UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF FLORIDA

KENNETH W. LILES; PATRICIA M. LILES EDWARD R. WEBB; JAMES JOSEPHSON WILLIAM J. ANDREWS, JR.; MARK R. ROODVOETS; JON D. ANDREWS; CHARLES B. LESESNE; JERRY A. CICOLANI, JR.; KRIS BRENNEMAN; DANA L. BALLINGER and SUSAN KHERKHER,

Plaintiffs,

Case No. 3: 08-cv-1217-J-34JRK

vs.

DEFENDANTS GINN-LA, LIMITED; GINN FINANCIAL SERVICES; STEWART TITLE GUARANTY COMPANY; SIMON L. CONWAY; PICKET FENCE REALTY; ROBERT F. MASTERS II; EDWARD R. GINN, III,

Defendants.
_____/

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY ON COUNTS II THROUGH VII

Pursuant to Fed.R.Civ.Proc. 56, Plaintiffs move for partial summary judgment as to liability on Counts II, III, IV, V, VI and VII. Partial summary judgment as to liability on Counts II through VII is appropriate because the undisputed facts establish that Defendants Ginn-LA West End, Limited (GLA), Robert F. Masters, II and Edward R. Ginn, III ("Robert Ginn") ("Ginn Defendants") violated the Interstate Land Sales Full Disclosure Act in several respects.

I. SUMMARY OF UNDISPUTED FACTS

Defendant GLA, as the Developer, Registers the VSM Subdivision with HUD Under ILSA

Defendant GLA was, at least from 2006 through 2008, the developer of the Versailles Sur Mer subdivision on Grand Bahama Island ("VSM"). (Ballinger Decl. Ex. J (040779.) On June

6, 2006, Defendant GLA (through its attorney) submitted an initial Statement of Record, including a Property Report, for certain VSM lots to the U.S. Department of Housing and Urban Development, Interstate Land Sales Division ("Initial VSM HUD Filing"). (*Id.* (040777).)[1]

Certain Ginn Entities Enter Into a $675 Million Credit Suisse Credit Facility

On June 8, 2006, before the Initial VSM HUD Filing, certain Ginn entities entered into a $675 million Credit Suisse Credit Facility ("CSCF"). (Ex. K (013944, 013979-80); Ex. L. (014708).) The Borrowers under the CSCF were Ginn-LA CS Borrower and Ginn-LA Conduit Lender ("CS Borrowers"). (Ex. K (at 013944, 013951); Ex. L (014708, 014715).) Defendant Masters executed the First and Second Lien Credit Agreements on behalf of the CS Borrowers. (Ex. K (01471-72); Ex. L (014822-23).)

What Happened to the $675 Million Borrowed Under the CSCF?

On the June 8, 2006 CSCF closing date, the CS Borrowers sent "irrevocable" notices requesting disbursement of $510 million. (Ex. M-N.) The CSCF included terms governing the use of its proceeds. More than $333 million was designated for "distributions" to entities owned by Defendant Robert Ginn and his financial partner Lubert Adler.[2] In addition, loan proceeds were applied "to repay the "Existing Indebtedness" of 5 different Ginn developments ("CSCF Developments"). (Ex. K (014002, 013951, 014365); Ex. L (014715, 014754, 015115); Ex. O (009573; 9578).) Of roughly $158 million distributed to repay Existing Indebtedness, only about $12 million was attributed to repay Existing Indebtedness of Defendant GLA. (Ex. O (009573; 009578).) Of the $510 million taken on the CSCF closing date, 64% went to "distributions" to Defendant Robert Ginn and Lubert Adler; 29% went to existing indebtedness for Ginn

[1] Unless otherwise noted, all citations are to the Ballinger Declaration.

[2] Loan proceeds were to be applied "to make certain distributions to the holders of Capital Stock in the Borrower in the amount of $333,125,000." (Ex. K (014002, 013951); Ex. L (014754, 014715).) The holders of Capital Stock in the 2 CS Borrowers were certain Lubert Adler Funds and ERG Enterprises, LP (owned by Defendant Edward Robert Ginn). (Ex. K (014554, 014559); Ex. L (015122, 015127).)

developments other than VSM, 5% went to transaction costs for the overall loan, and 2% went to existing indebtedness for VSM. (Ex. 0.)

How were the CS Borrowers Planning to Repay the $675 Million CSCF?

The $675 million CSCF was to be repaid from cash flow generated by the future "projected" lot sales in all 5 CSCF Developments. (Ex. K (014076-82); Ex. P.) Ginn provided the CS Lenders with Project Projections of cash flow from future lot sales the 5 CSCF Developments. (Ex. K (014076-82).) The Projections called for 58% of the cash flow for CSCF repayment to come from future lot sales in 4 CSCF Developments in Florida and North Carolina. (*Id.*)

How was the $675 Million CSCF Secured?

The $675 million CSCF was collateralized across all 5 CSCF Developments: substantially all assets of the CS Borrowers and each development, including all land and improvements, were pledged to secure the CSCF. (Ex. Q (015166-67, 015201); Ex. P.) Most important for Plaintiffs, VSM provided significant collateral for the CSCF. First, the CSCF was partially secured by a $276 million mortgage on 1,957 acres of VSM land. (Ex. I; Ex. R (009605).) Second, the entire $675 million CSCF was secured by a pledge of majority ownership interests in the parent companies of Defendant GLA, which interests included the right to control future development of VSM. (Ex. W (015444, 015453-55); Ex. X (015457, 015466-68); Ex. R (009605).)

The $675 Million CSCF Was a New and Unique Loan Product Offered By Credit Suisse

The $675 million CSCF was a new loan product offered by Credit Suisse to the owners of large-scale developments. (Ex. S at 22-24, 28.) Through its new loan product, Credit Suisse was able to offer a loan the size of which had previously been unavailable to borrowers. (*Id.*) A key feature of the new Credit Suisse loan product was that it allowed the equity holders in large-scale developments to take sizable distributions from all or part of the Credit Suisse proceeds by capitalizing on the value of their developments. (*Id.*)

Plaintiffs' VSM Lot Purchases

Between July 2006 and February 2007, Plaintiffs executed Purchase Contracts with Defendant GLA (the "Plaintiff Contracts") for nine undeveloped VSM lots. (Declarations of Kenneth W. Liles, Edward R. Webb, James Josephson, Mark Roodvoets, Jerry A. Cicolani, Jr, Dana L. Ballinger, Susan C. Kherkher, Ronald P. Van and Thomas E. Lammertse ("Plaintiff Decl.") ¶ 2.) Prior to executing the Plaintiff Contracts, Plaintiffs received one of two versions of a VSM Property Report, dated either June 28, 2006 or September 12, 2006. ("Plaintiff Property Reports"). (Ex. B, C.) (Plaintiff Decl. ¶ 3.)

Although they now contest the validity of their closings, between December 2006 and May 2007 Plaintiffs closed on the purported purchases of their VSM lots. (Plaintiff Decl. ¶ 5.) None of the Plaintiffs received evidence of a recorded Conveyance Deed for their lot purchase within 180 days of the date of execution for that Plaintiff's contract. (Plaintiff Decl. ¶ 4.)

Following the purported closings on their VSM lots, Plaintiffs received property tax bills for their lots from the Bahamas Ministry of Finance. (Plaintiff Decl. ¶ 6.) Those bills indicate that property taxes are being assessed at an approximate rate of 1.5% on the purported value of each Plaintiff Lot, which taxes amount to approximately $9,000- $20,000 annually. (*Id.*)

The Plaintiff Property Reports Did Not Include Information on Property Taxes

The Plaintiff Property Reports did not include figures for property taxes in the Cost Sheet section. (6/28/06 Property Report at 32; 9/12/06 Property Report at 29.) In addition, the Plaintiff Property Reports, under the heading "Taxes," did not provide any of the following information required by 24 C.F.R. § 1710.116(b)(1): "When will the purchaser's obligation to pay taxes begin?" "To whom are the taxes paid?" "What are the annual taxes on an unimproved

lot after the sale to a purchaser?" (6/28/06 Report at 31; 9/12/06 Report at 28.) Instead, under the section heading for "Taxes," the Plaintiff Property Reports stated:

> Our Agreement with the Bahamian government provides for certain benefits to encourage our development of this resort community and includes certain limits on the stamp duty payable on the transfer of real property within the project. The limitations are for 5 years on the transfer of unimproved lots and for 20 years on the transfer of condominium units and homes. A copy of this Agreement is available to you upon request.

(*Id.*) Significantly, a June 6, 2006 draft VSM Property Report included an explanation of property tax rate for VSM lots. (Ex. T-U.) But, this statement was deleted before the June 9, 2006 Initial VSM HUD Filing (Ex. J at 29), as well as from the Plaintiff Property Reports.

The Plaintiff Property Reports Did Not Include Material Facts About Recording Deeds

The Plaintiff Property Reports included a warning, as required under 24. C.F.R. § 1710.109(d)(1)(iv): "UNLESS YOUR DEED IS RECORDED YOU MAY LOSE YOUR LOT THROUGH THE CLAIMS OF SUBSEQUENT BUYERS OR SUBSEQUENT CREDITORS OF ANYONE HAVING AN INTEREST IN THE LAND." (6/28/06 Property Report at 4; 9/12/06 Property Report at 4.) The Plaintiff Property Reports also stated: "All Deeds will be recorded by the Title Company, as closing agent, in accordance with Bahamian law. We, through the Title Company, will deliver to you a recorded Deed." (*Id.*)

The Plaintiff Property Reports failed to inform Plaintiffs that Conveyance Deeds for VSM lots were routinely not lodged for recording with the Bahamian government until several months following the closing dates for those lots. For example, the Conveyance Deed for Plaintiff Ballinger was not lodged for recording until July 18, 2007, nearly seven months after the December 22, 2006 closing. (Ex. V.) Similarly, the Conveyance Deed for Plaintiff Kherkher was not lodged for recording until December 18, 2007, nearly nine months after the March 20, 2007 closing. (Ex. EE.) And the Conveyance Deed for Plaintiffs Liles was not lodged for recording until July 18, 2007, seven months after the December 8, 2006 closing. (Ex. DD.)

The Plaintiff Property Reports also failed to inform Plaintiffs that after Conveyance Deeds were lodged for recording with the Bahamian government, it could take anywhere from 6 to 8 months or longer for those documents to be processed by the Bahamian government. (Ex. Y.)

Plaintiffs served Defendant GLA with a request for "DOCUMENTS RELATING TO the recording of the Conveyance Deeds in the Bahamas for each of the PLAINTIFF LOTS." Documents produced by Defendant GLA did not include any evidence that the Bahamian government has recorded the Conveyance Deeds for Plaintiff's Lots. (Ballinger Decl. ¶ 38.)

The Initial VSM HUD Filing Failed to Disclose Material Facts on the $675 Million CSCF

The Statement of Record (including the Property Report) in the Initial VSM HUD Filing (Ex. J) failed to disclose material facts about the $675 million CSCF ("Material CSCF Facts"):

1. The terms of the CSCF provided for a $333 million distribution to entities owned by Defendant Robert Ginn and his financial partner, Lubert-Adler.
2. The terms of the CSCF provided funding for 5 Ginn developments, not just VSM.
3. The terms of the CSCF provided that it was to be repaid from cash flow generated by future "projected" lot sales in 5 Ginn developments.
4. The CSCF was collateralized across 5 Ginn developments.
5. The CSCF was partially secured by a $277 million mortgage on the VSM land.
6. The entire $675 million CSCF was secured by a pledge of majority ownership interests in the parent companies of Defendant GLA, which included the right to control future development of VSM.

Direct Involvement of Defendants Masters and Robert Ginn in the Marketing of VSM

Defendant Robert Ginn served as a Director of Defendant GLA from 2004 to 2008, and Defendant Masters served as the President and CEO of Defendant GLA from 2004 to 2008. (Ex. Z.) Defendant Masters signed the Initial GSM Statement of Record. (Ex. J at 040059.) He also

executed both of the Plaintiff Property Reports.

Defendant Robert Ginn was personally and directly involved in the marketing of VSM lots. (Ex. D-G.) He allowed his name and likeness to be used in marketing materials for VSM, some of which told prospective purchasers that he would direct the development of VSM:

a. A page from a VSM marketing book and a page on the VSM website both featured a picture of Robert Ginn and a signed message that stated, *"The fact is we would not have compromised the integrity of our vision, nor would we have shared any plans that we weren't 100% certain we could both develop and operate to the level you've come to expect from the Ginn Clubs and Resorts team."* (Ex. D-E.)

b. A page on the VSM website stated that VSM was being developed under the direction of Defendant Bobby Ginn. (Ex. F.)

c. A press release on the VSM website included a message from Defendant Bobby Ginn: "Ginn Sur Mer promises to offer a recreational lifestyle unparalleled by any other resort in the Caribbean and beyond." (Ex. G.)

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted if the evidence "shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Material facts are those that "might affect the outcome of the suit" under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

Once the moving party makes its initial showing, the nonmoving party must cite "specific facts showing that there is a genuine issue for trial." *Id.* at 324. "[A] bare opinion or an unaided

claim that a factual controversy persists" cannot defeat a motion for summary judgment. *Alyeska Pipeline Serv. Co. v. U.S. E.P.A.*, 856 F.2d 309, 314 (D.C. Cir. 1988). That is, "[w]hen the moving party has carried its burden...its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The existence of a mere scintilla of evidence in support of the non-movant's position is insufficient; there must be evidence on the basis of which a jury could reasonably find for the non-movant. *See Anderson v. Liberty Lobby, Inc.* at 252.

III. The Interstate Land Sales Full Disclosure Act

The Interstate Land Sales Full Disclosure Act ("ILSA") was intended "to insure that a buyer, prior to purchasing certain kinds of real estate, is informed of facts which will enable him to make an informed decision about purchasing the property." *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 99 (5th Cir.1978). The Act is a consumer-protection statute, and "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *McCown v. Heidlier,* 527 F.2d 204, 207 (10th Cir.1975). "The (ILSFDA) is based on the full disclosure provisions and philosophy of the Securities Act of 1933. . ." *Flint Ridge Devel. Co. v. Scenic River Assoc.*, 426 U.S. 776, 778 (1976).

Consistent with its consumer-protection roots, ILSA "is an anti-fraud statute that uses disclosure as its primary tool to protect purchasers from unscrupulous sales of undeveloped home sites. *Stein v. Paradigm Mirsol, LLC*, 551 F.Supp.2d 1323, 1327 (M.D.Fla. 2008); *Pugliese v. Pukka Development, Inc.*, 524 F.Supp.2d 1370, 1371 (S.D. Fla., 2007) (ILSA "designed to discourage fraud by keeping buyers informed through rigorous disclosure requirements"). The disclosure requirements reflect the broad remedial purpose of ILSA, which is directed at the harm resulting from nondisclosure as well as from misrepresentation. The

remedial purpose of ILSA therefore requires that buyers must receive information necessary to make a decision prior to entering into the purchase contract. *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444, 1449 (11th Cir. 1985).

A. Standards Governing Liability Under ILSA

ILSA makes it unlawful for a developer to use interstate commerce "to sell... any lot unless a printed property report meeting the requirements of section 1707... has been furnished to the purchaser... in advance of the signing of any contract or agreement by such purchaser...." 5 U.S.C. §1703(a)(1)(B). The property report is an extensive and detailed disclosure that must include specific information required under ILSA. *See* 15 U.S.C. §1707; 24 C.F.R. § 1710.102-1710.118. The fundamental purpose of the property report is to provide "information designed to assist potential buyers in making a fully-informed decision whether to purchase." *Harvey v. Lake Buena Vista Resort, LLC*, 568 F.Supp.2d 1354, 1358 (M.D.Fla. 2008). Therefore, ILSA makes it unlawful for a developer to omit any material facts required to be in the property report under ILSA or regulations promulgated under the Act. 15 U.S.C. §1703(a)(1)(C).

ILSA closely parallels the Securities Act of 1933. The purpose of both statutes is to ensure that a buyer is informed of facts that would enable a reasonably prudent individual to make an informed purchase decision. *Paquin v. Four Seasons of Tennessee, Inc.*, 519 F.2d 1105, 1109 (5th Cir.1975), cert. denied, 425 U.S. 972. The test for determining materiality, as defined in this Circuit, is "whether a reasonable investor might have considered the omitted fact or erroneous statement as important in making a decision." *Paquin*, 519 F.2d 1105, 1109 (5th Cir.1975) (whether "[a]ny reasonable investor under similar circumstances, would consider such facts to be important in determining whether or not to expose his investment to a great risk"); *Gentry v. Harborage Cottages-Stuart, LLLP*, 602 F.Supp.2d 1239, 1254-55 (S.D. Fla. 2009) (applying

reasonable purchaser standard to claims of fraudulent statements); *see also Gibbes v. Rose Hill Plantation Development Co.*, 794 F.Supp. 1327, 1334 (D.S.C., 1992) (information is deemed material if a reasonable investor might have considered the omitted fact or information important in making a decision whether to purchase the real estate); *Price v. Owens-Illinois Development Corp.*, 646 F.Supp. 314 (M.D. Ga., 1986).

The test of materiality is an objective one. Therefore, while reliance has been required in cases alleging violations under 15 U.S.C. § 1703(a)(2)(A)-(C), *see Sewell v. D'Alessandro & Woodyard, Inc.*, 2009 WL 2913505, *23-24 (MD Fla. Dec. 5, 2009),[3] both reliance and intent to defraud have been held to be irrelevant in cases alleging violations of 15 U.S.C. § 1703(a)(1)(C). *Burns v. Duplin Land Development, Inc.*, 621 F.Supp.2d 292, 303-306 (E.D. NC 2009) (under clear language of ILSA, "simply making a material misrepresentation or omission…is actionable under… §1703(a)(1) and does not require proof of reliance); *Gibbes v. Rose Hill Plantation Development Co.*, 794 F.Supp. 1327, 1335 (D.S.C., 1992) (if property report statement is untrue, court must then determine whether the untrue statement was one of material fact); *Prebil v. Pinehurst, Inc.*, 638 F.Supp. 1314, 1317 (D.Mont.1986) (test of materiality is "whether a reasonable investor might have considered the omitted fact or erroneous statement as important in making a decision"); *Hester v. Hidden Valley Lakes, Inc.*, 495 F.Supp. 48, 53-54 (N.D. Miss., 1980); *Bryan v. Amrep Corp.*, 429 F.Supp. 313, 317 (S.D.N.Y.1977); *Hoffman v. Charnita, Inc.*, 58 F.R.D. 86, 90-91 (M.D.Pa. 1973).

Therefore, under 15 U.S.C. § 1703(a)(1)(C) a purchaser need not lack actual knowledge of a fact omitted from the property report. *Duplin*, 621 F.Supp.2d at 305-6 (in light of the plain text of the statute and its remedial purpose, "the court declines to judicially impose an ignorance

[3] At least one case has held that a plaintiff need not show reliance to maintain a cause of action under §1703(a)(2)(B) based on an omission. *Gibbes*, 794 F.Supp. at 1336.

requirement"). In addition, the sophistication of a plaintiff/purchaser is irrelevant. *Murray v. Holiday Isle*, 2009 WL 857406, *6 (S.D. Ala. 2009). Finally, a plaintiff's motives for seeking rescission are also immaterial. *Pigott v. Sanibel Development*, 576 F.Supp.2d 1258, 1265 (S.D. Ala. 2008) ("court is not sitting in judgment of the morality of plaintiffs' rescission decisions").

IV. Liability Under ILSA is Appropriate in This Case

Defendant GLA registered VSM with HUD, claimed no exemptions for the registered lots, and provided Plaintiffs with HUD-mandated VSM Property Reports. (Ex. J, A-B.) Therefore, it is subject to liability for violations of ILSA. Defendants Masters and Robert Ginn are also subject to liability under ILSA. ILSA liability extends to controlling officers and directors of a developer who participated in sales or could be considered controlling persons in an organization that participated in sales. *Gibbes v. Rose Hill Plantation*, 794F.Supp. at 1333; *see also Aboujaoude v. Poinciana Development Co. II*, 509 F.Supp.2d 1266, 1276 (S.D. Fla., 2007) (citing *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1301 n. 20 (5th Cir.1976); *McCown v. Heidler,* 527 F.2d at 207 (officers and directors of corporate land developer civilly liable under ILSA)). The *McCown* court explained the rationale for officer and director liability:

> The "developer" of a land sale plan is usually a corporate entity which, in a fraudulent scheme as here alleged, ends up defunct and offers no reserve for recovery to those persons defrauded; so, too, the end selling agent, when the development collapses financially, is often long gone or cannot respond pecuniarily. Indeed the actual selling agent may well be a creditor of the developer and an indirect victim of the fraud himself. The basic protection of the Act, to be meaningful, must be leveled against the fraudulent planners and profit makers for otherwise the Act would be pragmatically barren.

McCown v. Heidler, 527 F.2d at 207.

In this case, liability is appropriate as to Defendant Masters because he served as the President/CEO of Defendant GLA and executed the Plaintiff Property Reports. Liability is appropriate for Defendant Robert Ginn because he served as a Director of Defendant GLA, and he was personally involved in the marketing of VSM lots. He allowed his name and image to be

used in VSM marketing materials, which assured purchasers that he would manage and approve the development of VSM. He also personally assured purchasers that VSM would be developed under his direction and according to his plans. (Ex. D-G.)

A. The Basis for Plaintiffs' Claims Under ILSA

ILSA defines a "purchaser" to include "an actual or prospective purchaser… of any lot in a subdivision," (15 U.S.C. § 1701(10)), and authorizes purchasers to bring actions at law or in equity against developers who violate 15 U.S.C. § 1703(a), or to enforce any rights under 15 U.S.C. § 1703(b)-(e). *See* 15 U.S.C. § 1709(a), (b). Plaintiffs in this case, either individually or together with others, entered into the Plaintiff Contracts to purchase VSM lots. (Plaintiff Decls., ¶ 2.) Plaintiffs therefore have standing under ILSA to bring this action.

Plaintiffs raise 3 types of claims under ILSA. **First,** Counts II through VI arise out of the Ginn Defendants' failure to provide Plaintiffs with VSM Property Reports meeting the requirements of ILSA. These claims are based on one or both of two sections of ILSA:

- 15 U.S.C. §1703(a)(1)(B) makes it unlawful to sell a lot unless a property report, meeting the requirements of 15 U.S.C. § 1707, has been furnished to the purchaser in advance of signing the purchase contract. (Counts II through VI)
- 15 U.S.C. §1703(a)(1)(B) makes it unlawful to sell a lot where any part of the statement of record or property report includes an untrue statement of material fact or omits to state a material fact required under 15 U.S.C. § 1704-1707 or any regulations issued under those sections. (Counts II, III, V and VI)

Second, Count VI is also made under 15 U.S.C. §1703(a)(2)(B), which makes it unlawful to obtain money from Plaintiffs by means of an untrue statement of material fact or an omission of material fact necessary to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale) not misleading, with respect to

any information pertinent to the lot or subdivision. **Third,** Count VII is made under 15 U.S.C. §1703(d), based upon the Ginn Defendants' failure to include required language in the Plaintiff Contracts on remedies following default.

B. Property Report Requirements Under ILSA

The regulations issued under ILSA set forth the requirements for the Statement of Record and Property Report. Under 24 C.F.R. §§ 1710.100(a), "The Statement of Record consists of two portions: the Property Report portion and the Additional Information and Documentation portion." As described in 24 C.F.R. §§ 1710.100(b), the specific format and requirements for a Property Report are set forth at 24 C.F.R. §§ 1710.105-1710.118. The specific format and requirements for the Additional Information and Documentation portion are set forth at 24 C.F.R. §§ 1710.208-1710.219.

In addition to the specific format and requirements for the Statement of Record, 24 C.F.R. §§ 1710.102 sets forth general instructions for completing the Statement of Record, including the Property Report:

> **24 C.F.R. §§ 1710.102- General instructions for completing the Statement of Record:** **(f)** All information given in the Property Report portion shall be stated in narrative form using plan, concise, everyday language which can be readily understood by purchasers who are unfamiliar with real estate transactions... Disclose all pertinent facts. Potential consequences to a purchaser must be made clear even though not specifically asked for in the format and the instructions.
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> **24 C.F.R. §§ 1710.102(j)- Additional Information:** **(2)** The instructions are not all inclusive. The developer shall include any other facts which would have a bearing upon the use by the purchaser of any of the facilities, services or amenities; which would cause or result in additional expenses to the purchaser; which would have an effect on the use and enjoyment of the lot by the purchaser for the purpose for which it is sold or which would adversely affect the value of the lot.

These instructions impose a full disclosure obligation that is independent of and in addition to the more specific disclosure obligations set forth in the instructions that follow. Consistent with ILSA's materiality standard, these general disclosure requirements are not unlimited. By their

terms they apply to "pertinent facts" and "potential consequences to a purchaser," including those that might affect the use of facilities, services or amenities; those that might result in additional expense; and those that might affect the use, enjoyment or value of a lot.

V. Count II – Failure to Disclose Material Facts About Property Taxes

A. 15 U.S.C. § 1703(a)(1)(B)

Under 24 C.F.R. §§ 1710.116(b)(1) a developer must provide the following information in the Property Report, under the section entitled "Taxes": "When will the purchaser's obligations to pay taxes begin? To whom are taxes paid? What are the annual taxes on an unimproved lot after the sale to a purchaser?" In addition, 24 C.F.R. §§ 1710.117(a)(2)(i) and (vii) require a developer to enter all items on the Cost Sheet of the Property Report before a purchaser signs the receipt, including a line item for the estimated amount of annual taxes, which are to be based upon "the projected valuation of the lot after sale to a purchaser.

The Plaintiff Property Reports did not include any information on property taxes. Significantly, even though a June 6, 2006 draft of the VSM Property Report included information on the property tax rate for VSM lots, this information was removed from the version submitted to HUD on June 9, 2006.[4] Because the Plaintiff Property Reports omit property tax information that is required under 24 C.F.R. § 1710.116(b)(1), 24 C.F.R. § 1710.117(a)(2)(i), (vii) and 24 C.F.R. § 1710.118(c), Defendants GLA, Masters and Bobby Ginn violated 15 U.S.C. § 1703(a)(1)(B). This section does not require a showing of materiality.

B. 15 U.S.C. § 1703(a)(1)(C)

The Plaintiff Property Reports also violate 15 U.S.C. §1703(a)(1)(C), prohibiting the sale of

[4] Therefore, any reliance by the Ginn Defendants on *In re Paramount Lake Eola*, 2009 WL 2525558 (M.D. Fla. 2009) for guidance on this Count is misplaced. In *Paramount*, the Defendant stated that it was not possible to project the amounts for certain items on the cost sheet. Here, the draft Property Report section on taxes shows that the Ginn Defendants had the information to disclose the projected amount of property taxes for Plaintiffs' lots but chose instead to withhold such information.

a lot where part of the property report omitted to state a material fact required to be stated under 15 U.S.C. §§1704-1707. The materiality requirement of this section is met, because a reasonable purchaser would consider annual taxes in amounts ranging from $9,000 to $20,000 important in making a decision whether to purchase a lot in the VSM Subdivision. In addition, the fact that property tax information is specifically required under ILSA speaks to the materiality of this information. The obligation to pay property taxes and the projected amount of those taxes are precisely the type of information that would be material to a reasonable purchaser. As a result, several specific ILSA regulations require full disclosure of property tax information.[5]

For the reasons above, Defendants GLA, Masters and Robert Ginn violated 15 U.S.C. § 1703(a)(1)(B) and (C). Plaintiffs therefore request that the Court enter partial judgment against the Ginn Defendants and in favor of Plaintiffs as to liability on Count II.

VI. Count IV – Failure to Include Executed Agent Certification

The final page of the Plaintiff Property Reports includes an Agent Certification section as required under 24 C.F.R. § 1710.118(a). Under 24 C.F.R. § 1710.118(b) the Agent Certification must be executed when the Property Report is delivered to a purchaser. Under 24 C.F.R. § 1710.118(c) the Agent Certification must be executed prior to mailing if the transaction takes place through the mails; otherwise, it must be executed in the presence of the Purchaser. In this case, the Property Reports provided to all Plaintiffs, except Plaintiffs Lammertse, did not include an executed Agent Certification.

The rationale behind the Agent Certification is obvious. And where, as in this case, a developer fails to ensure that the Agent Certification takes place with respect to seven different

[5] Further, to the extent there is any question as to the materiality of information on the amount of property taxes, the general disclosure provisions in 24 C.F.R. §1710.102(f) and (j)(2)) eliminate all doubt. Property taxes are "potential consequences to a purchaser" and under subsection (f) "must be made clear even though not specifically asked for...." In addition, property taxes must be disclosed under subsection (j)(2) because they would result in additional expenses to a purchaser.

lot purchases, the omissions amount to more than an oversight. Here again, Defendants GLA, Masters and Bobby Ginn have ignored the requirements of ILSA. By failing to ensure that Plaintiffs' Property Reports included executed Agent Certifications as required under 24 C.F.R. § 1710.118, Defendants GLA, MASTERS and BOBBY GINN violated of 15 U.S.C. § 1703(a)(1)(B).[6] Plaintiffs therefore request that the Court enter partial judgment against the Ginn Defendants and in favor of all Plaintiffs except Plaintiffs Lammertse as to liability on Count IV.

VII. Count V – Failure to Disclose Material Facts About Recording of Deeds

A. 15 U.S.C. § 1703(a)(1)(B)

The Plaintiff Property Reports include a warning, as required under 24 C.F.R. § 1710.109(d)(1)(iv): "UNLESS YOUR DEED IS RECORDED YOU MAY LOSE YOUR LOT THROUGH THE CLAIMS OF SUBSEQUENT BUYERS OF SUBSEQUENT CREDITORS OR ANYONE HAVING AN INTEREST IN THE LAND." (6/28/06 Property Report at page 31 and 9/12/06 Property Report at page 28). In addition, the Plaintiff Property Reports state: "All Deeds will be recorded by the Title Company, as closing agent, in accordance with Bahamian law. We, through the Title Company, will deliver to you a recorded Deed." (*Id.*)

The Plaintiff Property Reports fail, however, to inform Plaintiffs of two material facts about the recording of deeds: (1) the Conveyance Deeds for VSM lots were routinely not lodged for recording until several months following the closing dates; and (2) once the Conveyance Deeds were finally lodged for recording with the Bahamian government, it could take anywhere from "6 to 8 months or longer" for those documents to be recorded by the Bahamian government. The failure to disclose these material facts violated 15 U.S.C. §1703(a)(1)(B).

[6] Any reliance by the Ginn Defendants on *Paramount Lake Eola* for guidance on this Count is also misplaced. In *Paramount*, the court found that the failure to list the Lot, Block and Section on the Agent Certification was not a lack of compliance because the property at issue was a condominium. The court did not address the requirement that the Agent Certification be executed.

The long delays in lodging and recording Conveyance Deeds for VSM lots placed Plaintiffs' VSM lot purchases at risk for many months following their closings. During that time period, Plaintiffs were vulnerable to claims of others asserting an interest in Plaintiffs' VSM lots, including the claims of creditors of Defendant GLA.[7] Because the delays in lodging and recording created potential consequences for a purchaser, including Plaintiffs, disclosure was required under 24 C.F.R. § 1710.102(f). Because the delays in lodging and recording could result in additional expenses to a purchaser, including Plaintiffs, who may be required to litigate a title dispute and could affect the use and enjoyment of the lot by a purchaser who may be deprived of title, even temporarily, disclosure was required under 24 C.F.R. § 1710.102(j)(2).

B. 15 U.S.C. § 1703(a)(1)(C)

The failure to disclose the "Recording Facts" also violated 15 U.S.C. §1703(a)(1)(C). The long delays in lodging and recording Conveyance Deeds for VSM lots were material because a reasonable purchaser would want to know whether his or her lot remained vulnerable to the claims of others for several months following the closing date for that lot.

For the reasons above, Defendants GLA, Masters and Robert Ginn violated 15 U.S.C. § 1703(a)(1)(B) and (C). Plaintiffs therefore request that the Court enter partial judgment against the Ginn Defendants and in favor of Plaintiffs as to liability on Count V.

VIII. Count VII – Failure to Include Mandatory Contract Language on Remedies

Under 15 U.S.C. § 1703(d), lot contracts must include specific language relating to notice and remedies in the event of default, as set forth at 15 U.S.C. § 1703(d)(3)(A)-(B). If a contract does not include this language, it "may be revoked at the option of the purchaser or lessee for two years from the date of the signing of such contract or agreement." 15 U.S.C. § 1703(d).

[7] Plaintiffs have yet to receive evidence that Conveyance Deeds were recorded for their VSM lots, even after requesting evidence in discovery. In light of the Credit Suisse issues described below, this is particularly troubling.

This revocation right is subject to exception where the buyer received a warranty deed or its equivalent within 180 days after executing the contract. 15 U.S.C. § 1703(d); *see also Meridian Ventures, LLC v. One North Ocean, LLC*, 538 F.Supp.2d 1359, 1363-65 (S.D. Fla., 2007). The sole exception to the revocation right is not applicable here. No Plaintiff received a Conveyance Deed within 180 days after executing the Contract for Lot Purchase. (Plaintiff Decl., ¶ 4.)

Here, the Plaintiff Contracts do not include language on notice and remedies in the event of default, as required by 15 U.S.C. § 1703(d). (Plaintiff Decl., Ex. A (¶ 12.a.) Instead, the Plaintiff Contracts set forth notice and cure provisions that are more burdensome for Plaintiffs than what is permitted under15 U.S.C. § 1703(d)(2), namely: (1) they give the purchaser 10 days to cure a default, rather than the statutorily required 20 days; and (2) they state that the cure period begins to run from the time Defendant GLA delivers notice of default, rather than from the date of Plaintiffs' receipt of the notice of default. (*Id.*) In addition, the Plaintiff Contracts fail to limit Defendant GLA's remedies for breach, as required under 15 U.S.C. § 1703(d)(3)(A)-(B). (*Id.*) Instead, the Contracts permit GLA to retain Plaintiffs' deposit "and any other payments Buyer has then made as liquidated damages." *Id.* The Plaintiff Contracts thus give Defendant GLA remedies that exceed what it is entitled to under ILSA.

For the reasons above, Defendants GLA, Masters and Robert Ginn violated 15 U.S.C. § 1703(d). Plaintiffs therefore request that the Court enter partial judgment against the Ginn Defendants and in favor of Plaintiffs as to liability on Count VII.

IX. Count III – Failure to Disclose Material Facts About Blanket Encumbrance

A. 15 U.S.C. § 1703(a)(1)(B)

1. The Specific Instructions for the Statement of Record and Property Report Required Disclosure of Material Facts Concerning the $675 Million CSCF

Three specific sections of ILSA required Defendant GLA to provide material information on

the CSCF. The **first** required unambiguous information in the Statement of Record:

> in the case of any subdivision or portion thereof against which there exists a blanket encumbrance, a statement of the consequences for an individual purchaser of a failure, by the person or persons bound, to fulfill the obligations under the instrument or instruments creating such encumbrance and the steps, if any, taken to protect the purchaser in such eventuality.

15 U.S.C. §1705(6). **Second,** 24 C.F.R. §§ 1710.109(c)(1) required GLA to provide information in the Property Reports on any blanket encumbrances, mortgages and liens ("Encumbrance"). **Third,** 24 C.F.R. §§ 1710.109(c)(2)(i) required GLA to explain in the Property Reports how the release provisions of any Encumbrance might affect purchasers.

2. The General Instructions for the Statement of Record and Property Report Required Disclosure of Material Facts Concerning the $675 Million CSCF

The general disclosure requirements of ILSA also required Defendant GLA to provide material information about the $675 million CSCF. 24 C.F.R. §§ 1710.102(f), required GLA to disclose all pertinent facts and to make clear potential consequences to a purchaser as a result of the $675 million CSCF. Under 24 C.F.R. §§ 1710.102(j), GLA was required to disclose: (1) ""any other facts bearing upon the use" by Plaintiffs "of any of the facilities, services or amenities" as a result of the CSCF; (2) "any other facts" "which would have an effect upon the use and enjoyment of the lot" by Plaintiffs as a result of the CSCF; and (3) "any other facts" "which would adversely affect the value of the lot" as a result of the CSCF.

B. 15 U.S.C. § 1703(a)(1)(C)

The Plaintiff Property Reports also violate 15 U.S.C. §1703(a)(1)(C), because they fail to disclose the CSCF MATERIAL FACTS. The materiality requirement of this section is met, because a reasonable purchaser would consider those facts important in making a decision whether to purchase a VSM lot. The CSCF was not a simple loan mortgaged against VSM Land and intended for the development of VSM. The $675 million CSCF was new and unique loan product that placed the VSM Land, the ownership of Defendant GLA, and the future

development of VSM at risk. The new loan product marketed by Credit Suisse allowed it to offer loans the size of which had previously been unavailable to borrowers. Thus, the massive size of the $675 million CSCF was material and should have been disclosed to VSM purchasers.

Another key feature of the new Credit Suisse loan product was that it allowed owners of large developments to take sizable distributions leveraged against the equity in their developments. Thus, the massive $333 million "distribution" to entities owned by Defendant Robert Ginn and Lubert Adler was material and should have been disclosed to VSM purchasers. The fact that the CSCF was used to repay existing debt in 5 different Ginn Developments, not just VSM, was material and should have been disclosed. The fact that the entire $675 million CSCF was secured by a pledge of majority ownership interests in the parent companies of Defendant GLA was material because it presented significant risks to the future development of VSM if the CS Borrowers defaulted. The fact that $277 million of the CSCF was secured by a mortgage on VSM land was material because it increased the mortgage on the VSM land from $12 million in August 2005 (Ex. H) to $277 million less than one year later on June 8, 2006. The $277 million mortgage on VSM Land was also material because it presented significant risks to the future development of VSM if the CS Borrowers defaulted.

Perhaps most significantly, because of the risks to VSM from the $675 million pledge of ownership in the parent companies of Defendant GLA and from the $277 million mortgage on the VSM Land, the fact that the CSCF was to be repaid from projected future lot sales in 5 different Ginn developments, was material and should have been disclosed. In light of the $675 million pledge of ownership and the $277 mortgage, the future of VSM was dependent upon the ability of 4 other Ginn subdivisions in the United States (3 of which were at the mercy of

Florida's already declining real estate market) to meet the projections for future lot sales necessary to generate cash flow to meet the CSCF repayment obligations.

In reality, Plaintiffs were investing in 5 different Ginn developments, not just VSM.[8] In reality, the future lot sales in 5 different Ginn developments would determine whether the CS Borrowers would default on the CSCF. In reality, therefore, the future lot sales in 5 different Ginn developments would make or break the future development of VSM. If the 5 Ginn developments did not meet the projections for future lot sales, the CS Borrowers would default on the CSCF. And if the CS Borrowers defaulted on the CSCF, the CS Lenders could foreclose on the $277 million mortgage and the pledge of majority ownership interests in the parent companies of Defendant GLA.[9]

A default on the $675 million CSCF would have a bearing on Plaintiffs' use of any of the facilities, services and amenities of VSM under 24 C.F.R. § 1710.102(j) because Ginn's loss of control over VSM development would result in its loss of control over the construction of facilities and amenities, over the use of facilities, services and amenities and over Plaintiffs' use of their lots, including building on or selling those lots. A default would also have a bearing on Plaintiffs' use and enjoyment of their lots and the value of Plaintiffs' VSM lots under 24 C.F.R. § 1710.102(j) because Plaintiffs cannot sell their VSM lots without full disclosure of the default and its effects on the future development of VSM.

Not surprisingly, the CS Borrowers defaulted on the CSCF. (Ex. CC at 2; GG at 1.) As a result, the CS Lenders filed a lawsuit to foreclose on the VSM Land and the majority ownership

[8] Notably, 3 other Ginn developments under the CSCF were registered under ILSA. (Ex. FF.) Given the potential impact of lot sales in those developments on the future of VSM, Plaintiffs arguably should have received Property Reports for those developments as well. Instead, Plaintiffs were told nothing about those developments or their potential impact on VSM.

[9] The risks of default under the CSCF included more than a failure to meet lot sales projections. Under the terms of the CSCF, routine operational issues with any of the CSCF Developments could create a default. For example, a change in control over a development, an event relating to ERISA, an adverse judgment over a set amount or a vendor lien resulting from a dispute over monies owed could all result in a default. (Ex. K at 01450-53.)

interests in the parent companies of Defendant GLA, naming Defendant GLA as a defendant. (Ex. AA at 6-8, 12, 23.) On December 29, 2009, the court entered an Order and Judgment of Foreclosure and Sale to cover liability for the final balance due on the CSCF, ordering public sale of the majority interests in parent companies of Defendant GLA and interests in the VSM land. (Ex. GG.)

As a result of the CSCF Default, HUD issued a directive "that it would administratively undertake" a suspension of the ILSA registrations filed for VSM and other CSCF Developments unless Ginn voluntarily suspended those registrations. (Ex. FF at 029075.)[10] Ginn's lawyer filed the voluntary suspensions on September 10, 2008 for four of the CSCF Developments, including VSM, noting in a ensuing letter that the suspensions "were requested due to a default under certain credit facilities for which Credit Suisse was the agent." (Ex. CC.)[11] Subsequently, Credit Suisse notified the CS Borrowers that such suspension was, itself, a default under the CSCF. (Ex. GG at 2.) In addition, Credit Suisse took the position that, "[t]he Borrower's suspension of the HUD Registrations and the resulting legal prohibitions on the sale of any Residential Lots resulted in a Material Adverse Effect" causing a default under the CSCF. (*Id.*)

C. The Ginn Defendants Ignored ILSA Disclosure Requirements and Attempted to Hide the $675 Million CSCF from HUD and Prospective Purchasers

The CSCF closed on June 8, 2006, and Defendant GLA submitted its Initial VSM HUD Filing one day later. In the Additional Information and Documentation section of the Statement of Record, GLA did not mention the $675 million CSCF. Notably, GLA did mention the CSCF in a draft response to the Additional Information and Documentation section. In response to §1710.209(3), which asks "whether the developer knows of any instruments not of record which,

[10] To the extent there is any question that the risks imposed by the CSCF were material to Plaintiffs' purchase decisions, the HUD directive removes all doubt.

[11] Ginn's lawyer also noted that 2 of the CSCF Developments had filed Chapter 7 bankruptcy proceedings on December 23, 2008. (*Id.*)

if recorded, would affect title to the subdivision," the GLA draft response stated: *"A copy of the Declaration of Covenants, Conditions and Restrictions to be recorded and will affect title to the lots in the subdivision, and a copy of the Loan Agreement to be entered into with Credit Suisse are submitted. See Exhibit 1710.209(a)(3)."* (Ballinger Decl., Ex. BB.)

In the Property Report portion of the Initial VSM HUD Filing, which was signed by Defendant Masters and dated June 8, 2006, GLA mentioned the CSCF only once:

> A mortgage called "Debenture and Legal Mortgage" dated August 17, 2005 and executed by Grand Bahama Hotel Co., the predecessor in interest to us, for the benefit of West End Resort, LTD, encumbers the property. The Mortgage has certain release provisions relating to our payment of fees to release the lien of the Mortgage from your Lot at or prior to the closing.
>
> We are presently entering into a new Loan Agreement with Credit Suisse which agreement will satisfy the existing recorded mortgage encumbering the property. This new Loan Agreement will ultimately result in a mortgage lien on the property and will contain release provisions.

(Ballinger Decl., Ex. J at 040789).) An identical statement is the only reference to the CSCF in the Plaintiff Property Reports. (6/28/06 Property Report at 3; 9/12/06 Property Report at 4.)

The statement about the CSCF in the Plaintiff Property Reports was untrue because the CSCF closed on June 8, 2008. That statement is also misleading because it suggests that the new "Loan Agreement with Credit Suisse" was in the nature of a refinancing of the old "Debenture and Legal Mortgage." Notwithstanding the fact that Defendant GLA on June 15, 2006 submitted several corrections to the Initial VSM HUD Filing, the Ginn Defendants failed to correct or supplement the Initial VSM HUD Filing by providing the MATERIAL CSCF FACTS. The Ginn Defendants also failed to correct or supplement the information on the $675 million CSCF in the September 12, 2006 VSM Property Report.

Finally, in a filing dated September 20, 2007 (more than 15 months after the CSCF closing), the lawyer for Defendant GLA notified HUD of the existence of the CSCF:

> The mortgage held by Grand Bahama Hotel Co... has been satisfied and a first and second mortgage in favor of Credit Suisse... now encumbers the property. The Statement of Record and Property Report have been amended to reflect this fact and a copy of the satisfaction as well as a copy of each of these mortgages is enclosed.

This representation was also misleading and incomplete. As an initial matter, the copies of the CSCF loan documents provided to HUD were undated. Thus, HUD could not tell by looking at the CSCF loan documents that the CSCF had closed more than 15 months earlier and before the date of the Initial VSM HUD Filing. In addition, neither the Statement of Record nor the Property Report submitted in September 2007 disclosed any of the CSCF MATERIAL FACTS.

X. Count VI – Failure to Disclose Material Facts About Capitalization and Financial Ability to Complete Development

A. 15 U.S.C. § 1702(a)(1)(B)

24 C.F.R. §§ 1710.103 required GLA, in connection with its warning that there was "NO GUARANTEE THAT THE RECREATIONAL FACILITIES WILL BE COMPLETED AS PROPOSED," to "clearly identif[y] conditions to which the completion of the facilities are subject." For the reasons set forth above, this section required disclosure of material facts concerning the CSCF. In the event of a default under the CSCF, the future development of VSM, including the completion of the proposed recreational facilities, would be at risk. Therefore, the Plaintiff Property Reports should have identified the CSCF as a condition to which the completion of the proposed VSM recreational facilities was subject.

B. 15 U.S.C. § 1702(a)(2)(B)

15 U.S.C. § 1702(a)(2)(B) is one of the anti-fraud provisions under ILSA. 24 C.F.R. § 1710.4(b). This section imposes broader requirements than the instructions for the Statement of Record (including the Property Reports). Focused beyond the Statement of Record, this section looks to the context for the overall offer and sale "with respect to any information pertinent to the lot or subdivision" to determine what material facts the developer must disclose.

In the overall context of the offer and sale for Plaintiffs' VSM purchases, the Ginn Defendants made at least two representations that were false, misleading and required the disclosure of the CSCF MATERIAL FACTS. First, as described above, the statement in the Plaintiff Property Reports about the "Credit Suisse Loan" was false and misleading. In light of that statement alone, therefore, the Ginn Defendants were obligated to disclose the CSCF MATERIAL FACTS. Second, the Plaintiff Contracts state that each "Project Partnership" that owns a specific Ginn development is "independent" and solely responsible for its own obligations and liabilities:

> Each Ginn Community is separately owned by an independent Project Partnership, and each such Project Partnership is solely and exclusively responsible for the obligations and liabilities incurred in connection with the acquisition, development, financing, marketing, management, and operations of the specific Ginn Community owned by such Project Partnership.

(Plaintiff Contracts ¶ 36.) In light of this statement, the CSCF MATERIAL FACTS should have been disclosed to Plaintiffs.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment as to Liability on Counts II through VII should be granted.

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Respectfully submitted,

s/ Dana L. Ballinger

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