

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Beth Feeley, et al.,)
Plaintiffs,)
)
v.) Case No. 1:08cv1212 (GBL)
)
Total Realty Management, et al.)
Defendants.)

MEMORANDUM ORDER

THIS MATTER is before the Court on Defendants Cooperative Bank and Frederick Willetts, III's Motion to Dismiss, Defendants Branch Banking & Trust Co. of South Carolina and BB&T Collateral Service Corporation's Motion to Dismiss, Defendant SunTrust Mortgage, Inc.'s Motion to Dismiss, Defendants Bank of America, N.A. and Prlap, Inc.'s Motion to Dismiss, Defendant Maryville's Motion to Dismiss, Defendants Woodlands Bank and John T. Harris' Motion to Dismiss, and Defendants Beach First National Bank and Carolina First Bank's Motion to Dismiss. Plaintiffs, a large number of individuals assert that they were lured by Total Realty Management into an investment in unimproved land in North Carolina and South Carolina that TRM asserted the individual investors could purchase with little or no money down and after the purchase flip or re-sell at a profit. The Plaintiffs' allege that this "too good to be

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.¹ 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

¹ 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.² 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

²The banks' trustees were also named as defendants in this action.

involuntary bankruptcy³, 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. Compl⁴. ¶ 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

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

⁴ 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).⁵

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

⁵ These claims are also made against the defendants' trustees.

Complaint on May 1, 2009.⁶ 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

⁶ 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

relief sought, which may include relief in the alternative or different types of relief. FED. R. CIV. P. 8(a). The requirement that the Court take the facts in the light most favorable to the plaintiffs on a motion to dismiss does not obligate the Court to accept the legal conclusions drawn from the facts. *E. Shore Mkts. Inc. v. J.D. Assoc. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). "Similarly, we need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.* (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990)). The Supreme Court in *Iqbal*, has recently enunciated the following plausibility requirement for motions to dismiss:

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." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of

misconduct, the complaint has alleged- but it has not "shown"- "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009) (internal citations omitted).

Plaintiffs claim as a threshold matter that the Banks colluded with TRM, corrupt real estate appraisers and bank loan officers to arrange for unsuspecting investors to enter into loans the investors could never pay, in land they could never sell, that was overvalued; and now that TRM has declared bankruptcy, that the Banks must charge off the investor loans and repay the investors. What does the bank get out of this, loan fees, foreclosed upon unimproved land to carry on their books? To the extent that Plaintiffs have essentially alleged that the banks and Maryville were in cahoots with TRM, as the basis for liability these allegations are simply implausible. The facts as alleged do not allow for an inference that the aforementioned parties were co-conspirators or that they were in an agency relationship. The Second Amended Complaint alleges that "[t]he fact that Bank of America, Carolina First, Cooperative and Beach First each stopped lending funds for TRM sales after they became aware of loan origination and underwriting failures and/or of flawed appraisals evidences the banks' awareness that the loans had been improperly

originated, underwritten and/or appraised." (Second Am. Compl. ¶ 562.) This allegation if accepted as true, fails to lead to the conclusion presented by Plaintiffs. In fact the logical conclusion would be the exact opposite—that the banks ceasing to work with TRM upon becoming aware of these alleged deficiencies, evidences that they were previously unaware of what was going on, not that the banks and TRM were working together. This is especially true, in light of the Complaint's utter failure to allege how the banks entering into a scheme to make under-collateralized loans would be in their self-interest.⁷ In their Oppositions to these Motions, Plaintiffs claim that the banks provided financial incentives to their employees for closing large numbers of loans, and that these employees' motives and actions may be imputed to the banks on a *respondeat superior* theory of liability. However not only are these allegations completely unsupported, they are not mentioned in the Second Amended Complaint, the sole point of examination for the Court on a motion to dismiss.

⁷ See generally, *Robertson v. First Union Nat'l Bank*, 350 S.E.2d 309, 315 (S.C. App. 2002) (upholding trial court's grant of summary judgment with respect to South Carolina Unfair Trade Practices Act claim, stating that, "we can think of no logical reason why Bank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default.")

Furthermore with respect to the agency relationships alleged by Plaintiffs, the Court first and foremost finds these insufficient because not only is the Second Amended Complaint, completely devoid of any factual allegations that the banks or Maryville exercised any control or authority over TRM, but it also fails to allege that or how TRM was acting in the interest of the banks or Maryville. These are essential elements required to demonstrate an agency relationship that are absent from the pleadings. These allegations are required to meet the *Iqbal* standard of pleading facts that constitute more than a mere possibility that an agency relationship existed between the parties. The same can be said for Plaintiffs efforts to impute knowledge from TRM to Southeastern to Maryville

2. Interstate Land Sales Act

i. The Banks

The Court grants the banks' Motions to Dismiss the claims arising under the Interstate Land Sales Act because the Act applies to developers, not financial institutions, and the Second Amended Complaint fails to present plausible allegations that the banks actively participated in and aided the advancement of the alleged fraudulent scheme so as to justify considering these financial institutions developers for purposes of establishing liability under the

Act. ILSA only regulates "developers" of subdivisions, and limits liability to "developers" and their "agents." 15 U.S.C. § 179. Section 1701 defines a "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). It defines an agent as "any person who represents or act for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision." 15 U.S.C. § 1701(6).

"Enacted in 1968 as part of a comprehensive housing statute the Interstate Land Sales Full Disclosure Act is a consumer protection statute designed to prohibit and punish fraud in land development enterprises. *McCown v. Heidler*, 527 F.2d 204, 207 (10th Cir. 1975); Public Law 90-488, 82 Stat. 476." *Bartley v. Merrifield Town Center, Ltd. P'shp*, 580 F.Supp. 2d 495, 498 (E.D.Va. 2008). "The Act was prompted by disclosure at Senate hearings of gross abuses by promoters of undeveloped land The Act is aimed at 'get rich quick promoters' who bilked purchasers"
." *Cumberland Capital Corp. v. Harris*, 621 F.2d 246, 249-50 (6th Cir. 1980). In *Cumberland*, a lending institution sought a declaratory judgment that it was not a "developer" for purposes of the Act. There the court

[H]eld that a lending institution which occasionally took mortgages or deeds of trust on unimproved lots as security for loans and which then foreclosed upon the default of borrowers according to the terms of the loan agreement, and which sometimes purchased the foreclosed property at the foreclosure sale and offered it for resale was not a developer under the Act. The court came to this conclusion based on the following: (1) none of the tracts of land in question was altered or improved while owned by the lending institution; (2) the land was not replatted or subdivided; and (3) the lending institution's involvement in the land sale was undertaken only as necessitated by the defaulting borrower, and was occasional and incidental in nature.

Hammar v. Cost Control Mktg. & Sales Mgmt. of Va., 757 F.Supp. 698, 702 (W.D. Va. 1990). The few courts who have examined the question of if and/or when a lending institution may be considered a developer under the Act have relied heavily on the opinion issued in *Timmreck v. Munn*. 433 F.Supp. 396 (N.D. Ill. 1977).⁸ In *Timmreck*, the court delineated the following circumstances where a financial institution may be considered a developer for purposes of the Act, namely where a bank "exceed[s] the

⁸ The exemption carved out in *Timmreck* has never been adopted by the Court of Appeals for the Seventh Circuit, nor has it been adopted by the Fourth Circuit. This opinion therefore is not a precedential authority and neither binding nor advisory in this Court. Thus, while the exception carved out in *Timmreck* has not been acknowledged in this Circuit, the Court pauses to examine it briefly, as the principal authority for any such exception.

normal scope of financing practices and actively participate[s] in and aide[s] the advancement of a fraudulent scheme" 433 F.Supp. at 406. The Court finds that Plaintiffs have insufficient facts to find the banks liable under the ILSA based on the exception carved on in *Timmreck*. Alternatively with respect to the claims for rescission, even if the banks were subject to suit under the ILSA, Plaintiffs seek rescission of the contract while simultaneously acknowledging an unwillingness to render what they have received. This is impermissible and if the ILSA were applicable to the defendants, Plaintiff's unwillingness to do their part to reestablish the status quo precludes any relief in the form of rescission of the contract. See *Am. Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir. 2007) (finding rescission inappropriate where lenders unable to tender loan proceeds).

Here the plaintiffs have asserted the following claims under ILSA: 1) promissory notes and deeds of trust are void for illegality under 24 C.F.R. §§ 1715.1 and 1715.2; 2) revocation/rescission of contracts pursuant to 15 U.S.C. § 1703(c); and 3) damages under 15 U.S.C. § 1703(a)(1) & (2)(B) & (C). Not only is there insufficient common law or statutory authority to support a finding that an exemption

permitting liability for lending institutions exists under the Act, even if it did Plaintiffs have not alleged sufficient facts to support the application of such an exemption. The circumstances that precluded application of the Act to lending institutions in *Cumberland* exist here as well. Plaintiff has failed to allege sufficient facts to allow the Court to infer that the banks that are the targets of these allegations have gone beyond standard industry practices with respect to real estate transactions. Therefore, the Court dismisses the Counts of the Second Amended Complaint brought against the banks under the ILSA, because the Act does not apply to lending institutions, the authority for an exemption for lending institutions that exceed standard industry practices is minimal, and the allegations in support of such an exemption are insufficient.

ii. Maryville

The Court dismisses the ILSA claim against Maryville⁹ because it is insufficient and flawed on its face to the extent that it relies on an implausible agency theory. Plaintiffs have simultaneously alleged that Southeastern were agents of both TRM and Maryville, without sufficiently addressing issues of control and/or conflicting interest. Plaintiffs have imputed knowledge of TRM's activities to Maryville via Southeastern without any supporting facts or plausible rationale. The Court is not required to accept unsupported legal conclusions without facts. For these reasons, the Court holds that Plaintiffs have failed to state a claim against Maryville under the ILSA and Maryville's Motion to Dismiss is granted.

3. Fraud

The Court grants the Defendants' Motion to Dismiss the conspiracy to commit fraud and civil conspiracy to defraud claims against the banks because corporations cannot conspire with their agents, the claims are not plead with sufficient particularity to comport with Rule 9(b), and Plaintiffs have failed to allege facts that would support a finding that a meeting of the minds occurred as is required

⁹ Maryville did not request dismissal of this claim against them under Rule 12(b)(6), however the Court may do so sua sponte. The parties not only argued this issue of agency in their briefs, but also significant time and energy was devoted to this issue at oral argument.

to support a conspiracy claim.¹⁰ "A civil conspiracy requires an object to be accomplished, a meeting of minds on the object or course of action, one or more overt acts, and damages as the proximate result thereof." 16 AM. JUR. 2D *Conspiracy* § 51 (2009). "To establish a prima facie fraud claim, the plaintiff must prove the following elements by clear and convincing evidence: (1) false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) resulting in injury or detrimental reliance." 37 AM. JUR. 2D *Fraud and Deceit* § 475 (2009).¹¹

The Court dismisses the conspiracy counts for failure to state a claim because Plaintiffs have alleged that the banks conspired with TRM who were serving as agents of the banks at the time of the conspiracy. This is a fatal flaw because "[t]he doctrine of intracorporate immunity . . . recognizes that a conspiracy 'requires two or more persons and that, because a corporation and its agents comprise a single legal entity, they are legally incapable of

¹⁰ Plaintiffs have alleged conspiracy to commit fraud against some of the banks and civil conspiracy to defraud against others. The allegations set forth in support of these claims are essentially identical, and the Court therefore addresses them together.

¹¹ The parties disagree as to whether Virginia or North Carolina law governs these claims. The Court's resolution of the motions to dismiss the conspiracy claims does not require a choice of law analysis because the claims can be dismissed on more general grounds that do not pertain to any particular state's law. Therefore the Court has merely stated the general elements of these claims in its analysis.

conspiracy.'" *SecureInfo Corp. v. Telos Corp.*, 387 F.Supp.2d 593, 616 (E.D.Va. 2005) (quoting *Lewin v. Cooke*, 95 F.Supp.2d 513, 524 (E.D.Va. 2000)). When confronted with this issue at oral argument, Plaintiffs' counsel suggested pleading in the alternative that TRM is an agent or that TRM is a co-conspirator and presenting a jury instruction as to which theory of recovery the jury was proceeding on. Mot. Dismiss Hr'g Tr. 104-05 July 1, 2009.

The Defendants Motion to Dismiss is granted for several reasons. First it is unclear which actual counts that Plaintiffs proposes to plead in the alternative. The Court is left wondering which counts Plaintiffs propose to abandon if the Court or a jury finds that no agency relationship exists so as to allow Plaintiffs to proceed with the conspiracy theory. Second, there was no indication in the multiple Complaints or the hundreds of pages of pleadings filed that Plaintiffs intended to plead in the alternative. Although there is a right to plead claims in the alternative, "[t]he right to plead alternatively or hypothetically does not sanction deviations from the basic obligation to plead comprehensibly. Indeed, it is in the context of alternative and hypothetical pleading that a party must exercise the greatest care so as not to transgress the

requirement of Rule 8(e)(1) of simple, direct and concise pleading." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1282 (3d ed. 2004). The Court finds Plaintiffs' impromptu proposal of alternative pleading insufficient to save these claims from dismissal, because it would fail to meet the aforementioned pleading requirements established in Rule 8.

Third, the Court grants the motion to dismiss the conspiracy counts against the banks because the Complaint fails to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b) because the Complaint groups the banks together with broad brush allegations instead of making specific factual allegations against individual defendants. Under Federal Rule of Civil Procedure 9(b) "the circumstances required to be pled with particularity . . . are the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999); FED. R. CIV. P. 9(b). Rule 9(b) applies to allegations of conspiracy to defraud. *Harrison*, 176 F.3d at 790. Pages 67 through 72 of the Second Amended Complaint addressing the allegations of fraud with respect to the banks, refer almost exclusively to the "Bank

