLARIS LLLP; WAVELAND VENTURES, LLC,

Defendants - Appellees,

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and

PETER KNOBEL,

Defendant.

October 7, 2022, Decided

ORDER AND JUDGMENT[*]

Before MATHESON, KELLY, and PHILLIPS, Circuit Judges.

Appellants are two groups of Chinese investors, the Li Appellants and the Cui Appellants. Each investor purchased a limited partnership interest in Colorado Regional Center Project Solaris LLLP ("CRCPS"). Through its general partner, CRCPS loaned the proceeds from the investments to a real estate development project. After the project produced low returns and defaulted on the loans, each group of Appellants separately sued CRCPS, its general partner, and other parties involved in the real-estate project.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix B

The district court dismissed both complaints, denied several motions filed by Appellants, and ordered them to pay attorney fees. Each group of Appellants appealed. We consolidated their appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we

(A) affirm the district court's dismissal of Appellants' claims under Federal Rule of Civil Procedure 12(b)(6) except for the Li Appellants' claim for breach of fiduciary duty, which we affirm in part and reverse in part;

(B) affirm dismissal of the Cui Appellants' remaining state law claims for lack of subject-matter jurisdiction;

(C) reverse the district court's denial of the Cui Appellants' motion to amend their complaint;

(D) affirm the district court's denial of the Li Appellants' motion for default judgment; and

(E) vacate the awards of attorney fees as described herein.

We remand to the district court for further proceedings consistent with this Order and Judgment.

Appendix B

I. BACKGROUND

A. Factual Background[1]

1. The Parties

CRCPS is a limited liability limited partnership created by Colorado Regional Center, LLC ("CRC") and Waveland Ventures, LLC. It serves as an EB–5 Regional Center, an entity approved by the federal government to promote economic growth by encouraging investments by foreign persons in exchange for permanent resident cards (green cards). As described in *Liu v. SEC*, 140 S. Ct. 1936, 1941, 207 L. Ed. 2d 401 (2020), "[t]he EB–5 Program, administered by the U.S. Citizenship and Immigration Services, permits noncitizens to apply for permanent residence in the United States by investing in approved commercial enterprises that are based on proposals for promoting economic growth." (quotations omitted). Colorado Regional Center I LLC ("CRC I"),[2] a subsidiary of CRC, manages CRCPS as its general partner.

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1. The Li Appellants and Cui Appellants each amended their complaints three times. Their third amended complaints are the operative complaints, from which we draw the factual background presented above. "In reviewing a district court's dismissal under . . . 12(b)(6), we accept as true all well-pleaded factual allegations in the complaint and view them in the light most favorable to the plaintiff[s]." *Garling v. United States Env't Prot. Agency*, 849 F.3d 1289, 1292 (10th Cir. 2017) (quotations and alterations omitted).

2. Although the Li Appellants refer to this entity as "CRC 1," the Cui Appellants refer to it as "CRC I," which we adopt throughout this order.

Appendix B

Appellants, two groups of Chinese investors, purchased limited partnership interests in CRCPS. In total, 165 investors each paid approximately $500,000 for their limited partnership interests, totaling $82.5 million. CRCPS loaned the proceeds from these investments to Solaris Property Owner, LLC ("SPO") to fund the completion of a condominium complex in Vail, Colorado.

2. Governing Documents

Three documents set forth the terms of the parties' arrangements.

First, CRCPS's "Partnership Agreement" (undated) set the terms of CRCPS's internal management. It provided that CRC I had the exclusive right to manage, operate, and control CRCPS. Neither CRCPS nor the limited partners could hold CRC I liable for any acts or omissions unless CRC I acted in bad faith, gross negligence, or willful misconduct. The Partnership Agreement allowed limited partners to exercise a put option[3] to sell their interest to the partnership.

Second, the "Loan Agreement," dated November 5, 2010, provided for CRCPS to loan funds to SPO to complete development of SPO's condominium project.

Third, the "Confidential Information Memorandum," dated March 31, 2011, set the terms of each investor's

3. A put option is "[a]n option to sell something (esp. securities) at a fixed price even if the market declines." *Option*, Black's Law Dictionary (11th ed. 2019).

purchase of the limited partnership stake. It stated that each investor would pay approximately $500,000 for a limited partnership interest in CRCPS. CRCPS would loan the proceeds to SPO, which would use these funds to pay project development costs for the condominium complex. The Memorandum also stated that certain condominium units in the building would be used as collateral for the loan. A related document designated 19 condominium units as collateral.

The Confidential Information Memorandum provided that CRCPS would fund the loan through multiple advances, and each advance would carry a 5% interest rate. The principal balance and accrued interest on each advance was due within five years of each advance. SPO could not prepay any of the balance for three years, but after the three-year-period, it could repay with cash or a collateral condominium unit. CRCPS could refuse repayment through cash and compel SPO to convey the collateral condominium unit.

3. Investments and Loans

Based on the documents, CRCPS began soliciting investments. Investors purchased limited partnership interests in CRCPS between 2012 and 2015. Before receiving any advances, SPO assigned its rights and obligations under the arrangement to its wholly owned subsidiary, Solaris Property Owner I ("SPO I").

Between April 2012 and January 2015, CRCPS made 19 loan advances to SPO I. About three years

after the first advance, CRCPS and SPO I entered into an agreement regarding the collateral condominium units (the "Agreement Regarding Collateral Units" or "ARCU"). Under the ARCU, SPO I gave CRCPS notice that it would pay back the loan advances by conveying the collateral condominium units. The ARCU stated that SPO I would not immediately transfer the deed to the condominium units but CRCPS would be responsible for all fees and costs associated with the units and would pause the accrual of interest on the advances. Thus, under the ARCU, SPO I was deemed to have repaid the loan advances.

In 2016, CRC I and CRCPS began sending notices to the limited partners that identified the collateral condominium units as partnership property but acknowledged that SPO I still held title. The notices stated that CRCPS was coordinating with SPO I to transfer title.

B. District Court Proceedings[4]

In 2019, the two groups of limited partners—the Li and the Cui Appellants—filed lawsuits alleging state and federal claims against various defendants. In general, they alleged that SPO and SPO I misrepresented the value of the collateral condominium units and that CRC I violated its duties as the general partner of CRCPS. According to Appellants, Defendants-Appellees misrepresented that the loan was fully secured when it was not. They alleged

4. We summarize the district court proceedings here and elaborate on them as needed later in our analysis.

that these misrepresentations led to losses of over $40 million and that SPO and SPO I defaulted on their loans.

In their operative complaint, the Li Appellants brought several direct and derivative[5] claims against CRCPS, CRC, CRC I, Waveland Ventures, LLC, SPO, SPO I, and Peter Knobel (SPO's owner).[6] Separately, the

5. "A derivative action is a vehicle that enables the prosecution of claims on behalf of a corporation or other entity." *S'holder Derivative Actions L. & Prac.* § 1:1 (2022). A derivative suit enables limited partners and other shareholders to assert claims on behalf of the entity, here CRCPS. A plaintiff in a derivative suit may assert claims against parties that owe fiduciary duties to the entity.

6. The Li Appellants brought:

(1) a derivative breach-of-fiduciary-duty claim against CRC I;

(2) a derivative civil-theft claim against CRC, SPO, SPO I, and Mr. Knobel;

(3) a derivative breach-of-contract claim based on the Loan Agreement against SPO I;

(4) a derivative breach-of-transfer-of-title claim against SPO I;

(5) a derivative federal securities-fraud claim against CRC I;

(6) a derivative Colorado securities-fraud claim against CRC and Mr. Knobel;

(7) a derivative claim to remove CRC I as CRCPS's general partner;

Appendix B

Cui Appellants sued CRCPS, CRC, CRC I, Waveland Ventures, LLC, SPO, SPO I, and Mr. Knobel alleging both direct and derivative claims.[7] In both complaints, the derivative claims were brought on behalf of CRCPS.[8]

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(8) a direct fraud claim against CRC, CRC I, Waveland Ventures, LLC, and Mr. Knobel;

(9) a direct fraud claim against CRCPS; and

(10) a direct claim to pierce the corporate veil to hold CRC I's and SPO I's owners and members liable.

7. The Cui Appellants brought:

(1) a direct fraud claim against all Defendants;

(2) a direct and derivative breach-of-fiduciary-duty claim against CRC and CRC I;

(3) a direct Colorado consumer protection claim against all Defendants;

(4) a direct federal securities-fraud claim against CRCPS and CRC I;

(5) a direct federal securities-fraud claim against all Defendants;

(6) a direct and derivative breach-of-contract claim against SPO I;

(7) a direct and derivative declaratory relief claim against CRC I, SPO, and SPO I; and

(8) a direct claim to pierce the corporate veil to hold CRC I's and SPO I's owners and members liable.

8. The Li and Cui Appellants also identified other Defendants that are not relevant to this appeal.

Appendix B

1. Motions to Dismiss and Other Motions

Appellees moved to dismiss both operative complaints for failure to state a claim. CRC I also filed a counterclaim against the Li Appellants after the Li Appellants alerted the district court that CRC I had been removed as general partner of CRCPS for cause. CRC I argued its removal as general partner was improper. The Li Appellants moved to dismiss the counterclaim, and the Cui Appellants moved for a receiver to be appointed to manage CRCPS.

Before the district court ruled on the motions to dismiss, Appellants voluntarily dismissed some of their claims. The Li Appellants' remaining claims were:

(1) a derivative breach-of-fiduciary-duty claim against CRC I;

(2) a derivative civil-theft claim against CRC, SPO, SPO I, and Mr. Knobel;[9]

(3) a derivative breach-of-contract claim based on the Loan Agreement against SPO I;[10]

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9. The district court dismissed this claim, and the Li Appellants mention it only in a footnote in their opening brief. They have thus waived any arguments as to this claim. *San Juan Citizens All. v. Stiles*, 654 F.3d 1038, 1055-56 (10th Cir. 2011) (argument raised in a footnote and inadequately developed is waived).

10. The district court also dismissed the Li Appellants' surviving derivative breach-of-contract claim against SPO I for lack of subject-matter jurisdiction. The Li Appellants do not challenge this dismissal on appeal.

(4) a derivative federal securities-fraud claim against CRC I; and

(5) a derivative state securities-fraud claim against CRC, its principals, and Mr. Knobel.

The Cui Appellants' remaining claims were:

(1) a direct fraud claim against all Defendants;

(2) a direct and derivative breach-of-fiduciary-duty claim against CRC and CRC I;

(3) a direct federal securities-fraud claim against all Defendants;

(4) a derivative breach-of-contract claim against SPO I; and

(5) a direct and derivative claim for declaratory relief against CRC I, SPO, and SPO I.[11]

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11. The district court order lists this claim as against CRCPS, SPO, and SPO I, but the complaint lists CRC I, SPO, and SPO I, so we describe the claim as stated in the complaint.

The Cui Appellants pled this as a separate claim for relief under Colo. Rev. Stat. § 13-51-106, which allows a plaintiff to "have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." *See Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 164 (Colo. App. 1994) (Section 13-51-106 is "intended to provide a method to

Appendix B

The district court granted the Appellees' motions to dismiss in part and denied them in part. It (1) granted the motions as to Appellants' federal securities-law claims; (2) denied the motions as to Appellants' breach-of-contract claims and the Cui Appellants' declaratory-relief claim against SPO and SPO I; and (3) dismissed the remaining state law claims.

Because only state law claims against SPO and SPO I remained, the court ordered the parties to address whether diversity jurisdiction existed, and if not, whether it should exercise supplemental jurisdiction over those claims. After briefing, the court determined that it lacked diversity subject-matter jurisdiction over Appellants' remaining state law claims against SPO and SPO I, declined to exercise supplemental jurisdiction over those claims, and dismissed them without prejudice.

The district court next denied the Cui Appellants' motion to appoint a receiver. It also denied the Li Appellants' motion to dismiss CRC I's counterclaim. CRC I later withdrew its counterclaim.

The Li Appellants moved for reconsideration of the district court's dismissal of their claims. They also moved for default judgment on their abandoned claim to remove CRC I as general partner. The Cui Appellants also renewed their motion for appointment of a receiver. The district court denied these motions.

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relieve parties from uncertainty and insecurity with respect to their rights, status, and other legal relations" (quotations omitted)).

Finally, the Cui Appellants moved to file a fourth amended complaint, which the district court denied.

2. Attorney Fees

Appellees then moved for attorney fees on multiple grounds. Waveland Ventures, LLC, CRC, and CRC I (collectively "CRC Defendants") sought attorney fees against the Li and Cui Appellants under Colorado law and the Private Securities Litigation Award Act ("PSLRA"). SPO, SPO I, and Mr. Knobel (collectively "SPO Defendants") sought attorney fees against the Li and Cui Appellants under the Loan Agreement, Colorado law, and the PSLRA. The district court addressed these requests in three orders, which we describe below.

a. Order on the CRC Defendants' motion for attorney fees

The court awarded the CRC Defendants $390,056.25 against the Li Appellants and $139,539.75 against the Cui Appellants under Colorado law, Colo. Rev. Stat. § 13-17-201. It explained that the CRC Defendants were entitled to attorney fees under Colorado law because (1) the Li and Cui Appellants asserted tort claims against the CRC Defendants and (2) the court had dismissed the entire action against the CRC Defendants under Rule 12(b)(6).

b. Order on the SPO Defendants' motion for attorney fees

The district court awarded the SPO Defendants attorney fees against the Li Appellants and the Cui Appellants.

i. Li Appellants

The court awarded the SPO Defendants $244,020.68 in attorney fees against the Li Appellants under the Loan Agreement and Colorado law, which each provided an independent basis for the award.

First, the court granted attorney fees under the Loan Agreement. The Loan Agreement provided that the prevailing parties in litigation arising from the loan were entitled to attorney fees. The district court concluded that the SPO Defendants were the prevailing parties. It then said that "[t]his should end the issue of fees as against the Li [Appellants] because the Court will not award a party, and the SPO Defendants cannot recover, the same fees more than once." App., Vol. XIV at 3867. Nonetheless, the court proceeded to evaluate the remaining bases for attorney fees.

Second, the court concluded that Mr. Knobel, but not the other SPO Defendants, was entitled to attorney fees under Colorado law. It determined that the entire action was dismissed with prejudice only as to Mr. Knobel under

Rule 12(b)(6), not SPO and SPO I,[12] so only he could recover attorney fees under Colorado law. It then concluded that the essence of the action against Mr. Knobel was in tort, which entitled him to fees under Colorado law.

ii. Cui Appellants

The court awarded the SPO Defendants $77,376.79 against the Cui Appellants under the Loan Agreement and Colorado law.

First, the court awarded attorney fees under the Loan Agreement because the SPO Defendants were the prevailing parties on the Cui Appellants' claims.

Second, the court awarded Mr. Knobel, but not the other SPO Defendants, attorney fees under Colorado law. It again explained that only Mr. Knobel was dismissed entirely under Rule 12(b)(6). It also concluded that the Cui Appellants' claims against Mr. Knobel were tort claims. The court declined to specify the amount of fees awarded to Mr. Knobel under Colorado law because it had awarded him fees under the Loan Agreement and he could not recover those fees twice.[13]

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12. The court dismissed certain state law claims against SPO and SPO I without prejudice for lack of diversity jurisdiction and because it declined to exercise supplemental jurisdiction.

13. On appeal, neither the Li Appellants nor the Cui Appellants challenge the attorney fee awards to the SPO Defendants based on the Loan Agreement.

c. Order on fees under the PSLRA

The court separately addressed the requests for attorney fees against the Appellants' counsel under the PSLRA. It concluded that the Li Appellants' counsel and the Cui Appellants' counsel had violated Federal Rule of Civil Procedure 11(b). Because the PSLRA imposes a rebuttable presumption in favor of attorney fees for substantial Rule 11 violations, the court evaluated whether each counsel's violation was substantial and, if so, whether the presumption that attorney fees should be assessed had been rebutted.

As to the Li Appellants' counsel, the court determined his Rule 11 violation was substantial, so the PSLRA's presumption applied, and that he had failed to rebut the presumption. It said that, excluding the claims that the Li Appellants voluntarily dismissed, four of the five remaining claims were frivolous. The court awarded $390,056.25 to the CRC Defendants and $244,020.68 to the SPO Defendants against the Li Appellants' counsel.

As to the Cui Appellants' counsel, the court determined that the entire amount of attorney fees should be assessed against him for the claims against the CRC Defendants. But it concluded that his Rule 11 violation was not substantial for the claims against the SPO Defendants, so the presumption that he should be liable for the full amount of attorney fees did not apply. The court thus awarded $139,539.75 to the CRC Defendants and $5,000 to the SPO Defendants against the Cui Appellants' counsel.

Finally, the court noted that the attorney fee awards were not cumulative and that the CRC and SPO Defendants could only collect once even though fees were awarded under different theories.

Appellants timely appealed.[14]

II. DISCUSSION

On appeal:

(A) The Appellants challenge the district court's Rule 12(b)(6) dismissal of their claims for (1) breach of fiduciary duty, (2) federal securities fraud, (3) Colorado securities fraud (Li Appellants only), and (4) Colorado common law fraud (Cui Appellants only).

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14. We summarize here our understanding of the district court's subject-matter jurisdiction underlying its orders. Both sets of Appellants filed claims for federal securities-fraud. The remainder of their claims were based on state law. The district court had federal question jurisdiction over the federal securities claims under 28 U.S.C. § 1331 and 15 U.S.C. §§ 77v and 78aa. It dismissed them under Rule 12(b)(6). It also dismissed the state law claims against the CRC Defendants and Mr. Knobel under Rule 12(b)(6), apparently exercising supplemental jurisdiction under 28 U.S.C. § 1367. It denied the Rule 12(b)(6) motions to dismiss the derivative state breach-of-contract and declaratory-judgment claims against SPO and SPO I. But, after asking for supplemental briefing on subject-matter jurisdiction regarding those claims, the court determined it lacked diversity jurisdiction under 28 U.S.C. § 1332 and declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367.

(B) The Cui Appellants argue the district court erred in dismissing their remaining state law claims for lack of subject-matter jurisdiction.

(C) The Cui Appellants contend the district court abused its discretion in denying their motion to file a fourth amended complaint.

(D) The Li Appellants assert the district court improperly denied their motion for default judgment on their original claim seeking removal of CRC I as general partner.

(E) The Appellants challenge the district court's awards of attorney fees under Colorado law and the PSLRA.

We address each issue in turn.[15]

A. Rule 12(b)(6) Dismissals

On appeal, both sets of Appellants challenge the dismissal of (1) their breach-of-fiduciary-duty claims against CRC I and (2) their federal securities-fraud claims. The Li Appellants contest dismissal of (3) their state securities-fraud claim, and the Cui Appellants argue against dismissal of (4) their fraud claim. Although many

15. The Li Appellants listed eight issues in their brief. Li Aplt. Br. at 5-6. The Cui Appellants listed seven issues in their brief. Cui Aplt. Br. at 5-6. We have consolidated the issues into the foregoing five categories and have identified those which both sets of Appellants raise and those which each of them raise on their own.

of the arguments overlap, we address them based on each separate complaint.

We review de novo the dismissal of a complaint under Rule 12(b)(6). *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016). "We accept all well-pleaded factual allegations in the complaint as true, and we view them in the light most favorable to the nonmoving party." *Sinclair Wyo. Refin. Co. v. A&B Builders, Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021) (quotations and alterations omitted). To survive a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

We typically consider "only the contents of the complaint when ruling on a 12(b)(6) motion." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013). But we will consider "documents incorporated by reference in the complaint [and] documents referred to in and central to the complaint, when no party disputes [their] authenticity." *Id.*; *see Broker's Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017).

"[W]e may affirm the judgment on any ground supported by the record" as long as the plaintiff "had a fair opportunity to address that ground." *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1157 (10th Cir. 2015).

"Federal courts exercising diversity jurisdiction apply the substantive law of the forum state . . . ." *Sinclair Wyo. Refin. Co.*, 989 F.3d at 765-66; *see Erie R.R. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). We therefore apply Colorado law to Appellants' state law claims.

1. Breach-of-Fiduciary-Duty Claims

a. Legal background

i. Economic loss rule

To state a breach-of-fiduciary-duty claim, a plaintiff must allege (1) "the defendant was acting as a fiduciary of the plaintiff," (2) "[the defendant] breached a fiduciary duty to the plaintiff," (3) "the plaintiff incurred damages," and (4) "the defendant's breach of fiduciary duty was a cause of the plaintiff's damages." *Taylor v. Taylor*, 2016 COA 100, 381 P.3d 428, 431 (Colo. App. 2016) (quotations and emphases omitted). This claim may be based on breach of a contractual duty or breach of a tort duty. *Compare Casey v. Colo. Higher Educ. Ins. Benefits All. Tr.*, 2012 COA 134M, 310 P.3d 196, 204 (Colo. App. 2012) (breach of fiduciary duty could support a breach-of-contract claim), *with Castro v. Lintz*, 2014 COA 91, 2014 COA 91, 338 P.3d 1063, 1069 (Colo. App. 2014) (construing breach-of-fiduciary-duty claim as a tort claim).

The Appellants' challenge to dismissal of their fiduciary-duty claims implicates the "economic loss rule," which bars a party to a contract from using a tort claim to recover contract damages unless the party can show it is owed an independent duty in tort creating a separate entitlement to those damages.

Under the economic loss rule, if a plaintiff alleges "only economic loss from the breach of an express or implied contractual duty," he or she "may not assert a tort claim for such a breach absent an independent duty of care under tort law." *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000). "Economic loss is defined generally as damages other than physical harm to persons or property." *Id.* To be independent of a contractual duty, the duty must (1) "arise from a source other than the relevant contract," and (2) "not be a duty also imposed by the contract." *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 962 (10th Cir. 2009) (applying Colorado law). "Fiduciary relationships may be the kind of special relationship that will trigger an independent common law duty of care," but "not every fiduciary relationship implicates a risk of damages for which contract law cannot provide a remedy." *Casey*, 310 P.3d at 202-03 (quotations omitted).

ii. Federal Rule of Civil Procedure 23.1 and the contemporaneous ownership rule

The fiduciary-duty claims also implicate Federal Rule of Civil Procedure 23.1(b), known as the contemporaneous

ownership rule. *Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 708 n.4, 94 S. Ct. 2578, 41 L. Ed. 2d 418 (1974). It provides that a plaintiff bringing a derivative action must allege that he or she "was a shareholder or member at the time of the transaction complained of." Fed. R. Civ. P. 23.1(b).[16] Rule 23.1 is a procedural rule, but we apply the state's substantive law in determining whether the transaction at issue occurred while the plaintiff was a shareholder or member. *Cadle v. Hicks*, 272 F. App'x 676, 678-79 (10th Cir. 2008) (unpublished) (cited as instructive under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).

b. Analysis

In their complaint, the Li Appellants brought a derivative-breach-of-fiduciary-duty claim against CRC I. They alleged that CRC I, acting as general partner of CRCPS, failed to adequately ensure that the loan agreement with the SPO Defendants was sufficiently collateralized. They also alleged that CRC I breached its fiduciary duty in failing to demand complete repayment of the loan and by providing misleading information about it.

The Cui Appellants separately brought both direct and derivative breach-of-fiduciary-duty claims against the CRC Defendants. They alleged that the CRC Defendants provided them with misleading marketing materials and took advantage of the Cui Appellants' lack of English

16. Under Colorado's limited partnership statute, "'Member' means a general partner or a limited partner." Colo Rev. Stat. § 7-61-102(2).

proficiency to convince them to invest in the limited partnership.

The district court dismissed the breach-of-fiduciary-duty claims on two grounds. *First*, the court read both complaints as asserting the claims under tort law. It concluded the economic loss rule barred the claims because the CRC Defendants' duties arose from contract. *Second*, the court held that many of the allegations supporting the Li Appellants' claim and all of the allegations supporting the Cui Appellants' derivative claim stemmed from the CRC Defendants' conduct that preceded the plaintiffs' investments in the limited partnership. Thus, under Federal Rule of Civil Procedure 23.1, the court held that Appellants could not recover based on those allegations.

Appellants argue the district court erred in construing their allegations as arising under tort and not under contract. They contend their complaints make clear that their breach-of-fiduciary-duty claims arose from contract and are therefore properly construed as breach-of-contract claims. And because their claims are contractual, Appellants argue the economic loss rule does not bar their claims. Appellants also contend the district court improperly applied Rule 23.1.

i. Li Appellants

The Li Appellants brought this claim derivatively against CRC I, arguing it breached its fiduciary duty to CRCPS and therefore violated its contractual obligations.

Appendix B

We employ a three-step analysis to determine whether the district court properly dismissed the Li Appellants' breach-of-fiduciary-duty claim. *First*, we determine this is a contract claim, not, as the district court concluded, a tort claim subject to the economic loss rule. So the district court should not have dismissed it on that ground. *Second*, because part of this claim was based on alleged misconduct that occurred before the Li Appellants invested in CRCPS, the district court correctly determined that Rule 23.1 and the "contemporaneous ownership rule" barred that part of the claim. *Third*, we conclude that the remaining post-investment allegations stated a claim for breach of contract. We thus affirm the district court's dismissal of the pre-investment allegations supporting the claim and reverse the dismissal of the post-investment allegations.

1) The contractual nature of the Li Appellants' claim

Construing the complaint in the light most favorable to the Li Appellants, *see Sinclair Wyo. Refin. Co.*, 989 F.3d at 765, we conclude that it pled a breach-of-contract claim rather than a tort claim. The Li Appellants' complaint labeled its claim as a "Breach of Fiduciary Duty *arising by Contract* and Statute." App., Vol. II at 299 (emphasis added). In describing this count, the complaint identified the contractual language creating the fiduciary relationship. *Id.* at 300 ¶ 114 ("The CRCPS [Partnership Agreement] at Section 8.04 states that 'In carrying out their duties and exercising their powers hereunder, the General Partner [CRC I] shall exercise reasonable skill, care, and business judgment."). It then described CRC's

breaches as "contractual and fiduciary." *Id.* at 301 ¶ 126. Finally, the complaint sought damages equaling the "shortfall between what it would have received i[f] the Loan had been paid in cash versus the value of what it actually received (hereafter, the 'Damages')." *Id.* at 302 ¶ 129. These allegations show that the legal predicate for the Li Appellants' breach-of-fiduciary-duty claim was contract, not tort.

Casey v. Colorado Higher Education Institute is instructive. 2012 COA 134M, 310 P.3d 196 (Colo. App. 2012). There, the plaintiffs brought a breach-of-contract claim alleging the defendants breached their fiduciary duties. *Id.* at 201. The defendants responded that, by alleging breach of fiduciary duties, the claim was based on tort and thus was barred. *Id.* The Colorado Court of Appeals rejected this argument, concluding that the "[t]he complaint does not allege a tort claim for breach of fiduciary duty against the trustees. Rather it alleges that the trustees breached the contract . . . by 'failing to perform their contractual obligations, including contractually imposed fiduciary duties.'" *Id.* at 203 (alterations omitted). Because the complaint referred to the specific contractual duties creating the fiduciary duty, the court concluded it was a contractual claim. *Id.* The Li complaint similarly alleged a breach of fiduciary duty that breached the parties' contract.

Appellees' assertion that the Li Appellants alleged a tort-based breach of fiduciary duty is not persuasive.

First, they point to the Li Appellants' colloquy with the district court at the motion-to-dismiss hearing where counsel confirmed to the district court that the claim was a breach-of-fiduciary-duty claim. Appellees argue that the Li Appellants should have clarified then that its claim arose from contract or statute. But the Li Appellants were not asked whether the claim arose from tort or contract. They were asked only whether it was a breach-of-fiduciary-duty claim, and they confirmed it was. App., Vol. X at 2723. Their response did not contradict the plain language of their complaint, which governs in any event.

Second, Appellees argue that the Li Appellants' assertion of breach-of-contract claims against SPO I shows that they knew how to assert breach-of-contract claims. But Appellees fail to explain how the Li Appellants' assertion of a breach-of-contract claim elsewhere in their complaint affects the substance of this claim.

We conclude that the complaint alleged a contractual breach-of-fiduciary-duty claim and is thus not subject to the economic loss rule. The district court erred in dismissing the claim on this ground.

2) Rule 23.1

The Li complaint alleged pre-investment misconduct as the basis for CRC I's breach of its fiduciary duties. Rule 23.1 barred its derivative claim based on these allegations. The complaint alleged that CRC I willfully and negligently structured the Loan Agreement with SPO. App., Vol. II at 300 ¶ 118. Because this alleged misconduct predated the Li

Appellants' investment, the district court dismissed these allegations. The Li Appellants contend the transaction supporting their derivative claim did not occur until they purchased the ownership stake in CRCPS. We disagree.

The Loan Agreement was executed on November 5, 2010. *Id.* at 276 ¶ 31. Per the Li complaint, no investors, including the Li Appellants, received marketing materials regarding the limited partnership stakes until after the Loan Agreement's execution. *Id.* at 285 ¶ 61. Thus, the Li Appellants did not own any interest in CRCPS when the transaction complained of—the Loan Agreement—was executed.

The Li Appellants cite *Elk River Assocs. v. Huskin*, 691 P.2d 1148 (Colo. App. 1984), to argue that CRC I's fiduciary obligation to the investors predated their actual investment. Li Aplt. Br. at 32. *Huskin* said "a fiduciary relationship between the parties to a limited partnership can attach during the negotiations which precede formal execution of the certificate of limited partnership." 691 P.2d at 1152. This argument fails for two reasons.

First, the Li Appellants sued derivatively on behalf of CRCPS, so the relevant fiduciary duty is not between the limited partners and the general partner but between the general partner and the CRCPS partnership. *See Burks v. Lasker*, 441 U.S. 471, 477, 99 S. Ct. 1831, 60 L. Ed. 2d 404 (1979) ("A derivative suit is brought by shareholders to enforce a claim on behalf of the corporation."); Colo. Rev. Stat. § 7-62-1001(1) (Colorado law permitting limited partners to bring derivative suits on behalf of the limited

partnership). Because the Li Appellants were not limited partners of CRCPS when the Loan Agreement was executed, they could not sue CRC I on behalf of CRCPS.

Second, even assuming the fiduciary relationship between the Li Appellants and CRC I began during negotiations to sell the limited partnership interests in CRCPS and that the Li Appellants were suing directly, the negotiations did not begin until after execution of the Loan Agreement. Thus, Rule 23.1(b) barred the Li Appellants' pre-investment derivative claims.

3) Remaining post-investment allegations

Turning to the Li Appellants' remaining, post-investment allegations, we conclude they plausibly stated a claim for breach of contract.

To plausibly state a breach of contract, a plaintiff must allege "(1) the existence of a contract; (2) performance by the plaintiff or some justification for nonperformance; (3) failure to perform the contract by the defendant; and (4) resulting damages to the plaintiff." *Marquardt v. Perry*, 200 P.3d 1126, 1129 (Colo. App. 2008).

The Li complaint alleged that (1) the Partnership Agreement was the contract governing the relationship between CRCPS and CRC I, App., Vol. II at 300 ¶ 114; (2) CRCPS paid management fees to CRC I, *id.* at 298 ¶ 104; (3) in failing to honor its fiduciary duties, CRC I failed to perform the contract, *id.* at 300-01 ¶¶ 114-18, 126; and

(4) CRCPS incurred damages resulting from the breach, *id.* at 302 ¶ 129. The Li complaint thus plausibly alleged a breach of contract.

* * * *

In sum, the breach-of-fiduciary-duty claim was validly pled as a contract claim, but Rule 23.1(b) barred the pre-investment part of the claim. We therefore reverse the district court's dismissal of the Li Appellants' breach-of-fiduciary-duty claim for allegations relating to post-investment conduct.

ii. Cui Appellants

In contrast, the Cui Appellants' complaint failed to allege a contractual breach-of-fiduciary-duty claim and was thus subject to the economic loss rule. The Cui complaint described this count generally as a breach of fiduciary duty by CRC and CRC I. App., Vol. VI at 1585. It did not mention any contractual creation of the fiduciary duty. Indeed, the Cui complaint stated that CRC owed the Cui Appellants a duty "[a]s the regional center entrusted by the Plaintiffs to oversee their investment." *Id.* at 1586 ¶ 107. Thus, the complaint on its face does not allege a fiduciary duty arising out of contract.

Because the Cui Appellants' claim arises out of tort, we must apply the economic loss rule. As described above, the rule bars recovery for economic losses under tort if the breach stemmed from a breach of a contractual duty. *Town of Alma*, 10 P.3d at 1264. Here, the breach stemmed

from a breach of contract, and the Cui complaint alleged only economic losses. Thus, the economic loss rule barred the Cui Appellants' breach-of-fiduciary-duty claim. We therefore affirm the district court's dismissal of the Cui Appellants' breach-of-fiduciary-duty claim.

2. Federal Securities-Fraud Claims

The Li Appellants appeal the dismissal of their derivative federal securities-fraud claim against CRC I. The Cui Appellants appeal dismissal of their direct federal securities-fraud claim against all Appellees.[17] We affirm the district court.

a. Li Appellants

The Li Appellants brought a derivative federal securities-fraud claim only against CRC I. They allege that CRC I made material misrepresentations to the limited partners to induce them to exercise their put options at a loss. The district court dismissed their claim because it (1) was barred under the statute of repose and (2) was not a proper derivative claim. We affirm on the second ground and do not address the first.

A derivative action "permits an individual shareholder to bring 'suit to enforce a *corporate* cause of action against officers, directors, and third parties.'" *Kamen v. Kemper*

17. The Cui complaint also included a direct federal securities-fraud claim under 15 U.S.C. § 80a against CRCPS and CRC I in its capacity as the general partner. The Cui Appellants do not raise this claim on appeal.

Fin. Servs., Inc., 500 U.S. 90, 95, 111 S. Ct. 1711, 114 L. Ed. 2d 152 (1991) (quoting *Ross v. Bernhard*, 396 U.S. 531, 534, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970)). The derivative action allows an individual shareholder "to protect *the interests of the corporation* from the misfeasance and malfeasance of faithless directors and managers." *Id.* (emphasis added) (quotations omitted).[18]

Here, the Li Appellants' securities-fraud claim did not allege violations by CRC I against CRCPS. Instead, they alleged harms that CRC I and CRCPS caused the *investors* directly. For instance, the Li complaint alleged that "CRCPS - acting through CRC1 - issued an offering of securities when it granted a put right to each limited partner to 'put' his unit back to CRCPS." App., Vol. II at 310 ¶ 187. In making this "offering of the put option *to investors*," the Li complaint alleged, "CRC failed to explain the history and method by which it was over-valuing the collateral." *Id.* at 310-11 ¶ 189 (emphasis added), *see also id.* at 311 ¶ 190 ("CRC never explained clearly to investors the implications of allowing SPO to recharacterize the loan (a debt) as 'investors equity.' . . . This is a material omission of fact *to induce the limited partners* to invest and stay in the transaction which has caused them continuing detriment." (emphasis added)). These allegations described a direct and not a derivative

18. We treat limited partnerships and corporations the same for purposes of a derivative suit. *See* Fed. R. Civ. P. 23.1(a) (treating unincorporated associations and corporations similarly for derivative suits); Colo. Rev. Stat. § 7-60-106(1) (defining a limited liability partnership as an association). The parties do not dispute this approach.

claim. They do not allege any harm caused to CRCPS. It was thus an improper derivative claim, and the district court properly dismissed it.

b. Cui Appellants

The Cui Appellants brought direct federal securities-fraud claims against all Appellees. They allege that Appellees made material misrepresentations to convince them to purchase their limited partnership interests in CRCPS.[19] The district court dismissed their claim after concluding it was barred under the statute of repose. We agree.

"A statute of repose . . . puts an outer limit on the right to bring a civil action." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8, 134 S. Ct. 2175, 189 L. Ed. 2d 62 (2014). Unlike a statute of limitations, whose limit begins after a claim accrues, a statute of repose's limit is measured "from the date of the last culpable act or omission of the defendant." *Id.* Thus, it bars "any suit that is brought after a specified time since the defendant acted . . . , even if this period ends before the plaintiff has suffered a resulting injury." *Id.* (quotations omitted).

Under 28 U.S.C. § 1658(b)(2), a plaintiff alleging a federal securities violation may not bring a private cause

19. The Cui Appellants' complaint also alleged that Appellees violated section 78o of the Federal Securities Act by selling securities without being registered. They do not present any argument regarding these allegations on appeal, so they have abandoned this claim.

of action later than "5 years after such violation." Before the district court, the Cui Appellants did not dispute Appellees' assertion that they purchased their limited partnerships in 2012. App., Vol. XI at 2955 n.43. They thus needed to bring their claims no later than 2017, but they failed to file their complaint until 2019. The Cui Appellants' federal securities-fraud claim was therefore time-barred.[20]

3. Li Appellants' Colorado Securities-Fraud Claim

The Li Appellants brought a derivative securities-fraud claim under the Colorado Securities Act against CRC, its principals, and Mr. Knobel. Their allegations were identical to their federal securities-fraud claims: CRC, along with Mr. Knobel, "sent misleading and fraudulent valuations to investors in connection with an attempt to get them to exercise a put option offered to them, which would cause a loss to each investor." App., Vol. II at 312 ¶ 200.

As with their federal securities-fraud claims, Appellants failed to allege a derivative action. They alleged that they, as investors, suffered harms, not CRCPS. We thus affirm the dismissal of their Colorado Securities Act derivative fraud claims.

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20. The Cui Appellants incorporate the Li Appellants' arguments regarding the statute of repose. They suggest that Appellees' 2016-2019 notices offering to allow limited partners to exercise their put options each constituted a new security. But the Cui complaint alleged only that the security at issue was the 2012 sale of the limited partnership interest.

4. Cui Appellants' Fraud Claims

The Cui Appellants appeal dismissal of their Colorado fraud claim against all Appellees. To state a fraud claim under Colorado law, a plaintiff must allege (1) "the defendant misrepresented a material fact," (2) "the defendant knew the representation was false," (3) the plaintiff "did not know the representation was false," (4) "the defendant made the misrepresentation intending that the [plaintiff] act on it," and (5) "damages resulted from the [plaintiff's] reliance." *Loveland Essential Grp., LLC v. Grommon Farms, Inc.*, 251 P.3d 1109, 1116 (Colo. App. 2010).

A plaintiff asserting a fraud claim must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). Under Rule 9(b), the plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). We have interpreted this Rule to require a plaintiff to "set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Toone v. Wells Fargo Bank, N.A.*, 716. F.3d 516, 522 (10th Cir. 2013) (quotations omitted); *United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730, 745 (10th Cir. 2018) (allegations of fraud must "provide factual allegations regarding the who, what, when, where and how of the alleged claims" (quotations and alterations omitted)).

The district court dismissed the Cui Appellants' fraud claim after determining the Cui complaint failed

to meet Rule 9(b)'s heightened pleading standard. The Cui Appellants contend the complaint adequately alerted Appellees to the nature of their claim, and any deficiency in the pleadings resulted from asymmetric information. We agree with the district court.

As the district court determined, the Cui Appellants' allegations lacked the specificity needed to allege fraud. For instance, the complaint alleged that Waveland LLC "colluded with SPO to defraud the EB–5 investors by misrepresenting to them that the Loan was 100% collateralized and safe." App., Vol. VI at 1564-65 ¶ 9. But this allegation contained no specifics regarding which statements were fraudulent, nor did it identify when or where the false representation was made. Elsewhere in the complaint, the Cui Appellants identified numerous purported misrepresentations in a marketing presentation to potential investors by Appellees' agents, *id.* at 1573-75 ¶¶ 65-66, but the complaint again failed to identify where, when, and to whom the misrepresentations were made. Indeed, as the district court noted, the complaint failed to allege that any of the Cui Appellants attended this presentation. These allegations lack the requisite specificity to allege a fraud claim.

The Cui Appellants argue we should relax Rule 9(b)'s heightened pleading standard because Appellees were better placed to have details regarding their fraudulent scheme. We have held that "courts may consider whether any pleading deficiencies resulted from the plaintiff's inability to obtain information in the defendant's exclusive control." *Polukoff*, 895 F.3d at 745 (quotations omitted). But the Cui Appellants' complaint was deficient, not because

they lacked information in Appellees' exclusive control, but because they failed to identify necessary information that was squarely within their knowledge, such as the dates, locations, and identities of relevant actors. We thus affirm the district court's dismissal of the Cui Appellants' fraud claim.

B. Dismissal of State Claims for Lack of Jurisdiction

After the district court denied the motion to dismiss the Li Appellants' derivative breach-of-contract claim against SPO I and the Cui Appellants' derivative breach-of-contract and declaratory-judgment claims against SPO and SPO I, it ordered the parties to address whether it had diversity jurisdiction over these claims, and if not, whether it should exercise supplemental jurisdiction.

After briefing, the district court concluded that because the Appellants' remaining claims were derivative in nature, it had to determine whether to align CRCPS as a plaintiff or a defendant. It concluded CRCPS's interests were adverse to the Appellants' interests, so the court aligned it as a defendant. And because CRCPS, as a limited partnership, takes on the citizenship of its limited partners, *see Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (1990), the court concluded it had the same citizenship as the Appellants. It therefore determined it lacked subject-matter jurisdiction. It then declined to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(3).[21]

21. On appeal, the Appellants do not challenge this declination of supplemental jurisdiction.

On appeal, the Li Appellants do not challenge the dismissal of their derivative breach-of-contract claim against SPO I for lack of subject-matter jurisdiction. We thus limit our analysis to the Cui Appellants' challenge to the dismissal of their derivative breach-of-contract and declaratory-judgment claims against SPO and SPO I for lack of subject-matter jurisdiction.[22] The Cui Appellants do not address the district court's determination of CRCPS's alignment or its citizenship. Instead, they focus on the diversity of citizenship between themselves and the SPO Defendants. Because the district court determined CRCPS and the Cui Appellants shared the same citizenship and therefore there was no complete diversity, the citizenship of SPO is not material to its holding that there was no diversity jurisdiction. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806). Because the Cui Appellants fail to dispute the alignment and citizenship of CRCPS, they have waived their challenge to the district court's dismissal for lack of subject-matter jurisdiction. *Krastev v. INS*, 292 F.3d 1268, 1280 (10th Cir. 2002) ("Issues not raised on appeal are deemed to be waived."). Any such challenge would fail in any event.

C. Leave to Amend the Complaint

The Cui Appellants argue the district court should have granted their motion for leave to file a fourth amended

22. In their reply brief, the Cui Appellants argue they alleged both direct and derivative claims that survived the motion to dismiss. This is incorrect. The district court dismissed the direct claims under Rule 12(b)(6) and left only the derivative claims.

complaint. "A district court should refuse leave to amend only upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Wilkerson v. Shinseki*, 606 F.3d 1256, 1267 (10th Cir. 2010) (quotations and alterations omitted). "We ordinarily apply the abuse-of-discretion standard when reviewing a denial of leave to amend." *Moya v. Garcia*, 895 F.3d 1229, 1239 (10th Cir. 2018).

In a June 14, 2021 order,[23] the district court denied the Cui Appellants' motion for leave to amend. It reasoned that amendment would be futile based on (1) its dismissal of the Cui Appellants' breach-of-fiduciary-duty and fraud claims with prejudice, (2) its refusal to exercise supplemental jurisdiction over the surviving state law claims, and (3) the Cui Appellants' previous three amendments of their complaint. *See Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir.2007) (a district court may deny a motion to amend a complaint if the amendment would be futile, and "[a] proposed amendment is futile if the complaint, as amended, would be subject to dismissal" (quotations omitted)). We view the request to amend differently.

To the extent the Cui Appellants proposed to amend their complaint to state a breach-of-contract claim based on CRC I's breach of its contractual fiduciary duty,[24] as

23. Issued the same day the court entered final judgment.

24. Although on appeal the Cui Appellants focus on their fraud claim, they moved to amend to "clarify[] the Claims for Fraud; Breach of Fiduciary Duty; and Declaratory Relief," and to plead "a

we explained above in our discussion of the Li Appellants' fiduciary-duty claim, such a claim is not subject to the economic loss rule. In short, the proposed amended complaint does not appear to be futile, and "[i]f a proposed amendment is not *clearly* futile, then denial of leave to amend is improper." *Seale v. Peacock*, 32 F.4th 1011, 1029 (10th Cir. 2022) (quoting Wright & Miller, Federal Practice & Procedure § 1487). We reverse the district court's denial of the Cui Appellants' request for leave to amend and remand for further consideration.

D. Motion for Default Judgment

The Li Appellants challenge the district court's refusal to enter default judgment in their favor on their abandoned claim to remove CRC I as general partner of CRCPS. They initially included a count in their operative complaint seeking removal of CRC I as general partner. But they voluntarily dismissed this count. App., Vol. VIII at 2090. After CRC I filed a counterclaim seeking a declaratory judgment that its purported removal was improper, the Li Appellants moved to dismiss the counterclaim and "for [an] order declaring general partner removed instanter." *Id.* at 2079.

The district court denied the Li Appellants' motion to dismiss the counterclaim and their request for a declaration stating that CRC I was properly removed as general partner. After this ruling, CRC I voluntarily

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Breach of Contract cause of action as an alternative to the Breach of Fiduciary Duty cause of action." App., Vol. XIII at 3470; *see also id.* at 3477, 3482-3519.

dismissed its counterclaim. The Li Appellants then moved for entry of default judgment ordering the removal of CRC I as general partner. The court denied their motion during a hearing. *See* App., Vol. XIII at 3420-69.

The Li Appellants argue this denial was erroneous. They appear to suggest that CRC I's voluntary dismissal amounted to a concession that its removal was proper. But as Appellees point out, the Li Appellants had already dismissed their claim seeking removal of CRC I as general partner. The district court thus had no claims involving removal of CRC I before it, let alone a claim adjudicated in the Li Appellants' favor. In short, when the Li Appellants moved for default judgment, there was no pending claim on which judgment could be entered. We therefore affirm.

E. Attorney Fees

The district court awarded attorney fees to the CRC Defendants under Colorado law and the PSLRA. It also awarded attorney fees to the SPO Defendants under the Loan Agreement, Colorado law (Mr. Knobel only), and the PSLRA. We vacate the award of attorney fees for the CRC Defendants under Colorado law and the awards of attorney fees for all Defendants under the PSLRA. We remand to the district court for further proceedings.

"[A]lthough this appeal involves the review of an award of attorneys' fees under state law, the standard of review under which we review an award of fees is a procedural matter controlled by federal precedent." *Xlear, Inc. v. Focus Nutrition, LLC*, 893 F.3d 1227, 1233 (10th

Cir. 2018). "We review the decision to award attorney fees, and the amount awarded, for abuse of discretion." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1232 (10th Cir. 2000). "A district court abuses its discretion if it commits legal error, relies on clearly erroneous factual findings, or issues a ruling without any rational evidentiary basis." *Xlear, Inc.*, 893 F. 3d at 1233. "Whether a litigant is a 'prevailing party' is a legal question we review de novo." *Id.*

1. Colorado Law

Under Colorado law, if a court grants a motion to dismiss a tort action, the "defendant shall have judgment for his reasonable attorney fees in defending the action." Colo. Rev. Stat. § 13-17-201(1).

If a plaintiff has pled tort and non-tort claims, the court must determine "whether the essence of that party's action was one in tort." *Gagne v. Gagne*, 2014 COA 127, 2014 COA 127, 338 P. 3d 1152, 1167 (Colo. App. 2014). The court first assesses "whether the 'essence of the action' is tortious in nature (whether quantitatively by simple number of claims or based on a more qualitative view of the relative importance of the claims)." *Id.* at 1168 (quotations omitted). If this assessment fails to give a definitive answer, the court must then determine "whether tort claims were asserted to unlock additional remedies." *Id.* (quotations omitted).

If the court determines the essence of the action was tortious, then attorney fees are mandatory. *See Luskin*

Daughters 1996 Tr. v. Young, 2019 CO 74, 448 P.3d 982, 987 (Colo. 2019). A court must also award attorney fees to a defendant even if claims remain live against a co-defendant. *See Stauffer v. Stegemann*, 165 P.3d 713, 718 (Colo. App. 2006). But "the statute does not authorize recovery if a defendant obtains dismissal of some, but not all, of a plaintiff's tort claims." *Colorado Special Districts Prop. & Liab. Pool v. Lyons*, 2012 COA 18, 2012 COA 18, 277 P.3d 874, 885 (Colo. 2012).

a. Li Appellants

Because we reverse the dismissal of the Li Appellants' breach-of-fiduciary-duty claim, we vacate the attorney fee award for the CRC Defendants against the Li Appellants. As discussed, the district court misconstrued the breach-of-fiduciary-duty claim as a tort claim rather than as a contract claim, and Colorado law does not permit an award of attorney fees if some of a plaintiff's claims remain live. *Falcon Broadband, Inc. v. Banning Lewis Ranch Metro. Dist. No. 1*, 2018 COA 92, 474 P.3d 1231, 1244-45 (Colo. App. 2018) (statute does not apply "if the court doesn't dismiss all the tort claims against a certain defendant or if an action contains both tort and non-tort claims and the defendant obtains C.R.C.P 12(b) dismissal of only the tort claims" (quotations omitted)). Our reversal revives the breach-of-fiduciary-duty claim against CRC I. We therefore vacate the award of attorney fees for the CRC Defendants under Colorado law.[25]

25. This does not affect the attorney fee award for Mr. Knobel against the Li Appellants under Colorado law. As discussed above, the district court awarded Mr. Knobel attorney fees under Colorado

b. Cui Appellants

Similarly, because we reverse and remand on the Cui Appellants' motion for leave to amend their complaint, we vacate the award of attorney fees under Colorado law.

As discussed, Colorado law awards attorney fees for a tort action when the "action is dismissed on motion of the defendant." Colo. Rev. Stat. § 13-17-201(1). But because we reverse the district court's denial of the Cui Appellants' proposed amendment, which included a breach-of-contract claim based on a breach of fiduciary duty, the district court must re-evaluate whether the statutory basis for the attorney fee award applies.[26]

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law because the entire action was dismissed against him and the claims against him sounded in tort. Because the Li Appellants asserted their breach-of-fiduciary-duty claim against CRC I, not Mr. Knobel, our revival of that claim does not affect the award against him.

In sum, (1) the fee award against the Li Appellants under Colorado law regarding the SPO Defendants was given only to Mr. Knobel and (2) our partial reversal of the breach-of-fiduciary-duty claim does not affect the award to him because that claim was not asserted against Mr. Knobel.

26. It is unclear from the Cui Appellants' briefing on appeal how they will amend their complaint. Because we do not know the specifics of their amended claim, the district court is best situated to revisit the award of attorney fees for Mr. Knobel and the CRC Defendants under Colorado law on remand.

2. Federal Law

The PSLRA requires a court, "upon final adjudication of the action," to make "specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." 15 U.S.C. § 78u-4(c)(1). If the court finds that a party violated Rule 11(b), it "shall impose sanctions on such party or attorney." 15 U.S.C. § 78u-4(c)(2). Unlike other sanctions provisions, the PSLRA imposes a presumption in favor of sanctions. *Id.* § 78u-4(c)(3).

After making its dismissal rulings and concluding that no claims were pending, the district court ordered the parties to address whether it should award attorney fees under the PSLRA. The court concluded that four of the Li Appellants' five claims—including their federal securities claim—were frivolous and thus warranted a sanctions award.

As to the Cui Appellants, the court concluded that two of the five claims it adjudicated—including the federal securities claim—were frivolous. The court determined that the Cui Appellants' claims against the CRC Defendants contained substantial defects and that the Cui Appellants failed to rebut the presumption in favor of sanctions. But it concluded the Cui Appellants' claims against the SPO Defendants were not as defective, so it awarded lower sanctions.

The court then ordered (1) the Li Appellants' counsel to pay about $390,000 to the CRC Defendants and $244,000 to the SPO Defendants; and (2) the Cui Appellants' counsel to pay about $140,000 to the CRC Defendants and $5,000 to the SPO Defendants.

a. Li Appellants

Because we reverse the district court's dismissal of one of the Li Appellants' claims, we vacate the PSLRA fee award. The PSLRA provides that, "[i]n any private action arising under" the securities statutes, the district court must award attorney fees "upon final adjudication of the action." 15 U.S.C. § 78u-4(c)(1). The parties have not briefed, and the district court did not address whether "final adjudication of the action" refers solely to federal securities-law claims or whether it refers to the entire action. If it refers to the latter, our reversal of the district court's dismissal of the Li Appellants' breach-of-fiduciary-duty claim means that adjudication of the action is not final.[27] On remand, the district court must determine

27. We note the case law understanding of 15 U.S.C. § 78u-4(c)(1) is unsettled. The Fourth Circuit has said, but only in dicta, that the PSLRA "applies to any action with a claim arising under Chapter 2B of Title 15 of the U.S. Code, 15 U.S.C. § 78a et seq." *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 276 (4th Cir. 2006). Relatedly, district courts have attempted to address the meaning of "final adjudication." *See Blaser v. Bessemer Trust Co., N.A.*, 2002 U.S. Dist. LEXIS 19856, 2002 WL 31359015, at *3 (S.D.N.Y. 2002) (noting "there is little case law on its meaning"); *Manchester Mgmt. Co., LLC v. Echo Therapeutics, Inc.*, 297 F. Supp. 3d 451, 465 (S.D.N.Y. 2018); *Great Dynasty Int'l Fin. Holdings Ltd. v. Haiting Li*, 2014 U.S. Dist. LEXIS 94658, 2014 WL 3381416, at *5 (N.D. Cal. 2014).

whether it should first resolve the Li Appellants' surviving breach-of-fiduciary-duty claim before assessing attorney fees under the PSLRA.[28]

b. Cui Appellants

Because we reverse the district court's order denying the Cui Appellants leave to amend their complaint, we vacate the district court's PSLRA fee award. As with the award against the Li Appellants, the district court must determine whether "final adjudication of the action" refers

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28. The district court concluded that the breach-of-fiduciary-duty claim was frivolous, which is not correct in light of our reversal. We affirm the dismissal of the derivative federal securities-law claim because it did not allege harm to CRCPS, the limited partnership. But the district court may have awarded fees on a faulty basis because it seems to have broadly concluded that a derivative federal securities-law claim against a general partner would be a suit against the limited partnership itself and could not be maintained even if it alleged damage to CRCPS. App., Vol. XIV at 3823 ("It was not objectively reasonable for Li Plaintiffs to sue CRC I derivatively on behalf of CRCPS for alleged securities violations.").

The case law indicates that investors may pursue derivative federal securities-law claims against a corporate manager (here, the general partner, CRC I) for alleged harm to the corporation (here, the limited partnership, CRCPS). *See Frankel v. Slotkin*, 984 F.2d 1328, 1332-33 (2nd Cir. 1993) (plaintiff could maintain derivative federal securities-law claim against majority shareholder by showing damage to the corporation); *Hill v. Vanderbilt Cap. Advisors, LLC*, 834 F. Supp. 2d 1228, 1268-69 (D.N.M. 2011) (other circuits have established that federal securities-law claims may be pursued derivatively).

solely to the Cui Appellants' federal securities-law claim or whether it covers the entire complaint.[29]

III. CONCLUSION

In sum, we

(A) affirm the district court's dismissal of Appellants' claims under Federal Rule of Civil Procedure 12(b)(6) except for the Li Appellants' claim for breach of fiduciary duty, which we affirm in part and reverse in part;

(B) affirm dismissal of the Cui Appellants' remaining state law claims for lack of subject-matter jurisdiction;

(C) reverse the district court's denial of the Cui Appellants' motion to amend their complaint;

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29. As noted above, the Appellants do not challenge on appeal the awards of attorney fees to the SPO Defendants under the Loan Agreement. Appellees argue this moots Appellants' challenges to the fees awarded to the SPO Defendants under Colorado law and the PSLRA. *See* Aplee. Br. at 63-64. The district court is in the best position to consider the relationship among the various bases for the fee awards and should address this mootness argument on remand.

Nothing in this Order and Judgment should necessarily prevent the district court from revisiting whether it should award attorney fees under Colorado law or the PSLRA at the conclusion of proceedings on remand.

(D) affirm the district court's denial of the Li Appellants' motion for default judgment; and

(E) vacate the awards of attorney fees as discussed herein.[30]

The following chart lists the issues presented on appeal and our dispositions:

Appeal Issue		Li Appellants	Cui Appellants
(A)	Rule 12(b)(6) Dismissal of:		
(1)	Breach of fiduciary duty	Affirmed in part Reversed in part	Affirmed
(2)	Federal securities fraud	Affirmed	Affirmed
(3)	Colorado securities fraud	Affirmed	N/A

30. We thus deny as moot the following motions addressing the district court's orders regarding the attorney fee awards: (1) CRC I's motion for leave to allow the district court to correct the amended final judgment, Doc. 10870007; (2) the Li Appellants' motion for affirmative relief striking the amended final judgment, Doc. 10878163; and (3) the Li Appellants' motion to strike the second amended final judgment, Doc. 10874725.

We also deny the Li Appellants' motion for appointment of a neutral appellate counsel for CRCPS, Doc. 10847355. The Li Appellants provide no legal basis for this request.

Appendix B

Appeal Issue		Li Appellants	Cui Appellants
(4)	Colorado common law fraud	N/A	Affirmed
(B)	Dismissal for Lack of Subject-Matter Jurisdiction	N/A	Affirmed
(C)	Denial of Motion to Amend	N/A	Reversed
(D)	Denial of Motion for Default Judgment	Affirmed	N/A
(E)	Attorney Fees		
(1)	Colorado	Vacated as to the CRC Defendants	Vacated
(2)	PSLRA	Vacated	Vacated

We remand to the district court for further proceedings consistent with this Order and Judgment.[31]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

31. This court's rulings on appeal revive the Li Appellants' breach-of-fiduciary-duty claim and potentially revive certain of the Cui Appellants' state law claims through amendment of their complaint. In either instance, the district court on remand will need to consider whether to exercise supplemental jurisdiction in light of the dismissal of the federal claims.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-1232
(D.C. No. 1:19-CV-02443-RM-STV)
(D. Colo.)

JUN LI, *ET AL.*,

Plaintiffs - Appellants,

and

DIANWEN CUI, *ET AL.*,

Plaintiffs,

v.

COLORADO REGIONAL CENTER I, LLC, *ET AL.*,

Defendants - Appellees.

No. 21-1253
(D.C. No. 1:19-CV-02443-RM-STV)
(D. Colo.)

DIANWEN CUI, *ET AL.*,

Plaintiffs - Appellants,

Appendix C

and

JUN LI, *ET AL.*,

Plaintiffs,

v.

COLORADO REGIONAL CENTER LLC, *ET AL.*,

Defendants - Appellees,

and

PETER KNOBEL,

Defendant.

ORDER

Before MATHESON, KELLY, and PHILLIPS, Circuit Judges.

The petition for rehearing filed by Li Plaintiffs is denied.

Entered for the Court
/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D — DENIAL OF REHEARING *EN BANC* OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-1232
(D.C. No. 1:19-CV-02443-RM-STV)
(D. Colo.)

JUN LI, *et al.*,

Plaintiffs - Appellants,

and

DIANWEN CUI, *et al.*,

Plaintiffs,

v.

COLORADO REGIONAL CENTER I, LLC, *et al.*,

Defendants - Appellees.

No. 21-1253
(D.C. No. 1:19-CV-02443-RM-STV)
(D. Colo.)

DIANWEN CUI, *et al.*,

Plaintiffs - Appellants,

Appendix D

and

JUN LI, *et al.*,

Plaintiffs,

v.

COLORADO REGIONAL CENTER LLC, *et al.*,

Defendants - Appellees,

and

PETER KNOBEL,

Defendant.

ORDER

Before MATHESON, KELLY, and PHILLIPS, Circuit Judges.

The Li plaintiffs' petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is denied.

Entered for the Court
/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk