UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STEVE AARON, et al,

Plaintiffs,

Case No.: 8:09-cv-2493

vs

THE TRUMP ORGANIZATION, INC., a New York Corporation, and DONALD J. TRUMP, an individual,

Defendants.
_____/

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendants, Donald J. Trump (Trump), and The Trump Organization, Inc. (Trump Org.), concealed and misrepresented facts and committed fraud in the advertising and sale of units in a planned luxury condominium known as the "Trump Tower Tampa." The Plaintiffs are purchasers of units in the failed project who paid and lost millions of dollars in deposits. Count I of the Plaintiffs' Second Amended Complaint states the Defendants violated the Interstate Land Sales Full Disclosure Act (ILSA). As shown below, the Plaintiffs are entitled to partial summary judgment under Federal Rule of Civil Procedure 56 on three elements of their ILSA claim. The only real issue left for trial on this claim should be damages.

Overview

The Plaintiffs purchased units in the planned ultra-luxury development known as the Trump Tower Tampa in 2005. Collectively they paid over $5.6 million in deposits for the units. They did so because they were told that they were buying a unit in a "Donald J. Trump

Signature Property." The Plaintiffs were promised the development would bear the Trump name, live up to the Trump standard of luxury, and have the backing and investment of the Defendants.

The Plaintiffs did not know the truth about the Trump Tower Tampa. In reality, the development was managed, funded, and financially backed only by SimDag-RoBEL, LLC, (SimDag), an inexperienced and unqualified group that had never developed such a project. Under the terms of a secret license agreement between SimDag and Trump – and unknown to the Plaintiffs – Trump had merely licensed his name and trademarks to SimDag for a fee, subject to his approval of marketing materials and plans. Also unknown to the Plaintiffs, Trump reserved the right to remove his name from the project for a number of reasons. Ultimately, Trump removed his name from the project. The project folded, and the Plaintiffs lost millions in deposits.

When the Plaintiffs subsequently learned about the secret license agreement, they brought this action against Trump and Trump Org. The Plaintiffs sued Trump and Trump Org. for fraudulent and negligent misrepresentation under Florida law and, as relevant to this motion, for violating ILSA.

ILSA, codified at 15 U.S.C. sections 1701-20, is a federal consumer protection and antifraud statute that uses disclosure as its primary tool. *Winter v. Hollingsworth Props., Inc.*, 777 F. 2d 1444, 1447 (11th Cir. 1985). ILSA applies to the sale of condominium units in the Trump Tower Tampa because the units were sold using interstate commerce. 15 U.S.C. § 1703(a); *Winter*, 777 F. 2d at 1446-49. ILSA's purpose is to insure that "prior to purchasing certain kinds of real estate," a buyer "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)[1]; *see also Goldberg v. 401 N. Wabash Venture LLC*, No. 09-C-6455, 2010 WL 1655089, *9 (N.D. Ill. Apr. 22, 2010). To accomplish this purpose, ILSA requires developers to furnish prospective buyers with specific disclosures. It also makes it illegal for developers or agents, as defined in the statute, to obtain money or property for a development by means of a material false statement or any omission of a material fact necessary to make the statements made not misleading. 15 U.S.C. §§ 1703, 1705, 1707. A developer or agent who violates these provisions is liable to purchasers for damages, certain costs, and attorneys' fees. 15 U.S.C. § 1709.

The Court should grant partial summary judgment for the Plaintiffs on three elements of their ILSA claim in Count I of the Second Amended Complaint [Dkt. 19]. Specifically, the Court should rule that the undisputed evidence shows:

(1) Trump and Trump Org. are "developers," "agents," or "aiders and abettors" as defined by ILSA.

(2) The existence and terms of the secret License Agreement between Trump and SimDag were "material facts" under ILSA.

(3) The Defendants did not disclose the existence and terms of the License Agreement to purchasers until May 25, 2007.

Plaintiffs have submitted a Notice of Filing Appendix in Support of their Motion, attaching a total of 17 exhibits consisting of depositions and other items of evidence, cited as "Exh. __." Plaintiffs incorporate those documents by reference.

[1] The Eleventh Circuit has adopted as binding precedent Fifth Circuit decisions issued prior to September 30, 1981. *Bonner v. City of Prichard*, 661 F. 2d 1206, 1209 (11th Cir. 1981).

UNDISPUTED FACTS

Defendant Trump is a "worldwide renowned builder and developer of real estate who enjoys the highest reputation in these fields." Exh. 1 (License Agreement). He is internationally recognized as a real estate mogul and celebrity. Exh. 2 (Trump Tower Tampa Publication). He is also famous for developing real estate projects around the world through the corporate defendant, Trump Org. *Id.* In early January 2005, the Defendants issued a press release to media outlets in Tampa touting a new Trump project in downtown Tampa. Exh. 3 (Press Release); Exh. 4 (Trump Depo), at 15; Exh. 5 (Trump Jr. Depo), at 127, 210; Exh. 6 (Eric Trump Depo), at 35-36. The press release stated:

> Donald J. Trump announced today plans for a 52-story, ultra-luxury condominium in downtown Tampa, Florida, to be called Trump Tower Tampa. **The project will be developed in a partnership with local Tampa Bay-area developers, SimDag-RoBEL, LLC.** Trump Tower Tampa will be Mr. Trump's first project, as well as the tallest residential building, on the Gulf of Mexico.

Exh. 3 (emphasis added).

As the press release stated, SimDag is a Tampa Bay area development company. *Id.* It has five principals. Exh. 2. Some of SimDag's principals had prior real estate experience, but none had the name recognition or experience of Trump and Trump Org. *Id.* In fact, SimDag and its principals had no experience at all in the development of condominiums. Exh. 7 (Property Report) at 29. And as an entity, SimDag had no significant operating experience and no audited financial statements. *Id.*

The Plaintiffs purchased their units in the supposedly soon-to-be-built ultra-luxury Trump Tower Tampa in 2005. Exh. 8 (Purchase Contract). To reserve an exclusive residence

in the Trump Tower Tampa, the Plaintiffs signed purchase agreements for specific units and paid deposits totaling over $5.6 million. Exhs. 8; 9 (Supplemental Answers to Interrogatories).

What the Plaintiffs did not know was that despite the promotional materials and press releases indicating this was a "Trump project" developed in "partnership" with SimDag, the Defendants had no obligation – and only minimal incentive – to see the Trump Tower Tampa through to completion. The Defendants had invested no capital in the project and their only obligations were those spelled out in the secret License Agreement. Exh. 1 (License Agreement). Under that agreement, SimDag paid Trump a nonrefundable license fee of $2 million – later doubled to $4 million – and promised Trump a percentage of sales or profits in exchange for the use of the Trump name on SimDag's project. *Id*.

SimDag and the Defendants agreed to keep secret both the existence of the License Agreement and its terms. To that end, the agreement contained a confidentiality clause:

> 15. **Confidentiality.** Licensor and Licensee covenant and agree that, without the written consent of the other Party, unless required by law, **they will not, under any circumstances, disclose or permit to be disclosed the existence of this Agreement or any of its contents, to any persons or entities for any purpose whatsoever**, other than solely to their respective shareholders, directors, members, officers and other employees, attorneys and accountants (collectively, "Affiliated Parties"), in each such case, on a "need to know basis." . . . . All Affiliated Parties shall be deemed bound by the provisions of this Paragraph 15. In connection with any such permitted disclosure to any Affiliated Parties, Licensor and Licensee, as applicable, shall be liable to the other Party for the acts or omissions of their Affiliated Parties that are in violation of this Paragraph 15.

Id. at ¶ 15 (emphasis added).

Even though Trump had no capital investment in the project, the License Agreement gave him control over certain key aspects of it. For example, Trump had the right "to review and approve all promotional materials" or any materials using a Trump mark. Exh. 1 at ¶ 2(f). The agreement prohibited SimDag from issuing any press release about Trump without his prior written approval. *Id.* at ¶ 2(f). SimDag was also required to deliver all plans and specifications to Trump for his review and approval. *Id.* at ¶ 3. And the agreement set forth "Trump Standards" and gave Trump veto power over the plans by making him "the sole judge" of whether those standards were met. *Id.* at ¶ 3.

The License Agreement provided Trump the right to terminate his role in the project with ten days' written notice for any one of a laundry list of reasons. Among other reasons, Trump could terminate if (1) SimDag became insolvent or was the subject of a bankruptcy petition; (2) a substantial portion of the building was damaged by casualty and not rebuilt in a "diligent and expeditious manner in compliance with the Trump Standards"; (3) construction failed to start within eighteen months absent certain unavoidable delays; (4) a permanent certificate of occupancy did not issue within thirty-six months from the notice of commencement absent certain unavoidable delays; or (5) SimDag did not close on seventy percent of the units under binding purchase contracts within thirty months from the commencement date absent limited unavoidable delays. *Id.* at ¶ 6. If Trump exercised his termination rights, the agreement allowed him to prohibit any further use of the Trump name or related marks on the project. *Id.*

Neither the Defendants nor SimDag ever disclosed the existence and terms of the License Agreement to purchasers of the project. Exhs. 9; 10-11 (Plaintiffs Lucadano and

Robbins Depositions). To the contrary, Trump always referred to SimDag as his "partners." Exh. 4 (Trump Depo) at 28, 37. The Defendants disseminated marketing and promotional materials which held Trump out as a "partner" and "developer" of the project. In fact, all of the sales materials contained a crest, promoting the "Trump Tower Tampa – A Donald J. Trump Signature Property – A Development of Donald J. Trump and SimDag-RoBEL, LLC":

See Example Sales Materials, [Dkt. 32-2]; Exh. 3 (Press Release titled "Donald J. Trump To Partner With SimDag-RoBEL In Developing A New Residential Condominium Tower In Downtown Tampa"). *See also* Defendants' Answer, ¶ 17 at 3, [Dkt. 20] (admitting "at certain times and at certain places [Trump] made statements regarding the Trump Tower development and his association with that development").

In May 2007, Trump sued SimDag for breach of the License Agreement. Trump contended SimDag failed to pay him amounts due under that agreement. *See Trump v. SimDag/Robel, LLC*, Case No. 08:07-CV-00910, M.D. Fla., [Dkt. 1], Notice of Filing Exhibits to Complaint (hereinafter the "Trump/SimDag Lawsuit"). Trump attached the License Agreement as an exhibit to his complaint. *Id.*, Exh. A. Trump also exercised his

option to terminate the agreement and to prohibit the use of his name and related marks on the project. *Id.*; *see also* Exh. 4 (Trump Depo), at 25. The project that the Defendants had marketed as Trump Tower Tampa was no longer a Trump Tower or a Trump Signature Property. The 2007 suit was the first public disclosure of the secret License Agreement.

SimDag filed a counterclaim against Trump. It alleged Trump breached the confidentiality provision of the License Agreement by attaching it to Trump's complaint. *See* Trump/SimDag Lawsuit, [Dkts. 11, 12, 53]. Trump and SimDag later conditionally settled the lawsuit. *Id.* at [Dkts. 75, 77]. Just as they agreed to do with the License Agreement, the Defendants and SimDag have kept the terms of their settlement secret. To this day, the Defendants have refused to provide the settlement in discovery for this lawsuit. *See* Order, [Dkt. 72]; Plaintiffs' Motion for Clarification, [Dkt. 73].

Trump Tower Tampa was never built. In fact, nothing was built. SimDag filed bankruptcy. *See* SimDag Bankruptcy, M. D. Fla. (Tampa), Case No. 8:08-bk-08804-KRM. Millions of dollars in deposits paid by the Plaintiffs were never returned. *Id. See also* Exh. 9.

The Plaintiffs filed this lawsuit after they discovered the terms of the secret License Agreement. That was when they learned that the Defendants' involvement in the so-called "Trump Tower Tampa" involved no capital investment or partnership, but was a marketing gimmick limited to selling the use of the Trump name. Exhs. 9-11. The Second Amended Complaint states four causes of action. Count I states the Defendants violated 15 U.S.C. section 1703(a)(2) of ILSA. Counts II, III, and IV state claims under Florida law for the Defendants' negligent misrepresentation, fraudulent misrepresentation, and negligent

supplying of information. This motion for partial summary judgment addresses only the Plaintiffs' ILSA claim.

ARGUMENT

Count I of the Plaintiffs' complaint alleges the Defendants violated 15 U.S.C. section 1703(a)(2) of ILSA. Under that section, it is unlawful for a developer or agent to use any means of interstate commerce:

> (A) to employ any device, scheme, or artifice to defraud;
>
> (B) to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order 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 or lease) not misleading, with respect to any information pertinent to the lot or subdivision; [or]
>
> (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser[.]

15 U.S.C. § 1703(a)(2).

Three elements of the Plaintiffs' ILSA claim are at issue in this motion for partial summary judgment. The undisputed facts establish the following elements of the Plaintiffs' ILSA claim as a matter of law and merit the entry of partial summary judgment: (1) The Defendants are "developers," "agents," or "aiders and abettors" as defined by ILSA and the case law interpreting the Act; (2) the secret License Agreement was a "material fact" under section 1703(a)(2) of ILSA; and (3) the Defendants did not reveal the existence and terms of the License Agreement to the Plaintiffs before May 25, 2007.

I. Both Trump and Trump Org. are "developers," "agents," or "aiders and abettors" under ILSA as a matter of law because they actively participated in the marketing and development of the Trump Tower Tampa.

A. Trump and Trump Org. are by definition "developers" or "agents" under ILSA.

ILSA governs activities by a "developer" or "agent." 15 U.S.C. § 1703. The term "developer" is defined in 15 U.S.C. section 1701(5) as "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision." An "agent" is defined in section 1701(6) as "any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision" (except an attorney solely rendering legal services). In turn, section 1701(11), defines the term "offer" broadly by stating it "includes any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision."

Courts must rely on "the plain wording of the Act, persuasive authority, and common sense" to interpret the Act and apply it to the facts of each case. *Hammar v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 757 F. Supp. 698, 701 (W.D. Va. 1990). And given the Act's remedial purposes to prohibit and punish fraud, the provisions of ILSA must be liberally and flexibly construed to effectuate those goals. *Id.* at 704; *McCown v. Heidler,* 527 F. 2d 204, 207 (10th Cir. 1975).

Under the plain wording of ILSA, a developer or agent is one who participates directly or indirectly in the advertising or sales process. ILSA's rules thus apply when a person or entity actively participates in advertising or sales either directly through contact with potential purchasers, or indirectly by means other than face-to-face contact with buyers. *Gibbes v. Rose Hill Plantation Dev. Co.*, 794 F. Supp. 1327, 1333 n.9 (D.S.C. 1992)

("indirect seller" is one who conducts selling efforts through means other than direct, face-to-face contact with buyers; citing *Bartholomew v. Northampton Nat'l Bank of Easton, Penn.*, 584 F. 2d 1288, 1293 (3rd Cir.1978)).

Both of the Defendants, Trump and Trump Org., were undeniably involved in the advertising and sales of units in the Trump Tower Tampa. As explained in subsections 1 through 3 below, the Defendants' role as a developer or agent is established by undisputed facts that they (1) actively marketed the units, (2) held themselves out as partners with the developer, and (3) took actions to both develop and sell the units to prospective purchasers.

1. Trump and Trump Org. actively marketed units in the Trump Tower Tampa.

The following undisputed facts show that Trump and Trump Org. were actively involved in marketing the units in the Trump Tower Tampa:

- The Defendants personally announced the development in a press release on January 10, 2005. That press release provided contact information for Trump Org. and characterized the project as "Mr. Trump's first project, as well as the tallest residential building, on the Gulf of Mexico." Exh. 3; Exh. 4, at 15; Exh. 5, at 127, 136, 210; Exh. 6, at 35-36.

- The Defendants issued a quarterly publication called *Views*. Each edition said it was "a publication of Trump Tower Tampa, a development of Donald J. Trump and SimDag." *Views* updated prospective purchasers on the status of the building and development efforts. Exh. 2.

- The March 2006 issue of *Views* included a letter from Trump personally directed to potential or current purchasers assuring them of the high standards of luxury the building would fulfill. *Id*.

- Trump was required by the secret License Agreement to "assist in the marketing plan for the Tower Property." Exh. 1, at ¶ 2. Trump travelled to Tampa two or three times to market the project. Exh. 4, at 26.

- Trump attended and participated in the sales center grand opening on February 18, 2005. Exh. 2.

- Both Trump and his son, Donald Trump, Jr., attended a groundbreaking event for the project. Exh. 5 at 139. While there, Trump did media interviews. *Id.* at 143.

- It was standard practice for Trump Org. to prepare promotional materials used at sales centers and to have those reviewed by Trump executives. *Id.* at 211.

2. Trump and Trump Org. held themselves out as partners with SimDag in developing the Trump Tower Tampa.

In addition to marketing the units, the Defendants held themselves out as partners with SimDag and joint developers of the property. The following undisputed facts show the numerous representations the Defendants made that they were developing the Trump Tower Tampa in a partnership with SimDag:

- The title of the January 10, 2005, press release the Defendants issued read: "Donald Trump to Partner with SimDag-RoBEL in Developing a New Residential Condominium Tower in Downtown Tampa." The text stated, "The project will be developed in a partnership with local Tampa Bay-area developers, SimDag-RoBEL, LLC." Exhs. 1; 4 at 15; 5 at 127, 136, 210; 6 at 35-36.

- The March 2006 *Views* included a letter from Trump that states, "Working with our partners at SimDag, we took the time and steps necessary to make sure that every aspect of this development would be executed to the highest standards possible . . . . It is our intention to develop a landmark for this wonderful city . . . ." Exh. 2.

- The Spring 2005 *Views* included a page captioned, "Meet the Developers," which showed a picture of Trump grouped with members of SimDag. The same page included biographical information on the members of SimDag and on Trump. *Id.*

- Trump was quoted in multiple press releases as saying he had a "substantial" stake in the development. In a February 19, 2005, article, Trump told the Tampa Tribune the project was "a partnership between the Trump Organization and a local developer" that was "more than a licensing or marketing arrangement." Exh. 12. A similar quote was included in a St. Petersburg Times article of the same date. Exh. 13.

- Brochures for the property complete with floor plans labeled the project "A Development of Donald J. Trump and SimDag-RoBEL, LLC" and "A Donald J. Trump Signature Property." One brochure included a page titled "The Partners" and displayed a picture of Trump and members of SimDag. The same brochure included a letter from Trump personally stating, "I am very proud to partner with SimDag-RoBEL, LLC in presenting Trump Tower Tampa." Exh. 14.

- A website advertising the Trump Tower Tampa included a statement signed by Trump, "I am proud to join SIMDAG-RoBEL, LLC, in presenting Trump Tower Tampa." Exh. 15.

- The Trump Tower Tampa logo appeared on virtually all marketing materials and was always followed by this phrase: "A Donald J. Trump Signature Property." Exh. 14.

- Sales material consistently stated that Trump Tower Tampa was "A Development of Donald J. Trump and SimDag-RoBEL LLC." *Id.*

3. Trump and Trump Org. acted in a manner consistent with their advertised role as a developer of the project.

Finally, the following undisputed facts show that in addition to their public statements and marketing ploys, the Defendants took other actions to develop the project:

- Based on the terms of the secret License Agreement, the Defendants had the right to review and approve all promotional materials, and no press release regarding Trump could be issued without Trump's prior written approval. Exh. 1 at ¶ 2. Trump personally reviewed much of the marketing materials for the Trump Tower Tampa. Exh. 4 at 15.

- Under the secret License Agreement, the Defendants had to approve all of the plans and specifications for the development. Trump was the "sole judge" of whether the plans met Trump standards. Exh. 1 at ¶ 3. If they did not, Trump could terminate the License Agreement. *Id.* at ¶ 3.

- According to Trump, he and Trump Org. were intimately involved in the design of the building. Exh. 4 at 10, 25. "[W]e were working on the building, we were helping to design the units. We were putting in certain size windows and requiring certain size ceiling heights. We were doing many other things." *Id.* at 33.

- Trump controlled approval of the preliminary and final plans (everything from the lobby to the appliances in the units) and defined the standards that the development had to meet. Exh. 1. Donald Trump, Jr. explained that the Defendants' role in a development under a license agreement is "extensive" because it involves looking at and approving plans, reviewing all promotional and sales materials and sometimes writing or rewriting such materials, rearranging floor plans and stacking of units in a building, working on aspects of collateral materials, etc. Exh. 5 at 124-27.

- On at least two occasions, Trump Org. representatives communicated directly with concerned purchasers to alleviate their concerns about the Trump Tower Tampa's progress. Exh. 16 (I. Trump Depo), at 81-82; Exh. 5, Depo. Exh. 44 (Email from B. Diamond discussing contact with purchaser).

As shown in subsections 1 through 3 above, Trump and the Trump Org. actively marketed and sold Trump Tower Tampa as a Trump development. Under ILSA, they are developers or agents because they "directly or indirectly . . . offer[ed] to sell or lease, or advertise[d] for sale or lease" the Trump Tower Tampa units. *See* 15 U.S.C. § 1701(5). And it is beyond dispute that their "offers" and "advertisements" for sale included various forms of "inducement, solicitation, or attempt[s] to encourage a person to acquire" a unit in the project. *See* 15 U.S.C. § 1701(11).

B. The case law confirms that Trump and Trump Org. are developers or agents under ILSA.

The controlling cases confirm that Trump and Trump Org. are developers or agents under ILSA. In *Olsen v. Lake Country. Inc.*, 955 F. 2d 203, 205-06 (4th Cir. 1991), the appellate court rejected a defendant's argument that it was not a "developer" and affirmed a summary judgment in favor of the plaintiff on an ILSA claim. The defendant had actively marketed lots to the general public. Te defendant argued it was not a "developer" because it did not participate in the initial subdividing, platting, and planning of the development and never improved the land. *Id.* at 206. The Court disagreed. It held that because the defendant

was "actively involved in the planning and promotion of the development" and was "not merely an incidental player in the [land] sales scheme," it was liable for any violation of the Act. *Id.*

Trump and Trump Org., like the defendant in *Olsen*, were not mere "incidental players" in the marketing and sales of Trump Tower Tampa. As shown above, Trump and Trump Org. were deeply and "actively involved in the planning and promotion" of Trump Tower Tampa. They wrote or reviewed and approved all promotional materials for this project. Exh. 1 (License Agreement) at ¶ 2; Exh. 5 (Trump Jr. Depo) at 211; Exh. 4 (Trump Depo) at 26. Press releases and other materials came directly from Trump and Trump Org. Exh. 3. Any materials that were not distributed directly by the Defendants were reviewed and approved by them. Exh. 1 at ¶ 2; Exh. 5 at 211; Exh. 4 at 26. And the promotional materials provided to the Plaintiffs included letters from Trump himself, pictures of Trump, and a description of the Trump Tower Tampa as a "Donald J. Trump Signature Property." Exhs. 2, 14, 15. The Defendants also reviewed and approved plans and specifications for the building. Exh. 1 at ¶ 2; Exh. 4 at 15. Like the defendant in *Olsen*, Trump and Trump Org. are, as a matter of law, developers or agents who must comply with ILSA.

Another instructive case is *Sewell v. D'Alessandro & Woodyard, Inc.*, 655 F. Supp.2d 1228 (M.D. Fla. 2009). In *Sewell*, the complaint alleged the defendant personally participated in the marketing efforts to sell properties by orally representing that tenants would be found for the properties and that buyers had "nothing to worry about." *Id.* at 1254. The defendant also assured buyers they would receive a "double-digit" return on their investment without any cost or expense other than the down payment. *Id.* The district court

held that the defendant's participation in the sales process brought her within the definition of "developer" or "agent" under ILSA.

Like the defendant in *Sewell*, Trump and Trump Org. actively participated in marketing a development. As shown, Trump and Trump Org. issued marketing materials touting the benefits of living in a Trump property and assuring potential purchasers this was a good investment. Exhs. 2, 14, 15. They created or approved press releases and promotional materials to sell the units in the Trump Tower Tampa. Exhs. 1 at ¶ 2; 5 at 211; 4 at 26. Many materials included personal appeals by Trump to prospective purchasers. Exh. 2. And on some occasions, Trump Org. executives communicated directly with purchasers to address concerns about the project. Exh. 16 at 81-82; Exh. 5, Depo Exh. 44. Here as in *Sewell*, these direct and indirect marketing efforts mean the Defendants are developers under ILSA.

The conclusion that the Defendants in this case are "developers" under ILSA is also supported by *Merritt v. Lyons Heritage Pasco, LLC*, No. 8:09-cv-1201, 2010 WL 3666763 (M.D. Fla. Sept. 15, 2010). In *Merritt*, the plaintiffs' allegation that the defendants advertised lots for sale in a development was "sufficient to render the[] Defendants 'developers' within the meaning of the statute" and to permit a claim for violations of section 1703(a)(2) to go forward. *Id*. at *3. Trump and Trump Org. undeniably advertised and promoted sales of Trump Tower Tampa. They issued press releases to sell condominiums. Exh. 3. They helped design and approve solicitations to buyers. Exh. 1 at ¶ 2; Exh. 5 at 211; Exh. 4 at 26. And they personally participated in events such as the grand opening of the sales center. Exh. 2; Exh. 5 at 139, 143. Like the defendants in *Merritt*, the Defendants in this case are developers or agents under ILSA.

Based on the case law and the plain language of ILSA, the undisputed facts show that the Defendants are developers or agents as defined by the Act. The Court should enter partial summary judgment on this point.

C. Both Trump and Trump Org. are liable under ILSA as developers or agents because both participated in the marketing and sale of units.

Both Trump and Trump Org. are liable under ILSA for their marketing, development, and sales activities. With respect to the performance of those functions, there was no meaningful distinction between the Defendants' roles.

The Defendants' initial press release for the Trump Tower Tampa explained, "Donald J. Trump established the Trump Organization in 1974 as the umbrella organization for all of his real estate developments and other corporate affiliates." Exh. 3. Trump signed the secret License Agreement individually because he personally owns the intellectual property rights to his name and other related marks. Exh. 4 at 21; Exh. 5 at 22, 110; Exh. 16 at 38-40. But as Trump himself and various Trump executives explained, Trump heads Trump Org. and delegated to that corporation the tasks required by the License Agreement. Exh. 4 at 29; Exh. 5 at 29, 49-51, 109-10, 115-16; Exh. 16 at 38-40. As a result, Trump Org.'s marketing department spearheaded press releases and helped draft or review marketing materials for the Trump Tower Tampa, subject to final approval by Trump. Exh. 4 at 29; Exh. 5 at 29, 49-51, 54, 112, 115, 117; Exh. 16 at 38-40. And it was Trump Org. employees who communicated with SimDag, reviewed and approved plans, and addressed prospective purchasers' concerns, again subject to approval and oversight by Trump. Exh. 4 at 29; Exh. 5 at 29, 49-51; Exh. 16 at 38-40. Because the Defendants themselves drew no distinctions between the activities of Trump and Trump Org., both are liable for the ILSA violations.

In any event, courts have consistently held that ILSA imposes developer or agent liability on corporate developers, like Trump Org., and on individuals acting with or through those corporations, like Trump, where both the individual and the corporation participate in the wrong. *See Kemp v. Peterson*, 940 F.2d 110, 113 (4th Cir. 1991); *McCown*, 527 F.2d at 207. As the Court explained in *Kemp*, "officers, directors, and participating planners may be held individually liable for violations of the Act" because "[t]o hold otherwise would defeat the purpose of the Act, since it is the officers of the corporation who are behind the alleged fraud." *Id.* at 113. Under these well-established principles, both Trump and Trump Org. are developers and agents as defined by ILSA. Both must comply with the Act's terms.

In sum, Trump and Trump Org. were developers or agents under ILSA. They actively planned and marketed units and were by no means "incidental players" in the development and sales of Trump Tower Tampa. *See Olsen; Sewell; Merritt; see also Palmer v. Ocean Club at Biloxi, Ltd.*, No. 1:08cv236HSO-JMR, 2008 WL 4934045 (S.D. Miss. Oct. 21, 2008) (defendants could be considered developers based on allegations they directly or indirectly developed, marketed, advertised, offered to sell, and participated in offering for sale condominium units; held a beneficial interest in the project; and/or realized financial gain from the sale of units). There are no disputed issues of material fact on this point. The Plaintiffs are entitled to a partial summary judgment holding that Trump and Trump Org. are developers or agents as defined by ILSA.

D. Trump and Trump Org. are also liable under ILSA as aiders and abettors of violations committed by SimDag.

Not only are the Defendants liable as "developers" or "agents" under ILSA, they are also liable for aiding and abetting any violation of ILSA by SimDag. Trump and Trump Org.

have attempted to cast SimDag as the only developer on this project. That argument fails because, as shown above, Trump and Trump Org. actively marketed units and meet the definition of a developer or agent under ILSA's plain terms. But even if SimDag were the sole or primary developer, Trump and Trump Org. would still be liable for SimDag's ILSA violations because they knowingly participated in and assisted them.

A person or entity is liable as an aider and abettor under ILSA when that person or entity knowingly assists and participates in a violation of ILSA. *See McCown*, 527 F.2d at 207; *Hammar*, 757 F. Supp. at 706; *see also Timmreck v. Munn*, 433 F. Supp. 396, 407 (N.D. Ill. 1977) ("If the plaintiffs can assemble sufficient evidence to establish that the Continental Bank aided and abetted the alleged fraud of the developers, the Bank may be held liable under the Act."). The undisputed evidence in this case – as stated in the bullet points above – shows the Defendants knowingly assisted and participated in ILSA violations.

The secret License Agreement demonstrates that SimDag and the Defendants acted together to conceal their agreement and the specific terms of Trump and Trump Org.'s involvement from potential purchasers. Exh. 1 (License Agreement). Together they marketed the property as the "Trump Tower Tampa" and "A Trump Signature Property" and extolled the value of the Trump name. Exhs. 2, 14. Publicly they called themselves "partners" and "developers." Exhs. 2, 12-15. But the truth was that Trump had no capital investment in the project and was leasing his name under conditions that allowed him to terminate his involvement and leave the purchasers with a condominium built by unknown and inexperienced developers. Accordingly, while the Defendants are liable under ILSA as

developers or agents in their own right, they are also liable for actively and knowingly aiding and abetting any ILSA violation that SimDag committed.

E. The liability of Trump and Trump Org. under ILSA is consistent with the legislative intent and stated purpose of the Act.

As explained, Trump and Trump Org. are developers or agents under the plain language of ILSA and the controlling case law. Trump and Trump Org.'s status as developers or agents under ILSA is also mandated by the intent of the legislature and the purpose of the statute. As the Court explained in *McCown*:

> 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.

527 F. 2d at 207.

When Trump withdrew his name from this project and sued SimDag, the project collapsed. The undercapitalized and inexperienced SimDag folded and declared bankruptcy. Trump and Trump Org., on the other hand, walked away having already pocketed a substantial amount in licensing fees. Trump and Trump Org. were planners and profit-makers in the Trump Tower Tampa scheme. The purpose of ILSA would be frustrated here if Trump and Trump Org. were permitted to design, develop, market, and profit from the sale of Trump Tower Tampa units but escape liability for the ILSA violations committed in connection with those sales.

As the quarterly publication for the Trump Tower Tampa put it, buyers "only want a Trump." Exh. 2. The Plaintiffs thought they were in fact buying "a Trump" when they paid substantial deposits on units in the Trump Tower Tampa. The marketing and promotional materials prepared or approved by Trump and Trump Org. told the Plaintiffs that the Trump Tower Tampa was a "Donald J. Trump Signature Property." Exh. 14. They also told the Plaintiffs that Trump was developing the property in partnership with SimDag. Exhs. 2, 12-15. Having actively marketed the development in this way, Trump and Trump Org. are liable as developers under ILSA as a matter of law.

II. The secret License Agreement was a "material fact" under ILSA as a matter of law.

ILSA requires a developer or agent to disclose—and not conceal or misrepresent—the "material facts" pertaining to a development. Specifically, 15 U.S.C. section 1703(a)(2)(B) prohibits persons and entities covered by ILSA from

> obtain[ing] money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order 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 or lease) not misleading, with respect to any information pertinent to the lot or subdivision.

A fact or statement is material under ILSA if "a reasonable investor might have considered the omitted fact or erroneous statement as important in making a decision." *Paquin v. Four Seasons of Tenn., Inc.*, 519 F. 2d 1105, 1109 (5th Cir. 1975) (citing *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 153-54 (1972)); *see also Burns v. Duplin Land Dev., Inc*., 621 F.Supp. 2d 292, 307-08 (E.D.N.C. 2009). This test for materiality comes from federal securities jurisprudence. *Id.* Under that test, a fact stated or omitted is material

if there is a substantial likelihood that a reasonable purchaser or seller (1) would consider the fact important in deciding whether to buy or sell the property or (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact. *Burns*, 621 F. Supp. 2d at 308 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988)).

Before buying a unit in the Trump Tower Tampa, a reasonable purchaser would have considered it important to know that there was a secret License Agreement between the Defendants and SimDag. As stated in the promotional materials used for this development, buyers "only want a Trump." Exh. 2. They expected to live in "A Trump Signature Property." Exh. 14. As Trump himself testified in his deposition, it has been "very well proven" that when he puts his name on a property, it brings the property immediate increased value. Exh. 4 at 4. But the terms of the secret License Agreement meant that buyers were not buying a Trump – **they were buying a SimDag that *might* carry the Trump name**. Buyers were also led to believe that Trump was a fully invested "partner" in the development and that he had every motivation to see the project through. Exhs. 2, 12-15. Yet under the terms of the secret License Agreement, Trump had no capital investment in the project, little or no financial risk, and little incentive to remain involved in the project if and when SimDag encountered problems. Exh. 1.

Simply put, the secret License Agreement was "material" because it affected the value of what the Plaintiffs thought they were buying. It is undisputed that buyers pay a premium to purchase a unit in a Trump development and to live in a building with the Trump name. The Defendants and SimDag knew that. Exh. 4, at 13, 19; Exh. 5, at 72, 200-201; Exh. 6 at 41. The Defendants confirmed that in 2007 when they had a consulting group prepare a

report quantifying how much value the Trump name added to a project. Exh. 17 (Linneman Report); Exh. 5 at 66-67, 70; Exh. 16 at 43. That report compared Trump buildings with other comparable developments and concluded that Trump buildings sold for $250 to $500 more *per square foot* than non-Trump developments. Exh. 17. Units for Trump buildings also sold quicker. *Id.* The report concluded: "Projects associated with The Trump Organization consistently command higher pricing and higher sales velocity than the competition," regardless of geography, type of location, or property type. *Id.*

Despite the undisputed evidence that the Defendants were using the valuable Trump name to lure prospective buyers, the Defendants concealed the License Agreement that showed the development was not a Trump development at all. It was not even a partnership with Trump. And under the License Agreement, there was a substantial likelihood—which eventually became a certainty—that the Trump name would never grace the tower's facade.

Facts that specifically bear on the value or perceived value of a property are "material facts" under ILSA. Examples of facts or omissions that have been considered "material" in other cases include: whether mobile homes are allowed in an area, *see Price v. Owens-Illinois Dev. Corp.*, 646 F. Supp. 314 (M.D. Ga. 1986); the date when access roads will be completed, *see Prebil v. Pinehurst, Inc.*, 638 F. Supp. 1314 (D. Mont. 1986); lack of information with respect to whether specific financing could be obtained, *Hester v. Hidden Valley Lakes, Inc.*, 495 F.Supp. 48 (D.C. Miss. 1980); and whether membership in the property owners' association was voluntary rather than mandatory, *id.* Although each case involves different facts, the focus is the same. If the information could affect the value of the property, it is material under ILSA.

Had prospective purchasers known the true relationship between the Defendants and SimDag, they would have considered it important in deciding whether to buy a unit. Indeed, they would have viewed the total mix of information available to them significantly altered. *See Burns*, 621 F.Supp. 2d at 308 (material fact is one that if known to purchaser would be considered to alter the total mix of information available to them). The promotional and sales materials told the Plaintiffs that they were purchasing a residence in the Trump Tower Tampa, A Trump Signature Property. Such a property would have additional or enhanced value based on the Trump name. The materials furnished to the Plaintiffs also indicated that the project had the investment and backing of Trump himself, lending an aura of financial stability and substantial experience to a project that was otherwise headed by a development company with no condominium development experience and not even a single audited financial statement.

When the secret License Agreement was revealed to purchasers for the first time in May 2007, it showed the project was truly the responsibility of the inexperienced SimDag. Trump had agreed only to lease his name to the project with no capital investment and little or no financial risk. The Defendants could jump ship for circumstances beyond any buyer's control. And they did. That was a material fact that purchasers should have known.

Based on the undisputed facts, the License Agreement was a material fact under ILSA as a matter of law. Partial summary judgment should be entered on this point.

III. The undisputed facts show that the Defendants never disclosed the existence and terms of the secret License Agreement to purchasers until May 25, 2007.

In addition to the legal elements of the Plaintiffs' ILSA claims discussed above, there is a factual element of the claim that is undisputed – namely, that the Defendants never

disclosed the existence and terms of the secret License Agreement to purchasers until May 25, 2007. That is when Trump sued SimDag and attached the agreement to his complaint. *See* Trump/SimDag Lawsuit.

The Defendants prepared and approved numerous press releases and promotional materials for the Trump Tower Tampa. None of those revealed that the relationship between Trump and SimDag was governed by a License Agreement that would allow Trump to walk away from the deal and take his name with him. The Defendants did not disclose the License Agreement and its terms to purchasers until May 25, 2007. And when Trump disclosed the agreement in his lawsuit against SimDag, SimDag countersued alleging that the disclosure constituted a breach of the confidentiality provision. It is a matter of undisputed fact that the Defendants did not reveal the existence and terms of the License Agreement to purchasers until long after the Plaintiffs had bought into the Trump Tower Tampa illusion. Partial summary judgment should be entered on this point.

CONCLUSION

Based on the undisputed facts and controlling law, partial summary judgment should be granted. The Court should make the following rulings:

1. Both Trump and Trump Org. are "developers" or "agents" under ILSA or "aiders and abettors" to the developer SimDag.

2. The existence and terms of the License Agreement were "material facts" under ILSA.

3. The Defendants did not disclose the existence and terms of the License Agreement to purchasers until after May 25, 2007.

Respectfully submitted,

/s/ J. Daniel Clark
J. Daniel Clark, Esq. FBN 0106471
CLARK & MARTINO, P.A.
3407 W. Kennedy Boulevard
Tampa, FL 33609
(813) 879-0700
(813) 879-5498 (Facsimile)
dclark@clarkmartino.com

- and -

BAJO, CUVA, COHEN, & TURKEL, P.A.
Kenneth G. Turkel, Esq. FBN 867233
V. Stephen Cohen, Esq. FBN 0948756
100 North Tampa Street, Suite 1900
Tampa, Florida 33602
(813) 443-2149
(813) 443-2193 (Facsimile)
kturkel@bajocuva.com
scohen@bajocuva.com

Attorneys For Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of April, 2011, a true and correct copy of the foregoing Plaintiffs' Motion For Partial Summary Judgment and Memorandum of Law In Support was filed electronically. Notice of this filing will be sent to all parties in this case by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J. Daniel Clark
J. Daniel Clark, Esq.