

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

**CYNTHIA L ABBOTT REVOCABLE TRUST,
et al.,**

Plaintiffs,

v.

Case No. 3:14cv646/MCR/EMT

**OLSON & ASSOCIATES OF NW
FLORIDA INC., et al.**

Defendants.

ORDER

Pending before the Court is Defendant Sara Comander's Motion to Dismiss Count 14 (doc. 13) and Defendant Walton County, Florida's Motion for More Definite Statement (doc. 14), among several other pending motions and discovery disputes.¹ The Court finds that Comander's Motion to Dismiss Count 14 and Defendant Walton County's Motion for a More Definite Statement should be granted, and therefore, all remaining motions are moot.

Background

The Plaintiffs (which are the Cynthia L. Abbott Revocable Trust, Jonilea Foster Bell Revocable Trust, Alex R. Kish Revocable Trust, Diana J. Kish Revocable Trust, and Samuel A. Osborne and Illeana E. Osborne) are homeowners in a neighborhood called Driftwood Estates I ("Driftwood I"), located along the perimeter of a peninsula in Walton County and Sandestin, Florida. This property is within and subject to the Development of

¹ Also pending are Defendant Adams Homes's Motion for Oral Argument and Motion to Dismiss and Strike the Seventh Amended Complaint and Motion for Oral Argument (doc. 16); Defendant David O. Campbell's Motion to Dismiss and to Strike the Seventh Amended Complaint (doc. 17); Defendants Adams and Comander's joint motion requesting leave to file a reply brief (doc. 123); and Campbell's motion for leave to file a Supplemental Motion to Strike (doc. 122). Discovery disputes include Defendant Comander's motion for a protective order (doc. 75) and a Motion to Quash and for Protective Order filed by nonparty Intrawest (doc. 77).

Regional Impact Plan for the Sandestin Development (“Sandestin DRI”) and is part of the “integrated development plan” described in a 1984 Ordinance governing the development of this land. As described in the Seventh Amended Complaint, changes to the Sandestin DRI over the years have been approved by Walton County through ordinances, and each ordinance has adopted a master plan. In April 2003, Walton County approved a plan to develop the interior property adjacent to Driftwood I, which Plaintiffs allege improperly allowed the development of residential property partially on what had been designated as green space and wetlands; this new neighborhood development was called Driftwood Estates II (“Driftwood II”). The changes and construction leading to the claims in this cause of action occurred from 2004 through 2007, and were implemented by the developers—Defendants Olson & Associates of NW Florida, Inc. (“Olson”); Intrawest Sandestin Company, LLC (“Intrawest”);² Northtip Development, LLC (“Northtip”); and Adams Homes of Northwest Florida, Inc. (“Adams”)—and civil engineer Defendant David Campbell (“Campbell”) and Campbell Engineering, Inc., who were responsible for the stormwater retention and management design.

Plaintiffs brought suit in 2007 against Defendants Olson, Intrawest, Northtip, Adams, Campbell, and Campbell Engineering, Inc., alleging that they developed Driftwood II by unlawfully demolishing land adjacent to Driftwood I that was designated by law as Open/Green Space and wetlands, negligently designing and constructing the stormwater drainage system, and colluding and conspiring to procure Walton County’s unlawful approval of the Driftwood II development, all contrary to law and the Sandestin DRI.³ Plaintiffs specifically alleged that Defendants negligently modified the terrain of the lots in Driftwood II in a manner that impeded and obstructed the flow of stormwater drainage in Driftwood I, causing water to stagnate and flood Plaintiffs’ yards and the Driftwood I roads of ingress and egress. Plaintiffs further alleged that Defendants should have known that

² Intrawest was the owner and developer of the Sandestin Resort in Walton County, Florida, from July 1998 to March 2010, and the developer under the Sandestin DRI.

³ The County and Comander were not added to the suit until August 2014.

approval for the project had been unlawfully procured without proper legal process, that the development was not in accordance with law, and the Defendants had misrepresented the scope of actual compliance with Open Space and wetlands determinations and permits. The state court litigation progressed through discovery, several amendments to the Complaint, motions to dismiss, and motions to compel and for summary judgment. The County was added as a party in 2012, but at that time, no federal cause of action was asserted, and the County was dismissed without prejudice in 2013.⁴

Finally, the state court case was ready for trial in state court in November 2013, but shortly before that date, the state trial judge continued the trial and ordered the parties to engage in mediation, and Plaintiffs subsequently settled with Intrawest. However, based on additional records that came to light at that time, Plaintiffs were given leave to file another Amended Complaint (the Sixth), which Adams and Campbell moved to dismiss on grounds of standing, failure to state a claim under Florida law, and that the County was an indispensable party. The state court judge denied the motions to dismiss this complaint, citing liberal pleading standards but not expressly addressing the merits of the standing challenge. The judge also granted Plaintiffs' unopposed motion for leave to file a Seventh Amended Complaint to add claims against the County.⁵

The Seventh Amended Complaint is a sprawling 148-page document chronicling the development of Driftwood II.⁶ In it, Plaintiffs repeat the allegations of the Sixth Amended

⁴ On March 4, 2013, a default was entered under the Fifth Amended Complaint against Olson and Northtip (which are now dissolved) for their failure to appear; however the Fifth Amended Complaint has been superceded by two subsequent amended complaints. The filing of an amended complaint supersedes the original complaint. See generally *Dresdner Bank AG v. M/V Olympia Voyer*, 463 F.3d 1210 (11th Cir. 2006). Also, "[t]he filing of an amended complaint similarly cures a party's default as to the superseded original complaint." *Montgomery Bank, N.A. v. Alico Road Business Park, LP*, 2014 WL 757994, at *2 (M.D. Fla. 2014) (citing cases, including *Harvey v. Home Savers Consulting Corp.*, Case No. 07-CV-2645 (JG), 2008 WL 724152, *2 (E.D.N.Y. Mar.17, 2008) ("If plaintiffs file an amended complaint, the defaulting defendants must be included in any new complaint if plaintiffs wish to pursue their claims against the defaulting defendants, and plaintiffs must seek new default judgments against them if they again fail to appear.")).

⁵ Defendants did not oppose the motion to amend but expressly reserved all objections to the substance of the new complaint.

⁶ The Court notes that the caption of the Seventh Amended Complaint still includes Intrawest but does not include Walton County or Comander.

Complaint and add claims against the County and Sara Commander, a County Commissioner, individually. The Seventh Amended Complaint begins with 125 paragraphs of facts common to all counts. It contains state law negligence claims (Counts 1, 2, 3) against the developers and engineer, alleging that the negligent design and construction of Driftwood II and the stormwater drainage system caused flooding and standing water damage to Plaintiffs' property in Driftwood I, which in turn resulted in diminished property value and impaired their right of quiet enjoyment of the property. Plaintiffs also allege that the Defendants caused a nuisance and trespass (Count 4); that Northtip and Olson violated Florida's Deceptive or Unfair Trade Practices Act (Count 5); and that the Defendants engaged in a civil conspiracy with Walton County to have the project approved contrary to law and by virtue of their "peculiar power of coercion and influence" in combination and with participation of the County (though the County is not sued as a civil conspirator in this count) (Count 6). The Seventh Amended Complaint further alleges that the developers breached the implied warranty of habitability for services provided to Driftwood I, such as ingress, egress and drainage, under the Sandestin DRI (Count 7); and they allege Defendants are liable on a theory of aiding and abetting (Count 8).

Plaintiffs added counts against the County in the Seventh Amended Complaint, seeking an injunction requiring the County to maintain the roadways and stormwater drainage system according to law (Count 9), realleging the first 125 paragraphs. The Osbornes asserted a claim of inverse condemnation against the County, realleging and incorporating certain unspecified prior paragraphs and claiming that the County's failure to provide proper drainage or maintain the drainage system diverts the natural flow of water or restricts aspects of the drainage system, which diverts water onto Plaintiffs' property, resulting in an unlawful taking of their property (Count 10). In Count 13,⁷ Plaintiffs allege numerous civil rights violations against Walton County pursuant to 42 U.S.C. § 1983, based on alleged policy and customs violations of their property rights, procedural due process protections, substantive due process rights, and equal protection rights under the

⁷ The Seventh Amended Complaint does not include a Count 11 or Count 12.

United States Constitution related to the alleged conspiracy and development of Driftwood II. In Count 14, Plaintiff Osborne alleges that Walton County Commissioner Sara Comander, individually, violated his protected speech rights.

Defendants Adams and Campbell moved to dismiss the Seventh Amended Complaint, and the County then timely removed the case to federal court with the consent of the remaining Defendants based on the newly asserted federal constitutional claims. Defendant Comander then filed a motion to dismiss Count 14 under Rule 12(b)(1) for lack of standing and Rule 12(b)(6) for failure to state a claim, and the County filed a motion for a more definite statement. The Court subsequently denied Plaintiffs' motion to remand⁸ and stayed the case pending resolution of the outstanding motions challenging the complaint.

Discussion

When considering a motion to dismiss for failure to state a claim, see Fed. R. Civ. P. 12(b)(6), the Court determines whether the complaint contains "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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see also *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008) (accepting all factual allegations of the complaint as true and construing them in the light most favorable to the plaintiff for purposes of Rule 12(b)(6)). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," not detailed allegations. See *Iqbal*, 556 U.S. at 678. The "plausibility standard" requires a showing of "more than a sheer possibility" that the defendant is liable on the claim but does not rise to the level of a "probability requirement." *Id.* The allegations of the complaint need only set forth enough facts "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Threadbare recitals" of the legal elements of a claim, or legal conclusions,

⁸ Also, the Court entered a default against Campbell Engineering, Inc., for its failure to retain substitute counsel, and the record reflects that Plaintiff Cynthia L. Abbott Revocable Trust filed a Rule 41 voluntary dismissal with prejudice of its claim against Adams (doc. 30).

unsupported by plausible factual allegations are not credited because “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Iqbal*, 556 U.S. at 678.

Subject matter jurisdiction may be challenged by a motion to dismiss pursuant to Rule 12(b)(1). Standing is a “threshold jurisdictional question” originating from the case or controversy requirement of Article III of the Constitution that must be resolved before the Court addresses the merits of a dispute. *Elend v. Basham*, 471 F.3d 1199, 1204-05 (11th Cir. 2006); see also *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 974 (11th Cir.2005) (“In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims.”). The party invoking federal court jurisdiction has the burden to demonstrate standing, which consists of three necessary elements: (1) an injury in fact that is concrete and particularized as well as actual or imminent; (2) a causal connection between the injury asserted and conduct at issue; and (3) that the injury is likely to be redressed by a favorable decision. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Elend*, 471 F.3d at 1205 (“It is by now axiomatic that standing requires the plaintiff to demonstrate injury in fact, causation, and redressability.”). Injury-in-fact requirements, however, are most loosely applied where First Amendment speech rights are involved and there is a danger that free speech will be chilled even before a law, regulation, or policy is enforced; in those circumstances, “the injury is self censorship.” See *Harrell v. The Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (internal marks omitted).

Defendant Comander moves to dismiss Count 14 on grounds that the allegations do not allege any injury caused by her actions. The Court agrees. Osborne alleges that on June 9, 2011, Comander sent an email to the Walton County Attorney, advising her not to publicize an upcoming Growth Management Workshop to be held in Defuniak Springs, Florida, advising, “We don’t need to announce that DCA [Department of Community Affairs] will be in DFS [Defuniak Springs] on July 5th or Allen Osborne will be there!” Osborne alleges that Comander had a malicious intent to suppress information known by the County, to retaliate against him for his prior speech, and to prevent him from engaging

in further protected speech. He further alleges that the county attorney complied with Comander's directions by not advertising the workshop and that this caused "the deprivation of his rights, privileges and immunities secured by the United States Constitution and laws." This threadbare recital of the law, unsupported by any plausible facts, is not entitled to a presumption of truth and is insufficient to demonstrate an injury for purposes of standing. There is no allegation that Osborne was entitled to have the meeting "announced," that it was a forum he could have used for his protected speech, that he otherwise would have attended, or that the email somehow chilled his speech or prevented him from attending the meeting and speaking. Whether Osborne would have attended and would have been entitled to speak but was chilled or prevented from doing so by Comander's email is not pleaded by any factual allegations that rise above the level of speculation. Absent an alleged injury, standing is lacking, and the count fails to state a claim.

Osborne argues that § 1983 claims do not require heightened pleading. Comander's argument, however, is not based on a heightened pleading standard but a lack of injury and causation, which are necessary both for jurisdictional standing and as elements of the claim. Osborne also argues that Comander's actions show a retaliatory intent when considered in context of the events alleged in the first 125 paragraphs of the complaint. Those paragraphs, however, do not mention any action by Comander. He further argues that circumstances described in his response to the motion to dismiss demonstrate Comander's retaliatory intent, but the response details additional factual circumstances from 2007 through 2009 that are not recited in the Complaint and, in any event, they also fail to assert facts from which it is plausible that Comander's June 2011 email chilled or prevented Osborne's speech rights. The content of the alleged comment in Comander's email does not itself violate Osborne's free speech rights, and even assuming it demonstrates a retaliatory intent, no facts are alleged to show that Osborne's speech was threatened or restricted by the email or that he was otherwise harmed by it. Having fully reviewed the allegations in Count 14, the Court agrees with Defendant

Comander that the Seventh Amended Complaint fails to allege facts setting forth a plausible injury, and the motion to dismiss is due to be granted. Also, the Court finds that amendment would be futile. The email on which this claim is based, and which Osborne was unaware of, could not have chilled or restricted his speech and did not directly reference his speech. Although Osborne asserts he should be given an opportunity to amend because his discovery was hindered by Intrawest destroying information, the plausible facts of his own injury, if any, would have been within his own knowledge, and Osborne's response to the motion did not identify any plausible facts showing that the June 2011 email caused him injury. See *Fox v. Prudential Financial*, 178 F. App'x 915 (11th Cir. 2006) (stating a district court is not required to "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile"). Therefore, Count 14 will be dismissed with prejudice.

Defendant Walton County has moved for a more definite statement. Rule 12(e) permits a defendant to seek a more definite statement if the complaint is "so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading." A more definite statement may be required if a pleading amounts to an impermissible "shotgun" pleading from which it is "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Anderson v. Dist. Bd. of Trustees of Cent. Fla.*, 77 F.3d 364, 366 (11th Cir. 1996); see also *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (noting the Eleventh Circuit has repeatedly condemned shotgun pleadings). Shotgun pleadings impermissibly thwart a defendant's ability to craft a responsive pleading and force the court to "sift through facts presented and decide for itself which were material to the particular cause of action asserted." *Strategic Income Fund, LLC v. Spear, Leeds & Kellogg Corp.*, 305 F.3d 1293, 1296 n.9 (11th Cir. 2002). Incorporating the same lengthy allegations into each claim makes it difficult to know which allegations are intended to support which claim for relief. See *Anderson*, 77 F.3d at 366.

Furthermore, “[t]his type of pleading completely disregards Rule 10(b)’s requirement that discrete claims should be pled in separate counts.” *Magluta*, 256 F.3d at 1284. Thus, the Eleventh Circuit has instructed defendants to move for a more definite statement when faced with a shotgun pleading and also advised that district courts should dismiss or strike the pleading *sua sponte* if necessary, giving the plaintiff an opportunity to replead. See *Weiland v. Palm Beach County Sheriff’s Office*, ___ F.3d ___, 2015 WL 4098270, at *4 n.10 (July 8, 2015) (but also stating that where a plaintiff fails to make meaningful modifications to the complaint, a district court may dismiss the case).

Walton County argues that it is unable to formulate a response because the Seventh Amended Complaint asserts a hodgepodge of claims, with paragraphs and counts misnumbered or out of sequence; counts that incorporate the first 125 paragraphs plus sometimes incorporate additional counts or reallege and incorporate unspecified preceding paragraphs (i.e., “Plaintiffs reallege paragraphs ___ and incorporate them herein.”); and some identically numbered paragraphs contain wholly different allegations (i.e., ¶¶ 432-434 appearing on pages 145-146 contain different allegations than ¶¶ 432-434 on page 123). The County contends it would have to pour over the 148 pages of the Seventh Amended Complaint to try to decipher which allegations of the first 125 paragraphs, if any, are pertinent to each count. Additionally, the County argues that Count 13, which alone spans 20 pages and is comprised of multiple constitutional claims, including violations of Plaintiffs’ First Amendment rights, procedural due process violations, substantive due process violations, and equal protection violations, is incomprehensible. The County asserts that defining the contours of the claims upfront would be beneficial for all parties and could avoid needless discovery and discovery disputes.

The Court agrees with the County that the Seventh Amended Complaint suffers from shotgun pleading deficiencies. Neither the County nor the Court should be required to sift through over 100 numbered paragraphs to determine how or whether they are related to each claim or to guess at the nature of the constitutional violation being alleged pertaining to each fact. The misnumbering and incorporating of unrelated or unspecified

prior paragraphs makes it virtually impossible to craft a meaningful response, and, although Count 13 appears to be organized by alleged constitutional violations, each category within it nonetheless lumps together several claims, making it difficult to know which facts support which claims. For instance, under the heading of “First Amendment Violations,” the allegations incorporate all of the conspiracy allegations of Count 6, which is not pleaded against the County but implicates the County as a conspirator, and under the same heading, multiple facts are alleged with assertions that the County violated Plaintiffs’ speech rights, influenced whether they would testify in judicial proceedings, and attempted to prevent them from exercising their right to petition the government. Plaintiffs also mix in allegations of intimidation, retaliation, selective enforcement, and the deprivation of property rights under the heading First Amendment Violations. Under a separate heading of “Procedural Due Process Violations,” also within Count 13, Plaintiffs allege the failure to give notice of public meetings, that unwritten policies gave staff complete discretion, that the County selectively enforced certain aspects of the law, failed to supervise and train employees, and, again, that the County retaliated based on First Amendment rights. Numerous similar paragraphs are included under headings labeled “Substantive Due Process” and “Equal Protection Violations.” The Court also agrees with the County that requiring an answer to the Seventh Amended Complaint would amount to an invitation for a shotgun answer, which in turn would result in wasted resources on unfocused discovery and likely further discovery disputes in this already prolonged case. Thus, a more definite statement must be provided. Although the Court is loathe to permit more pleading at this stage, because the Seventh Amended Complaint was the first to include federal claims against the County, the Plaintiffs are entitled to an opportunity to replead and attempt to define their claims against the County in a concise and organized manner. Therefore, Plaintiffs will be required to replead and formulate the claims into separate discernable counts organized with factual allegations relevant to each particular claim asserted and set forth in a short and plain statement showing an entitlement to relief. See Fed. R. Civ. P. 8(a) & 10(b).

Because of this ruling, an amended complaint will supercede the Seventh Amended Complaint, and as a result, all Defendants will be required to respond anew to the pleading. Therefore, the pending motions to dismiss the Seventh Amended Complaint and related motions are moot. To the extent arguments set forth in the motions to dismiss remain applicable to the new complaint, however, Adams and Campbell are free to renew or incorporate the motions by reference in response to the new complaint.

Accordingly:

1. Defendant Sara Comander's Motion to Dismiss Count 14 (doc. 13) is **GRANTED** with prejudice.

2. Defendant Walton County, Florida's Motion for More Definite Statement (doc. 14) is **GRANTED** with leave to amend. Plaintiffs have fourteen (14) days to file an amended complaint, and Defendants have fourteen (14) days thereafter to respond.

3. Defendant Adams Homes's Motion to Dismiss and Strike the Seventh Amended Complaint and Motion for Oral Argument (doc. 16); Defendant David O. Campbell's Motion to Dismiss and to Strike the Seventh Amended Complaint (doc. 17); the joint motion requesting leave to file a reply (doc. 123); Defendant Campbell's motion for leave to file a supplemental motion to strike (doc. 122); and Defendant Comander's Motion for Protective Order (doc. 75) are **MOOT**.

4. The stay is **LIFTED**. The Clerk is directed to re-refer to the Magistrate Judge the outstanding Motion to Quash Subpoena and for Protective Order filed by Nonparty Intrawest (doc. 77).

DONE AND ORDERED on this 28th day of July, 2015.

M. Casey Rodgers

M. CASEY RODGERS
CHIEF UNITED STATES DISTRICT JUDGE