UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARK F. BAILEY, et al.,

Plaintiffs,

Civil Action No. 3:10-cv-00422-J-32JRK

vs.

ERG ENTERPRISES, LP, et al.,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS FILED BY LUBERT-ADLER[1]

LA's Motion to Dismiss is steeped in unsupported assertions about Plaintiffs' motivations for filing this lawsuit. The irony of LA's efforts to cast Plaintiffs as villains in the saga underlying this case is clear from an April 24, 2006 draft memo of Lubert-Adler to advisory boards for Defendants LA Funds III and IV less than two months before the June 8, 2006 CSCF closing. (Ballinger Dec. Ex. A.)[2] The LA memo lists the goals of the CSCF including: (1) "immediate mitigation of 100% of the capital risk" and "removal of all guarantee exposure" for Defendants LA and Bobby Ginn by "paying off all existing recourse debt" and replacing it with debt that was recourse to the CSCF developments; and (2) "an immediate dividend of $333,125,000" that allows "the harvesting of profits with no risk of capital loss" and would "provide an earlier than anticipated profit distribution." (*Id.* pages 12, 18.) The memo also details risks inherent in the

[1] As used herein, Lubert-Adler ("LA") refers to Defendants Lubert-Adler Management Company, LP; Lubert-Adler Real Estate Fund III, LP; Lubert-Adler Real Estate Parallel Fund III, LP; Lubert-Adler Capital Real Estate Fund III, LP; Lubert-Adler Real Estate Fund IV, LP; Lubert-Adler Real Estate Parallel Fund IV, LP; Lubert-Adler Capital Real Estate Fund IV, LP; Lubert-Adler Real Estate Fund V, LP; Lubert-Adler Real Estate Parallel Fund V, LP; and Lubert-Adler Capital Real Estate Fund V, LP.

[2] The memo is part of an August 20, 2010 filing by Trustee Drew Dillworth in consolidated bankruptcy cases for two Florida CSCF developments: Tesoro and Quail West. Case No. 08-29769-PGH, Southern District of Florida (Dkt. No. 534). Trustee Dillworth recently filed a Second Amended Complaint for Voidance and Recovery of Fraudulent Transfers against, *inter alia*, ERG Enterprises and LA, seeking recovery of part of the $333 million CSCF distribution. Case No. 10-02976-PGH, Southern District of Florida (Dkt. No. 39). (Ballinger Dec. Ex. B.)

CSCF, which requires that "the properties will all be cross-collateralized," such that "any poorly performing properties would be supported by the other properties":

> [T]he principal risk of any cross-collateralized financing is that Project A (e.g., Tesoro), though highly successful on its own, could nevertheless be lost to foreclosure in the event that Project B (e.g., Laurelmor) or Project C (e.g., Grand Bahamas-West End) do not perform well, thereby causing the Credit Suisse loan to go into default.
>
> …
>
> If the Projects continue to be developed separately, the owner of each Project will be free to evaluate whether to invest more capital in that particular Project or let it go – solely on the merits of that particular Project. Once the Projects have become part of a cross-collateralized mortgage pool, the common owner of Project A and Project B will, to some degree, be forced to support Project A (performing poorly) in order to protect its equity in Project B (performing well).
>
> …
>
> [T]he percentage of loan proceeds which is allocated to each Project will not be based upon a "fairness" opinion or a current fair market appraisal of each Project. Accordingly, the investors in each Project must make a determination as to whether the perceived benefits to that Project from the proposed financing will, on balance, be proportionate to the potential risks assumed by that Project.

(*Id.* pages 18-20.) The LA memo thus confirms LA as principal villains in this saga: Tired of funding Ginn-LA developments and waiting for legitimate returns on its investments from lot sales, LA pooled five independent Ginn-LA developments, "harvested" early profits without any risk, shifted all recourse and risk for debt obligations to the developments (including GSM) and left the formerly independent developments to stand or fall as one.

Stripped of its unsupported assertions about Plaintiffs' motivations, LA's Motion to Dismiss: (1) grossly mischaracterizes the allegations of the Complaint and ignores critical allegations against LA; (2) attempts to recast Plaintiffs' claims as solely for fraudulent concealment by ignoring allegations detailing LA's part in the scheme to obtain the $675 million CSCF, take a $333 million distribution, leave GSM without adequate capital for development, make GSM liable for the entire $675 million loan amount and pledge GSM land, ownership and control as collateral for the CSCF; (3) attempts to recast Plaintiffs' damage allegations as claims for lost

investment value resulting from the CSCF Default; and (4) attempts to recast Plaintiffs' claims as seeking benefits under the Purchase Contracts in an effort to take advantage of the venue ruling in a separate action filed by certain Plaintiffs herein.[3] For these reasons and the reasons set forth below, LA's Motion should be denied in its entirety.

I. Factual Background

The CSCF Fraud alleges that months before Plaintiffs signed their GSM Purchase Contracts, LA and other Defendants secretly looted the GSM Subdivision by taking a $675 million loan from Credit Suisse ("CSCF") utilizing inflated estimates of future lot sales; taking a distribution of $333 million from CSCF proceeds; leveraging GSM Land, ownership and control for the entire $675 even though only a small fraction of the loan proceeds went to GSM; and hiding material facts concerning two defaults under the CSCF and resulting restructuring agreements that further jeopardized GSM Land, ownership and control. More specifically, the Complaint alleges: The purchase of GSM Land and creation of development plans with the Bahamian government prior to the CSCF (¶¶ 34-40). Description of the new Credit Suisse loan (¶¶ 41-43). The CSCF Defendants' actions in obtaining the CSCF, including use of unsupported sales projections and a TNV "appraisal" method, resulting in a loan that carried an excessive risk of failure (¶¶ 44-92). Failure of Defendants GLA West End, Lubert-Adler and ERG to disclose material facts about how the CSCF was obtained (¶ 93). Summary of CSCF terms requiring debt service based on cash flow from future sales in CSCF Developments (¶¶ 94-99). Failure of Defendants GLA West End, Lubert-Adler and ERG to disclose material facts about CSCF debt service terms (¶ 100). CSCF collateralization, including terms that made GSM liable for the entire $675 million CSCF (¶¶ 101-108). Failure of Defendants GLA West End, Lubert-Adler and ERG to disclose material facts about CSCF collateralization (¶ 109). Summary of CSCF

[3] *Liles, et al. v. Ginn-LA West End Limited, et al.,* Middle District of Florida Case No. 3:08-cv-1217-J-34JRK.

terms governing use of funds, including the $333 distribution (¶¶ 110-118). Failure of Defendants GLA West End, Lubert-Adler and ERG to disclose material facts about use of CSCF funds (¶ 119). Defendant Bobby Ginn's reported use of CSCF funds for a NASCAR team (¶¶ 120-125). How the CSCF prevented development of amenities planned and marketed for GSM (¶¶ 126-143). Failure to disclose risks due to CSCF repayment terms (¶¶ 144-145). Bobby Ginn's immediate concern about CSCF default (¶¶ 146-148). Concealment by Defendants GLA West End, Lubert-Adler and ERG of material facts concerning existence and terms of the CSCF (¶¶ 149-172). Summary of 2007 CSCF Initial Default and terms of 2007 CSCF Restructure (¶¶ 173-188). Failure of Defendants GLA West End, Lubert-Adler and ERG to disclose 2007 CSCF Initial Default and 2007 CSCF Restructure, including sale of GSM Resort Core (¶¶ 189-190). Summary of 2008 CSCF Default (¶¶ 191-200). Concealment and false representations by Defendants GLA West End, Lubert-Adler and ERG about 2008 CSCF Default and 2008 Restructure (¶¶ 201-225). Effects of 2008 CSCF Default on GSM, including HUD suspension and agreement to foreclose on GSM Land, ownership and control (¶¶ 226-234). Concealment of effects from 2009 CSCF Default (¶¶ 235-236). Summary of GSM Foreclosure and concealment thereof. (¶¶ 237-243). Continuing concealment of CSCF Fraud (¶ 244). How CSCF Fraud affected Plaintiffs, why concealed facts were material to Plaintiffs' GSM purchase decisions and how Plaintiffs would have acted but for the CSCF Fraud (¶¶ 245-256). Plaintiffs were damaged by the CSCF Fraud (¶¶ 257-273). Predicate acts in furtherance of CSCF Fraud (¶¶ 342-343).

II. Motion to Dismiss on the Ground of Improper Venue[4]

Because a Motion to Dismiss for improper venue is properly brought under Fed.R.Civ.P. 12(b)(3), a "court may consider matters outside the pleadings such as affidavit testimony…" *Wai*

[4] In note 4, LA attempts to incorporate arguments from the Motion to Dismiss filed by the Ginn Defendants. This is improper. However, if the Court consents to consider those arguments in connection with LA's Motion, Plaintiffs respectfully request that the Court consider Plaintiffs' Opposition to the Ginn Motion as it relates thereto.

v. Rainbow Holdings, 315 F.Supp.2d 1261, 1267-68 (S.D. Fla. 2004). A plaintiff opposing a Rule 12(b)(3) motion has the burden to show venue is proper, but a court "must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff. *Id.*

As an initial matter, this is not merely, as LA would have the Court believe, "a dispute relating to property in the Bahamas." As the Complaint alleges and the LA Memo describing the CSCF confirms, this case is about an elaborate and complex scheme to harvest profits from five separate Ginn-LA developments, four of which were U.S. developments. (Ballinger Dec. Ex. A pages 11-21.) The Complaint alleges that all but 2% of the $510 distributed on the June 8, 2006 CSCF closing date was distributed to LA and Defendant ERG ($333 million - 64%), used for the U.S. developments ($146 million - 29%) and paid in transaction costs to Credit Suisse (5%).[5] (¶¶ 111-119.) As the LA memo reveals, the CSCF was intended to pool five independent Ginn-LA developments "to provide Credit Suisse with a package of cross-collateralized assets as security for its loans." (*Id.* Ex. A page 18.) As a result of the terms of the CSCF, Plaintiffs were unknowingly investing in all five of the CSCF Developments. (Complaint, ¶ 133.)

A. **The Venue Clause in Plaintiffs' Purchase Contracts Does Not Apply in This Case**

LA argues the venue clause in Paragraph 22 of the Purchase Contracts, which applies to suits "in any way related to" the Purchase Contracts, governs the venue for this action. Eleventh Circuit authority, including the cases cited by LA, is to the contrary. The 11th Circuit has noted that "arising out of or related to" language in the similar context of a contractual arbitration clause "proved especially problematic in cases . . . where the dispute concerns a tort." *Telecom Italia, SpA v. Wholesale Telecom Corp.*, 248 F.3d 1109, 1114 (11th Cir. 2001). In such cases, the dispositive issue is whether a dispute is "related to" the subject matter of a contract. *Id.*

[5] Sadly, when the $510 was allocated on the CSCF closing date, Credit Suisse received more in transaction costs than GSM received for payment of its existing debt. Nevertheless, GSM was liable for the entire $675 million.

Reviewing 11th Circuit precedent on this question, the *Telecom Italia* Court concluded,

> It is possible to harmonize the results in these four cases by focusing on whether the tort or breach in question was an immediate, foreseeable result of the performance of contractual duties. Disputes that are not related – with at least some directness – to performance of duties specified by the contract do not count as disputes "arising out of" the contract and are not covered by the standard arbitration clause.

Id. at 1114-1116;[6] *accord Triple I: Int'l Investments, Inc. v. K2 Unlimited, Inc.,* 287 Fed.Appx. 63, 65-66 (11th Cir. 2008) ("We have required arbitration where the tort could not have occurred but for a breach of contract"). If the defendant "had fully complied with the contract, … there would be no tort claims." *Triple I*, 287 Fed.Appx. at 66 (quoting *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (11th Cir. 1996).

Under these cases (which address disputes between parties to the underlying contracts), even if the LA Defendants were parties to the GSM Purchase Contracts, they could not invoke the venue clause in this case. Plaintiffs' claims here have nothing to do with whether the developer of GSM breached the Purchase Contracts, and those claims are not related "to performance of duties specified by the contract." As detailed above, Plaintiffs allege a fraudulent scheme to loot the GSM Subdivision, months before Plaintiffs entered into Purchase Contracts, so that LA and Defendant ERG Enterprises could take a $333 million distribution from the CSCF. (¶ 140.) Plaintiffs' claims are not subject to the venue clause in the Purchase Contracts.

In support of its argument that Plaintiffs' claims "relate to" the Purchase Contracts, LA repeatedly portrays those claims as contractual in nature.[7] These descriptions mischaracterize the Complaint, which does not include a single allegation that infrastructure was not completed

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[6] The *Telecom Italia* Court rejected an argument that the dispute was related to the contract simply because the Complaint included allegations that certain contract terms were unfair: "Although these claims, if alleged as causes of action, would plainly be arbitrable as 'related to' the…contract, their recitation in support of the [tort] claim does not suffice to make the [tort] claim arbitrable." *Id.*

[7] E.g., "Plaintiffs' core contention is that the infrastructure and amenities referenced in their Purchase Contracts have not been completed" (16); "Plaintiffs further allege that, had the infrastructure and amenities been completed… they would have suffered no damage" (16); Plaintiffs claim damages for loss of infrastructure "specified in" the Purchase Contracts (6, 11); Purchase Contracts "include provisions pertaining to development of the amenities" (11).

and alleges no damages relating to infrastructure. Instead, the Complaint alleges damages based on facts including the following: (1) LA and ERG looted the GSM Subdivision to take a $333 million distribution from the CSCF; (2) the terms of the CSCF made it impossible, as of the date of closing on the loan, for the GSM developer to complete amenities that were *not contractually required*; (3) the terms of the CSCF made GSM liable on the entire $675 million loan; (4) LA and ERG pledged GSM land, ownership and control as collateral for the CSCF; and (5) LA and ERG cross-collateralized GSM with 4 U.S. Ginn-LA developments under the CSCF, so that as of the date of closing on the loan, the future of GSM was tied to lot sales in the U.S. developments. The Complaint does not seek to enforce any provision of the Purchase Contracts, and Plaintiffs' do not seek any benefit of the bargain under those Contracts.

B. **LA Cannot Invoke Equitable Estoppel to Apply the Venue Clause in the Purchase Contracts**

LA seeks to take advantage of the Court's ruling in *Liles,* which applied the venue clause in the Purchase Contract to two non-signatories to the Contract under a theory of equitable estoppel. (*Liles* Dkt. 189 at 23-24.)[8] Equitable estoppel does not apply here. The *Liles* Court correctly noted that, "as 'a contractual right[,]' a forum-selection clause 'cannot ordinarily be invoked by or against a party who did not sign the contract in which the provision appears.'" (*Liles*, Dkt. 189 at 23 (citing *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1169 (11th Cir. 2009)). As an exception to this general rule, an equitable estoppel theory allows a non-signatory to compel arbitration either where the signatory: (1) "'must rely on the terms of the written agreement in asserting [its] claims' against the nonsignatory," or (2) "raises allegations of ... substantially interdependent and concerted misconduct" by the nonsignatory and one or more of the signatories. (*Liles*, Dkt. 189 at 23 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942,

[8] The *Liles* Plaintiffs have appealed the *Liles* Court's Order, including the application of equitable estoppel to permit non-signatories to enforce the contractual venue clause.

947 (11th Cir 1999)). The *Liles* Court failed to note, however, that subsequent to the ruling in *MS Dealer,* the 11th Circuit clarified the applicability of equitable estoppel.

Under 11th Circuit authority, equitable estoppel does not apply simply because a plaintiff alleges collusive conduct between signatory and non-signatory defendants.

> A plaintiff's allegations of collusive behavior between the signatory and nonsignatory parties to the contract do not automatically compel a court to order arbitration of all of the plaintiff's claims against the nonsignatory defendant; rather, *such allegations support an application of estoppel only when they "establish[] that [the] claims against [the nonsignatory are] intimately founded in and intertwined with the obligations imposed by the [contract containing the arbitration clause*.]"

In re: Humana Inc. Managed Care Litigation, 285 F.3d 971, 976 (11th Cir. 2002) (equitable estoppel not applicable where suit did not rely on contract and sought RICO remedies "apart from any available remedies for breach of contract") (emphasis added). *Humana* ruled that,

> *MS Dealer* "is not a rigid test, and each case turns on its facts." In all cases, "*the lynchpin for equitable estoppel is equity," and the point of applying it to compel arbitration is to prevent a situation that "would fly in the face of fairness*." The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from "rely[ing] on the contract when it works to [his] advantage [by establishing the claim], and repudiat[ing] it when it works to [his] disadvantage [by requiring arbitration]." *The plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the sine qua non of an appropriate situation for applying equitable estoppel*.

In re: Humana, 285 F.3d at 976 (emphasis added). Thus, the critical question for determining if equitable estoppel allows a non-signatory to invoke a contractual arbitration clause is whether the plaintiff's claims rely on the terms of that contract. Only where a plaintiff relies on the terms of a contract and attempts to hold a non-signatory defendant to those terms is the plaintiff bound by the arbitration clause in that contract. *Becker v. Davis*, 491 F.3d 1292, 1300 (11th Cir. 2007); *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 754 (11th Cir. 1993).

The same reasoning applies here. Because the LA Defendants are all non-signatories to the Purchase Contracts, they cannot invoke the venue clause in those Contracts unless Plaintiffs'

claims rely on and attempt to hold LA to the terms of the Contracts. They do not. The Complaint allege that LA looted the GSM subdivision to obtain the $675 million CSCF and take a $333 million distribution in secret, months before Plaintiffs signed their Purchase Contracts. In fact, the Complaint alleges that at the time Defendants obtained the CSCF, the GSM developer had not even secured approval from HUD to market GSM lots in the United States and there were no purchase contracts for GSM. (¶ 84.) The Complaint further alleges that Plaintiffs would not have entered into the Purchase Contracts but for Defendants' concealment of the CSCF Fraud. Plaintiffs' claims therefore: (1) do not rely on any terms in the Purchase Contracts to establish LA's liability; (2) do not attempt to hold LA to any terms in the Purchase Contracts; and (3) do not allege breach of any terms in the Purchase Contracts. As non-signatories to the Purchase Contracts, therefore, the LA Defendants are not entitled to invoke the venue clause in those Contracts under a theory of equitable estoppel.

C. **The Liles Court Ruling is Not Applicable Here**

LA argues the *Liles* Court's venue ruling is equally applicable here because the Complaints in both cases include allegations relating to the CSCF. However, the claims in *Liles* are distinct from the claims in this case. The *Liles* Complaint alleges violations of the Interstate Land Sales Full Disclosure Act ("ILSA"). ILSA is inextricably bound to the contract for real property at issue in an ILSA lawsuit because ILSA and its implementing regulations: (1) provide for revocation of non-exempt contracts (15 U.S.C. § 1703(b)-(d)); (2) require specific contractual language governing remedies on default (15 U.S.C. § 1703(d)); (3) require provision of a Property Report prior to the date a purchaser executes a purchase contract (15 U.S.C. § 1703(d); 24 C.F.R. §1715.20(b)); (4) specify statutes of limitations that run from the date of contract execution (15 U.S.C. § 1703(b)-(c); 15 U.S.C. § 1711); (5) require specific contractual language specifying rescission rights (24 C.F.R. § 1710.209(f)); and (6) include additional requirements

for purchase contracts (e.g., 24 C.F.R. § 1710.103(a)(d) and 24 C.F.R. 1715.15).

In this case, by contrast, the Complaint alleges a fraudulent scheme where the most damaging predicate acts took place months before Plaintiffs entered into their Purchase Contracts. (¶¶ 34-145; 342(a)-(w).) The Complaint does not allege that the fraud, or Plaintiffs' damages, "could not have occurred but for a breach of contract." *Triple I*, 287 Fed.Appx. at 66. In addition,

> Finding that a tort could not have occurred but for a *breach* of a contract is different from finding that the tort could not have occurred but for the *existence* of the contract. A tort that could not have occurred but for the existence of the contract does not necessarily arise from the contract.

Id. (emphasis in original). In this case it is true that if Plaintiffs had not contracted for and closed on their GSM lots, Plaintiffs would not have been damaged. In that sense, Plaintiffs' claims presume the *existence* of the Purchase Contracts. But because the CSCF Fraud does not presume a breach of the Purchase Contracts and, in fact, is alleged to have occurred without any such breach, the Complaint in this case is not "related to" the Contracts under 11th Circuit authority.

D. **"Ginn Limited" is Not an Indispensable Party**

LA argues the developer of GSM (the contracting party with Plaintiffs), "Ginn Limited," is an indispensable party because the Prayer for Relief seeks rescission of Plaintiffs' Purchase Contracts. On this basis alone, LA concludes that Plaintiffs' Complaint must be dismissed. However, the analysis under Rule 19 is neither as simple, nor as draconian, as LA would have it. "Rule 19 provides a two-part test for determining whether an action should proceed in a nonparty's absence." *Ginn-LA St. Lucie Ltd., LLLP v. Drew Dillworth, et al.,* 420 B.R. 598, 603 (S.D. Fla. 2009) (quoting *City of Marietta v. CSX Transp., Inc.*, 196 F.3d 1300, 1305 (11th Cir. 1999)). Under this analysis:

> "The first question is whether complete relief can be afforded in the present procedural posture, or whether the nonparty's absence will impede either the nonparty's protection of an interest at stake or subject parties to a risk of inconsistent obligations. If the answer to this first question is 'no,'" it is unnecessary to reach the second question which

> requires the Court to determine if the case should proceed or be dismissed in the event joinder of required parties is not feasible.

Id. (citations omitted). Here LA argues "Ginn Limited" must be joined because Plaintiffs seek rescission of the Purchase Contracts.[9]

Plaintiffs agree "Ginn Limited" would be a necessary party to an action for rescission of the Purchase Contracts. Therefore, Plaintiffs agree to drop the request for rescission of the Purchase Contracts in the Prayer for Relief. Plaintiffs are prepared to proceed against the existing Defendants, seeking damages and other relief as set forth in the Prayer for Relief. Under Rule 19(a)(1)(A), Plaintiffs may drop their request for rescission, which is one of several remedies set forth in the Prayer for Relief, and "the Court can afford complete relief between the existing parties to this action" without the addition of "Ginn Limited." *Ginn-LA St. Lucie*, 420 B.R. at 603-604 ("complete relief" factor only concerned with relief between existing parties, not between parties and the absent person whose joinder is sought) (citations omitted). Because Plaintiffs seek damages in addition to rescission, Plaintiffs can recover in the absence of "Ginn Limited." Similarly, if the Court ultimately finds in favor of the Defendants, Plaintiffs' damages claims would be denied. Thus, under Rule 19(a)(1)(A) the Court can afford complete relief between the existing parties in the absence of "Ginn Limited."

LA does not argue "Ginn Limited" is a required party under Rule 19(a)(1)(B).[10] Moreover, "Ginn Limited" has not claimed any interest relating to the subject matter of this case. For these reasons as well, "Ginn Limited" is not necessary under Rule 19(a)(1)(B). *Id.* at 606 ("an absent party must claim an interest in the subject matter of the action before such party is determined to be necessary and indispensable") (citations omitted). Finally, because "[t]he philosophy of Rule

[9] Though LA cites Fed.R.Civ.Proc. 19(a)(2), their argument is more properly made under Rule 19(a)(1), which sets forth the two-part test for determining whether a party must be joined if feasible.
[10] LA bears the burden of demonstrating that "Ginn Limited" must be joined to facilitate a just adjudication. *Id.*

19 is to avoid dismissal whenever possible," courts confronted with motions to dismiss under Rule 19(a)(1) should, "where it is possible to resolve the dispute without adversely affecting the interests of absent parties," not dismiss the case. *Id.* at 607 (citations omitted).[11]

III. LA's Rule 12(b)(6) Motion to Dismiss

"Because fair notice is '[p]erhaps the most basic consideration' underlying Rule 9(b)…the plaintiff who pleads fraud must 'reasonably notify the defendants of their purported role in the scheme.'" *Ambrosia Coal & Constr.Co. v. Pages Morales*, 482 F.3d 1309, 1317 (11th Cir. 2007). Rule 9(b) requires a plaintiff to "state with particularity the circumstances constituting fraud." However, the application of Rule 9(b) "must not abrogate the concept of notice pleading." *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 972 (11th Cir. 2007) (citations omitted). "'Allegations of date, time or place satisfy the Rule 9(b) requirement that the *circumstances* of the alleged fraud must be pleaded with particularity.'" *Id.* at 972-973.

Each alleged fraudulent act "need not be attributed to certain defendants if the 'complaint sufficiently describes the acts and provides defendants with sufficient information to answer the allegations.'" *Peters v. Amoco Oil Company*, 57 F.Supp.2d 1268, 1278 (M.D. Ala. 1999) (citations omitted). In addition, courts recognize "there are circumstances under which 'a plaintiff may not be able to plead the precise role of each defendant when a group of defendants has acted in concert to cause the complained of injury.'" *Id.* In such circumstances,

> it is appropriate to plead the actions of the group and leave development of individual liability questions until some discovery has been undertaken, rather than to dismiss the plaintiff because he does not have what may be concealed information.

Id. In this case, the Complaint provides "fair notice" to LA of the nature of the fraudulent acts

[11] LA argues that Plaintiffs did not join "Ginn Limited" in an effort to avoid the venue issue. As shown above, this case is not related to the Purchase Contracts such that the venue clause becomes applicable. In addition, LA's arguments ignore the fact that a plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject to joinder of necessary parties. *Lincoln Property Co. v. Roche*, 546 U.S. 81, 91 (2005).

alleged against them with detailed allegations of the CSCF Fraud. The Complaint also includes detailed predicate acts for each LA Defendant, as well as general descriptions of additional predicate acts that are presently known only to LA and Defendant ERG.[12] Where the Complaint alleges concealment, it provides as much specificity as possible, and Defendants alone possess information as to the individuals who would have been required to disclose such information.[13]

A. **The Complaint Alleges LA's Participation in the CSCF Fraud**

The LA Defendants conveniently ignore the vast majority of the detailed allegations against them, to which they apply the innocuous label: "Underlying Events." In fact, the Complaint includes detailed allegations about LA's conduct in obtaining the CSCF and looting GSM for the $333 million distribution, all of which took place before Plaintiffs entered into the Purchase Contracts. Specifically, LA: controlled the Ginn-LA entities (¶ 20); had actual or fairly implied knowledge of the acts of the Ginn-LA entities and Bobby Ginn (¶ 20); were beneficial owners of GSM (¶ 40); had communications with Credit Suisse about whether and on what terms they would obtain the CSCF (¶¶ 44-45); knew the CSCF was new and unique due to its size, structure and terms (¶ 47); caused the CSCF Borrowers to be formed for the sole purpose of taking out the CSCF (¶ 48, 342(d)-(e)); cause the CSCF Borrowers to enter into the CSCF (¶ 49); was an 80% owner in the Tesoro and Quail West developments and knowingly provided overstated lot sales projections to Credit Suisse and Cushman & Wakefield for these and other CSCF developments in an effort to obtain the CSCF (¶¶ 60-63, 68-69, 81-84); knew the TNV method would vastly overstate the fair market value of the CSCF developments (¶ 79); increased the projected number

[12] The August 20, 2010 filing by Trustee Dillworth reveals that LA is resisting the Trustee's efforts to obtain documents relating to the CSCF. (Ballinger Dec. Ex. A pages 1-4.)

[13] As summarized below, the Complaint includes sufficient detail to establish the existence of a fraudulent scheme, and specifically alleges the types of communications that are in the control of Defendants. This is sufficient to withstand Plaintiffs' burden at the pleading stage. *See, e.g., New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 290-292 (1st Cir. 1987). However, if the Court determines Plaintiffs have not plead sufficient facts detailing LA's role in the CSCF Fraud, Plaintiffs request the opportunity to take discovery on documents and information in the possession and control of LA that would permit more detailed allegations.

of GSM lots for sale in order to boost the TNV for GSM (¶¶ 85-86);[14] knew the TNV method was used to inflate the size of CSCF to $675 million, that the size of CSCF not reasonable in comparison to the value of the collateral, that the CSCF was obtained based on estimates of speculative future value to create debt service obligation of $675, and that because it was based on TNV the CSCF carried an excessive risk of failure (¶¶ 89-93); concealed facts about the TNV appraisals (¶ 93); allocated future cash flow from lot sales to CSCF repayment rather than to each development as an independently capitalized entity subject to its own market conditions (¶ 94); knew that 59% of future cash flow for CSCF repayment would come from the U.S. market, that the CSCF required 100% of future cash flow, that GSM was obligated to loan repayment funds to other CSCF developments that did not meet lot sales projections (¶¶ 96-100); concealed CSCF repayment obligations (¶ 100); pledged all the assets of each CSCF Development as collateral, including land, improvements and ownership of developer entities (¶¶ 101-102); pledged ownership interests in GSM developer entities, including assets and control over future development (¶ 105); made sure they had no personal liability for the CSCF by placing liability for the entire $675 on GSM (¶ 107); knew the CSCF was not intended to and did not benefit GSM (¶ 108); knew the CSCF doomed the future development of GSM (¶ 108); concealed cross-collateralization and related risks to GSM (¶ 109); took more than 80% of the $333 million distribution (¶¶ 113-114); knew that of $510 distributed as CSCF closing, 64% went to distributions, with only 2% to existing debt for GSM (¶¶ 111-119); concealed facts about use of CSCF proceeds (¶ 119); looted GSM to obtain the $333 million distribution (¶ 140); concealed the existence and terms of the CSCF in order to make lot sales in GSM (¶¶ 149-172).

[14] These allegations support Plaintiffs' claim for bank fraud. There is no allegation that Credit Suisse knew the GSM lot numbers were inflated.

B. **LA Mischaracterizes the CSCF Fraud Scheme**

LA labors to convince the Court that the CSCF Fraud Scheme is nothing more than a scheme to conceal the CSCF: "Plaintiffs identify concealing the "existence, terms, defaults, and effects of the CSCF (collectively, the 'Underlying Events') as the goal of the alleged conspiracy" (8); "Plaintiffs do not contend the Underlying Events in and of themselves constitute RICO predicate acts. Rather, Plaintiffs base their claims on alleged concealment of, and misrepresentations about, the Underlying Events." (17-18) [342]; Plaintiffs' only claim against LA is "a lone subparagraph of the 148 page Complaint" alleging LA engaged in communications about whether and how the keep the CSCF secret (8, 18). Again LA mischaracterizes the Complaint.

The Complaint identifies the object of the CSCF Fraud to include the "Underlying Events":

> The object of the conspiracy was to secure the $675 million CSCF, obtain a $333 million distribution from the CSCF for Defendants Lubert-Adler and ERG Enterprises and conceal the existence, terms, defaults, and effects of the CSCF on the development of GSM.

(¶ 378.) LA also fails to acknowledge that the Complaint includes specific allegations against each of the LA Defendants, detailing their participation in the CSCF Fraud. (**Lubert-Adler ¶¶** 44-45, 47-49, 68-69, 79, 82, 85-87, 93-94, 100-102, 105, 107, 109, 118-20, 137, 140-42, 149-72, 181-82, 189-90, 193, 202, 206, 213, 217, 230-31, 234-44, 257, 259; **LA Funds III ¶¶** 48-49, 79, 101-102, 113-14, 118, 230; **LA Funds IV ¶¶** 48-49, 79, 101-102, 107, 113-14, 118, 182, 230-31, 237-41; **LA Funds V ¶¶** 182, 230.) Finally, LA ignores predicate acts alleged in furtherance of the CSCF Fraud, including LA's role in the "Underlying Events." (**Lubert-Adler ¶¶** 342(a), (c)-(f), (h), (j)-(ee), (hh)-(ii), (kk)-(bbb); **LA Funds III ¶¶** 342(t)-(u), (zz)-(bbb); **LA Funds IV ¶¶** (y)-(u), (dd)-(ee), (zz)-(bbb); **LA Funds V ¶¶** 342(bb)-(cc), (zz).) These specific allegations meet the requirements of Rule 9(b).

C. **The Allegations of CSCF Fraud are Not Consistent with Innocuous Conduct**

LA argues that because it disclosed information to an investment ratings company, Standard & Poor's ("S&P"), the allegations of CSCF Fraud are equally consistent with an absence of wrongdoing. This strains credulity. The Complaint alleges: (1) Defendants closed the CSCF and looted GSM to obtain a $333 million distribution months before Plaintiffs entered into GSM Purchase Contracts; (2) LA formed the CSCF Borrowers for the sole purpose of the CSCF (¶¶342(d)-(e)); (3) Defendants provided information on the CSCF Borrowers to S&P, which issued detailed ratings statements on the CSCF Borrowers; (5) because Plaintiffs were not S&P subscribers, they did not learn about the CSCF until August 2008 (¶ 52); (6) LA concealed information about the CSCF from all GSM purchasers, including Plaintiffs; and (7) because the CSCF was a new loan product with extraordinarily unique terms, Plaintiffs had no reason to expect that GSM was part of a loan of this type (¶ 150). In light of allegations that LA formed the CSCF Borrowers for the sole purpose of the CSCF and concealed the existence of both the CSCF Borrowers and the CSCF, it is not reasonable to suggest that Plaintiffs should have known about the subscription-only S&P ratings statements for undisclosed entities and an undisclosed loan.[15] LA's disclosures to S&P do not establish that the "Underlying Events" were innocuous conduct. Indeed, LA offers no alternative, innocuous explanation for Plaintiffs' allegations.

D. **The CSCF Fraud Scheme is a Cognizable RICO Scheme**

In keeping with its claim that Plaintiffs only allege concealment, LA argues it had no duty to disclose the Underlying Events. This intentionally misses the point. Eleventh Circuit authority holds that mail fraud requires allegations of "a scheme to defraud where 'some type of deceptive

[15] In order to learn about the CSCF through the S&P ratings, Plaintiffs would need subscriptions to S&P or other access to S&P ratings statements. Even if Plaintiffs had access to S&P ratings statements, Plaintiffs would not have learned of the S&P ratings statements on the CSCF Borrowers unless: (1) Plaintiffs knew the CSCF Borrowers existed; (2) Plaintiffs knew the names of the CSCF Borrowers; (3) Plaintiffs knew the CSCF Borrowers had entered into the CSCF; and (4) Plaintiffs knew that information had been submitted to S&P, as opposed to some other ratings company, on the CSCF Borrowers and the CSCF.

conduct occurred.'" *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1065 (11th Cir. 2007) (quoting *Pelletier v.Zweifel*, 921 F.2d 1465, 1500 (11th Cir. 1991).) Mail fraud thus reaches beyond common law fraud to include any "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." *U.S. v. Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996). As set forth above, the Complaint alleges a fraudulent scheme that includes, but is not limited to, LA's failure to disclose the existence and terms of the CSCF, including all of the "Underlying Events." These allegations are sufficient to plead mail and wire fraud.

Even though a duty to disclose is not required in order to state mail and wire fraud against LA, the Complaint does, in fact, include allegations sufficient to establish that LA had a duty to disclose the existence and terms of the CSCF. A duty to disclose can exist by virtue of the nature of the transaction and the relationship between the parties:

> [I]t would be an error to find that a duty to disclose information for purposes of the federal mail and wire fraud statutes can only be found where a statute, regulation, or formalized legal relationship between the parties expressly delineates such a duty. Plaintiffs are correct that concealment of critical data, even without a formalized duty to disclose that data, can constitute mail and/or wire fraud in certain situations. Schemes to defraud can take many forms – criminal ingenuity is an amazing, if disturbing, thing to behold. It would be unduly constrictive to hold that a duty to disclose can only exist where it is statutorily or contractually implied; the complexity of transactional relationships is such that duties to disclose may exist in other situations if the transaction is to be legitimate. We can envision many situations in which a failure to disclose information could constitute fraud pursuant to 18 U.S.C. §§ 1341 and 1343, even when no duty to disclose exists independently. Determinations as to whether a duty to disclose information exists must be made on a case by case basis, with appropriate attention given to the nature of the transaction and the relationship between the parties.

Langford v. Rite Aid of Alabama, Inc., 231 F.3d 1308, 1312-1313 (11th Cir. 2000). Here LA's failure to disclose the existence and terms of the CSCF, seen in conjunction with LA's role in the Underlying Events, constitutes mail and wire fraud.

The Complaint alleges that months before Plaintiffs contracted to buy GSM lots, LA pooled GSM with four U.S. Ginn-LA developments, used overstated estimates of future lot sales to

obtain the $675 million CSCF, took a $333 million distribution, and pledge GSM land, ownership and control as collateral for the entire $675 loan, even though the loan was not intended to and did not benefit GSM. In addition to looting GSM, LA made any future development of GSM impossible by agreeing to CSCF terms under which: (1) debt that was formerly recourse to Bobby Ginn and LA became recourse to GSM; (2) GSM was leveraged way beyond its fair market value; (3) 100% of cash flow from GSM lot sales was required for repayment of the CSCF; (4) GSM was required to loan other CSCF developments funds to meet their repayment obligations; and (5) GSM was prohibiting from taking out additional debt. Even though LA had no contractual relationship with Plaintiffs, LA relied on future GSM lots sales (including sales to Plaintiffs) to obtain the TNV appraisal that justified the massive size of the $675 million CSCF. LA also knew that the Underlying Events made development of GSM impossible, regardless of what amenities GSM had been marketed to include.[16] Having siphoned future profits from GSM in the form of an immediate distribution from the CSCF, LA left GSM excessively leveraged, liable for a $675 million loan and unable to obtain additional capital for operations or development. Under these facts, LA's concealment of the existence and terms of the CSCF constitute mail and wire fraud. LA's suggestion that the Underlying Events amount to nothing more than "financing or corporate structure of GSM" is insulting.

E. Representations Made in a Continuing Effort to Conceal the CSCF are Valid Predicate Acts

LA claims the fraudulent statements by Bobby Ginn and Robert Gidel cannot serve as predicate acts because Plaintiffs do not allege they heard and relied on those acts. The Complaint alleges that post-CSCF fraudulent statements were part of a continuing fraudulent

[16] The Complaint does not, as LA suggests, allege that marketing materials constituted affirmative misrepresentations. The marketing materials are alleged to establish that facts concerning the existence and terms of the CSCF were material to Plaintiffs' evaluations of the risks of purchasing GSM lots. (¶¶ 245-256)

scheme to hide the CSCF in order to prevent Plaintiffs from discontinuing payments on their GSM mortgage loans and from taking legal action against Defendants. (¶¶ 189-90, 194, 200-225, 234-236, 242-244.) The Complaint alleges that Plaintiffs first learned about the CSCF when Robert Gidel announced the CSCF Default and Bobby Ginn gave his press conference on the CSCF. (¶ 257.) The Bobby Ginn and Gidel statements are therefore proper predicate acts.

F. **Pleading Damages**

LA argues Plaintiffs do not allege how their damages were caused by Defendants' conduct, as opposed to market declines. Again, LA intentionally misses the point. The Complaint does not, as LA suggests, plead damages resulting from the fact that the CSCF failed.[17] Under Plaintiffs' theory of damages, **as of the date Plaintiffs closed on their GSM lots and even if the CSCF Borrowers never defaulted on the CSCF**, Plaintiffs would still have suffered damages because: (1) LA and ERG had already looted the GSM Subdivision to take a $333 million distribution from the CSCF; (2) the terms of the CSCF required 100% of GSM cash flow for debt service; (3) the terms of the CSCF required GSM to loan other CSCF Developments funds to cover any debt service shortfalls; (4) the terms of the CSCF prevented the GSM developer from obtaining capital for development; (5) LA and ERG had already looted the GSM Subdivision to provide $146 million to cover the existing debt of the U.S. CSCF Developments; (6) GSM Land, ownership and control had been pledged as collateral for the $675 million CSCF, even though GSM received only $12 million from CSCF proceeds; and (7) CSCF terms made further development of GSM impossible.

[17] The Complaint alleges the CSCF Default as background for LA's continuing fraud and to further establish the materiality of the concealed facts concerning the existence and terms of the CSCF.

At the time Plaintiffs' closed on their GSM lots, the damage had already been done.[18] Plaintiffs were damaged because they unknowingly purchased lots in a development that had been looted, crippled and leveraged far beyond their fair market value. (¶¶ 245-256; 260-273.) But for the CSCF Fraud, Plaintiffs would not have purchased their GSM lots; and/or (2) would not have continued making payments on their GSM mortgage loans. (¶¶ 126-145, 174-185, 198-200, 242-273.) Plaintiffs' damages include: (1) amounts paid for down payments on GSM lots; (2) cash paid at closing; (3) interest paid at closing; (4) amounts paid for tax stamps; (5) loan fees; (6) property taxes paid and still owing; and (7) mortgage payments paid and still owing. (¶¶ 268-269.)

IV. Conclusion

For the foregoing reasons LA's Motion to Dismiss, should be denied. If the Court determines the Complaint is deficient in any of its allegations against the LA Defendants, Plaintiffs request an opportunity to amend in order to correct such deficiencies. If the Court determines Plaintiffs have not plead sufficient facts detailing LA's role in the CSCF Fraud, Plaintiffs request the opportunity to take discovery on documents and information in the possession and control of LA that would permit more detailed allegations.

September 13, 2010 s/ Dana L. Ballinger

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[18] In fact, at the time of the CSCF closing, which was months before Plaintiffs signed the GSM Purchase Contracts, the damage had been done.

CERTIFICATE OF SERVICE FOR OPPOSITION TO MOTION TO DISMISS FILED BY LUBERT-ADLER

I HEREBY CERTIFY that on this 13th day of September 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing and complete service to the following:

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September 13, 2010

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