





true" investment was really a scheme between TRM, several banks, several bank mortgage officers, real estate developers and appraisers to defraud the investors of their funds. Plaintiffs' investors ultimately did acquire property, however the land is not highly marketable at a profit in this downturn economy, and Plaintiffs' investors assert that TRM and the banks are liable to them for fraud, violation of the Interstate Land Sales Disclosure Act, conspiracy with bank officers and corrupted appraisers, and violation of the state unfair trade practices. The Amended Complaint is 326 pages long, asserts 45 claims on behalf of 127 plaintiffs against 26 Defendants. The key threshold question is whether the Amended Complaint states a plausible claim under *Ashcroft v. Iqbal*. That is whether after 326 pages the Complaint succinctly states facts showing sufficient factual matter to state a plausible claim on its face where the Complaint fails to show facts supporting the claim that the Banks or mortgage companies made any affirmative representations of material facts upon which Plaintiffs could rely to their detriment which proximately caused Plaintiffs to suffer damages.

There are 5 issues before the Court. The first issue is whether the Complaint's allegations that Banks colluded with corrupt mortgage loan officers and corrupt appraisers

to enter into risky loans that would fail sufficiently states a plausible claim. The second issue is whether the Complaint states sufficient facts in support of the alleged agency relationships between the banks and developers and Total Realty Management ("TRM") where these agency relationships form the predicate for liability against these defendants. The third issue is whether the banks are liable under the Interstate Land Sales Act ("ILSA") where the Act is explicitly applicable to developers, not banks.<sup>1</sup> The fourth issue is whether Plaintiffs claims alleging civil conspiracy to defraud and conspiracy to commit fraud are subject to the particularity requirements of Rule 9(b), and if so, whether Plaintiffs have made sufficient allegations to sustain this claim. The fifth issue is whether the place of the wrong for purposes of an unfair trade practice claim is the location of the settlement or the location of Plaintiffs' residences.

The Court holds that the Complaint fails to state a claim against the banks and TRM as either co-conspirators or as parties involved in an agency relationship because there are insufficient allegations to support a plausible conclusion that the Banks would enter into risky loans

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<sup>1</sup> The Court will also address whether the ILSA claims against developer Maryville are plausible.

based upon knowingly false information so the banks would sustain a loss. The Court also holds that the Complaint contains insufficient factual allegations of agency demonstrating a relationship between TRM and the banks or TRM, Southeastern and Maryville because the Complaint is devoid of allegations that these alleged agents were operating under the control of the defendants, or that these entities were acting in the defendants' interest. With respect to the third issue, the Court grants the Defendant's Motion to Dismiss the claims against the banks under the ILSA because the Act is limited in application to developers, not banks, and there are insufficient allegations to support finding the banks liable as developers on the grounds that they exceeded the normal course of conduct. The Court grants the Defendant's Motion to Dismiss the conspiracy to defraud and conspiracy claims because the claims are not alleged with sufficient particularity as to the who, what, where, when, and why to meet the requirements of Federal Rule of Civil Procedure 9(b). The Complaint while long, is replete with broad brush general group allegations, group pleading which is not sufficient in fraud claims and the Amended Complaint is devoid of key factual allegations. The Complaint fails to allege facts that would support the requisite finding of a

meeting of minds for a conspiracy claim as opposed to mere parallel conduct. Finally, the Court grants the Defendants' Motions to Dismiss the North and South Carolina unfair trade practices acts claims, because the harm Plaintiffs assert, the loss of their investment money or credit occurred in the Plaintiff's states of residence, none of the plaintiffs are North Carolina residents, Plaintiffs have not met the requirement that the alleged conduct impacts the public interest in order to state a claim under the South Carolina Act, causes of action under other states' unfair trade practices statutes have not been asserted, and with respect to the Virginia Plaintiffs, the Virginia Consumer Protection Act, precludes actions such as these against banks.

#### I. BACKGROUND

Presently before the Court is a 326 page Complaint with 45 Counts filed on behalf of 127 plaintiffs against 26 defendants. The foundation of this action is Plaintiffs' purchase from TRM of unimproved lots in North and South Carolina for the purpose of resale. Plaintiff investors assert they met with representatives of TRM who presented an investment opportunity where the plaintiffs could buy unimproved land in area ripe for development with little or no money down that the plaintiffs could easily resell at a

profit. TRM promised to make it easy to invest and to take care of arranging financing and closing for the investors. These lots were located in three (3) subdivisions— two (2) in North Carolina (Summerhouse on Everett Bay and Cannonsgate on Bogue Sound); and one (1) in South Carolina (Craven's Gate at Winyah Bay). Plaintiffs' purchases were financed by the following seven (7) banks, which are named as defendants in this action: Bank of America, Carolina First, Cooperative Bank, SunTrust Mortgage Inc., Branch Banking & Trust Co., Woodlands Bank and Beach First National Bank.<sup>2</sup> In addition to bringing suit against the banks and their trustees, Plaintiffs have also names as defendants, TRM, Mark Dain (TRM Chief Executive Officer), Mark Jalajel (TRM President), Michael McCracken (TRM Chief Financial Officer), Cari Deuterman (TRM Vice President of Finance), and Daniel Meier (TRM spokesperson). Additionally, Plaintiffs have named as defendants, developers involved with these properties as well as their independent contractors and entities who received funds from TRM. Maryville, who has filed one of the motions to dismiss presently before the Court is one such developer. As of the date of this opinion, TRM has been placed into

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<sup>2</sup>The banks' trustees were also named as defendants in this action.

involuntary bankruptcy<sup>3</sup>, Mr. Jalajel, Mr. Meier and Ms. Deuterma have filed for bankruptcy, and Mr. Dain and Mr. McCracken have failed to respond to the Second Amended Complaint and Plaintiffs have filed motions for default judgments against them.

Plaintiffs' Complaint alleges that TRM purchased properties at fair market value prices and in turn "flipped" the properties by selling them for a substantial profit to Plaintiffs, promising Plaintiffs that they too would be able to resell their properties at a profit. (Second Am. Compl. ¶¶ 166, 122.) According to the Complaint, "TRM Representatives held themselves out as a provider of a complete package of real estate services, including not only being the seller, but also being the real estate agent, mortgage broker, settlement service provider and notary." (Second Am. Compl<sup>4</sup>. ¶ 172.) As such TRM handled all contact with the banks on behalf of the Plaintiffs, who concede that they had little, if any direct contact with the banks. According to the Second Amended Complaint, Plaintiffs assert that this arrangement allowed TRM: "(i) to qualify purchasers for loans for which they

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<sup>3</sup> U.S. Bankruptcy Court for the Eastern District of Virginia, Alexandria Division Bankruptcy Petition #09-11938

<sup>4</sup> This document is titled "Amended Complaint", but is actually the Second Amendment Complaint filed on May 1, 2009, subsequent to the Original Complaint filed on November 20, 2008 and the First Amended Complaint filed on January 15, 2009.

would not normally qualify; (ii) to create a mistaken belief in the purchasers that the transactions were legitimate fair market transactions; and (3) [sic] to facilitate significant financial inducements with which TRM could induce sales." (*Id.* ¶ 124.) Furthermore, with respect to the Banks, the Complaint

[A]lleges that TRM rigged the appraisals relied on by the banks to value the land securing the loans—the banks' collateral—thus causing the banks to make under-collateralized loans, a feat TRM accomplished by allegedly orchestrating "sham transactions" through "straw purchasers" and by "flipping" lots at inflated sale prices to gin up inflated comparables. ([Second Am. Compl.] ¶¶ 118, 146, 154, 159-61, 167) The complaint alleges that, in the end, Plaintiffs paid TRM for the lots using bank funds from the mortgage loans—i.e., that TRM used the banks' money to finance its profit from this alleged illicit scheme. (*Id.* ¶ 122)

(BB&T Mem. Supp. Mot. Dismiss 1-2.). Plaintiffs also allege that they either did not receive Property Reports as required by the Interstate Land Sales Act, or that when reports were provided they were incorrect and/or missing information.

Plaintiffs have alleged the following counts against the defendants who have filed the Motions to Dismiss that are before the Court: 1) conspiracy to commit fraud (Cooperative/Willetts, Sun Trust, Carolina First); 2) civil

conspiracy to defraud (BB&T, Bank of America, Woodlands/Harris, Beach First); 3) North Carolina Unfair and Deceptive Trade Practices Act (Cooperative/Willetts, BB&T, Sun Trust, Bank of America, Maryville, Woodlands/Harris, Carolina First, Beach First); 4) South Carolina Unfair Trade Practices Act (SunTrust, Bank of America, Maryville, Carolina First, Beach First); 5) declaratory judgment promissory notes and deeds of trust void for illegality (Cooperative/Willetts, BB&T, SunTrust, Bank of America, Woodlands/Harris, Beach First, Carolina First); 6) revocation of contract pursuant to 15 U.S.C. §1703(c)—revocations within two (2) years (Bank of America, Carolina First, Cooperative, SunTrust, BB&T, Woodlands, and Beach First); 7) revocation of contract pursuant to 15 U.S.C. §1703(c)—revocations within three (3) years (Bank of America, Carolina First, Cooperative, SunTrust, BB&T, Woodlands, and Beach First); 8) damages pursuant to ILSA (Maryville).<sup>5</sup>

The original Complaint in this matter was filed on November 20, 2008. Prior to the filing of an Answer by any Defendant, the First Amended Complaint was filed on January 15, 2009. Several defendants filed motions to dismiss, in turn prompting the filing of the Second Amended

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<sup>5</sup> These claims are also made against the defendants' trustees.

Complaint on May 1, 2009.<sup>6</sup> This matter was consolidated with *Abraham et al v. Total Realty Management, et al* 1:09cv6 on May 14, 2009. The previously listed motions to dismiss that are the focus of this opinion were filed between May 28, 2009 and June 11, 2009. The Court held oral argument on all of the motions on July 1, 2009.

## II. DISCUSSION

### A. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007); see FED. R. CIV. P. 12(b)(6). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In addition to the complaint, the court may also examine "documents incorporated into the complaint by reference, and matters

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<sup>6</sup> When several defendants filed an initial set of motions to dismiss, Plaintiffs responded by filing a Motion for Leave to Amend the Complaint. The Court removed the pending motions to dismiss from the active docket, to allow for the consideration of the motion for leave to amend, and instructing the defendants to re-file their motions to dismiss if leave to amend was granted and they believed that the amended Complaint was still subject to dismissal.

of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007). "Conclusory allegations regarding the legal effect of the facts alleged" need not be accepted. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendant to prepare a fair response. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

#### B. Analysis

##### 1. Plausibility

Defendants' Motions to Dismiss the Amended Complaint are granted because the plaintiffs claims do not meet the *Ashcroft v. Iqbal* plausibility standard required to survive a motion to dismiss because the facts alleged on the face of the complaint do not allow for a reasonable inference that the defendants are liable to Plaintiffs for their individual investment decisions. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the

