NO. 18-____

IN THE

SUPREME COURT OF THE UNITED STATES

Streambend Properties II LLC et. al.,

Petitioners,

v.

Ivy Tower Minneapolis, LLC et. al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Jury trials in federal civil cases have fallen to 0.63% of all cases for the 12 months ending on September 2017. Further, judicial dispositions favorable to plaintiffs dropped from approximately 70% in 1985 to 33% in the fourth quarter of 2009.

Both the Department of Housing and Urban Development and the Consumer Financial Protection Bureau concur that scienter is not required to establish a violation of 15 U.S.C. §1703(a)(2)(A), (B), or (C). The Ninth and Eleventh Circuits, the Colorado Supreme Court and many federal districts concur with this finding, but the Eighth Circuit both partially accepted and ultimately rejected it.

The **first** question presented is whether the courts erred in dismissing with prejudice Petitioners' ILSFDA claims and in not vacating the judgment.

The **second** question presented is whether the courts violated Petitioners' Seventh Amendment right to a trial by jury.

The **third** question presented is whether the courts violated Petitioners' Fifth Amendment due process rights.

PARTIES TO THE PROCEEDING

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

The plaintiffs/appellants below were Streambend Properties II LLC and Streambend Properties VIII LLC ("Streambend"). Both Streambend Properties II LLC and Streambend Properties VIII LLC are owned by GoalAssist Corporation, a non-publicly held company owned by Jerald Hammann ("Hammann"). On April 24, 2015, Streambend assigned all rights and obligations relative to this action to Hammann.

The respondents here and defendants/respondents below are Ivy Tower Minneapolis, LLC, Ivy Tower Development, LLC, Moody Group, LLC, Goben Enterprises, LP, Wischermann Holdings, LLC, Jeffrey Laux, Gary Benson, Burnet Realty, LLC and Commonwealth Land Title Insurance Company, LLC.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The opinions of the lower courts are unpublished. These documents are produced in the Appendix. App. 1a (Appellate Rule 60 Rehearing Order), 3a (Appellate Rule 60 Opinion), 6a (District Court Rule 60 Order), 12a (Appellate Opinion Granting Dismissal), 36a (District Court Order Granting Dismissal).

JURISDICTION

The Eighth Circuit Court of Appeals denied Petitioner's Rule 60 motion on November 16, 2017. It also denied rehearing on Petitioner's Rule 60 motion on December 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides that:

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

The Fifth Amendment to the United States Constitution provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a)(2)(A-C), provides:

(a) Prohibited activities

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails— . . .

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702 (a) of this title—

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of the first instance is the federal Interstate Land Sales Full Disclosure Act ("ILSFDA")(15 U.S.C. § 1701 et. seq.) claims.

Respondents were developers (collectively, "Developers") of a failed residential condominium development in Minneapolis, MN (the "Development") and their real estate ("Burnet Realty") and escrow and disbursing agent ("Commonwealth").

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

Developers then compounded these initial material misrepresentations and omissions by adding two additional floors to the Development, further delaying the start of construction and further extending its completion date. Ultimately, these delays and the enlarged construction plan resulted in cost overruns that subjected the Development to mechanic's liens that Developers were unwilling to pay. Developers and Burnet Realty made other material representations which were not true and omitted material facts regarding the development. Developers also engaged in other conduct identified in the complaint that operated or would operate as a fraud or deceit upon Streambend.

Commonwealth, the escrow and disbursing agent of Developers, accepted Streambend's earnest monies relating to the Development, but then disbursed them without Streambend's permission. The earnest monies were spent on Developers' loan closing costs when the agreement between Developers and Streambend only permitted them to be spent on construction costs and then only if a disbursement request was made to Streambend.

Developers and Burnet Realty first motioned for dismissal for failure to state a claim for which relief can be granted. Inter alia, the parties argued Streambend failed to sufficiently allege their use of means of interstate commerce or of the mails. The District Court agreed and dismissed the ILSFDA claims. On appeal, the Court of Appeals reversed this finding. Eighth Circuit Case No. 11–2114.

Developers next motioned for dismissal of Streambend's ILSFDA claims for failure to plead fraud with specificity. Citing a single non-

precedential case not containing any supporting rationale, they claimed that ILSFDA claims were subject to the heightened pleading standard of Federal Rules of Civil Procedure 9(b).

Wischermann Partners, Inc. and Paul Wischermann also argued a failure to plead specific conduct related to their involvement. Burnet Realty argued that an earlier Eighth Circuit reversal did not apply to claims against it and that Streambend should not be permitted to amend its complaint to add prior dismissed and additional counts. On a motion for summary judgment, Commonwealth argued that its conduct relating to the Development was not covered by ILSFDA.

Streambend opposed these motions, citing numerous persuasive authorities concluding that fraud is not an element of ILSFDA claims. However, as this legal question had never been addressed by the Federal District of Minnesota or Eight Circuit Court of Appeals, none of these authorities were precedential.

On July 10, 2013, the district court concluded that "[s]ection 1703(a)(2)(A)-(C) proscribes fraudulent conduct" and that the complaint failed to plead this fraud with particularity. App. 47a. The dismissal motions were therefore granted. Streambend's remaining state law claims were dismissed without prejudice based on the district court's election not to exercise supplemental jurisdiction. App. 51a-52a.

Less than one month later, on August 7, 2013, the Consumer Financial Protection Bureau ("CFPB") concluded that "[s]cienter is not required to establish a violation of §1703(a)(2)(A), (B), or (C)."(see *In re 3D Resorts-Bluegrass, LLC*, Administrative File No.

2013-CFPB-0002 at 10 fn.7). This determination by the CFPB Enforcement Director was reported on the CFPB's website, but does not appear in any traditional precedent-reporting database or in the Federal Register. On December 2, 2013 the Director of the CFPB concurred with the determination of the Enforcement Director.

On March 20, 2014, the district court found the following regarding Commonwealth relating to its summary judgment motion:

> Nothing about Commonwealth's role as escrow agent [or its additional role to supervise the disbursement of loan funds under the construction loan agreement] indicates that Commonwealth represented, or acted for or on behalf of, a developer in selling or offering to sell the condominiums to Plaintiffs.
>
> App. 38a.

The district court entered Judgment on March 21, 2014. Streambend appealed to the Eighth Circuit. The Eighth Circuit found that:

> "Subsections (A) and (C), like Rule 10b-5(a) and (c), are explicitly grounded in fraud. They prohibit the seller of property from "employ[ing] any device, scheme, or artifice to defraud," or "engag[ing] in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser."
>
> App. 22a.

. . . . and . . . .

"There also were no allegations of intentional wrongdoing (scienter) by any defendant."

App. 24a.

. . . and . . . (regarding Subsection (B))

"Unlike § 1703(a)(2)(A) & (C), this provision [i.e., subsection B] is not explicitly grounded in fraud."

App. 24a.

. . . . and . . . .

"In avoiding averments of fraud, Streambend failed to allege that the Developers never intended to fulfill their contractual promises to perform future undertakings. Absent an allegation defendants made promises they did not intend to keep, these allegations sound in breach of contract, not tortious misrepresentation."

App. 26a.

The Eighth Circuit therefore upheld the conduct of the district court. It also affirmed the dismissal of Burnet (App. 17a) and summary judgment in favor of Commonwealth (App. 31a-32a).

Streambend filed a petition for writ of certiorari. However, while timely-mailed, the Clerk of Supreme Court found that it was not timely filed. In the process of contacting the CFPB to solicit an amicus brief in support of the petition for writ of certiorari, Streambend discovered the CFPB determinations.

Recognizing the 2013 CFPB determinations as new precedential authority binding upon the Minnesota Federal District and Eighth Circuit and which further demonstrated the clear error in the earlier decisions, Streambend filed a Federal Rule of Civil Procedure 60(b) motion for relief from the judgment.

The district court found the Rule 60 motion to be an improper collateral attack on the entered judgment and therefore refused to address the merits of the arguments. App. 8a. On appeal, the court of appeals concurred and further found that it lacked the authority to overturn a decision of a prior appellate panel. App. 4a. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 27, 2017. App. 1a.

REASONS FOR GRANTING THE PETITION

I. PRELIMINARY STATEMENT

If the Court is confused by the obvious disconnect between the appellate court finding that subsection B of 15 U.S.C. § 1703(a)(2) does not require proof of fraud and its finding two pages later that "absent an allegation defendants made promises they did not intend to keep," these allegations were insufficient to allege a subsection B claim, understanding why the disconnect exists will eliminate the confusion.

Understand that the monsters who roam our world destroying things often have enablers who permit – and sometimes participate in – their destruction.

The Strategic Plan for the Federal Judiciary (September 2015) defines as its highest Core Value

the "Rule of Law, which it defines as "legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law." Other Core Values include Equal Justice (fairness and impartiality); Accountability (stringent standards of conduct); Excellence (adherence to the highest jurisprudential and administrative standards); and, Service (commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States).

Not even one of these Core Values was adhered to in the present matter. Unfortunately, adherence to these Core Values has become the exception rather than the rule across the entire federal judiciary.

This failure of adherence to Core Values is documented and tracked by the federal judiciary itself. The percent of civil actions reaching trial was 1.0% during the 12-month period ending September 30, 2016. Table 4.10—U.S. District Courts–Civil Judicial Facts and Figures (September 30, 2016). For a similar 12-month period in 1990, that number was 4.3%. Id. And as recently as 1968, that number was 12%. Galanter, Marc, and Angela M. Frozena, "A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts," 143 Daedalus 115, 117 Fig. 1 (2014);[1] relying upon the Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2012).

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[1] Accessible at http://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/.

The effective elimination of jury trial and due process rights disproportionately impacts plaintiffs. For example, in the third quarter of 1985, plaintiffs won almost 70% of federal cases that were adjudicated to completion. By 2009, the plaintiffs' win rate had dropped to 33%. Lahav, Alexandra D. and Siegelman, Peter, The Curious Incident of the Falling Win Rate (July 7, 2017);[2] relying upon the Administrative Office of the US Courts Civil Terminations dataset (1980-2009).

The monsters who roam our world destroying things often have enablers who permit their destruction. This is the story of one monster in the Federal District of Minnesota who seeks to destroy the Seventh Amendment jury trial right, the Fifth Amendment due process right, and the Federal Judiciary's Core Values. This is also the story of the enablers in the Eighth Circuit who not only permit, but affirmatively participate in, this destruction.

II. CIRCUIT COURT ERRED IN DISMISSING WITH PREJUDICE ILSFDA CLAIMS

15 U.S.C. § 1703(a) states in relevant part:

> "PROHIBITED ACTIVITIES It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—
>
> (2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702 (a) of this title—

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[2] Accessible at SSRN: https://ssrn.com/abstract=2993423 or http://dx.doi.org/10.2139/ssrn.2993423.

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision;

(C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser."

A. ILSFDA Requires No Proof of Fraudulent Intent

The tale of remedial consumer protection Acts for important financial transactions is approaching the end of its first century. It began in 1933 with the passage of the Securities Act of 1933 and continued with the Securities Exchange Act of 1934. The United States Supreme Court found that Section 10 of the Securities Exchange Act of 1934 related to "any manipulative or deceptive device or contrivance." *Ernst & Ernst v. Hochfelder*, 425 US 185, 195 (1976). Rule 10b-5, which was promulgated under the rule-making authority provided by Section 10, is titled "Employment of manipulative and deceptive devices." It is based on this language and the legislative history of the enactment of the Securities Exchange Act of 1934 that a split Supreme Court – over the objections of the Securities and Exchange Commission – found that the first and third of its three subsections were grounded in fraud. Id at 197, 199. In contrast, in evaluating 15 U.S.C. § 77q(a)(1-3), which derives from

the Securities Act of 1933 (not 1934, and therefore possessing a different legislative history) and is titled, "Use of interstate commerce for purpose of fraud or deceit," a split Supreme Court found subsection 1 requires proof of scienter, but subsections 2 and 3 do not. *Aaron v. SEC*, 446 US 680, 701-02 (1980).

ILSFDA was passed by Congress in 1968. In its first version, the three subsections of 15 U.S.C. § 1703(a)(2) were identical to their respective subsections addressed in *Hochfelder* and *Aaron*. Because early judicial treatment of this remedial Act left Congress dissatisfied, and perhaps because of *Hochfelder* and the ongoing case of *Aaron*, Congress amended ILSFDA in 1979 to broaden its protections. The section in dispute in this action removes all reference to fraud and is simply titled, "Prohibited Activities." 15 USC §1703(a).

The 1979 amendments to ILSFDA also eliminated personal reliance as an element of proof, changed the means for evaluating materiality, expanded the statute of limitations and expressly brought omissions of material fact into the realm of actionable claims. Further, they broadened the scope of the Act to encompass all conduct "with respect to" a covered activity. "With respect to" is inclusive of "an indirect relationship between the regulations and [conduct]." *Lorillard Tobacco Co. v. Reilly*, 533 US 525, 547 (2001).

HUD weighed in on the 1979 version of ILSFDA in *Pierce v. Apple Valley, Inc.*, 597 F. Supp. 1480, 1492 (S.D.Ohio 1984) ("The emphasis is placed upon the effect of the prohibited act, not the intent or knowledge with which it is done."). The Colorado Supreme Court did as well. *Ackmann v. Merchants*

Mortgage & Trust Corp., 645 P.2d 7, 16-17 (Colo.1982) ("we follow other courts that have held that liability under the ILSFDA is not constrained by the same requirements necessary to establish common law fraud"). The Ninth and Eleventh Circuits similarly concurred. *United States v. Dacus*, 634 F.2d 441, 446 (9th Cir.1980); Pattern Jury Instructions, Civil Cases, Eleventh Circuit (2005 revision) 13.1.

In 2010, "all powers and duties that were vested in the Secretary of HUD" were transferred to the CFPB. On December 2, 2013 and on May 1, 2015, the CFPB issued determinations disclosing its interpretation of key sections of ILSFDA, definitively resolving matters of law that are in dispute in the present action. In *In Re 3D Resorts-Bluegrass, LLC*, (2013-CFPB-0002) the CFPB reaffirmed the 30-year old position of its predecessor entity that scienter is not an element of any ILSFDA claim ("Scienter is not required to establish a violation of §1703(a)(2)(A), (B), or (C)"). See also *In Re: International Land Consultants, Inc., Rocco Toscano, Joseph Mazzucco, James Vincent, and James Tague* (2015-CFPB-0010).

B. CFPB Determination is Precedential

Prior to the 2013 CFPB determination that ([s]cienter is not required to establish a violation of §1703(a)(2)(A), (B), or (C)," there was no precedent binding upon the Minnesota Federal District or the Eighth Circuit.

Because the determination of the CFPB is both reasonable and consistent with ILSFDA's legislative history, as well as with the judicial history of its sister statutes, Chevron deference should be accorded it. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

However, even if Chevron deference were not accorded the CFPB determination, *Skidmore* deference should then apply because: a) the CFPB adopted the more than 30-year-old interpretation of its predecessor entity (HUD); b) this determination is consistent with every other major court to evaluate the statute (i.e., the Ninth and Eleventh Circuits, and the Colorado Supreme Court); and, c) this determination is obviously correct when considering the actual language and legislative history of the statute and the judicial history of its sister statutes. *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944).

Whereas prior to the 2013 CFPB determination that ([s]cienter is not required to establish a violation of §1703(a)(2)(A), (B), or (C)" there was no precedent binding upon the Minnesota Federal District and the Eighth Circuit, now there is.

C. CFPB Determination Entitled to Retrospective Operation

On July 10, 2013, the district court concluded that ILSFDA claims require proof of fraud. Less than one month later, on August 7, 2013, the CFPB determined that ILSFDA claims do not require proof of fraud. While this determination by the CFPB Enforcement Director was reported on the CFPB's website, it did not appear in any traditional precedent-reporting database or in the Federal Register. On December 2, 2013 the Director of the CFPB concurred with the determination of the Enforcement Director. Id. Doc. 33.

As the present action was still pending before the district court, the CFPB determination is unquestionably subject to retrospective operation.

"[R]etrospective operation [] has governed judicial decisions . . . for near a thousand years." *Harper v. Virginia Dept. of Taxation*, 509 U. S. 86, 94 (1993) (internal quotations omitted).

> "When [a precedent-setting body] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [its] announcement of the rule. . . .
>
> Id. at 97 (1993) (internal citations and quotations omitted).

The CFPB's "construction of [the] statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994).

This retrospective operation must occur even after judgment is final. *Agostini v. Felton*, 521 US 203, 236 (1997) (law of the case doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice); *Hazel-Atlas Co. v. Hartford Co.*, 322 US 238, 248-49 (1944) ("federal appellate courts have the power to pass upon, and hence to grant or deny, petitions for bills of review even though the petitions be presented long after the term of the challenged judgment has expired."); *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010) ("exercise of a court's equity powers ... must be made on a case-by-case basis."); *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005) ("[W]e give little weight to

respondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality.").

D. Retrospective Operation is a Valid Basis for a Rule 60 Motion

One basis under which Streambend sought Rule 60 relief was for retrospective operation of the CFPB determinations regarding ILSFDA.

The district court found that Petitioner's Rule 60 motion was an improper collateral attack on the Eighth Circuit's affirmation of the district court judgment. App. 8a. On appeal, the court of appeals concurred and further found that it lacked the authority to overturn a decision of a prior appellate panel. App. 4a. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on December 27, 2017. App. 1a.

However, these findings are inconsistent with the Supreme Court findings in *Harper v. Virginia Dept. of Taxation*, 509 U. S. 86, 94 (1993), *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994), *Agostini v. Felton*, 521 US 203, 236 (1997), *Hazel-Atlas Co. v. Hartford Co.*, 322 US 238, 248-49 (1944), *Holland v. Florida*, 130 S. Ct. 2549, 2563 (2010), and *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). Therefore, these findings should be reversed.

E. Clear Error, Unsoundness and Manifest Injustice are Valid Bases for a Rule 60 Motion

Three additional bases under which Streambend sought Rule 60 relief were to correct clear error, unsoundness and prevent manifest injustice. These

findings too are inconsistent with the Supreme Court precedents identified above.

For the above reasons, the lower courts erred in denying Streambend's Rule 60 motion.

III. COURT DENIED PETITIONER RIGHT TO A TRIAL BY JURY

"One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons v. Bedford*, 28 U. S. 445 (1830). Therefore, the Seventh Amendment was passed, which provides:

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

In *Baltimore & Carolina Line, Inc. v. Redman*, 295 US 654, 55 S. Ct. 890 (1935), the court found:

> The right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted. The Amendment not only preserves that right but **discloses a studied purpose to protect it from indirect impairment** through possible enlargements of the power of reexamination existing under the common law, and to that end declares that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. (**emphasis** added).

The studied purpose found in the Seventh Amendment relating to one well-known form of indirect impairment should not be construed to mean that all other forms of indirect impairment are permissible. Indirect impairment now results from numerous forms of pre-examination inherent in present-day procedures, like those found in summary judgment, dismissal, and admissibility pre-examinations.

A new summary judgment standard was created in *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 265 (1986). In response to this new standard, Justice Brennan asked: "how does a judge assess how one-sided evidence is, or what a 'fairminded' jury could 'reasonably' decide?" He also identified his "grave concerns [] concerning the constitutional right of civil litigants to a jury trial." Id. at 267.

A new dismissal allegation exception was created in *Papasan v. Allain*, 478 US 265, 286 (1986) ("we are not bound to accept as true a legal conclusion couched as a factual allegation"). However, this "new" exception was of an ancient, intentionally-discarded lineage. "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'"[3]

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[3] See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 439 fn. 29 (1986). "To make the point clearer, the drafters prepared a series of form complaints that were by definition sufficient to satisfy the new standard. These forms were startlingly brief." Id. (citing FED. R. CIV. P. Form 9); see also Edson R. Sunderland, The New Federal Rules, 45 W. VA. L.Q. 5, 12 (1938) (discussing the intentional omission of the word "fact" and stating "[t]he reason for that is, nobody knows what 'facts' are; courts have been trying for five hundred years to find 'facts'

Another new dismissal standard was created in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007). In response to this new standard, Justice Stevens asked and answered: "Does a judicial opinion that the charge is not 'plausible' provide a legally acceptable reason for dismissing the complaint? I think not." And looking at the implications of *Papasan* in the context of the allegations in Twombly, Justice Stevens found it "mind boggling." Id. at 1984.

As evident, numerous indirect impairments to the Seventh Amendment have been created in the very recent history. See also e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). While the indirect impairment of the Seventh Amendment caused by any one of these changes may not be well known, their collective impact is well documented.

The percent of civil actions reaching trial was 1.0% during the 12-month period ending September 30, 2016. Table 4.10—U.S. District Courts–Civil Judicial Facts and Figures (September 30, 2016). For a similar 12-month period in 1990, that number was 4.3%. Id. And as recently as 1968, that number was 12%. Galanter, Marc, and Angela M. Frozena, "A Grin without a Cat: The Continuing Decline & Displacement of Trials in American Courts," 143 Daedalus 115, 117 Fig. 1 (2014);[4] relying upon the Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2012).

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and nobody has ever been able to draw a line between what were and what were not 'facts'").

[4] Accessible at http://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/.

Moreover, the District of Minnesota is the worst abuser of constitutional jury trial rights within the Eighth Circuit. During the 12-month period ending September 30, 2017, only 0.40% of Minnesota Federal District cases were resolved by a jury, 38% worse than the average of 0.64% for the entire Eighth Circuit. [5]

As evident from the Administrative Office statistics, the federal courts' Race to Zero for civil jury trials began long before the significant indirect impairments introduced by the Supreme Court in 1986 and subsequently. Federal judges already succeeded in reducing jury trials from 12% to 4.3% without these new impairments. The present case presents an example of how jury trial rights are impaired by a host of more classic methods highlighted below.

Citation Neglect: Streambend supported its argument that its ILSFDA claims required no proof of scienter with sound, persuasive citations, including the opinion of HUD (*Pierce v. Apple Valley, Inc.*, 597 F. Supp. 1480, 1492 (S.D.Ohio 1984)), the Colorado Supreme Court (*Ackmann v. Merchants Mortgage & Trust Corp.*, 645 P.2d 7, 16-17 (Colo.1982)), and numerous federal district courts. The Developers, Burnet and Commonwealth cited one case

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[5] Administrative Office of the U.S. Courts, Caseload Statistics Data Tables, Table C-4A (Sept. 30, 2017) (http://www.uscourts.gov/file/23803/download). Minnesota also provided litigants the fewest trial dispositions by a significant margin, pairing its 0.40% jury disposition rate with a 0.13% bench trial disposition rate. The next most restrictive Eighth circuit district (E.D.Mo.) had a combined 0.56% combined bench and jury trial disposition rate, 6% higher than Minnesota's combined 0.53% rate.

(*Degirmenci v. Sapphire-Fort Lauderdale, LLLP*, 693 F.Supp.2d 1325, 1343-44 (S.D.Fla.2010)) containing no rationale for its conclusion and not even representing valid law in its own jurisdiction. See Pattern Jury Instructions, Civil Cases, Eleventh Circuit (2005 revision) 13.1. Streambend's argument and citations were undeniably more persuasive. It is exactly because the citations were more persuasive that neither the district court nor the appellate court elected to acknowledge or address them.

Citation Misdirect: Both the district court and the appellate court chose to issue and affirm findings each knew did not reflect the law. For example, the analysis the appellate court undertook identified ILSFDA's two sister statutes, but then only considered the more restrictive 1934 Exchange Act statute rather than the less restrictive 1933 Securities Act statute. Compare *Ernst & Ernst v. Hochfelder*, 425 US 185, 195 (1976) to *Aaron v. SEC*, 446 US 680, 701-02 (1980). It is exactly because addressing *Aaron* would have required the appellate court to admit that both subsections B and C of ILSFDA do not require proof of fraud and that addressing both *Hochfelder* and *Aaron* together in the context of the language and legislative history of ILSFDA would have required the appellate court to admit that none of subsections A, B, or C of ILSFDA require proof of fraud that the circuit court elected to only include analysis of *Hochfelder* in its opinion.

Rule 9 Surprise: Even in adopting the most restrictive 1934 Exchange Act interpretation to Streambend's ILSFDA claims, the appellate court would have been required to conclude that subsection B did not require proof of fraud, which it initially did. App. 24a. Admitting this, it then found that Fed. R.

Civ. P. 9(b) could nonetheless potentially apply to the claims. App. 24a. But if proof of fraud is not required, then under the plain language of the Federal Rules, particularity is not required because any allegation of fraud would be a surplusage to the facts required to prevail upon the claim. *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314-315 (8th Cir.1997).

Indeed, the Eighth Circuit even exposes its backup findings, concluding that the Rule 8 pleading standard is functionally identical to the Rule 9 pleading standard. To accentuate its point, the circuit court cites to *In re Buffets, Inc. Sec. Litig.*, 906 F. Supp. 1293, 1298 (D. Minn. 1995). The court in *In re Buffets* summarizes its belief as follows: "By complying with the requirements of Rule 8, it is likely that a Complaint will also comply with Rule 9(b)." Id. at 1298. In other words, the court claims that Rule 9 is not a "heightened" pleading standard at all, but instead that the general pleading requirement of Rule 8 and the particularity pleading requirement of Rule 9 are functionally identical.

Glaring Aggression: Even after admitting that subsection B did not require proof of fraud (App. 24a), the appellate court nonetheless dismissed these claims because it found that:

> In avoiding averments of fraud, Streambend failed to allege that the Developers never intended to fulfill their contractual promises to perform future undertakings. Absent an allegation defendants made promises they did not intend to keep, these allegations sound in breach of contract, not tortious misrepresentation.

App. 26a.

However, "to promise what one does not mean to perform, or to declare an opinion as to future events which one does not hold, is a fraud." *Walling v. Beverly Enterps Corp.*, 476 F.2d 393, 396 (9th Cir. 1973), citing *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896). Therefore, after admitting that Streambend's subsection B claims did not require proof of fraud, it nonetheless dismissed its subsection B claims because they did not allege fraud.

Catch-22: The Eighth Circuit admitted that ILSFDA claims under Subsection B do not require proof of fraud. However, it nonetheless found that fraud must be alleged and that otherwise the claims are deficient. App. 26a. And it also found that if fraud were alleged, the claims would be subject to Rule 9(b) particularity requirements, which it would never find were satisfied. App. 24a.

The circuit court tacitly admits that there were no circumstances by which it would find Streambend's complaint sufficient to survive dismissal. The Complaint was dead on arrival regardless of its contents. This is a classic Catch-22.

The On Other Grounds Con: The On Other Grounds Con nearly always involves sua sponte decision-making on issues which the parties were never provided an opportunity to be heard. Such was the circumstances in this matter. App. 25a. However, the con does not work independently, but instead must be accompanied by another method. Here the circuit court employed the oldest method – the First Method – the Can't See It method.

The court claims that:

Streambend alleged that the Declaration provided identical and thus false legal descriptions for the Ivy Residence and the related Ivy Hotel, but it failed to allege that this was an untrue and material statement of fact.

App. 26a-27a.

However, the definition of "untrue" is "not in accordance with fact or reality; false or incorrect." Google Search: "define: 'untrue'." Therefore, the complaint alleged that the legal description was untrue. Second Amended Complaint ("SAC") ¶134(g), 59. Further, The House Report for the 1979 amendments to ILSFDA stated that although "actual reliance" was being eliminated as an element of proof, "in proving that an untrue or omitted fact was material, it must be established that the fact was important enough that a reasonable person would have relied upon it in making a decision to purchase or lease that particular piece of land." H.R. Rep. 96-154, 35, 1979 U.S.C.C.A.N. 2317, 2350; incorporating the materiality finding in *Paquin v. Four Seasons of Tennessee, Inc.*, 519 F.2d 1105, 1109 (5th Cir. 1975). See also *Santidrian v. Landmark Custom Ranches, Inc.*, 405 F. App'x 381, 384 (11th Cir. 2010). The complaint alleges this fact. SAC ¶139.

The court claims that:

> Streambend alleged that "Developers failed to disclose that two additional floors would be added . . ." but failed to allege when the floors were added and how this was a material nondisclosure "with respect to the sale."

App. 27a.

However, the SAC alleges that "Subsequent to Plaintiffs' signing of the Ivy II Purchase Agreement and the Ivy VIII Purchase Agreement, two additional floors were added to the Ivy Hotel + Residence." SAC ¶64. It alleges that "No amended Disclosure Statements were provided to Plaintiffs coincident with the addition of the two floors disclosing an amended Allocation of Voting Power, Interest in Common Elements and Assessments and none have ever been provided to Plaintiffs." SAC ¶65. It alleges that "By adding two additional floors, Defendants increased the costs of the Development and the timeline for its completion, without consideration of the impact of this unilateral decision upon Plaintiffs. Ultimately, this unilateral decision contributed to the damages Plaintiffs suffered when Developers ran behind schedule and ultimately ceased funding the Development." SAC ¶65. It alleges that "Developers failed to disclose that two additional floors would be added to the Development, thereby adding more units than initially represented, increasing construction and financing costs, and delaying the completion of construction of the Development." SAC ¶135. Finally, it alleges that "The statements or omissions above were important enough that a reasonable person would have relied upon them in making a decision to purchase a unit within the development." SAC ¶139.

Moreover, under ILSFDA. "[I]nvestors are not generally required to look beyond a given document to discover what is true and what is not." *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 887 (9th Cir.), cert. denied, 129 S.Ct. 161 (2008); "[W]hen a seller draws attention to information which is favorable to the sale of the lot and delays providing contradictory information, a predisposition is created. Any subsequent

information of a countervailing nature must be highlighted; it is not sufficient simply to deliver the information to the purchaser. The seller by omission has taken on an affirmative obligation to make the statements clear and unambiguous to the purchaser." H.R. Rep. 96-154, 35, 1979 U.S.C.C.A.N. 2317, 2350-2351.

By not amending the Disclosure Statement (as alleged at SAC ¶65) to reflect the addition of two floors, and highlighting this information, making it clear and unambiguous, Respondents remain liable to Streambend for their omissions and prior contradictory representations. Streambend's SAC adequately alleged its claims.

After a long lead-up, the court claims that:

> These later events obviously did not affect Streambend's decision to enter into the purchase agreements.
>
> App. 27a.

However, personal reliance was eliminated as an element of proof as part of the 1979 amendments. The House Report for the 1979 amendments to ILSFDA stated that although "actual reliance" was being eliminated as an element of proof, "in proving that an untrue or omitted fact was material, it must be established that the fact was important enough that a reasonable person would have relied upon it in making a decision to purchase or lease that particular piece of land." H.R. Rep. 96-154, 35, 1979 U.S.C.C.A.N. 2317, 2350; incorporating the materiality finding in *Paquin v. Four Seasons of Tennessee, Inc.*, 519 F.2d 1105, 1109 (5th Cir. 1975). See also *Santidrian v. Landmark Custom Ranches,*

Inc., 405 F. App'x 381, 384 (11th Cir. 2010). Again here, Streambend's SAC adequately alleged its claims.

It's Something Else: If the Can't See It method is the oldest and First Method, the It's Something Else method is most certainly the Second Method. The circuit court found:

> The only involvement of Commonwealth, a title company, was to accept earnest money deposits after sales were negotiated, and to disburse those funds for construction costs in accordance with the purchase agreements. On these undisputed facts . . .
>
> App. 31a.

However, the undisputed facts are that Commonwealth disbursed most of the funds for loan closing costs – which are not construction costs – rather than construction costs and that, although the purchase agreements required that a request be made to Streambend and that Streambend agree to the request, Commonwealth had no evidence of any request being make or of Streambend's acquiescence to any request relating to either of the two separate disbursements from Streambend's trust accounts. Therefore, the court intentionally misrepresents the undisputed facts, stating that the facts are exactly opposite to their true state.

Ignore It: The circuit court employed both the It's Something Else and the Ignore It methods relating to Commonwealth. It found:

> Commonwealth cannot be deemed an agent or developer because it did not, directly or indirectly, sell or offer to sell Ivy Tower condominium units,

> or represent a developer in doing so, as the statutory definitions require.
>
> App. 31a.

However, the court intentionally left out the operative phrase "with respect to" contained at 15 U.S.C. § 1703(a)(2). "With respect to" is inclusive of "an indirect relationship between the regulations and [conduct]." *Lorillard Tobacco Co. v. Reilly*, 533 US 525, 547 (2001). It is indisputable that the conduct of Commonwealth in accepting Streambend's earnest monies and then unlawfully removing them without its permission took place and that escrow agreements in general take place "with respect to" the sale or offer of sale of the condominium units. Without the sale or offer of sale, there would be no escrow agreement.

Therefore, Streambend, and not Commonwealth, was entitled to summary judgment.

Paper Tiger: Once Streambend discovered the CFPB determinations bearing directly upon its claims and consequently brought a Rule 60 motion for relief, both the district and appellate courts declined to follow Supreme Court precedent and instead pretended that Rule 60 could not be employed for retrospective operation and could not correct the prior error. This claim that the courts are simply paper tigers does not accord with Supreme Court precedent.

As demonstrated above, the federal courts' Race to Zero for civil jury trials is aided by a host of time-tested and more recently introduced methods of eliminating valid claims. It is the combination of these methods – these indirect impairments to the Seventh Amendment – that has effectively eliminated the right completely. These impairments have denied

a substantial number of federal court litigants their Seventh Amendment rights. These impairments deny Petitioner its Seventh Amendment rights.

IV. COURT DENIED PETITIONER RIGHT TO DUE PROCESS

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

As demonstrated above, Streambend was denied its right to a trial by jury. Additionally, it was also denied its right to due process of law before being deprived of its property rights in the form of its claims against Respondents.

This due process denial took the following specific forms: a) the systematic and wrongful dismissal or grant of summary judgment to each defendant; b) the collective outcome of each of these individual dismissals/judgments, which was to dismiss the action and thereby deny Streambend the justice to which it was fairly entitled; c) the substitution of new

erroneous findings by the Eighth Circuit; d) the provision of entirely new findings at the appellate stage such that Streambend was never provided a full and fair opportunity, other than through the disfavored opportunity to seek reconsideration, to respond to the specific new arguments resulting in the dismissal of its claims; e) the denial of Streambend's right to a jury trial when a material factual dispute existed; and f) the denial of its right to fully and fairly litigate (and to prevail on) its action when it otherwise would have absent the judicial conduct exhibited in this case.

The effective elimination of Seventh Amendment jury trial rights as a result of all of the more recently-created indirect impairments disproportionately impacts plaintiffs. For example, in the third quarter of 1985, plaintiffs won almost 70% of federal cases that were adjudicated to completion. By 2009, the plaintiffs' win rate had dropped to 33%. Lahav, Alexandra D. and Siegelman, Peter, The Curious Incident of the Falling Win Rate (July 7, 2017);[6] relying upon the Administrative Office of the US Courts Civil Terminations dataset (1980-2009).

"As you've probably realized, the elephant in the room (or, in this case, the study) is judicial attitudes." Frankel, Allison; "Stunning drop in federal plaintiffs' win rate is complete mystery – new study" Reuters, June 28, 2017.[7]

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[6] Accessible at SSRN: https://ssrn.com/abstract=2993423 or http://dx.doi.org/10.2139/ssrn.2993423.

[7] Accessible at https://www.reuters.com/article/us-otc-mystery/stunning-drop-in-federal-plaintiffs-win-rate-is-complete-mystery-new-study-idUSKBN19J2MB.

All of the new indirect impairments to the Seventh Amendment have resulted in a drop in plaintiff win rates from 70% in the third quarter of 1985 to 33% by 2009. Many plaintiffs who were entitled to prevail on their claims had they been provided due process of law are now no longer prevailing on their claims. This denial of due process has deprived these plaintiffs of their property right in a successful outcome they were entitled to receive.

This impairment has denied a substantial number of federal court litigants their Fifth Amendment due process rights. This impairment also denies Petitioner its Fifth Amendment due process rights.

It is apparent – and also inherently and intuitively obvious – that district and appellate court judges who have no concern for preserving Seventh Amendment rights similarly have no concern for preserving Fifth Amendment rights in civil settings.

It is apparent that all of the new indirect impairments to Seventh Amendment jury trial rights created an environment where ordinary judges were transformed into destructive monsters in shockingly-large numbers. In the 10 years from 1985 to 1995, plaintiff win rates in federal courts dropped from 70% to 30%. See Lahav.

What does it say about our system of justice when a circuit court confronted with numerous outrageous, obviously-intentional district court errors elects not to correct the errors, but instead intentionally makes new erroneous findings to cover up the errors?

The district court judge and the appellate court judges presented with this case are all destructive monsters. However, the environment in which they

operate has become so corrupted that many may no longer even recognize that they are monsters. They live in a world where neither the Fifth nor Seventh Amendments have any apparent sway over their actions. The collective actions of the judiciary have destroyed these constitutional protections.

V. DENIAL OF JURY TRIAL AND DUE PROCESS RIGHTS ENDEMIC

As the statistics demonstrate, a plaintiff entitled under our laws to prevail on their cause of action is substantially more likely to be re-victimized by the courts than to obtain justice. Moreover, this victimization is done disproportionately to certain types of plaintiffs. As the Lahay study at 27 demonstrates, it is not the federal or state governments who are being victimized. For example, tax suit win rates are actually up 35%. It is also not large banks and corporations. It is instead entities and people like the Petitioner in this action who are being victimized. The monsters are picking and choosing their victims, preying upon the weakest and most vulnerable.

As the Lahay study (at 1) documents, in the federal courts alone, district court judges selected approximately 377,000 victims to be denied justice during the period between the third quarter of 1985 and the third quarter of 2009. This translates to approximately two judicial abuse victims per hour.

Unfortunately, these same impulses in the judiciary to deny plaintiffs justice exist in the state courts. For example, on average, state district court justices disregard the jury trial rights of their respective state constitutions at a greater rate than their federal counterparts. Whereas the federal jury

trial rate was 0.63% in the 12-month period ending September 30, 2017, the state jury trial rate in the calendar year 2016 for the 24 states reporting to the Court Statistics Project was 0.19%, more than three times less frequent than the miserable federal court rate.[8] If one were to apply the 37% decline in plaintiffs' win rates to the 4,057,357 cases resolved by these 24 state courts in 2016, this translates to 1,501,222 victims per year, or 2.86 judicial abuse victims every minute.

Petitioner's owner has been victimized at least ten different times by various federal and state courts, including being improperly found a frivolous litigant three different times for refusing to be silent in the face of egregious judicial misconduct like that presented in this case. This victimization is in part the legacy of *Anderson v. Liberty Lobby, Inc.* and *Papasan v. Allain*.

Since the present case is an ILSFDA case, Streambend will demonstrate another example of this victimization as it relates to a contemporaneous ILSFDA case before the Eighth Circuit. Sexton Lofts was a condominium development where the developers started scheduling unit closings without completing a parking structure for the development and without being able to provide clear title to the units. This case before the Federal District of

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[8] Compare Administrative Office of the U.S. Courts, Table 4-10 (1990–2016) (http://www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2016.pdf) to R. Schauffler, R. LaFountain, S. Strickland, K. Holt, & K. Genthon, eds. Last updated 11 January 2017 Court Statistics Project DataViewer Accessed 27 January 2018 <www.courtstatistics.org>.

Minnesota[9] and the Eighth Circuit[10] addressed ILSFDA's statute of limitations (15 U.S.C. § 1711(a)(2)), which states:

> SECTION 1703(A) VIOLATIONS No action shall be maintained under section 1709 of this title with respect to—
>
> . . .
>
> (2) a violation of subsection (a)(2)(A), (a)(2)(B), or (a)(2)(C) of section 1703 of this title more than three years after discovery of the violation or after discovery should have been made by the exercise of reasonable diligence.

Petitioners requested a trial by jury. At the dismissal stage, the district court found that the 15 U.S.C. § 1711(a)(2) limitations period could be initiated by either "actual or constructive knowledge." It identified a date which it claimed "triggered [Plaintiffs'] duty to exercise reasonable diligence and determine whether the Developers had constructed the parking ramp" and held that, "on the face of the SAC, Plaintiffs' ILS[FD]A claims are barred by the statute of limitations. Therefore, [the ILSFDA counts] are dismissed with prejudice."

When Plaintiffs' later moved to amend its ILSFDA claims, the court found that the "law of the case prevents [Plaintiffs'] from resurrecting these claims, which were dismissed with prejudice." Judgment in favor of Defendants was entered.

Dismissal was error because: a) when discovery of a violation occurs, what is reasonable diligence under

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[9] D.Minn. No. 10-CV-4745 (MJD/SER).

[10] Eighth Circuit No. 14-1450.

the circumstances and whether discovery would have occurred if such diligence were exercised are all fact-based jury questions; b) constructive knowledge cannot trigger the running of an ILSFDA statute of limitations; c) each ILSFDA violation is subject to its own limitations period instead of there being a single limitations period for all ILSFDA violations; d) a complaint need not allege facts to overcome affirmative defenses as affirmative defenses are instead pleaded by defendants; e) the complaint nonetheless did allege facts sufficient to overcome the statute of limitations affirmative defenses; f) the "law of the case" doctrine does not govern pre-appeal matters; g) amendment of a complaint is subject to a freely-given standard; h) the CFPB determination that "investors are not generally required to look beyond a given document to discover what is true and what is not" contradicts the level of "reasonable diligence" implicitly required to sustain the court's finding; and, i) when confronted with the precedential CFPB determination in the form of a Rule 60 motion, the court erred by not reversing the dismissal.

The Strategic Plan for the Federal Judiciary (September 2015) defines Core Values that only rarely exhibit their presence in the federal courts. The Rule of Law (legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law), Equal Justice (fairness and impartiality), Accountability (stringent standards of conduct), Excellence (adherence to the highest jurisprudential and administrative standards), and, Service (commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the

United States) are no longer valued by the courts. Nor is the Constitution, or at least the Fifth and Seventh Amendments thereof.

Indeed, some seasoned judicial participants and researchers in this area have concluded that the destruction of these values and rights is so complete as to be irreparable. As the above brief and its supporting citations demonstrate, we are undeniably living in an Age of Un-Law. It is incumbent upon the Supreme Court to lead the process of navigating our way out of this abhorrent state.

CONCLUSION

The Eighth Circuit entered a decision in conflict with the decision of the CFPD, HUD, the Ninth and Eleventh Circuits and the Colorado Supreme Court. Further, the accepted and usual course of judicial proceedings have so far departed from the alleged Core Values of the federal judiciary as to call for an exercise of this Court's supervisory power.

Petitioner respectfully prays that the Court grant this petition.

Respectfully submitted,

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