IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Haven Trust Bank,	:	**CIVIL ACTION NO. 1:11-CV-02303-SCJ**
Plaintiff,	:	
v.	:	
EDWARD BRISCOE, KEN CUTSHAW, SCOTT DIX, BRIJ KAPOOR, BALVANT R. PATEL, DHIRU PATEL, KUNAL S. PATEL, MUKESH PATEL, MUKUND PATEL, NARENDRA D. PATEL, R. C. PATEL, B. RUTH STRICKLAND, ALAN TALLIS, MICHAEL F. JOHNSTON, and MARK DONOVAN,	:	
Defendants.	:	

ORDER

This matter appears before the Court on the Defendants' Motion to Dismiss the Complaint. Doc. No. 17.

I. Factual Background

On July 14, 2011, the Plaintiff, Federal Deposit Insurance Corporation, as Receiver for Haven Trust Bank (hereinafter, "Plaintiff" or "FDIC-R"), filed a Complaint for Damages against the above-named defendants, who are former directors and officers of Haven Trust Bank (hereinafter "Bank"). Doc. No. 1.

The Georgia Department of Banking closed the Bank on December 12, 2008. Id. at p. 2. The FDIC-R was thereafter appointed receiver for Bank. Id. at pp. 3 - 4, ¶ 6. Under 12 U.S.C. § 1821(d)(2)(A) and § 1823(d)(3)(A), FDIC-R "has . . . all rights, titles, powers, and privileges of the [Bank] and of account holders, depositors and stockholders with respect to the institution and its assets. Id.

In the present action, the FDIC-R seeks to recover from the Bank's former directors and officers for losses of approximately $40 million that the Bank suffered in connection with the following alleged actions: (1) high risk acquisition development and construction ("ADC") loans and other types of imprudent commercial real estate ("CRE") loans; (2) improper loans to insiders, and (3) imprudent dividend payments to the Bank's parent corporation. Id. at p. 2, ¶ 3. The specific counts of the Complaint are: (1) Count I (negligence); (2) Count II (breach of fiduciary duty); and Count III (gross negligence and violation of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA")). Id. at p. 33.

On September 15, 2011, Defendants filed a Motion to Dismiss the Complaint. Doc. No. 17. Defendants argue that Count I should be dismissed because Georgia's business judgment rule (hereinafter "BJR") protects bank directors and officers from personal liability for ordinary negligence. Defendants argue that Count II (breach of fiduciary duty), should be dismissed because Georgia's business judgment rule also protects bank directors and officers from personal liability for breach of fiduciary duty

in the absence of allegations of bad faith, fraud or abuse of discretion. Defendants argue that Count III does not plead a valid claim for gross negligence.

On October 17, 2011, FDIC-R filed a response to the Defendants' motion to dismiss and on November 3, 2011, Defendants filed a reply. Doc. Nos. 22 and 28.

The Court held oral argument on April 17, 2012.

The Court will address the arguments of the parties, as follows.

II. Motion to Dismiss

A. Legal Standard

A complaint may be dismissed if the facts as pled do not state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561–62, 570 (2007) (retiring the prior Conley v. Gibson, 355 U.S. 41, 45–46 (1957) standard which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In Iqbal, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949.

In Twombly, the Supreme Court emphasized a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 555 (internal citations and emphasis omitted).

B. Consideration of a presumption and/or an affirmative defense at the motion to dismiss stage of the proceedings

In the context of their motion to dismiss, Defendants have asked the Court to consider Georgia's business judgment rule. Defendants argue that said rule is a presumption which renders the FDIC-R's claims for personal liability for ordinary negligence (Count I) and ordinary breach of fiduciary duty (Count II) invalid as a matter of Georgia law. Doc. No. 28, p. 12; see In re Bal Harbour Club, Inc., 316 F.3d 1192, 1195 (11th Cir. 2003) ("In using the word 'presumption' or 'presumed' in articulating the business judgment rule, the courts have not intended to create a presumption in the classical procedural sense-as a vehicle that puts the burden of going forward with the evidence on the party without the burden of proof. Rather, the courts are merely expressing the substantive rule of director liability.").

The Court notes that in addition to a presumption, the business judgment rule could be considered an affirmative defense.[1] See, e.g., Heard v. Perkins, 441 B.R. 701, 710 - 11 (Bankr. N.D. Ala. 2010) ("This court assumes, but does not decide, that said rule must be considered as an affirmative defense.").

One court has noted that it is considered "debatable" as to whether to apply the business judgment rule at the motion to dismiss stage. See Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Group Ltd., No. 05-60080, 2008 WL 926509, at * 4 (S.D. Fla. Mar. 31, 2008) ("Courts that have considered this subject concur that it is 'debatable' whether a court should consider the protection of the business judgment rule on a motion to dismiss."). However, another court has held that "Twombly and Iqbal appear to expand the right to have business judgment considered pursuant to a motion to dismiss." Heard, 441 B.R. at 711. The Eleventh Circuit has held that "'[g]enerally, the existence of an affirmative defense will not support a motion to dismiss.' 'Nevertheless, a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense, so long as the defense clearly appears on the face of the complaint.'" Brown v. One Beacon Ins. Co., 317 F. App'x 915, 916- 17 (11th Cir. 2009).

[1]If the BJR is considered an affirmative defense, the Court recognizes that the Defendants have not yet filed an answer, raising said defense. Thus, it would be considered an anticipated affirmative defense.

In light of the above-cited authority, the Court finds that consideration of the business judgment rule in the context of said rule being a presumption and/or affirmative defense is proper at this early context (i.e., *only* as to the ordinary negligence claims), where the issue of the applicability of the BJR appears on the face of the Complaint and is limited by the law of Georgia, not dependent upon additional evidentiary facts.

C. Consideration of matters outside of the pleadings in the context of a motion to dismiss

Defendants argue that the Complaint contains omissions of basic, critical facts that should be judicially noticed by reference to the FDIC's own published report, "Material Loss Review of Haven Trust Bank, Duluth, Georgia," Report No., AUD-09-017 (hereinafter "FDIC OIG Report"). Doc. No. 17-1, p. 13. In response, FDIC-R argues that the Court may not consider the referenced document without converting Defendants' motion into a motion for summary judgment. Doc. No. 22, p. 19, n. 2.

The Court disagrees. As noted by the Defendants, in Speaker v. U.S. Dep't. of Health and Human Servs., 623 F.3d 1371, 1379 (11th Cir. 2010), the Eleventh Circuit held that it has "recognized . . . [that] where certain documents and their contents are undisputed: '[i]n ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged.'"

After review, the Court finds that the FDIC OIG Report is central to FDIC-R's claims in that it appears that a portion of the allegations of the Complaint are drawn from said report and it also does not appear that FDIC-R is challenging the authenticity of the report.

The Court will consider said report for purposes of determining whether the Complaint meets the Twombly/Iqbal plausibility standard.

D. Analysis

1. Count I (negligence) and Count II (breach of fiduciary duty)

In Count I of the Complaint, FDIC-R alleges that "[b]y their actions and inactions, as described specifically and generally herein, each of the Defendants failed and neglected to perform their respective duties as officers and/or directors of the Bank, constituting breaches of their statutory and common law duties of care owed to the Bank." Doc. No. 1, p. 30, ¶ 70. In Count II of the Complaint, FDIC-R alleges that "[b]y their actions and inactions, as described specifically and generally herein, each of the Defendants failed and neglected to perform their respective duties as officers and/or directors of the Bank, constituting breaches of their fiduciary duties owed to the Bank." Id. at 33, ¶ 78.

In their motion to dismiss, Defendants argue that "[t]he FDIC's claims in Counts I and II, as pleaded and by their own express limitations, are insufficient as a matter of law to overcome Georgia's business judgment rule." Doc. No. 28, p. 9. Defendants

further argue that Georgia's business judgment rule protects banks, officers, and directors from personal liability for ordinary negligence or breach of fiduciary duty without allegations of fraud, abuse of discretion or bad faith. Doc. No. 17-1, p. 22.

In response, FDIC-R argues that it has alleged facts that negate the application of the business judgment rule on the grounds that the Defendants did not make informed deliberative decisions, abused their discretion, and did not act in good faith. Doc. No. 22, p. 29. In their reply to FDIC-R's argument, Defendants state that claims of bad faith or abuse of discretion are by definition, not claims of ordinary negligence or breach of fiduciary duty. Doc. No. 28, p. 9.

The business judgment rule "is a policy of judicial restraint born of the recognition that [officers] are, in most cases, more qualified to make business decisions than are judges." Brock Built, LLC v. Blake, 300 Ga. App. 816, 821- 22, 686 S.E.2d 425, 430 - 31 (2009) (quoting In re The Bal Harbour Club, 316 F.3d 1192, 1194 - 95(II) (11th Cir. 2003)). Georgia's business judgment rule is found in two primary cases of the Georgia Court of Appeals: Flexible Products Co. v Ervast, 284 Ga. App. 178, 643 S.E.2d 560 (2007) and Brock Built , LLC v. Blake, 300 Ga. App. 816, 686 S.E.2d 425 (2009), *appeal after remand*, --- S.E.2d --- , 2012 WL 2756337 (Ga. App. Jul. 10, 2012).[2]

[2]In Gooding v. Wilson, 405 U.S. 518, 526 n.3, 92 S. Ct. 1103, 1108 n.3 (1972), the United States Supreme Court recognized that it had been informed that "the Court of Appeals of Georgia is a court of statewide jurisdiction, the decisions of which are binding upon all trial courts in the absence of a conflicting decision of the Supreme Court of Georgia." The Court further stated: "[f]ederal courts therefore follow these holdings as to Georgia law." Id.

In Flexible Products, the Georgia Court of Appeals stated:

> Georgia's business judgment rule relieves officers and directors from liability for acts or omissions taken in good faith compliance with their corporate duties. **Such rule forecloses liability in officers and directors for ordinary negligence in discharging their duties.** "[O]rdinary diligence or negligence is what an ordinarily prudent man would do under the same circumstances . . . ." **Given that officers and directors thus are protected from liability for ordinary negligence**, the trial court erred in refusing to direct a verdict for [defendant] on [plaintiff's] ordinary negligence claim.
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> 284 Ga. App. at 182, 643 S.E.2d at 564 - 65 (emphasis added).

In Brock Built, the Georgia Court of Appeals explained the business judgment rule as follows:

> Georgia law requires that corporate officers and directors discharge their duties in good faith and with the care of an ordinarily prudent person in a like position. In determining whether a corporate officer has fulfilled his or her statutory duty, Georgia courts apply the business judgment rule. The business judgment rule affords an officer the presumption that he or she acted in good faith, and absolves the officer of personal liability unless it is established that he or she engaged in fraud, bad faith or an abuse of discretion:[3]
>
> > The business judgment rule protects . . . officers from liability when they make good faith business decisions in an informed and

[3]The Court notes that it could be said that there are two statements of the business judgment rule in the Brock Built case. This note marks the end of the first statement. The next note, *infra*, will mark the end of the next statement.

> deliberate manner. The presumption is that they have acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Unless this presumption is rebutted, they cannot be held personally liable for managerial decisions. However, officers may be held liable where they engage in fraud, bad faith, or an abuse of discretion.[4]
>
> **Allegations amounting to mere negligence, carelessness, or "lackadaisical performance" are insufficient as a matter of law.**
>
> 300 Ga. App. at 821 - 22, 686 S.E.2d at 430 - 31 (citations omitted, emphasis added).

In light of this authority, the Court finds that when Georgia's business judgment rule is applied to claims for ordinary negligence, Georgia courts hold that such claims are not viable. See Flexible Products, 284 Ga. App. at 182, 643 S.E.2d at 565 (holding that under business judgment rule, "officers and directors thus are protected from liability for ordinary negligence . . . . ") and Brock Built, 300 Ga. App. at 822, 686 S.E.2d at 430 (setting forth the business judgment rule and stating that "[a]llegations amounting to mere negligence, carelessness, or 'lackadaisical performance' are insufficient as a matter of law.").

The Court finds that the standard of care set forth in O.C.G.A. § 7-1-490 (i.e., that "[d]irectors and officers of a bank or trust company shall discharge the duties

[4]This note marks the end of the second statement of the business judgment rule.

of their respective positions in good faith and with that diligence, care, and skill which ordinarily prudent men would exercise under similar circumstances in like positions") does not change this interpretation. This is because there is a "difference between the standard of care, which is the standard of conduct expected of directors in their decision making, and the business judgment rule, which is the standard of review that determines whether directors will be held liable for a poor decision." Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, DEL. J. CORP. L. 343, 352 (2005).

The Court further notes that while it appears that there is no Georgia case directly stating that the business judgment rule is to be applied in the banking context, there is a general principle "fixed in [Georgia] jurisprudence that 'the courts will not interfere in matters involving merely the judgment of a majority in exercising control over corporate affairs.'" Millsap v. Am. Family Corp., 208 Ga. App. 230, 233, 430 S.E.2d 385, 388 (1993). The Georgia Supreme Court has also specifically held in the banking litigation context in which negligence and misconduct allegations were made that "[t]he mere exercise by directors of poor judgment in making loans is not sufficient to form a basis of liability; for the directors merely assume the obligations to manage the affairs of the institution with diligence and good faith." Mobley v. Russell, 174 Ga. 843, 847, 164 S.E. 190,

193 (1932). While not a specific declaration of the business judgment rule, the Mobley case (together with the above-stated fixed jurisprudence of Georgia), lead the Court to conclude that the business judgment rule is applied in Georgia in the banking context.

Accordingly, Defendants' motion to dismiss on the grounds of the applicability of the business judgment rule is hereby **GRANTED** as to the ordinary negligence and breach of fiduciary(based upon ordinary negligence) counts of the Complaint.[5]

2. Count III (gross negligence)

In Count III of the Complaint, FDIC-R alleges that "[t]he Defendants' actions and inactions as described herein exhibit such a degree of carelessness and/or inattention as to constitute gross negligence under Georgia law." Doc. No. 1, p. 34, ¶ 83. The actions and inactions described in the Complaint allege that each of the Defendants caused or permitted "some or all" of the following acts or omissions: violations of law and regulations; failure to establish, enforce and follow loan policies; inadequate investigation; failure to heed to regulatory warnings; loans to non-creditworthy borrowers; inadequate financial information;

[5]The Court also adheres to and incorporates by reference into this order, the Court's prior holdings (in the context of a motion to dismiss, motion for judgment on the pleadings, and motion for reconsideration) on the business judgment rule in FDIC v. Skow, et al., No. 1:11-cv-111 (N.D. Ga. 2012).

inadequate loan documentation; unsecured and undersecured loans; inadequate or non-existent appraisals; failure to perfect and maintain collateral; diversion of loan proceeds; improper loan repayment programs; improper loan extensions and renewals; inadequate collection procedures; improper selection and supervision of officers; improper investment and liquidity policy compliance; improper maintenance of capital-to-asset ration; insider loans; and failure to properly exercise management and supervision duties. Doc. No. 1, pp. 25 - 29. The Complaint lists a total of twenty-four "imprudent loans" made on or after April 17, 2008 and also alleges "[b]y way of example" deficiencies in a SAI Hospitality, Inc. $4.2 million loan approved in May 2008 that "demonstrate[d] Defendants' blatant disregard for prudent underwriting and disbursement standards, as well as violations of the Bank's lending policy." Id. at ¶ 43. The Complaint then goes on to allege deficiencies and losses sustained by insider loans. Id. at pp. 18- 20.

In their motion to dismiss, Defendants argue that FDIC-R has failed to state a plausible claim for gross negligence. Defendants argue that the FDIC-R's Complaint offers no specific facts showing that the standard of gross negligence liability has been met (as required by Twombly and Iqbal). Doc. No. 17-1, p. 28. Defendants argue that FDIC-R has lumped the entire group of fifteen defendants together, without regard to whether they were on the Bank's Loan Committee or in fact had any involvement or responsibility for the decisions and approvals at

issue, and then takes no account of the Defendants' Georgia statutory right to rely on other officers and directors, outside professionals and board committees in performing their duties as bank directors and officers. Id. at p. 10. Defendants also raise specific arguments as to Mark Donovan (the Bank's former Senior Credit Officer) and Michael Johnston (the Bank's former Chief Financial Officer), asserting an absence of specific allegations for individual liability for the alleged losses. Id. at p. 12. As to the twenty-four specific loans and six insider loans that are the basis for FDIC-R's claims, Defendants argue that but for a few loans "by way of example" in paragraph 43, the Complaint provides no detail as to how or why each of the Defendants was grossly negligent in participating in or "allowing" the Bank to approve and administer each of the loans cited in the Complaint. Doc. No. 28, p. 13. Defendants argue that "the FDIC-R similarly fails to specify why all of the Defendants were grossly negligent in approving (or 'allowing' the approval of) the 2008 dividends and, instead, merely relies on the hindsight assertion that the dividend approvals were 'imprudent' because the Bank later failed." Id. at p. 13.

Defendants also note that "[t]he FDIC has been the receiver thereof, and in possession of all of the Bank's documents, including loan files, board of director and loan committee agendas, packages and minutes, and financial information

for nearly three years. Therefore, it stands to reason that the FDIC has or should reasonably have at hand the factual basis for its claims." Doc. No. 28, p. 14.

In regard to the applicable standard, Defendants argue: "[t]o meet the plausibility test under Twombly and Iqbal and overcome a motion to dismiss, the FDIC should not be permitted to allege only favorable facts and unfairly distort the context in which the Defendants' conduct occurred, especially when the omitted facts and context may be the subject of judicial notice." Doc. No. 17-1, p. 30. Defendants further argue that the Court can readily infer obvious alternative explanations for the losses that are the subject of the FDIC's claim – other than the Defendants' conduct. Id. at p. 31. Defendants ask the Court to look to the pertinent facts and alleged omissions from the Complaint to this regard. Id.

In response to the Defendants' motion and arguments, FDIC-R argues that the Complaint alleges enough facts to raise a reasonable expectation that discovery will reveal evidence in support of its claims for gross negligence. Doc. No. 22, p. 30. FDIC-R further argues that it has alleged the specific roles and duties of each of the individual defendants. Doc. No. 22, p. 28.

"'Gross negligence' is defined as 'the failure to exercise that degree of care that every man of common sense, however inattentive he may be, exercises under the same or similar circumstances; or lack of the diligence that even careless men are accustomed to exercise.'" Morgan v. Horton, 308 Ga. App. 192, 197- 98, 707

S.E.2d 144, 150 - 51 (2011); see also O.C.G.A. § 51-1-4 (providing that gross negligence is the absence of that degree of care "which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.").

Assuming the allegations of the Complaint are true, the Court finds that the complaint has alleged in a collective/group manner, sufficient facts for which a jury might reasonably conclude that Defendants were "grossly negligent" as defined by Georgia law. Wood v. Olson, 104 Ga. App. 321, 322, 121 S.E.2d 677, 678 (1961) ("When facts alleged as constituting gross negligence are such that there is room for difference of opinion between reasonable men as to whether or not negligence can be inferred, and if so whether in degree the negligence amounts to gross negligence, the right to draw the inference is within the exclusive province of the jury."). The Court makes its plausibility ruling after review of the Defendants' citation of omitted "critical facts"and Defendants' arguments concerning the inference of obvious alternative explanations for the losses that are the subject of FDIC-R's claim. [Doc. No. 17-1, pp. 29 -30]

In regard to the Defendants' arguments concerning lack of specificity as to each Defendant's role and actions in the loans/transactions at issue, the Court notes that the Eleventh Circuit has held that "[w]hen multiple defendants are named in a complaint, the allegations can be and usually are to be read in such a

way that each defendant is having the allegation made about him individually." Crowe v. Coleman, 113 F.3d 1536, 1539 (11th Cir. 1997). The Court further notes that it appears that in the context of a multiple defendant lawsuit, the Eleventh Circuit has only required the pleading of specific allegations as to each defendant's conduct when there are fraud allegations. See Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1317 (11th Cir. 2007) ("[I]n a case involving multiple defendants . . . the complaint should inform each defendant of the nature of his alleged participation in the fraud.") (internal quotes omitted). (In the case *sub judice*, Count III of the Complaint is labeled gross negligence, not fraud.) In considering Defendants' specificity arguments, the Court also recognizes the Supreme Court's holding in Twombly, in which the Supreme Court explained that a complaint "does not need detailed factual allegations," but the allegations "must be enough to raise a right to relief above the speculative level." 550 U.S. at 555, 127 S. Ct. at 1964 -65.

The case of George & Co., LLC v. Alibaba.com, Inc., No. 2:10-cv-719, 2011 WL 6181940, at * 2 (M.D. Fla. Dec. 13, 2011) provides additional guidance that this Court will adopt. In George, the district court stated: "[a]lthough a complaint against multiple defendants is usually read as making the same allegation against each defendant individually, factual allegations must give each defendant 'fair notice' of the nature of the claim and the 'grounds' on which the claim rests.

Accordingly, at times, a plaintiff's 'grouping' of defendants in a complaint may require a more definite statement." Id. at *2.

The Court's independent research further shows that when faced with similar arguments (regarding group or "lump" pleading), other courts have dismissed the allegations without prejudice and/or ordered repleading. See, e.g., Petrovic v. Princess Cruise Lines, Ltd., No. 12-21588, 2012 WL 3026368, at * 3 (S.D. Fla. Jul. 20, 2012) (reviewing arguments that the complaint improperly "lump[ed]" the defendants together as a single entity and granting motion to dismiss without prejudice, allowing an amended complaint to be filed at a later date); In re All American Semiconductor, Inc., No. 07-12963, 2010 WL 2854153, at * 10 (Bankr. S.D. Fla. Jul. 20, 2010) ("the [c]ourt finds that these claims likewise should be dismissed without prejudice as [p]laintiff improperly lumps [d]efendants together in these claims despite that [d]efendants are separate and distinct legal entities. . . . . If [p]laintiff elects to amend these claims he must treat each [d]efendant as a separate and distinct legal entity and delineate the conduct at issue as to each [d]efendant."); Court Appointed Receiver of Lancer Offshore, Inc. v. Citco Group Ltd., No. 05-60080, 2008 WL 926512, at * 12 (S.D. Fla. Mar. 31, 2008) (holding that "[b]y lumping . . . three defendants together in each claim and providing minimal individualized allegations to distinguish their conduct, even though their roles were different, . . . [c]omplaint challenges the standard of Rule

8" and concluding by granting motion to dismiss with leave to replead); cf. Porter v. Duval Cnty Sch. Bd., 406 F. App'x 460, 461 - 62 (11th Cir. 2010) (noting that the complaint included numerous claims against multiple defendants in lengthy, unnumbered paragraphs and concluding that "the district court acted within its discretion when it granted the motion for a more definite statement and required [plaintiff] to amend her original complaint.").

After review of the above-cited case law, in the interest of caution, the Court exercises its discretion to order that the FDIC-R replead the allegations of its Complaint to provide specific allegations as to each Defendant's involvement or responsibility for the alleged wrongs, decisions, approvals, transactions, and loans referenced in the original Complaint. Said repleading shall be filed within **ten (10) days** of the entry of this Order.

III. Conclusion

Defendants' Motion to Dismiss the Complaint [Doc. No. 17] is hereby **GRANTED in part as to Counts I and II of the Complaint based upon claims of ordinary negligence and DENIED in part as to Count III**. In the interest of caution, the Court orders that the Plaintiff replead Count III within **ten (10) days** of the entry of this order in accordance with the instructions herein.

IT IS SO ORDERED, this 14th day of August, 2012.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE