

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

STEVE J. RETTERATH,

Plaintiff,

vs.

HOMELAND ENERGY SOLUTIONS, LLC;
PAT BOYLE; MAURICE HYDE; CHRISTINE
MARCHAND; MATHEW DRISCOLL; LESLIE
HANSEN; CHAD KUHLERS; DAVID FINKE;
WALT WENDLAND; JOSEPH LEO; and
BROWN, WINICK, GRAVES, BASKERVILLE,
AND SCHOENEBAUM,

Defendants.

JASON RETTERATH and ANNIE RETTERATH,

Intervenors.

No. 4:14-cv-00158 – JEG

O R D E R

This matter comes before the Court on Motion to Dismiss by Homeland Energy Solutions, LLC (HES), ECF No. 107; Motion to Dismiss by Joseph Leo and Brown, Winick, Graves, Baskerville, and Schoenebaum (collectively, Brown Winick Defendants), ECF No. 108; Motion to Dismiss by Pat Boyle, Maurice Hyde, Kevin Howes, Christine Marchand, Mathew Driscoll, Leslie Hansen, Chad Kuhlers, James Boeding, David Finke, and Walt Wendland (collectively, Individual Defendants),¹ ECF No. 109; Motion to Dismiss Complaint in Intervention by HES, ECF No. 148; Motion for Partial Summary Judgment by Plaintiff Steve J. Retterath (Retterath), ECF No. 110; and Motion to Compel Payment of Undisputed Funds by Retterath, ECF No. 150. A hearing on the motions was conducted on November 7, 2014. The motions are fully submitted and ready for disposition.

¹ Defendants Kevin Howes and James Boeding were voluntarily dismissed without prejudice on August 13, 2014. Notice of Dismissal, ECF No. 122.

I. BACKGROUND

A. Factual Background²

Homeland Energy Solutions, LLC (HES) is an Iowa limited liability company that was formed to develop and operate a corn-processing ethanol plant in Chickasaw County, Iowa. HES was initially organized with one class of equity interests, known as Units, which are registered with the United States Securities and Exchange Commission. Defendant Walt Wendland is the CEO/President of HES, and Defendant David Finke serves as CFO. Defendants Pat Boyle, Maurice Hyde, Christine Marchand, Mathew Driscoll, Leslie Hansen, and Chad Kuhlars served on the HES Board of Directors during all times relevant to this suit. Defendant Joseph Leo is the HES attorney and is a member at the law firm of Brown, Winick, Graves, Baskerville, and Schoenebaum (Brown Winick).

Steve Retterath, a resident of Palm Beach County, Florida, initially invested in HES in 2006. At the time Retterath initiated this suit, Retterath had acquired 24,860 Units and 25,860 voting rights in HES, representing 28.15 percent of the company's outstanding interest. Members of Retterath's family, including Intervenors Jason Retterath and Annie Retterath, also made investments in HES. Pursuant to the HES Amended and Restated Operating Agreement (Operating Agreement), Retterath's ownership interest entitled him to appoint two directors to the Board. He used this interest to appoint himself and one other individual as directors.

On January 23, 2013, the Board held a meeting to discuss two proposed amendments to the Operating Agreement. One of the proposed amendments, known as the Housekeeping

² For purposes of this Order, the factual allegations are taken from the Second Amended Complaint, ECF No. 84, and are assumed to be true. See Ashcroft v. Iqbal, 556 U.S. 662, 681 (2009).

Amendment, sought to change the language of Section 5.16 of the Operating Agreement to provide that a committee may only consist of one or more persons, rather than the previous requirement that a committee must have two or more directors. Retterath sought to have his personal counsel, Allen Libow, present at the meeting to advise him of the impact of the amendments on his personal rights in HES. However, upon concerns that allowing Retterath's personal attorney to attend the meetings would give other directors the right to demand that their personal attorneys attend the meetings and concerns that it would break HES' attorney client privilege, the Board voted to disallow legal counsel outside of HES' representation to be present at the January 23, 2013, meeting and any future meetings. Leo, on behalf of HES, then advised Retterath that his personal counsel was prohibited from being present at company meeting.

Leo provided the directors a memo advising them on the proposed amendments. The memo informed the Board that the Housekeeping Amendment made only non-material changes to the Operating Agreement and recommended that the Board vote in favor of the amendment. Leo advised the directors that the amendment would not adversely affect their substantive rights as directors. Retterath alleges that he personally believed Leo was acting at that time as his personal counsel and that Leo was providing him advice on how the amendment would impact his individual interest in HES. The Board, including Retterath, voted in favor of approving the Housekeeping Amendment, and the amendment was later passed by a vote of the HES membership.

On May 11, 2013, Retterath met with Kuhlers and proposed an agreement to vote together in an effort to remove some of HES' directors from the Board. Kuhlers denied Retterath's offer. Retterath alleges that this discussion was an effort to form a legal "voting trust." HES, however, viewed this meeting as an attempt by Retterath to illegally bribe Kuhlers to vote in his favor to obtain a majority hold on the Board. The Board subsequently tasked Leo and Brown Winick to

carry out a further investigation into the content of this meeting. Retterath alleges Defendants used this threat of a criminal investigation to coerce Retterath into sell his Units in HES.

On June 11, 2013, Retterath and Boyle entered into negotiations for HES to repurchase all of Retterath's Units. Boyle negotiated with Retterath on behalf of a committee that was specifically formed by the Board to negotiate the repurchase of Retterath's interest in the company. Boyle originally offered Retterath \$28,000,000 in exchange for his Units, which Retterath rejected.

On June 13, 2013, Retterath reached an agreement with Boyle to resell his Units back to HES. Boyle and Retterath each signed and executed a Membership Unit Repurchase Agreement (MURA) in which HES agreed to repurchase Retterath's Units for \$30,000,000 – paid in two installments of \$15,000,000. As a condition, Retterath agreed to resign from the Board prior to closing. The MURA was also conditioned upon Board approval, lender approval, and financing. The MURA specified a closing date of August 1, 2013.

According to a Form 8-K statement filed with the SEC, the Board approved the MURA on June 19, 2013, and HES was in the process of addressing certain conditions of the agreement, including lender approval. The statement also indicated that effective June 19, 2013, Retterath resigned from the Board and was replaced by Ed Hatten.

The parties ultimately failed to close on the agreement on or before August 1, 2013. Retterath alleges that he revoked his acceptance of the MURA after recognizing that the agreement was void and unenforceable because Boyle was not authorized to purchase his interests on behalf of HES and HES did not obtain consent from a majority of the membership to purchase his Units, as required by the Operating Agreement.

B. Procedural Background

On August 1, 2013, Retterath filed this action in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.³ After Retterath amended his complaint to add claims for federal securities fraud, HES removed this case on September 17, 2013, to the United States District Court for the Southern District of Florida. On April 17, 2014, Judge Kenneth A. Marra granted Defendants' motion to change venue to the Southern District of Iowa, ruling the MURA's forum selection clause required the parties to litigate any disputes in the state of Iowa. This case was thereby transferred to the Southern District of Iowa on April 18, 2014.

In Count 1 of the Second Amended Complaint (hereinafter Complaint), Retterath seeks a declaration that the MURA is void *ab initio* because it was not authorized by the HES Board and HES did not obtain consent from a majority of the HES members as required by the Operating Agreement. Count 2 alleges Individual Defendants oppressed Retterath's expectancy interest by not distributing dividends and refusing to repurchase his shares for a fair value. Count 3 alleges breach of fiduciary duty against Leo and Individual Defendants for breaching their duty of good faith and fair dealing by making misrepresentations pertaining to his contractual rights, the force and effect of the Housekeeping Amendment, and HES' authority to execute the MURA, as well as threatening him with criminal prosecution and prohibiting him from voting his shares in Board meetings. Count 4 alleges fraud in the inducement against Brown Winick Defendants for

³ On August 14, 2014, HES filed suit against Retterath in the Iowa District Court for Polk County seeking specific performance of the MURA. Retterath removed the case to the Southern District of Iowa on December 30, 2013, asserting exclusive federal jurisdiction pursuant to 28 U.S.C. § 1331 because the Petition alleges a cause of action under the Securities and Exchange Act of 1934. HES filed a Motion to Remand on January 9, 2014. On May 21, 2014, this Court remanded the case to Polk County for lack of subject matter jurisdiction. See Homeland Energy Solutions, LLC v. Retterath, No. 4:13-cv-00518, ECF No. 27 (S.D. Iowa May 21, 2014). The case is currently still pending before the state district court.

making misrepresentations at the January 13, 2013 meeting. Count 5 alleges fraud in the inducement against Boyle for misrepresentations made on June 11, 2013, regarding the MURA. Count 6 alleges conspiracy to commit fraud in the inducement against Leo and Individual Defendants, alleging said Directors acted in concert with Leo to fraudulently induce Retterath to vote in favor of the Housekeeping Amendment and to threaten Retterath with a criminal prosecution to induce him to sell his shares to HES. Count 7 alleges negligent misrepresentation against Brown Winick Defendants for misrepresenting the personal impact of the Housekeeping Amendment on Retterath and by misstating that he was in violation of federal and state criminal law for his meeting with Kuhlers. Count 8 alleges violations of the Florida Deceptive and Unfair Trade Practices Act against Individual Defendants. Count 9 alleges violations of the Florida Securities and Investor Protection Act against Leo and Individual Defendants. Count 10 alleges securities fraud pursuant to Section 10(b) of the Securities and Exchange Act and SEC Rule 10b-5 against Individual Defendants and Leo for making fraudulent misstatements relating to the execution of the MURA. In Count 11 Retterath seeks injunctive relief to prevent Homeland from holding Retterath's Units in escrow during a vote of the membership which took place on December 19, 2013.

On June 16, 2014, Defendants filed motions to dismiss under Rule 12(b)(6), which Retterath resists. On June 18, 2014, Retterath filed a motion for partial summary judgment on Count 1, which Defendants resist.

On August 21, 2014, HES members Jason and Annie Retterath (Intervenors) filed a motion to intervene to protect their Membership rights and interests arising under the Operating Agreement. The Court granted Intervenors' motion on September 5, 2014, and Intervenors filed their Complaint in Intervention on September 8, 2014. The Complaint in Intervention seeks declara-

tory relief finding the MURA void, illegal, and unenforceable and alleges breach of the duty of good faith and fair dealing and breach of fiduciary duty of loyalty and care against HES and its Directors. The Complaint also seeks injunctive relief to enjoin the performance of the MURA, future transactions wherein HES attempts to repurchase Units of a Director without membership approval, and to prevent HES from further violations of Section 5.6 of the Operating Agreement. On September 29, 2014, Defendants filed a Motion to Dismiss the Complaint in Intervention, which Intervenors resist.

On October 6, 2014, Retterath filed a Motion to Compel Payment of Undisputed Funds. Retterath requests the Court to compel HES to transfer to him \$14,197,140 for payment of the distributions HES has made to its Members since August 1, 2013; or alternatively, order HES to transfer \$14,197,140 into the Court's registry, along with any future distributions. Defendants resist.

II. DISCUSSION

The Court's sole jurisdictional hook in this case is federal question jurisdiction, 28 U.S.C. § 1331, over Count 10 of the Complaint, which alleges securities fraud against Leo and Individual Defendants under Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and the SEC's Rule 10b-5a, 17 C.F.R. § 240.10b-5(a). The remaining claims are based on state law and are subject to supplemental jurisdiction, 28 U.S.C. § 1367.⁴ As such, the Court

⁴ Retterath contends that if the Court dismisses his federal securities fraud claim, the Court has diversity jurisdiction over the claims asserted against the Individual Defendants and the Brown Winick Defendants. See Pl.'s Resp. to Individual Defs.' Mot. to Dismiss 12-13, ECF No. 123; Pl.'s Resp. to Brown Winick's Mot. to Dismiss 20, ECF No. 125. Retterath asserts that complete diversity exists between himself and the Individual Defendants and Brown Winick Defendants; however, Retterath admits complete diversity does not exist over HES because Retterath is a resident of Florida and HES has other members who reside in Florida. Retterath's assertion of diversity jurisdiction fails as a matter of law. In order for diversity jurisdiction to

must begin its discussion by addressing Individual Defendants’ and Brown Winick Defendants’ motions to dismiss Count 10 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Absent a federal cause of action, the Court has discretion to determine whether to maintain supplemental jurisdiction over the remaining state law claims.

A. Motion to Dismiss the Securities Fraud Claim

“Section 10(b) makes it unlawful ‘[t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.’” Minneapolis Firefighters’ Relief Ass’n v. MEMC Elec. Materials, Inc., 641 F.3d 1023, 1028 (8th Cir. 2011) (quoting 15 U.S.C. § 78j(b)). “Rule 10b-5 implements [§ 10(b)] by making it unlawful to, among other things, ‘make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.’” Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1317 (2011) (quoting 17 C.F.R. § 240.10b-5(b)). To prevail on a securities fraud claim, the claimant must show “‘(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.’” Minneapolis

exist, there must be *complete* diversity between all of the plaintiffs and *all* of the defendants. See Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 564 (2005) (“A failure of complete diversity, unlike the failure of some claims to meet the requisite amount in controversy, contaminates every claim in the action.”).

Firefighters' Relief Ass'n, 641 F.3d at 1028 (quoting Stoneridge Inv. Partners, LLC v. Sci.-Atl., Inc., 552 U.S. 148, 157 (2008)).

In general, “[t]o 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.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “The plausibility of a complaint turns on whether the facts alleged allow [the court] to ‘draw the reasonable inference that the defendant is liable for the misconduct alleged.’” Lustgraaf v. Behrens, 619 F.3d 867, 872 (8th Cir. 2010) (quoting Iqbal, 556 U.S. at 662). When addressing a motion to dismiss under Rule 12(b)(6), courts must “accept all factual allegations in the complaint as true” and “must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

The Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4(b)(2), “imposes a heightened pleading standard in cases alleging securities fraud.” Lustgraaf, 619 F.3d at 873. “Claims governed by the PSLRA must ‘specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading’ (the “falsity requirement”), and ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind’ (the “scienter requirement”).” Id. (citing 15 U.S.C. § 78u-4(b)(1) & (2)). The “PSLRA’s heightened pleading requirements compel the plaintiff to ‘plead the who, what, when, where and how of the misleading statements or omissions.’” In re 2007 Novastar Fin., Inc. Sec. Litig., 579 F.3d 878, 882 (8th Cir. 2009) (citations omitted). In addition, the PSLRA requires that “a complaint must not only indicate that false statements were made, but

must indicate why the alleged misstatements were false when made.” Lustgraaf, 619 F.3d at 874.

1. Alleged Misstatements

Retterath pleads two specific allegations in Count 10 to form the basis for his securities fraud claim. Retterath asserts that

Defendants fraudulently misrepresented several material facts, including but not limited to:

- a. On or about June 12, 2013, Defendant Boyle had the authority to execute the [MURA] on behalf of HES;
- b. That the [MURA] was executed in compliance with the terms of HES’ Amended and Restated Operating Agreement.

Compl. ¶ 114, ECF No. 84. These two specific factual allegations fail to meet the PSLRA’s heightened pleading standard. First, the alleged misstatements are not materially misleading in relation to the sale of a security because the statements have no direct relation to the price or market value of the securities, but rather concern issues of contract law and organizational governance. See Ketchum v. Green, 557 F.2d 1022, (3d Cir. 1977) (holding plaintiffs failed to state a claim under Section 10(b) because the alleged fraudulent misstatements were in connection with the internal controls of the company and were not in connection with the sale of a security). Additionally, Count 10 is alleged generally against Defendants Wendland, Boyle, Finke, Hyde, Marchand, Driscoll, Hansen, Kuhlens, and Leo⁵ and does not specify which particular defendants made the alleged misstatements.

Further, Retterath’s specific allegations of securities fraud as pled in Count 10 are factually implausible. Retterath pled securities fraud as an alternative claim that is wholly dependent upon the Court’s determination in Count 1 that the MURA is a valid and enforceable contract.

⁵ The cause of action also alleges Leo was “acting individually and as the agent of Defendant Brown Winick.” Compl. ¶ 111, ECF No. 84.

See Compl. ¶ 113, ECF No. 84 (“In the event this Court finds that the Alleged Agreement was valid and Plaintiff has sold his membership interest in HES, Plaintiff states this cause of action”). Although the federal rules permit alternative claims to be pled, Retterath’s securities fraud claim cannot succeed as an alternative to a ruling concerning the validity of the MURA. In Count 1, Retterath specifically requests that the Court declare that the MURA is void and unenforceable because Boyle lacked the authority to enter into the agreement and the agreement was not executed in compliance with the Operating Agreement. Compl. ¶¶ 58-67, ECF No. 84. Assuming, without determining, that the MURA is void and unenforceable, there would be no purchase or sale of a security to maintain a claim for securities fraud. On the other hand, if the MURA is a valid and enforceable contract, it would require that Boyle was authorized to contract on behalf of HES and that the MURA was executed in compliance with the Operating Agreement, thereby making the alleged misrepresentations in Count 10 in fact true.

The PSLRA not only imposes heightened pleading requirements with respect to allegations of false or misleading statements, but it also requires particular allegations that the Defendants acted with scienter. Tellabs, Inc., 551 U.S. at 321. The plaintiff is required to prove the “facts alleged, taken collectively, give rise to a strong inference of scienter.” Id. at 322-23. “[A]n inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” Id. The Complaint generally pleads scienter by asserting that “[t]he misrepresentations were made with an intent to defraud the Plaintiff, or at the very least made with reckless disregard as to the truth of the communications.” Compl. ¶ 116, ECF No. 84. Such a blanket assertion of scienter, without more, does not adequately support an inference that Defendants intended to deceive Retterath. The Complaint does not allege how Retterath knows or has a reason to know that Defendants

intended to defraud him by allegedly executing the MURA without authority and in violation of the Operating Agreement. Accordingly, the misstatements alleged in Count 10 are not sufficient to create a plausible cause of action for securities fraud.

Retterath argues his claim should not be limited to the two alleged misstatements specified in Count 10 but rather should take into account all allegations made throughout the Complaint. In Retterath's resistance brief, he asserts for the first time that his securities fraud claim is based on the allegation that "he was fraudulently coerced into selling his federally registered securities after the Individual Defendants accused him of 'bribing' a fellow board member." Pl.'s Resp. to Individual Defs.' Mot. to Dismiss 3, ECF No. 123. Retterath relies on Paragraph 49 of the Complaint in support of his argument. As a general factual allegation in the Complaint, Paragraph 49,⁶ in relevant part, alleges as follows:

Defendants acted in concert in an effort to intimidate the seventy-year old Plaintiff. Defendant Leo, on behalf of HES, went so far as to unethically utilize violations of state and federal criminal statutes by Plaintiff as an illegal scare tactic to intimidate his own client. In order to pressure Plaintiff into selling his interest in HES, the Defendants initiated an investigation of the Plaintiff's meeting with Kuhlert by employing Mr. Leo's firm to do so. The Defendants used the threat of this investigation to pressure Plaintiff into considering to sell his interest in HES, or suffer severe consequences.

Compl. ¶ 49, ECF No. 84.

Although Retterath's allegation in Paragraph 49 may suffice as an alleged false statement, this allegation is couched in the 33-page Complaint, which contains numerous other allegations against Defendants and eleven different causes of action. The allegation of coercion in Paragraph 49 is not alleged as a basis for securities fraud but is rather specifically alleged as a basis for Retterath's claims for breach of fiduciary duty, conspiracy to commit fraud in the

⁶ The Complaint contains two paragraphs numbered 49. The Court presumes Retterath is relying on the first Paragraph 49 as a basis for his argument.

inducement, negligent misrepresentation, and violations of the Florida Deceptive and Unfair Trade Practices Act. The purpose of a complaint is to put the defendants on notice of the claims alleged against them. Relying on a general factual allegation that was not stated as a basis for the specific claim fails to put Defendants on notice of the allegations against them.

Even considering the allegation of coercion as a basis for Retterath's securities fraud claim, the allegation does not push Retterath's claim across the line from implausible to plausible. Retterath's alleged misstatements in Paragraph 49 do not meet the PSLRA's requirements of pleading the fraudulent misstatements with particularity. The allegation does not contain any specific statements by a Defendant coercing or threatening him to enter into the MURA, nor does it describe "who, what, when, where and how" the statements were misleading. In re 2007 Novastar Fin., 579 F.3d at 882 (citations omitted). Any coercive pressure by Defendants to force Retterath to enter into the MURA is merely speculative.

Furthermore, Retterath fails to adequately plead that Defendants intended to coerce him into selling his Units. Not as a finding of fact, but as another test of the strength of the securities claims, it can be reasonably inferred from the pleadings that HES viewed Retterath's meeting with Kuhlbers as an attempt to illegally bribe Kuhlbers to vote in his favor, and when the Board tasked Leo and Brown Winick to conduct a further investigation, Retterath voluntarily sought to sell off his shares to avoid any future criminal charges for attempted bribery. The fact that Boyle and Retterath had more than one exchange during the execution of the MURA and that the purchase price increased from \$28 million to \$30 million creates an inference that the MURA was a product of negotiation, not coercion or intimidation. Further, the reasons Retterath cites for failing to close the MURA are not that it was procured out of duress or allegations of criminal charges, but rather because he believed the MURA was not executed in compliance of

the Operating Agreement. See Compl. ¶¶ 64-67, ECF No. 84. The Court finds these competing inferences further illustrate the fatally thin nature of Retterath's allegations that Defendants acted with fraudulent intent.

In sum, the Court finds that Retterath has failed to plead a false statement and scienter to sustain a claim for securities fraud under the pleading requirements of the PSLRA. For the reasons stated, Retterath's claim, even considering the allegation of coercion, fails to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading," and does not "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(1) & (2).

2. Loss Causation

Defendants also argue that Retterath has failed to plead sufficient loss causation. "To adequately plead loss causation, the complaint must state facts showing a causal connection between the defendant's misstatements and the plaintiff's losses." McAdams v. McCord, 584 F.3d 1111, 1114 (8th Cir. 2009). Unlike the elements of false misrepresentations and scienter, which are subject to the PSLRA's heightened pleadings standards, the pleading of loss causation only requires a short and plain statement of the claim. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 346 (2005). The Supreme Court has noted that "it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind." Id. at 347.

In McAdams, Eighth Circuit found the plaintiff failed to sufficiently allege loss causation to withstand a motion to dismiss by alleging, "Plaintiffs have been damaged in amounts to be determined at trial but which exceed \$10 million." 584 F.3d at 1114. Id. Similar to the pleading

in McAdams, Retterath's claim also fails to adequately plead loss causation to withstand a motion to dismiss. Retterath pleads in Count 10 that "Defendants' violation of [sic] has damaged the Plaintiff in an amount to be determined at trial." Compl. ¶ 118(J), ECF No. 84. The Complaint contains no further indication of the amount of damages that are causally connected to the alleged fraudulent misstatements.

3. Leave to Amend

Retterath requests that if the Court finds that he has failed to state a claim for securities fraud, that he should be granted leave to amend the Complaint. See Pl.'s Resp. to Individual Defs.' Mot. to Dismiss 19, ECF No. 123 ("In event this Court finds Mr. Retterath's pleading insufficient, Mr. Retterath should be granted leave to amend. Amendment would not be futile, and in fact is necessary . . ."). "Although leave to amend 'shall be freely given when justice so requires,' see Fed. R. Civ. P. 15(a), plaintiffs do not have an absolute or automatic right to amend." In re 2007 Novastar Fin., 579 F.3d at 884 (quoting U.S. ex rel. Lee v. Fairview Health Sys., 413 F.3d 748, 749 (8th Cir. 2005)). "[I]n order to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." Id. (quoting Clayton v. White Hall Sch. Dist., 778 F.2d 457, 460 (8th Cir. 1985)). Retterath did not attach a proposed amended complaint, nor did he include a statement indicating the substance of the proposed amendment. Retterath merely indicates that as an alternative, he should be granted leave to amend and that amendment would not be futile. On this record, and in the context of evaluating the plausibility of a securities claim and the Court's subject matter jurisdiction, the Court finds this bald request is insufficient and therefore must deny Retterath's request for leave to amend. See Minneapolis Firefighters' Relief, 641 F.3d at 1030-31; In re 2007 Novastar Fin.,

579 F.3d at 884-885; Clayton, 778 F.2d at 460 (holding it is insufficient to merely place a footnote or a short statement in a resistance to a motion to dismiss requesting leave to amend in the alternative without attaching a proposed amended complaint and providing an explanation of the proposed amendment). Additionally, the Court finds any amendment to the Complaint regarding Count 10 would be futile for the reasons detailed above.

The Court must dismiss Count 10 pursuant to Rule 12(b)(6) for failure to state a plausible claim for relief. Retterath failed to meet the heightened pleading requirements of the PSLRA, did not plead adequate loss causation, and has not adequately moved for leave to amend his Complaint.

B. Supplemental Jurisdiction

Upon dismissal of the federal securities claim, the Court is left only with supplemental jurisdiction over the remaining state law claims. Under 28 U.S.C. § 1367(c), “[a] district court[] may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction.” “[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988). District courts are given great discretion in determining whether to exercise pendent jurisdiction over state law claims when the underlying federal claims have been dismissed prior to trial. See Carlsbad Tech. Inc. v. HIF Bio, Inc., 556 U.S. 635 (2009) (“A district court’s decision whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary”); see also

Mo. Roundtable for Life v. Carnahan, 676 F.3d 665, 678 (8th Cir. 2012); Gibson v. Weber, 433 F.3d 642, 647 (8th Cir. 2006); Barstad v. Murray Cnty., 420 F.3d 880, 888 (8th Cir. 2005); Regions Bank v. J.R. Oil Co., 387 F.3d 721, 732 (8th Cir. 2004); Eddings v. City of Hot Springs, Ark., 323 F.3d 596, 600 (8th Cir. 2003) (each upholding the district court's decision to not exercise supplemental jurisdiction over the state law claims after the federal claims were dismissed).

The primary issue in dispute in this case is the validity and enforceability of the MURA. This is a pure state law contract dispute that belongs in state court. In fact, a breach of contract claim brought by HES to determine the validity of the MURA is currently pending before the Iowa District Court for Polk County. That case was previously removed to this Court by Retterath on the basis that it asserted a federal securities claim, and upon HES' motion, it was remanded back to the state court for lack of federal jurisdiction. See Homeland Energy Solutions, LLC v. Retterath, No. 4:13-cv-00518, ECF No. 27 (S.D. Iowa May 21, 2014). This case is in a relatively early stage of litigation as this matter comes before the Court on pre-answer motions to dismiss and motion for partial summary judgment, and discovery has not begun. The remaining issues are purely matters of state law, arising under the laws of Florida and Iowa. Upon these facts, the Court declines to exercise supplemental jurisdiction over the remaining state law claims.

The strategic posture of the parties has changed while the current motions were pending. Defendants assert in their briefs that if the Court dismisses Retterath's federal claim, the Court may decline to exercise supplemental jurisdiction over the remaining claims. Brown Winick Defs.' Mot. to Dismiss ¶ 8, ECF No. 108 ("Once Count X is dismissed, this Court may then decline to exercise its supplemental jurisdiction over the six remaining state law claims against

the Brown Winick Defendants under 20 U.S.C. section 1367(c)(3), thereby dismissing those claims because they are not properly before this Court.”); Individual Defs.’ Mot. to Dismiss ¶ 2, ECF No. 109 (“If Count Ten is dismissed, the Court may decline to exercise its supplemental jurisdiction over Plaintiff’s state law claims.” (internal citations omitted)). However, at the hearing, Defendants urged the Court to maintain supplemental jurisdiction in the event the Court dismisses the federal securities claim. Although the Court considers the parties requests, and appreciates the complexities of collateral litigation in remote jurisdictions, the Court cannot choose to exercise jurisdiction over claims where jurisdiction is lacking simply because the parties request the Court’s jurisdiction.

Absent federal jurisdiction over the remaining state law claims, the case must be remanded to the court where the suit originated pursuant to 28 U.S.C. § 1367(c)(3) and § 1441(c)(2). A similar procedural scenario was addressed by the Third Circuit Court of Appeals in Allied Signal Recovery Trust v. Allied Signal Inc., 298 F.3d 263 (3d Cir. 2002). In Allied Signal, the plaintiff initiated his suit in the Circuit Court for Polk County, Florida, and the case was removed to the United States District Court for the Middle District of Florida after the complaint was amended to add federal bankruptcy claims. 298 F.3d at 265-66. The Middle District of Florida then transferred the case to the United States District Court for the District of Delaware, where the bankruptcy proceedings were pending. Id. The Delaware District Court remanded the case to the Delaware state court after finding no federal jurisdiction. Id. The Third Circuit concluded that removal to the Delaware state court was without legal authority, and the court ordered the case to be remanded to the Florida state court where the suit was originated. Id. at 270. The court noted that “a court has authority to send a case back to the state court where it originated” and “[a] district court does not have authority to ‘remand’ a case to a stranger court.” Id.

Accordingly, the Court must remand this case to the Fifteenth Judicial Circuit in and for Palm Beach County, Florida.

III. CONCLUSION

For the reasons stated, Brown Winick Defendants' Motion to Dismiss, ECF No. 108, and Individual Defendants' Motion to Dismiss, ECF No. 109, must be **granted**. The Court dismisses Count 10 of the Complaint for failure to state a claim under Rule 12(b)(6). Given the posture of the case and the nature of the remaining causes of action, the Court concludes the exercise of supplemental jurisdiction would be contrary to controlling precedent. The remaining claims are **remanded** to the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, pursuant to 28 U.S.C. § 1367(c)(3) and § 1441(c)(2). The remaining motions, ECF Nos. 107, 110, 148, and 150, are **denied as moot**.

IT IS SO ORDERED.

Dated this 24th day of December, 2014.



JAMES E. GRITZNER, Chief Judge
U.S. DISTRICT COURT