

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 07-61542-CIV-UNGARO

JOSEPH C. HUBBARD, individually and on behalf of  
all other similarly situated,

Plaintiff,

v.

BANKATLANTIC BANCORP, INC.,  
JAMES A. WHITE, VALERIE C.  
TOALSON, JOHN E. ABDO, JARRETT S.  
LEVAN and ALAN B. LEVAN,

Defendants.

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**ORDER DENYING DEFENDANTS' MOTION TO DISMISS  
THE FIRST AMENDED CONSOLIDATED COMPLAINT**

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss the First Amended Consolidated Complaint, filed February 6, 2008 (D.E. 85). Plaintiff responded in opposition to the Motion to Dismiss on March 5, 2009 (D.E. 89). Defendants replied on March 20, 2009 (D.E. 93). The matter is ripe for disposition.

THE COURT has considered the Motion, the pertinent portions of the record, and is otherwise fully advised in the premises. By way of background, this is a securities fraud action brought against BankAtlantic Bancorp, Inc. ("BankAtlantic Bancorp") and several officers and board members of both BankAtlantic Bancorp and its wholly-owned subsidiary, BankAtlantic (collectively, the "Company"). Plaintiff asserts claims under the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j, alleging that BankAtlantic Bancorp and the individual defendants knew, or were reckless in not knowing, about certain lending and accounting practices that the Company engaged in during the class period that artificially affected

the value of BankAtlantic Bancorp's stock.

The instant motion represents Defendants' second motion to dismiss, the Court having granted without prejudice Defendant's first motion on December 12, 2009. (D.E. 70, the "Order".) In its Order, the Court found that (i) Plaintiff's allegations regarding Defendants' material misrepresentations and omissions were sufficiently particularized under Federal Rule of Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 ("PSLRA"),<sup>1</sup> and (ii) Plaintiff adequately alleged a causal relationship between his pecuniary loss and Defendants' material misrepresentations and omissions. (See Order at 18-20, 36-38.) However, the Court also found that Plaintiff failed to plead facts that gave rise to a strong inference that each of the Defendants acted with scienter in making the alleged material misrepresentations and omissions. Accordingly, the Court granted Plaintiff leave to amend his complaint in order to comply with the PSLRA's demanding standard for pleading scienter.

On January 12, 2009, Plaintiff filed his First Amended Consolidated Complaint (D.E. 80, the "Amended Complaint"). The Amended Complaint represents a substantial revision of Plaintiff's earlier complaint. Nonetheless, Defendants argue in their instant Motion that it still fails to meet the PSLRA's stringent requirements for pleading scienter. The Court disagrees. The Amended Complaint cures the most pertinent deficiencies in Plaintiff's earlier complaint – namely, that Plaintiff's earlier allegations rested upon statements from confidential witnesses about whom the Court knew nothing, and that many of the allegations were vague and failed to show what each of the individual defendants knew or should have known during the class period.

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<sup>1</sup> Pub. L. No. 194-67, 109 Stat. 743, codified at 15 U.S.C. § 78u-4(b).

For example, the Court's Order held that Plaintiff failed to allege facts giving rise to a strong inference of scienter as to individual defendants Abdo, A. Levan, and J. Levan<sup>2</sup> because certain of the allegations made with regard to these individuals were based on statements from confidential witnesses about whom Plaintiff provided absolutely no information from which the Court could evaluate the bases for their statements. (See Order at 23-24 (relying on *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230 (11th Cir. 2008).) In contrast, the Amended Complaint contains sufficient information regarding these confidential witnesses, including their employment duties, whether they were employed during the Class Period and how they obtained direct knowledge of the facts they were reporting.<sup>3</sup> While Plaintiff's previous complaint vaguely stated that the Company's lax underwriting was "common knowledge" (a statement that told the Court nothing about what any of the individual defendants knew and was attributed to a confidential witness about whom the Court knew nothing), the Amended Complaint clearly states that A. Levan, Abdo, and J. Levan knew, or were reckless in not knowing, about the underwriting deficiencies in the Company's commercial real estate loans because they were at

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<sup>2</sup> All terms defined herein shall have the meaning ascribed to them in this Court's previous Order.

<sup>3</sup> Defendants argue that Plaintiff again failed to plead facts establishing a foundational basis for its confidential witnesses because, *inter alia*, the Amended Complaint does not specify the witnesses' exact dates of employment with the Company. (Response at 7.) This Court, however, has previously stated that Plaintiff is not strictly required to plead such dates. (See Order on Lead Plaintiff's Emergency Motion for a Telephonic Hearing, D.E. 78.) Rather, *Mizzaro* states that "the weight to be afforded to allegations based on statements proffered by a confidential source depends on the particularity of the allegations in each case . . . [c]onfidentiality, however, should not eviscerate the weight given if the complaint otherwise fully describes the foundation or basis of the confidential witness's knowledge, including the position(s) held, the proximity of the offending conduct, and *the relevant time frame*." 544 F.3d at 1240 (emphasis added). Plaintiff has provided information that assures the Court that the confidential witnesses were employed with the Company at relevant times and were in close proximity to the offending conduct.

meetings where such deficiencies were discussed and regularly received reports (the “Exception Reports”) detailing such deficiencies during the Class Period (a statement that tells the Court about what the individual defendants knew and was attributed to a manager in the Company’s loan servicing and closing department who participated in such meetings and reviewed the same reports during the Class Period). (See Am. Compl. ¶¶ 34, 65, 67, 69, 84-85, 103, 105, 222.) Consequently, the Amended Complaint now “unambiguously provides in a cognizable and detailed way the basis of the whistleblower’s knowledge” and alleges specifically what A. Levan, Abdo, and J. Levan knew, or were reckless in not knowing, when they allegedly misrepresented to the public that the Company was engaging in prudent lending practices.<sup>4</sup> See *Mizzaro*, 544 F.3d at 1239.

Additionally, the Amended Complaint contains other specific allegations that give rise to a strong inference of scienter. In Paragraph 70 of the Amended Complaint, Plaintiff alleges that a manager in the Company’s loan department during the Class Period stated that the Company’s underwriting deficiencies were so pervasive that of the 74 loans reported on the Company’s books in 2007, approximately 50-60% of these loans appeared on an Exception Report at any given time, and that the Exception Reports were circulated to the individual defendants and were

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<sup>4</sup> Previously, this Court held: “Allegations that Abdo, A. Levan and J. Levan sat on the Major Loan Committee, received Exception Reports and were involved in the management of the CRE portfolio may demonstrate negligence,” but not extreme recklessness. (Order at 28.) Defendants cite this language and argue that the Amended Complaint similarly fails. (Motion at 9.) This, however, is not the case in light of the revisions contained in the Amended Complaint. That is, previously, the Court could not afford any weight to the facts attributed to confidential witnesses, and, perhaps more importantly, the Court could not afford any weight to the Exception Reports because Plaintiff’s earlier complaint did not contain particularized facts about what was in those reports or when they were circulated. (See Order at 27.) Consequently, the Court could make no inferences about the individual defendants’ knowledge about what was in those reports. In contrast, the Amended Complaint does contain such information. (Compare Original Compl. ¶ 65 with Am. Compl. 69-72.)

agenda items at the meetings that the individual defendants attended. (Am. Compl. ¶ 70.)

Further, the Amended Complaint in Paragraphs 61 and 86 alleges that notwithstanding the fact that the individual defendants knew or were reckless in not knowing that the Company had never received the \$2 million in escrow monies it was due for the non-recourse Steeplechase Loan, the Company's Major Loan Committee (of which A. Levan, Abdo, and J. Levan were voting members) voted to approve a future advance<sup>5</sup> on that loan for another \$1-2 million during the Class Period. (See, e.g., Am. Compl. ¶¶ 61, 86.) Also, Paragraph 87 alleges that after the borrower on Steeplechase Loan received his loan and his future advance, he defaulted, and the collateral on the loan was transferred to one of the Company's subsidiaries during the Class Period in order to avoid having to record the loss on the Company's books – a decision that A. Levan, Abdo, and J. Levan, as members of the Company's Major Loan Committee, either knew about or would have been reckless in not knowing when they made certain statements to their investors about the Company's risk exposure during the class period. (See Am. Comp. ¶ 87.)

The Court is mindful that when determining whether the Amended Complaint sufficiently alleges scienter under the PSLRA it must “consider plausible nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2510 (2007). Defendant argues that there are competing inferences from which a reasonable person would not infer scienter, such as the fact that certain individual defendants purchased stock during the Class Period, the Company's financials received approval from an outside auditor, and the Company repeatedly warned the market that

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<sup>5</sup> The Amended Complaint states that a “future advance” is mortgage clause allowing the lender to advance funds after the initial loan closing and disbursement of funds, without executing a new mortgage deed or taking additional collateral.

its financial health heavily depended on the vitality of the Florida real estate market. (Response at 4.) The Court notes, however, that the inference that a “defendant acted with scienter need not be irrefutable, *i.e.*, of the ‘smoking-gun’ genre, or even the ‘most plausible of competing inferences.’” *Id.* (citation omitted). Rather, it must be “strong in light of other explanations.” *Id.*

Viewing the allegations in the Amended Complaint as a whole, the Court finds the Amended Complaint contains facts that give rise to a strong inference scienter on the part of A. Levan, J. Levan and Abdo because it includes specific facts demonstrating that they knew or were severely reckless in not knowing of the Company’s risk exposure, which was greater than what they disclosed to their investors. And while Defendants emphatically argue that it was the deterioration in the real estate market – not any material misrepresentations or omissions by the Defendants – that really caused the Company’s losses, the Court has already found that Plaintiff adequately plead causation and whether Defendants’ alternative causation theory bars Plaintiff’s claims for damages is a question for another day.

Finally, the Court considers whether the Amended Complaint adequately alleges scienter as to the remaining individual defendants, White and Toalson. (*See* Order at 30-31.) Whereas before Plaintiff’s complaint simply stated that these two individual defendants knew about the Company’s risky lending practices by virtue of their high-ranking positions at the Company, the Amended Complaint contains particularized allegations regarding the role Toalson and White played in approving the Company’s commercial real estate loans and setting the Company’s inadequate loan loss reserves. (*See* Am. Compl. ¶ 121.) For example, Plaintiff alleges that a manager in the Company’s loan department during the Class Period stated that Toalson and

White took active roles<sup>6</sup> in deciding how to reserve for different loans during the Class Period, and, during this time, there was an initiative at the Company to “reallocate, move, and redefine” many of its commercial real estate loans to avoid having to establish larger loan loss reserves. (Am. Compl. ¶¶ 119-121.) Additionally, the Amended Complaint specifically alleges that Toalson and White were members of the Company’s Board of Directors and that in this capacity they received the Exception Reports during the Class Period and the Exception Reports were incorporated into the Board of Directors’ meeting minutes. (Am. Compl. ¶ 72.) Thus, whereas the Court earlier dismissed the allegations against Toalson and White because, in part, the complaint did not “allege that Toalson and White were presented information that would have shown the falsity of the Company’s financials or that they were confronted with concerns regarding the Company’s lending practices or loan loss reserves,”<sup>7</sup> the Amended Complaint does contain such allegations and these allegations rest on statements made by confidential witnesses with a foundational basis of knowledge for stating such facts.

In conclusion, the Court notes that the pleading requirements under the PSLRA are stringent, but are not insurmountable. Plaintiff’s Amended Complaint, taken as a whole,

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<sup>6</sup> The Complaint further alleges that as Chief Financial Officer for all but four months during the Class Period, White was responsible for determining, reviewing and monitoring loan loss reserves. (Am. Compl. ¶33.) This allegation does more than simply allege that Toalson must have known about the Company’s inadequate loss reserves; this allegation alleges that Toalson was the person responsible for determining, reviewing and monitoring loan loss reserves. From this new allegation, it is reasonable that a person *would* think that Toalson either knew or was reckless in not knowing that the loss reserves were materially understated and being manipulated such that stating otherwise to investors would be a material misrepresentation. (See, e.g., Am. Compl. ¶ 124 (alleging that Toalson misrepresented to investors that the Company’s reserve calculations were prudent).) See *Mizzaro*, 544 F.3d at 1239 (holding that the “strong inference” standard under the recent Supreme Court case, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), requires a court to determine what a reasonable person would think).

<sup>7</sup> See Order at 30.

sufficiently alleges that the Defendants were extremely reckless in making the Company's commercial real estate loans and in failing to disclose the Company's exposure to risk to its investors. Therefore, it hereby

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 85) is DENIED.

Defendants SHALL file their Answer to Plaintiff's First Amended Consolidated Complaint within ten (10) days from the date of this Order. It is further

ORDERED AND ADJUDGED that Defendants' Motion for Hearing (D.E. 86) is DENIED AS MOOT.

DONE AND ORDERED in Chambers, in Miami, Florida this 11th day of May, 2009.



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URSULA UNGARÓ  
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record