APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1293

Streambend Properties II, LLC; Streambend Properties VIII, LLC

Plaintiffs - Appellants

v.

Ivy Tower Minneapolis, LLC, et al

Defendants - Appellees

Appeal from United States District Court for the District of Minnesota – Minneapolis

(0:10-cv-04257-JNE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 27, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1293

Streambend Properties II, LLC; Streambend Properties VIII, LLC

Plaintiffs - Appellants

v.

Ivy Tower Minneapolis, LLC; Ivy Tower Development, LLC; Moody Group, LLC; Goben Enterprises, LP; Wischermann Holdings, LLC; Jeffrey Laux; Gary Benson; Burnet Realty, LLC; Commonwealth Land Title Insurance Company; John Doe; Mary Rowe; XYZ, Corp.

Defendants - Appellees

Appeal from United States District Court for the District of Minnesota - Minneapolis

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Submitted: November 14, 2017

Filed: November 16, 2017

[Unpublished]

Before WOLLMAN, LOKEN, and COLLOTON, Circuit Judges.

PER CURIAM.

We have seen this case thrice before. First, we held Streambend Properties II, LLC and Streambend Properties VIII, LLC (collectively, Streambend) had alleged enough of a connection with interstate commerce to go forward with claims against various parties involved in the development of a residential condominium where Streambend had sought to buy units. See Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 451 Fed. Appx. 627 (8th Cir. 2012) (unpublished per curiam).

Second, we affirmed the subsequent dismissal of some of those claims and the grant of summary judgment to the defendants on the rest. See Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 781 F.3d 1003 (8th Cir. 2015). Third, in an unreported order, we summarily affirmed after the district court denied a motion by Streambend's beneficial owner, Jerald Hammann, to join the case or take Streambend's place as plaintiff. In the second and third appeals, we also denied additional motions originally filed in this court seeking to add Hammann to this litigation.

Now, Streambend appeals from the denial of its motion for relief from the judgment, see Fed. R, Civ. P. 60(b)(6), and a renewed motion for substitution of parties, see Fed. R. Civ. P. 25(c). We agree with the district court1[1] that these motions represent improper attempts to relitigate issues already decided. See SDDS, Inc. v. South Dakota (In re

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[1] The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

SDDS, Inc.), 225 F.3d 970, 972 (8th Cir. 2000); see also Maxfield v. Cintas Corp., No. 2, 487 F.3d 1132, 1134-35 (8th Cir. 2007) (law-of-the-case and prior-panel doctrines). Streambend's challenge to our precedent forbidding the use of Rule 60 motions for such collateral attacks would be unavailing even if we found it persuasive, because we cannot overrule another panel of this court. See Maxfield, 487 F.3d at 1135.

Further, we see no reversible error in the district court's implicit refusal to grant Streambend leave to amend the complaint or conduct limited discovery, as Streambend requested in its briefs. Streambend did not request this alternative relief by motion, did not cite authority supporting it, did not submit proposed amendments for review, and did not offer anything more than speculation about what it expected to discover. Any of these would suffice to justify the district court's decision. See Fed. R. Civ. P. 7(b)(1) (motions); United States v. Sigillito, 759 F.3d 913, 933 (8th Cir. 2014) (legal authority); Popoalii v. Corr. Med. Servs., 512 F.3d 488, 497 (8th Cir. 2008) (proposed amendments); cf. Toben v. Bridgestone Retail Operations, LLC, 751 F.3d 888, 895 (8th Cir. 2014) (discovery). We affirm the denial of Streambend's motions.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Civil No. 10-4257 (JNE)

Streambend Properties II, LLC; Streambend Properties VIII, LLC

Plaintiffs,

v.

Ivy Tower Minneapolis, LLC; Ivy Tower Development, LLC; Moody Group, LLC; Goben Enterprises, LP; Wischermann Holdings, LLC; Jeffrey Laux; Gary Benson; Burnet Realty, LLC; Commonwealth Land Title Insurance Company; John Doe; Mary Rowe; XYZ, Corp.

Defendants.

In March 2014, the Court dismissed Plaintiffs' claims and entered judgment. Plaintiffs appealed, and the Eighth Circuit affirmed. Streambend Props. II, LLC v. Ivy Tower Minneapolis, LLC, 781 F.3d 1003 (8th Cir. 2015).

Approximately one month later, Jerald Hammann, Plaintiffs' owner, submitted Appellants' Motion for Recognition of Assignment of Claims and to Permit Pro Se Representation to the Eighth Circuit. On May 15, 2015, the Eighth Circuit denied the motion.

Approximately one month later, Hammann submitted a Motion for Substitution of Parties to the Eighth Circuit. On June 17, 2015, the Eighth Circuit declined to file the motion: "Hammann has submitted pro se pleadings to the court. The court denied his motion for recognition of assignment of claims and to permit pro se representation on May 15, 2015. Pursuant to that order, these new pleadings will not be filed."

Less than two weeks later, Hammann submitted a Motion for Joinder or Substitution of Parties to this Court. The Court denied the motion.

At approximately the same time, Hammann filed a motion to direct the clerk to file a petition for a writ of certiorari by him, pro se, as assignee in the Supreme Court. The Supreme Court denied the motion in October 2015.

In the meantime, in August 2015, Hammann filed a Motion for Extension of Time to File Notice of Appeal in this Court. The Court denied the motion. Hammann appealed the denials of his Motion for Joinder or Substitution of Parties and his Motion for Extension of Time to File Notice of Appeal. In November 2015, the Eighth Circuit affirmed. The Eighth Circuit also denied Hammann's Motion for Substitution of Parties. In February 2016, Hammann filed a petition for a writ of certiorari. In May 2016, the Supreme Court denied the petition.

Less than one month later, Plaintiffs filed a motion to direct the clerk to file a petition for a writ of certiorari out of time in the Supreme Court. The Supreme Court denied the motion in October 2016.

Approximately one month later, Plaintiffs filed a Motion for Relief from Judgment in this Court. They also filed a Motion for Substitution of Parties. For the following reasons, the Court denies the motions.

Motion for Substitution of Parties

Plaintiffs moved to substitute Hammann in their place, asserting they transferred their interest in this action to him. The Eighth Circuit and this Court have previously denied Hammann's motions for substitution of parties. The Court denies Plaintiffs'

Motion for Substitution of Parties. See Fed. R. Civ. P. 25(c) ("If an interest is transferred, the action may be continued by or against the original party unless the court, on motion, orders the transferee to be substituted in the action or joined with the original party.").

Motion for Relief from Judgment

Plaintiffs moved to vacate the judgment that was entered in March 2014. They relied on Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure. Rule 60(b) states:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

"A motion under Rule 60(b) must be made within a reasonable time . . . ." Fed. R. Civ. P. 60(c).

Citing Pierce v. Apple Valley, Inc., 597 F. Supp. 1480 (S.D. Ohio 1984), and orders issued by the Consumer Financial Protection Bureau in December 2013 and May 2015, Plaintiffs asserted that the Eighth Circuit's decision that affirmed the March 2014 judgment is "clearly erroneous" and conflicts with determinations of the Department of Housing and Urban Development and the Consumer Financial Protection Bureau. They cited Pierce in the brief that they submitted in support of their appeal. Plaintiffs asserted they discovered the Consumer Financial Protection Bureau's determinations after they contacted the Bureau in May 2015.

"Just as a Rule 60(b) motion cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal, nor can it be used to collaterally attack a final court of appeals' ruling in lieu of a proper petition for review in the United States Supreme Court." In re SDDS, Inc., 225 F.3d 970, 972 (8th Cir. 2000). Plaintiffs did not properly petition for review in the Supreme Court. Their Rule 60 motion is an improper collateral attack on the Eighth Circuit's decision that affirmed the March 2014 judgment.

Even if Plaintiffs' Rule 60 motion were not such an improper collateral attack, Plaintiffs did not file the motion within a reasonable time. Plaintiffs filed their Rule 60 motion approximately 32 months after entry of the March 2014 judgment.

Setting aside the timing of Plaintiffs' motion, the Court discerns nothing in Rule 60(b)(5) that affords relief from the March 2014 judgment to Plaintiffs. The March 2014 judgment is not one that "has been

satisfied, released or discharged." It is not "based on an earlier judgment that has been reversed or vacated." And it is not one that has prospective application within the meaning of Rule 60(b)(5). See In re Racing Servs., Inc., 571 F.3d 729, 733 (8th Cir. 2009).

As to Rule 60(b)(6), nothing in Plaintiffs' motion presents extraordinary circumstances that would warrant relief from the March 2014 judgment. See Kan. Pub. Emps. Ret. Sys. v. Reimer & Koger Assocs., Inc., 194 F.3d 922, 925 (8th Cir.1999) ("Rule 60(b)(6) authorizes relief from final judgments in extraordinary circumstances. Generally, a change in the law that would have governed the dispute, had the dispute not already been decided, is not by itself an extraordinary circumstance." (citation omitted)); cf. Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 460-61 (8th Cir. 2000) (stating that "[i]t remains the law in this Circuit that 'relief under Rule 60(b)(1) for judicial error other than for judicial inadvertence' is not available" and that a Rule 60(b) motion alleging judicial inadvertence must be made within the time period allowed for appeal).

Conclusion

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Relief from Judgment [Docket No. 278] is DENIED.

2. Plaintiffs' Motion for Substitution of Parties [Docket No. 287] is DENIED.

Dated: January 6, 2017

s/ Joan N. Ericksen

JOAN N. ERICKSEN
United States District Judge

APPENDIX D

United States Court of Appeals

For the Eighth Circuit

No. 14-1929

Streambend Properties II, LLC; Streambend Properties VIII, LLC

Plaintiffs - Appellants

v.

Ivy Tower Minneapolis, LLC, et al

Defendants - Appellees

Appeal from United States District Court for the District of Minnesota - Minneapolis

Submitted: December 9, 2014

Filed: March 30, 2015

Before LOKEN, BYE, and SMITH, Circuit Judges.

LOKEN, Circuit Judge.

In October 2004, two Streambend Properties LLC entities, II and VIII (together, "Streambend"), signed purchase agreements to purchase two units in a residential condominium development, Ivy Hotel + Residences, in downtown Minneapolis. Six years later, Streambend filed a multi-count complaint in the District of Minnesota alleging state law contract, fraud, and statutory claims and violations of the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 U.S.C. § 1703(a)(2). The initial defendants were developers Ivy Tower Minneapolis ("Ivy Minneapolis"), Gary Benson, and Jeffrey Laux; their real estate agent, Burnet Realty, LLC ("Burnet"); and their escrow and disbursing agent, Commonwealth Land Title Insurance Company ("Commonwealth"). Culminating a complex procedural history, the district court[1] dismissed ILSA claims against the developers in the Second Amended Complaint ("SAC") for failure to plead fraud with the required specificity; granted summary judgment dismissing the ILSA claims against Commonwealth on the merits; and declined supplemental jurisdiction over the state law claims. Streambend appeals, challenging the denial of leave to amend to add a previously dismissed party, Burnet; the dismissal of the remaining ILSA claims; the denial of leave to file additional amended complaints; and the district court's refusal to exercise supplemental jurisdiction. We affirm.

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[1] 1The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

I. Procedural Background

Streambend's lengthy SAC alleged that it entered into agreements to purchase two units in the to-be-constructed condominium development in October 2004, secured by earnest money payments totaling $45,490, increased in November 2007 to $63,867.45. Completion of the units was delayed, two additional floors were added without proper disclosure, and earnest moneys were removed from the trust account to pay construction costs without Streambend's permission. Seller (Ivy Tower Minneapolis) allowed mechanics liens to be filed in 2008 and not removed. Burnet advised Streambend in December 2008 that closings would soon be scheduled, but no closing was scheduled for Streambend's units. Streambend requested return of its earnest moneys in March and April 2009. Instead, defendants served a Notice of Declaratory Cancellation stating the deposits were non-refundable. The developers' title to Streambend's units "will be ceded to the primary lender . . . through foreclosure proceedings." "Current Residents" of the development have asked Streambend to permit rental of its unoccupied units, which have substantially increased in value.

Streambend asserted statutory claims for violations of ILSA, the Minnesota Common Interest Ownership Act, and Minn. Stat. §§ 555.01 and 82.75; and common law claims for wrongful cancellation; breach of contract; unjust enrichment; wrongful conversion of trust account funds; negligent misrepresentation; and breach of fiduciary duty. Only the merits of the ILSA claims are at issue on appeal.

The district court dismissed all claims against Burnet on the merits on March 7, 2011. On April 14, the court dismissed the remaining ILSA claims because Streambend did not allege a sufficient connection to interstate commerce. The court declined to exercise supplemental jurisdiction over the state law claims against the non-Burnet defendants, dismissing those claims without prejudice. Streambend appealed the April order, but did not appeal the previous order dismissing Burnet. We reversed, concluding that two paragraphs in the lengthy initial complaint sufficiently alleged a connection to interstate commerce. Streambend Props. II, LLC v. Ivy Tower Mpls., LLC, 451 F. App'x 627 (8th Cir. 2012).

On remand Streambend promptly moved for leave to file a First Amended Complaint ("FAC"), including claims re-adding Burnet as a defendant. The magistrate judge[2] granted leave to amend but held that previously dismissed claims against Burnet were barred by law of the case. The order permitted Streambend to assert two new state law claims against Burnet. The district court later struck all claims against Burnet.

The FAC added additional developer defendants -- Ivy Tower Development, LLC ("Ivy Development"), alleged to be the sole member of Ivy Minneapolis; and Moody Group, LLC ("Moody"), Wischermann Holdings, LLC ("Wischermann Holdings"), and Goben Enterprises, LP ("Goben"), alleged to be the sole members of Ivy Development. The complaint

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[2] The Honorable Arthur J. Boylan, Chief Magistrate Judge of the United States District Court for the District of Minnesota, now retired.

alleged that Laux was the sole member of Moody and Chief Manager of Ivy Minneapolis and Ivy Development, and that Benson was Goben's general partner. Defendants other than Commonwealth again moved to dismiss.

With the motions to dismiss pending, Streambend moved for leave to file the SAC. Chief Magistrate Judge Boylan granted the motion but denied leave to re-add Burnet as a defendant and to add still more defendants -- Wischermann Partners, Inc., alleged to be the sole member of Wischermann Holdings, and Paul Wischermann, alleged to be CEO of Wischermann Partners, Inc. The Order ended:

> Plaintiffs . . . state that "to any extent Plaintiffs are incorrect in their belief regarding the sufficiency of their allegations [in the proposed SAC], Plaintiffs desire to promptly remedy these deficiencies through amendment." Plaintiffs appear to be stating that in the event defendants proceed to move to dismiss the [SAC], Plaintiffs will again move to amend the complaint to try to deflect defendants' arguments for dismissal. . . . [R]epeated motions to amend in an effort to avoid an ultimate ruling on the merits of one's claims do not serve the interest of justice, but rather operate as a waste of the parties' and the Court's resources. Such motions demonstrate dilatory tactics to avoid dismissal of the action. Plaintiffs have now had more than adequate opportunity to amend their pleadings.

Defendants other than Commonwealth moved to dismiss the SAC. After a February 2013 hearing, despite Judge Boylan's warning, Streambend moved for leave to file a Third Amended Complaint. Judge

Boylan stayed consideration of this motion pending the district court's ruling on the motions to dismiss the SAC. On July 10, 2013, the district court granted the motions to dismiss the SAC, dismissing with prejudice all federal claims except the ILSA claims against Commonwealth, and declining to exercise supplemental jurisdiction over the remaining state law claims. Streambend Props. II, LLC v. Ivy Tower Mpls., LLC, Civil No. 10-4257, 2013 WL 3465277, at *3 (D. Minn. July 10, 2013).

Three days after an August 2013 hearing on Streambend's motion for leave to file a Third Amended Complaint, Streambend moved for leave to file a substitute complaint, referred to by Judge Boylan as the Fourth Amended Complaint. In January 2014, Judge Boylan denied leave to file the Third Amended Complaint and the Fourth Amended Complaint. On March 20, 2014, the district court affirmed Judge Boylan's January Order, granted Commonwealth's motion for summary judgment on the ILSA claims, struck all claims against Burnet in the SAC, dismissed with prejudice all ILSA claims in the SAC against the remaining defendants, and dismissed the pendent state law claims without prejudice. This appeal followed.

II. The Claims Against Burnet

In March 2011, the district court dismissed Streambend's six claims against Burnet, two under the ILSA and four under state law. When Streambend appealed the April 2011 dismissal of other parties, its Notice of Appeal did not mention the Order dismissing Burnet. During the appeal, Streambend filed a letter with this court stating, "Appellants did not appeal the dismissal of Burnet

and it rightfully may be terminated as an appellee at this time." On remand, the district court denied Streambend leave to re-add Burnet to its Amended Complaints because the original claims against Burnet were dismissed with prejudice and Streambend failed to appeal the dismissal.[3] On appeal, we review this Order for abuse of discretion. See Hawks v. J.P. Morgan Chase Bank, 591 F.3d 1043, 1051 (8th Cir. 2010).

We reject Streambend's contention that the liberal amendment standard in Rule 15(a)(2) of the Federal Rules of Civil Procedure applies to this issue. When a party moves to amend a complaint after dismissal, a more restrictive standard reflecting interests of finality applies. See Hawks, 591 F.3d at 1050-51; United States ex rel. Roop v. Hypoguard USA, Inc., 559 F.3d 818, 824 (8th Cir. 2009). Applying the stricter standard in this case was particularly appropriate because Streambend sought leave to re-add a party whose prior dismissal was on the merits *and* was not challenged in the earlier appeal. Compare Hawks, 591 F.3d at 1050-51. There was no abuse of discretion. Streambend's cursory Rule 60(b) and estoppel arguments are

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[3] Streambend argues the district court lacked authority to reject the magistrate judge's prior ruling absent an objection or explicit finding the ruling was clearly erroneous or contrary to law. This contention is frivolous. See Thomas v. Arn, 474 U.S. 140, 154 (1985) (the Federal Magistrates Act "does not preclude further review by the district judge, sua sponte or at the request of a party, under a de novo or any other standard"); Belk v. Purkett, 15 F.3d 803, 815 (8th Cir. 1994) (district court has "substantial control over the ultimate disposition of matters referred to a magistrate").

without merit. See Park Hill School Dist. v. Dass, 655 F.3d 762, 768 (8th Cir. 2011).

III. The Remaining ILSA Claims

In granting developers' motions to dismiss the ILSA claims in Count I and Count II of the SAC, the district court concluded (i) that Federal Rule of Civil Procedure 9(b) applies to those claims because 15 U.S.C. § 1703(a)(2)(A)-(C) "proscribes fraudulent conduct," and (ii) that Streambend failed to plead fraud with the particularity that Rule 9(b) requires. Streambend, 2013 WL 3465277, at *2. On appeal, relying on our decision in In re NationsMart Corp. Securities Litigation, 130 F.3d 309, 314-15 (8th Cir. 1997), cert. denied, 524 U.S. 927 (1998), Streambend argues that Rule 8(a) rather than Rule 9(b) applies to its ILSA pleadings. Alternatively, Streambend argues that its allegations in the SAC satisfied Rule 9(b) and, if not, the district court erred in not permitting further amendments.

A. Framing the Rule 9(b) Issues. Rule 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The particularity requirement serves important purposes:

> First, it deters the use of complaints as a pretext for fishing expeditions of unknown wrongs designed to compel *in terrorem* settlements. Second, it protects against damage to professional reputations resulting from allegations of moral turpitude. Third, it ensures that a defendant is given sufficient

> notice of the allegations against him to permit the preparation of an effective defense.

Parnes v. Gateway 2000, Inc., 122 F.3d 539, 549 (8th Cir. 1997) (quotation omitted); see Abels v. Farmers Commodities Corp., 259 F.3d 910, 920 (8th Cir. 2001). Claims "grounded in fraud" must meet this heightened pleading requirement. See Roop, 559 F.3d at 822 (False Claims Act); NationsMart, 130 F.3d at 320 (10b-5 action under Securities Exchange Act of 1934). At least some of our sister circuits also apply Rule 9(b) to "associated claims where the core allegations effectively charge fraud." N. Am. Catholic Educ. Programming Found., Inc. v. Cardinale, 567 F.3d 8, 15 & n.4 (1st Cir. 2009) (negligent misrepresentation and breach of fiduciary duty claims); see Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003) ("[I]n cases in which fraud is not an essential element of the claim, Rule 9(b) applies, but only to particular averments of fraud.").

Streambend's ILSA claims alleged that defendants violated the first three subsections of 15 U.S.C. § 1703(a)(2), which provide:

> (a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments . . . 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 . . . .

These provisions incorporate, almost verbatim, Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, a rule "prohibiting fraud by any person in connection with the purchase of securities." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 212 n.32 (1976), quoting the SEC press release issued with Rule 10b-5 in 1942. It is not surprising that Congress looked to the federal securities laws when codifying acts and practices that should be prohibited to protect purchasers in interstate land sale transactions. Thus, § 1703(a)(2) has been described as "a general anti-fraud provision." Rice v. Branigar Org., Inc., 922 F.2d 788, 791 n.4 (11th Cir. 1991); accord United States v. Goldberg, 527 F.2d 165, 167 (2d Cir. 1975) ("general fraud provisions"), cert. denied 425 U.S. 971 (1976).

But that generality, while relevant, does not fully answer the Rule 9(b) question presented in this case, an issue that, to our knowledge, has not been addressed in any published circuit court opinion and in very few district court opinions. In addition to Rule 10b-5, the federal securities laws include Sections 11(a) and 12(a)(2) of the Securities Act of

1933, 15 U.S.C. §§ 77k(a), 77*l*(a)(2), which impose strict liability on persons who sell securities using a registration statement, prospectus, or "oral communication" that includes an untrue statement of a material fact or omits to state a material fact required to make the statements not misleading, the same language used in § 1703(a)(2)(B) and in Rule 10b-5(b). In NationsMart, plaintiffs asserted securities law claims under Sections 11 and 12(a)(2) and Rule 10b-5. The district court dismissed all claims, in part for failing to comply with Rule 9(b). In reversing dismissal of the Section 11 and Section 12(a)(2) claims, we concluded that Rule 9(b) did not apply because the complaint "expressly disavow[ed] any claim of fraud in connection with" those claims, and because fraud is not an element of those statutory claims. 130 F.3d at 315, 319. But we affirmed dismissal of the Rule10b-5 claims because Hochfelder established that proof of scienter is an element of a Rule 10b-5 claim, 425 U.S. at 193, and therefore "a Rule 10b-5 claim is necessarily grounded in fraud." 130 F.3d at 320.

In more recent decisions, our sister circuits have consistently held that the particularity requirement of Rule 9(b) applies to securities law claims under Rule 10b- 5, where intent to defraud is an element of the claim. Regarding claims under Sections 11 and 12(a)(2), however, most courts have resolved the Rule 9(b) question by close examination of plaintiff's complaint. The Second Circuit held in Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004), "that the heightened pleading standard of Rule 9(b) applies to Section 11 and Section 12(a)(2) claims insofar as the claims are premised on allegations of fraud." The Third Circuit fashioned a comparable test in In re

Suprema Specialties, Inc. Securities Litigation, 438 F.3d 256, 272-73 (3d Cir. 2006): Section 11 and Section 12(a)(2) "claims do not sound in fraud if ordinary negligence is expressly pled in connection with those claims. In such a case, the fraud allegations [in a separately pleaded Rule 10b-5 claim] cannot be said to 'contaminate' the Section 11 and 12(a)(2) claims if the allegations are pled separately."

We need not decide whether the approach in Rombach and Suprema is consistent with our decision in NationsMart, because this is not a case involving securities laws claims in which NationsMart would be controlling. Rather, we conclude that this is a sound approach for applying Rule 9(b) to claims under § 1703(a)(2) of the ILSA, a later statute that borrowed remedial language from the far more complex securities law regime. Thus, to solve the Rule 9(b) riddle, we must look closely at the elements of the claims asserted in Count II and at the allegations in Count I of Streambend's SAC.

B. Count II. In Count II, Streambend alleged that defendants violated 15 U.S.C. § 1703(a)(2)(A) & (C). The allegations tracked those statutory provisions: "Defendants' devices, schemes or artifices to defraud and/or transactions, practices, or courses of business that operated or would operate as a fraud . . . damag[ed] [Streambend] in an amount exceeding $75,000." 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." Consistent with NationsMart,

the district court correctly determined that these claims are "necessarily grounded in fraud," 130 F.3d at 320, and Rule 9(b) therefore applies.

Streambend further argues that Count II satisfied Rule 9(b). In Count II, Streambend broadly alleged various wrongdoings by "Defendants" or "Developers" after Streambend signed the purchase agreements that allegedly established a "scheme or artifice to defraud" and a course of business that operated "as a fraud or deceit" upon unit purchasers -- for example, "Developers' closing on and conveyance of units to purchasers without providing marketable title to the units," Developers adding two additional floors to the Development, and "Defendants leading Plaintiffs to believe that their earnest monies were safely maintained in the trust accounts when they were not." The SAC defined "Developers" as Ivy Minneapolis, Ivy Development, Moody, Goben, Wischermann Holdings, Wischermann Partners, Inc., Laux, Benson, Wischermann, and three John Doe defendants. It defined "Defendants" to include Commonwealth and all "Developers."

A complaint subject to Rule 9(b) "must identify who, what, where, when, and how." Roop, 559 F.3d at 822 (quotation omitted). It must "specify[] the time, place, and content of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result." Id.; see Mitec Partners, LLC v. U.S. Bank Nat'l Ass'n, 605 F.3d 617, 622 (8th Cir. 2010). The allegations in Count II do not come close to meeting this standard. The SAC attributed fraudulent representations and conduct to multiple

defendants generally, in a group pleading fashion. The district court correctly concluded that such vague allegations do not satisfy Rule 9(b). See Trooien v. Mansour, 608 F.3d 1020, 1030 (8th Cir. 2010); Parnes, 122 F.3d at 550. "Where multiple defendants are asked to respond to allegations of fraud, the complaint should inform each defendant of the nature of his alleged participation in the fraud." DiVittorio v. Equidyne Extractive Indus., Inc., 822 F.2d 1242, 1247 (2d Cir. 1987). The SAC repeatedly alleged that the Count II defendants took action "directly or indirectly through any series or chain of subsidiaries or other entities," and then incorporated all those allegations into Count II. Casting such a broad net in pleading a claim "grounded in fraud" does not satisfy Rule 9(b). There also were no allegations of intentional wrongdoing (scienter) by any defendant.

C. Count I. In Count I, Streambend alleged that defendants violated § 1703(a)(2)(B), which prohibits a developer or agent from "obtain[ing] 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 . . . not misleading, with respect to any information pertinent to the lot or subdivision." Unlike § 1703(a)(2)(A) & (C), this provision is not explicitly grounded in fraud. Its language is found in Sections 11(a) and 12(a)(2) of the Securities Act of 1933, as well as in Rule 10b-5(b). Lacking clear guidance in the statute, we conclude that a pleading- specific inquiry, like that fashioned by our sister circuits for determining whether Rule 9(b) applies to claims under Sections 11 and 12(a)(2), is the proper way to determine whether the particularity requirements of

Rule 9(b) apply to a § 1703(a)(2)(B) claim. Thus, if the claim is pleaded separately from any (a)(2)(A) or (C) fraud claims, as here, and if there are no specific averments of fraud, only allegations of innocent or negligent misrepresentations and omissions, then the sufficiency of this claim is governed by the notice pleading standards of Rule 8(a).

Applying this standard, we conclude that Rule 8 governs the § 1703(a)(2)(B) allegations in Count I. Though Count I did not "expressly disavow[] any claim of fraud," unlike the complaint in NationsMart, 130 F.3d at 315, Count I was pleaded separately, focused on different conduct and representations, and contained no fraud averments, such as wrongful intent. Also indicative of an intent to plead nonfraudulent misrepresentation is the fact that Streambend withdrew a state law fraud claim in the initial complaint from its FAC and SAC. Thus, the allegations in Count I did not implicate an important purpose of Rule 9(b), to ensure that defendants may promptly respond to specific allegations of immoral conduct.

However, this conclusion does not end our inquiry, as we "may affirm the district court's decision on any ground supported by the record." Wald v. Sw. Bell Corp. Customcare Med. Plan, 83 F.3d 1002, 1005 (8th Cir. 1996). To satisfy Rule 8(a)'s pleading requirements, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quotation omitted). A complaint does not suffice if it "tenders naked assertions devoid of further factual enhancement." Id. (quotations omitted). When the particularity requirement of Rule 9(b) does not apply

to a misrepresentation or omission claim such as Count I, the Rule 8(a)(2) standard -- "a short and plain statement of the claim showing that the pleader is entitled to relief" -- requires some attempt to show, "What is the representation? . . . Why is each representation false? Where was each representation made? Who made each representation? When was each representation made?" In re Buffets, Inc. Sec. Litig., 906 F. Supp. 1293, 1298 (D. Minn. 1995).

The allegations in Count I fail to state a plausible claim under § 1703(a)(2)(B). First, regarding the allegations of untrue statements and omissions made prior to Streambend signing the purchase agreements, most involved contractual promises of future performance contained in the purchase agreements, Disclosure Statement, Declaration, "model representations and blue print schematics" -- for example, "Developers would timely complete," "Developers would deliver the Units," "Developers would timely disclose insulation values." 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. See Sindecuse v. Katsaros, 541 F.3d 801, 803-04 (8th Cir. 2008) (interpreting Missouri law); Restatement (Second) of Contracts § 159 cmt. c.

Second, 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. Third, 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," as § 1703(a)(2) requires.

Fourth, Streambend signed the purchase agreements on October 23, 2004. Many Count I allegations concern events occurring long after that date, in particular, the removal of Streambend's earnest moneys from the trust escrow accounts, the adding of additional floors during construction, the failure to timely complete construction of the purchased units and to timely deliver the units to Streambend after completion, the failure to pay for labor and materials furnished in construction, and the failure to deliver a warranty deed. These later events obviously did not affect Streambend's decision to enter into the purchase agreements. Conceivably, depending on the way Streambend agreed to pay for the units, these events might have included untrue statements or omissions by which defendants obtained money "with respect to the sales." But Count I with its vague and conclusory allegations did not plausibly state such a claim.

For these reasons, we affirm the dismissal of Count I of the SAC because it failed to state a plausible claim upon which § 1703(a)(2)(B) relief can be granted.

D. Streambend's Further Amendments. Streambend contends the district court erred by not granting leave to file the Third and Fourth Amended Complaints. "A district court may appropriately deny leave to amend where there are compelling reasons

such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment." Moses.com Sec., Inc. v. Comprehensive Software Sys., Inc., 406 F.3d 1052, 1065 (8th Cir. 2005) (quotations omitted).

In granting Streambend leave to file the SAC, Judge Boylan explicitly warned that repeated amendments were a wasteful, dilatory tactic and that the Streambend plaintiffs "have now had more than adequate opportunity to amend their pleadings." A few months later, in defiance of that warning, Streambend moved for leave to file a Third Amended Complaint while the motions to dismiss the SAC were pending. In January 2014, Judge Boylan denied the motion (which by then included a Fourth Amended Complaint) as moot but also noted that Streambend had "failed to cure deficiencies by amendments previously allowed," and that the motion "appears to have been brought in bad faith and with dilatory motive . . . to avoid dismissal after defendants' motions to dismiss were fully briefed, heard, and taken under advisement by the District Court." The district court did not abuse its discretion when it affirmed Judge Boylan's decision not to permit Streambend more opportunities to file a complaint capable of surviving a motion to dismiss.

E. The Proposed Wischermann Claims. Streambend argues the district court also erred in affirming Judge Boylan's October 2012 Order denying Streambend leave to add Wischermann Partners, Inc. and Paul Wischermann as defendants to the ILSA claims in Count I and Count II of the SAC. The proposed SAC alleged that Wischermann

Partners, Inc. and Paul Wischermann were liable because of their ownership interests in Wischermann Holdings. Judge Boylan concluded this amendment was futile because, "Plaintiffs have not adequately pleaded any theory under which Wischermann Partners, Inc. or Paul Wischermann could be liable merely by their association with Wischermann Holdings LLC."

We review *de novo* the denial of leave to amend based on futility. United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932, 936 (8th Cir. 2001), cert. denied, 536 U.S. 925 (2002). Here, the district court subsequently dismissed the ILSA claims against Wischermann Holdings, a ruling we have now affirmed. These subsequent rulings confirm that the district court did not err in affirming Judge Boylan's denial of leave to amend. The claims against the proposed new defendants were properly dismissed as to all defendants. Thus, as in Wald, 83 F.3d at 1005, "the court correctly determined that [Streambend] did not state a cause of action" against the proposed additional defendants.

IV. The Commonwealth Summary Judgment

Ruling on cross motions for summary judgment, the district court dismissed Streambend's ILSA claims against Commonwealth because, as escrow and disbursing agent, Commonwealth did not act as a "developer or agent" within the meaning of 15 U.S.C. § 1703(a)(2). The ILSA defines "developer" as "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision." 15 U.S.C. § 1701(5). The statute defines an agent as "any person

who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision," excluding attorneys providing solely legal services. § 1701(6). The district court concluded that Commonwealth served in neither capacity in the transactions at issue:

> It is undisputed that Commonwealth did not sell or offer to sell the condominiums to [Streambend]; that [Streambend] executed purchase agreements; that Commonwealth did not execute the purchase agreements; that [Streambend] paid earnest money to Commonwealth as contemplated by the purchase agreements; that Commonwealth deposited the earnest money in trust accounts; and that Commonwealth subsequently disbursed funds from the accounts. . . . Nothing about Commonwealth's role as escrow agent indicates that Commonwealth represented, or acted for or on behalf of, a developer in selling or offering to sell the condominiums to [Streambend]. Nothing about Commonwealth's agreement in December 2005 to supervise the disbursement of loan funds under the construction loan agreement reveals that Commonwealth represented, or acted for or on behalf of, a developer in selling or offering to sell the condominiums to [Streambend].

Reviewing the district court's ruling *de novo*, we agree. There is no evidence that Commonwealth made any representations or even became involved in the sales until after Streambend signed the purchase agreements. 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, 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. Streambend argues that Commonwealth's "status as an agent is undisputed." That may be true, but Streambend still must prove that Commonwealth acted as agent "in selling or offering to sell" two units to Streambend. "It is axiomatic that the statutory definition of the term excludes unstated meanings of that term." Meese v. Keene, 481 U.S. 465, 484 (1987).

Alternatively, Streambend argues, as it did to the district court, that Commonwealth may be liable because it aided and abetted violations of the ILSA. The district court assumed that a defendant may be liable for aiding and abetting an ILSA violation. The court then concluded "that [Streambend] failed to direct the Court to evidence that raises a genuine issue of material fact as to whether Commonwealth aided and abetted a developer's violation of the [ILSA]." On appeal, Streambend argues the legal issue at length. As to the factual record, Streambend notes only that Commonwealth's improper disbursing of escrow funds long after Streambend entered into the purchase agreements aided and abetted the developers' "wrongful conduct." But this was not evidence that Commonwealth aided or abetted a violation of § 1703(a)(2) "with respect to the sale" of any property. Thus, assuming without

deciding the question of aiding and abetting liability, we affirm the district court's grant of summary judgment on this issue.

V. The Supplemental Jurisdiction Issue

Finally, Streambend appeals the district court's decision to decline supplemental jurisdiction over the state law claims. See 28 U.S.C. § 1367(c)(2). "When a district court dismisses federal claims over which it has original jurisdiction, the balance of interests usually will point toward declining to exercise jurisdiction over the remaining state law claims." In re Canadian Import Antitrust Litig., 470 F.3d 785, 792 (8th Cir. 2006) (quotation omitted). Streambend does not challenge the district court's exercise of this discretion. Rather, it first argues that we should revive the state law claims if we reverse the dismissal of any ILSA claims. Our decision to affirm those dismissals moots this contention. Second, Streambend argues the district court should have remanded the state law claims to state court, rather than dismiss them without prejudice. We reject this contention because a district court has no power to remand a non-removed case to state court. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 351 (1988) ("because the plaintiff in Gibbs filed his suit in federal court, remand was not an option in the case") (referring to the landmark decision in United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966)). For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Civil No. 10-4257 (JNE/AJB)

Streambend Properties II, LLC; Streambend Properties VIII, LLC

Plaintiffs,

v.

Ivy Tower Minneapolis, LLC; Ivy Tower Development, LLC; Moody Group, LLC; Goben Enterprises, LP; Wischermann Holdings, LLC; Jeffrey Laux; Gary Benson; Burnet Realty, LLC; Commonwealth Land Title Insurance Company; John Doe; Mary Rowe; XYZ, Corp.

Defendants.

ORDER

This action arises out of purchase agreements executed by Streambend Properties II, LLC, and Streambend Properties VIII, LLC,1[1] for two

[1] According to the Second Amended Complaint, Plaintiffs signed the purchase agreements on October 23, 2004. A database available on the Minnesota Secretary of State's website reveals that Streambend Properties II and Streambend Properties VIII filed articles of organization on October 29, 2004, and November 2, 2004, respectively. Consequently, Plaintiffs did not exist when they allegedly signed the purchase agreements. See Minn. Stat.

condominiums in a development in Minneapolis, Minnesota. The case is before the Court on two motions to dismiss the Second Amended Complaint.[2]

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§ 322B.175 (2012) (stating that "limited liability company existence begins when the articles of organization are filed with the secretary of state accompanied by a payment"). The Court afforded the parties an opportunity to brief the issues of (1) the legal effect of Plaintiffs' signatures on the purchase agreements before Plaintiffs existed and (2) the viability of Plaintiffs' claims given that Plaintiffs signed the purchase agreements before they existed. The parties did not adequately address the issues. The Court expresses no opinion on them. Compare Streambend Props. III, LLC v. Sexton Lofts, LLC, Civil No. 10-4745 (MJD/SER), 2013 WL 673854, at *9 (D. Minn. Jan. 28, 2013) ("Having determined that the State Court Decision meets the Minnesota standard for collateral estoppel, this Court must acknowledge that Judge Howard decided that Streambend did not exist on October 27, 2004, and therefore never made a valid contract to purchase Units 410 and 510 of Sexton Lofts."), adopted, 2013 WL 674014 (D. Minn. Feb. 25, 2013), with Almac, Inc. v. JRH Dev., Inc., 391 N.W.2d 919, 924 (Minn. Ct. App. 1986) ("A promoter of a corporation yet to be formed may make contracts for the corporation. Once the existence of the corporation is established, the corporation will be liable upon those contracts if it adopts them."). See generally 1A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 214 (perm. ed., rev. vol. 2010) ("[I]f a corporation can be held liable under a preincorporation contract made in its behalf, the corporation should have the right to enforce the terms of the contract."). Plaintiffs' motion to supplement their supplemental memorandum is denied.

[2] A brief review of this action's procedural history follows. The Court dismissed the Complaint with prejudice as to Burnet Realty, LLC, and, as to all other defendants, dismissed Counts I and II with prejudice and Counts III to XI without prejudice. Plaintiffs appealed. They expressly disclaimed an appeal of Burnet Realty's dismissal. The Eighth Circuit reversed the dismissal of Counts I and II and remanded for further proceedings. On remand, Plaintiffs obtained leave to file a First

See Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the Court grants in part and denies in part the motions.

Matters outside the pleadings have been presented to the Court. The Court excludes them and considers the motions under Rule 12(b)(6). See Fed. R. Civ. P. 12(d). In ruling on a motion under Rule 12(b)(6), a court accepts the facts alleged in the complaint as true and grants all reasonable inferences in favor of the plaintiff. Crooks v. Lynch, 557 F.3d 846, 848 (8th Cir. 2009). Although a pleading is not required to contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570).

The Second Amended Complaint contains fifteen counts. In Counts I and II, Plaintiffs claim that all defendants—Ivy Tower Minneapolis, LLC; Ivy Tower

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Amended Complaint. Motions to dismiss the First Amended Complaint were filed. The Court denied the motions as moot after Plaintiffs obtained leave to file a Second Amended Complaint. The magistrate judge ordered Plaintiffs not to name Burnet Realty as a defendant in the Second Amended Complaint or to assert any claims against it. Plaintiffs nevertheless included Burnet Realty as a defendant in the Second Amended Complaint's caption and sought a judgment against it in their requested relief. To the extent the Second Amended Complaint purports to assert claims against Burnet Realty, the Second Amended Complaint is stricken.

Development, LLC; Moody Group, LLC; Goben Enterprises, LP; Wischermann Holdings, LLC; Jeffrey Laux; Gary Benson; Commonwealth Land Title Insurance Company, LLC; John Doe; Mary Rowe; and XYZ Corp.— violated the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1703(a)(2)(A)-(C) (2006). Count III asserts that all defendants violated the Minnesota Common Interest Ownership Act. The Second Amended Complaint states that Count IV has been withdrawn. Count V is a claim of wrongful cancellation asserted against all defendants except Commonwealth Land Title Insurance. Count VI is a claim of breach of contract asserted against Ivy Tower Minneapolis. In Count VII, Plaintiffs assert a claim of unjust enrichment against all defendants. In Count VIII, Plaintiffs bring a claim under Minn. Stat. § 555.01 against all defendants. The Second Amended Complaint states that Count IX has been withdrawn. In Count X, Plaintiffs assert a claim of conversion against all defendants. Count XI claims that Commonwealth Land Title Insurance violated Minn. Stat. § 82.75 (2012). Count XII is a claim of negligent misrepresentation asserted against all defendants except Commonwealth Land Title Insurance. The Second Amended Complaint states that Count XIII is a claim of negligent misrepresentation against Burnet Realty and that the claim has been stricken. Count XIV is a claim of negligent misrepresentation against Commonwealth Land Title Insurance. Finally, in Count XV, Plaintiffs assert a claim of breach of fiduciary duty against Commonwealth Land Title Insurance.

As noted above, two motions to dismiss are before the Court. Ivy Tower Minneapolis, Ivy Tower

Development, Moody Group, Goben Enterprises, Laux, and Benson (collectively, Ivy Parties) filed one of the motions. Their motion seeks the dismissal of all counts asserted against Ivy Tower Development, Moody Group, Goben Enterprises, Laux, and Benson, as well as the dismissal of Counts I, II, VII, and XII against Ivy Tower Minneapolis.

Wischermann Holdings filed the other motion to dismiss. It seeks the dismissal of all claims asserted against it.

The Court begins with Counts I and II, the claims that assert violations of the ILSFDA. The Act provides:

> 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; [or]

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

15 U.S.C. § 1703(a)(2)(A)-(C). The Ivy Parties and Wischermann Holdings maintain that Counts I and II should be dismissed because Plaintiffs failed to plead the claims with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. Ivy Tower Development, Moody Group, Goben Enterprises, Laux, Benson, and Wischermann Holdings also maintain that Plaintiffs failed to sufficiently allege that they are "developers" within the meaning of the Act. Plaintiffs contend that Rule 9(b) does not apply to the claims under the Act, that they nevertheless satisfied Rule 9(b), and that they sufficiently alleged that Ivy Tower Development, Moody Group, Goben Enterprises, Laux, Benson, and Wischermann Holdings may be liable under the Act.

"In alleging fraud . . . a party must state with particularity the circumstances constituting fraud . . . ." Fed. R. Civ. P. 9(b). Section 1703(a)(2)(A)-(C) proscribes fraudulent conduct. The Court concludes that Rule 9(b) applies to Plaintiffs' claims under the ILSFDA. See Oginsky v. Paragon Props. of Costa Rica LLC, 784 F. Supp. 2d 1353, 1366-67 (S.D. Fla. 2011).[3]

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[3] Plaintiffs cited Husted v. Amrep Corp., 429 F. Supp. 298 (S.D.N.Y. 1977), to support the proposition that Rule 9(b) does not apply to their claims under the ILSFDA. Husted applied Rule 9(b) to a claim for violations of § 1703. 429 F. Supp. at 309-10.

Under Rule 9(b), a plaintiff must plead "such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." In other words, the party must typically identify the "who, what, where, when, and how" of the alleged fraud. This requirement is designed to enable defendants to respond "specifically, at an early stage of the case, to potentially damaging allegations of immoral and criminal conduct." The level of particularity required depends on, inter alia, the nature of the case and the relationship between the parties. "Conclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule." Rule 9(b) should be read "in harmony with the principles of notice pleading."

BJC Health Sys. v. Columbia Cas. Co., 478 F.3d 908, 917 (8th Cir. 2007) (citations omitted); see Drobnak v. Andersen Corp., 561 F.3d 778, 783 (8th Cir. 2009).

According to the Ivy Parties and Wischermann Holdings, Plaintiffs failed to satisfy Rule 9(b) because they made general allegations of misconduct against them as a group instead of specific allegations of each defendant's misconduct. See Trooien v. Mansour, 608 F.3d 1020, 1030 (8th Cir. 2010) ("It is not sufficient to attribute alleged false statements to 'defendants' generally."); Parnes v. Gateway 2000, Inc., 122 F.3d 539, 550 (8th Cir. 1997) ("Defendants are left to guess which controlling shareholders were responsible for this

alleged fraud."). Count I is asserted against the six Ivy Parties, Wischermann Holdings, Commonwealth Land Title Insurance, and the three unidentified defendants. It alleges that the Ivy Parties, Wischermann Holdings, and others "directly or indirectly through any series or chain of subsidiaries or other entities" created documents that were provided to Plaintiffs before the execution of the purchase agreements or last payment of earnest monies. The count identifies several false statements or omissions attributed to "Developers"—which the Second Amended Complaint defines as twelve individuals or entities, including the Ivy Parties and Wischermann Holdings—or the defendants. The paragraphs that precede Count I, which are incorporated by reference, do not contain any greater particularity. They too repeatedly allege that the Ivy Parties or Wischermann Holdings took action "directly or indirectly through any chain of subsidiaries or other entities." As to the Ivy Parties and Wischermann Holdings, the Court concludes that Plaintiffs failed to plead Count I with the requisite particularity.[4] The Court grants the Ivy

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[4] According to Plaintiffs, the Second Amended Complaint "eliminates reliance upon the group pleading doctrine." They nevertheless argue that the doctrine "represents acceptable practice in this district." "[I]t is not clear that the group pleading doctrine is viable in [the Eighth Circuit]." Bank of Montreal v. Avalon Capital Grp., Inc., 743 F. Supp. 2d 1021, 1029 (D. Minn. 2010); see Block v. Toyota Motor Corp., 795 F. Supp. 2d 880, 889 (D. Minn. 2011); cf. In re Cabletron Sys., Inc., 311 F.3d 11, 40 (1st Cir. 2002) ("This circuit has recognized a very limited version of the group pleading doctrine for securities fraud. There is presently great debate about the doctrine's continued existence after enactment of the PSLRA." (citation omitted)).

Parties' and Wischermann Holdings' motions to dismiss Count I.

Count II suffers from the same defects that are present in Count I. Count II is asserted against the six Ivy Parties, Wischermann Holdings, Commonwealth Land Title Insurance, and the three unidentified defendants. It claims that "Developers" or "Defendants" employed devices, schemes, or artifices to defraud and that "Developers" or "Defendants" engaged in conduct that operated or would have operated as a fraud or deceit upon a purchaser. The preceding paragraphs of the Second Amended Complaint, which are incorporated by reference, fail to provide the requisite particularity. The Second Amended Complaint repeatedly asserts that the Ivy Parties and Wischermann Holdings took action "directly or indirectly through any chain of subsidiaries or other entities." As to the Ivy Parties and Wischermann Holdings, the Court concludes that Plaintiffs failed to plead Count II with the requisite particularity. The Court grants the Ivy Parties' and Wischermann Holdings' motions to dismiss Count II.

A district court may decline to exercise supplemental jurisdiction over a claim if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(2) (2006); see United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 727 (1966) ("Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim

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"The doctrine is aimed at securities fraud cases . . . ." Bank of Montreal, 743 F. Supp. 2d at 1029.

may fairly be dismissed."); Oneida Indian Nation of N.Y. v. Madison Cnty., 665 F.3d 408, 439 (2d Cir. 2011) ("Even if the existence of one narrow surviving federal claim means that not 'all claims over which [the district court] has original jurisdiction' have been dismissed, it has nonetheless become clear that the state-law claims now 'substantially predominate[]' in this litigation." (alterations in original) (citations omitted)), petition for cert. filed, 81 U.S.L.W. 3277 (U.S. Nov. 12, 2012) (No. 12-604). Counts I and II of the Second Amended Complaint are the sole claims within the Court's original jurisdiction. Those counts have been dismissed as to all identified defendants except Commonwealth Land Title Insurance, which answered the Second Amended Complaint. The remaining claims are for violation of the Minnesota Common Interest Ownership Act, wrongful cancellation, breach of contract, unjust enrichment, declaratory relief, conversion, violation of Minn. Stat. § 82.75, negligent misrepresentation, and breach of fiduciary duty. Several actions that were heard in state court arose out of the condominium development in which Plaintiffs executed purchase agreements. The state-law claims substantially predominate over the surviving federal claims. The Court declines to exercise supplemental jurisdiction over the state-law claims.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Wischermann Holdings' Motion to Dismiss Second Amended Complaint [Docket No. 131] is GRANTED IN PART and DENIED IN PART.

2. The Ivy Parties' Motion to Dismiss Second Amended Complaint [Docket No. 137] is GRANTED IN PART and DENIED IN PART.

3. To the extent the Second Amended Complaint purports to assert claims against Burnet Realty, the Second Amended Complaint is stricken.

4. Plaintiffs' motion to supplement [Docket No. 173] is DENIED.

5. Counts I and II of the Second Amended Complaint are DISMISSED WITH PREJUDICE as to the Ivy Parties and Wischermann Holdings.

6. Counts III, V, VI, VII, VIII, X, XI, XII, XIV, and XV of the Second Amended Complaint are DISMISSED WITHOUT PREJUDICE.

Dated: July 10, 2013

s/ Joan N. Ericksen

JOAN N. ERICKSEN

United States District Judge