14-1916 (L)

14-2120(XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AVIRAL RAI and SANGEETA RAI,

Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants,

v.

WB IMICO LEXINGTON FEE, LLC and GARY BARNETT,

Defendants-Counter-Claimants-Appellants-Cross-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE*

Meredith Fuchs
General Counsel
To-Quyen Truong
Deputy General Counsel
John R. Coleman
Assistant General Counsel
Nandan M. Joshi
Jessica Rank Divine
Litigation Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7863 (telephone)
(202) 435-7024 (facsimile)
jessica.divine@cfpb.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

BACKGROUND 1

A. Statutory and Regulatory Background 1

B. Factual Background 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

Section 1703(a)(1)(B)'s Requirement that a Property Report be "Furnished to the Purchaser" is Satisfied When a Developer Delivers the Property Report to the Purchaser's Attorney 10

A. Neither ILSA nor its implementing regulations unambiguously address how property reports are to be furnished to purchasers who are represented by counsel 10

B. This Court should conclude that delivering a property report to the purchasers' attorney satisfied ILSA § 1703 15

CONCLUSION 23

TABLE OF AUTHORITIES

Cases **Page(s)**

Bacolitsas v. 86th & 3rd Owner, LLC,
702 F.3d 673 (2d Cir. 2012) 1, 20, 22

Barnhart v. Peabody Coal Co.,
537 U.S. 149 (2003).. 19

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma,
426 U.S. 776 (1976).. 20

Gerrish Corp. v. Univ. Underwriters Ins. Co.,
947 F.2d 1023 (2d Cir. 1991) 15

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004).. 18

United States v. Vonn,
535 U.S. 55 (2002).. 19

Veal v. Geraci,
23 F.3d 722 (2d Cir. 1994) 16

Webb v. Smart Document Solutions, LLC,
499 F.3d 1078 (9th Cir. 2007) 19, 20

Statutes

12 U.S.C. § 5581(b)(7).. 3

15 U.S.C. § 1692c(a)(2) 13

15 U.S.C. § 1701(6) 17

15 U.S.C. § 1701(10) 7, 11

15 U.S.C. § 1703 20

15 U.S.C. § 1703(a) 17

15 U.S.C. § 1703(a)(1)(B) 4, 10, 20

15 U.S.C. § 1703(a)(1)(C) 21

15 U.S.C. § 1703(c) 4, 10

15 U.S.C. § 1704 .... 2, 20

15 U.S.C. § 1705 .... 2, 3, 20

15 U.S.C. § 1706(e) 17

15 U.S.C. § 1707 .... 1, 20

15 U.S.C. § 1707(a) 3

15 U.S.C. § 1709(a) 17

15 U.S.C. § 1715 3

15 U.S.C. § 1718 3

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1955 (2010) 3

Exemption for Residential Condominium Units,
Pub. L. No. 113-167, 128 Stat. 1882 (2014) 6

Regulations

12 C.F.R. Part 1010, Subpart B 3, 21

12 C.F.R. Part 1010, Appendix A 21

12 C.F.R. Part 1011 3

12 C.F.R. Part 1012 3

12 C.F.R. § 1010.22 .... 3, 21

24 C.F.R. Part 1710 3

24 C.F.R. Part 1710, Subpart B 3

24 C.F.R. § 1710.3 .... 4, 13

24 C.F.R. § 1710.22 3

24 C.F.R. §§ 1710.100-.118 4

24 C.F.R. § 1710.102(f) 5, 14

24 C.F.R. § 1710.105(b) 5, 14

24 C.F.R. § 1710.105(c) 5

24 C.F.R. § 1710.106(b) 5, 14

24 C.F.R. § 1710.118 15

24 C.F.R. § 1710.118(a) 5

24 C.F.R. § 1710.118(b) 5

24 C.F.R. Part 1715 3

24 C.F.R. Part 1720 3

Other Authorities

Frauds and Deceptions Affecting the Elderly, Investigations, Findings, and Recommendations: Report of the Senate Subcomm. on Frauds and Misrepresentations Affecting the Elderly to the Special Comm. on Aging, 89th Cong. (Jan. 31, 1965) 2, 20

Interstate Land Sales Full Disclosure Act: Hearings on S. 2672 Before the Comm. on Banking and Currency and Subcomm. on Securities, 89th Cong. (Jun. 21-22 & Aug. 18, 1966) 3

Interstate Land Sales Registration Program (Regulations J, K, and L),
76 Fed. Reg. 79486 (Dec. 21, 2011) 3

Merriam-Webster's Collegiate Dictionary (11th ed. 2009).................................... 11

New Oxford American Dictionary (3d ed. 2010) 11

Restatement (Second) of Agency § 17, cmt. a. (1958) 11

Restatement (Second) of Agency § 140, cmt. a. (1958) 15

Restatement (Second) of Agency § 268 (1958)... 16

S. Rep. No. 90-1123 (1968) 1

Webster's Third New International Dictionary (2002) 11

STATEMENT OF INTEREST

The Consumer Financial Protection Bureau (Bureau or CFPB) respectfully submits this brief in response to the Court's May 18, 2015 letter that invited the Bureau to submit its views regarding the interpretation of § 1703(a)(1)(B) and (c) of the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 U.S.C. §§ 1701 *et seq*. Specifically, the Court requested the Bureau's views regarding whether the provision of a "property report," as defined by § 1707 of ILSA, to a purchaser's attorney satisfies the statutory requirement that the report be "furnished to the purchaser" and precludes revocation of a purchase contract under § 1703(c).

BACKGROUND

A. Statutory and Regulatory Background

1. Congress enacted ILSA in 1968 to "protect[] individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments . . . by mandating that developers make certain disclosures." *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, 676 (2d Cir. 2012). ILSA was designed to address abuse by "get rich quick promoters who [made] glowing promises of fully developed 'dream communities,'" but failed to disclose "all of the pertinent information, . . . such as, the availability of convenient access and utilities." S. Rep. No. 90-1123 (May 15, 1968), at 109 ("1968 Report"). Consumers often were solicited through the mail "to make small payments — usually $10 down and $10 a month" — for property featured in "bright advertising brochures" that offered

"security, good climate, and a new way of life . . . on faraway sites in communities not yet built."[1] In many cases, these consumers had "no lawyer to advise [them], for the amount of money involved [did] not justify such an expenditure."[2]

To address these concerns, ILSA requires developers to prepare and file a "statement of record" with the Director of the Bureau. 15 U.S.C. §§ 1704, 1705. The Statement of Record must include information about the lots being sold and about the developer, including "a legal description of . . . the subdivision and a statement of the topography thereof," "a statement of the condition of the title to the land," "the present condition of access to the subdivision," "the availability of sewage disposal facilities and other public utilities (including water, electricity, gas, and telephone facilities) in the subdivision, the proximity in miles of the subdivision to nearby municipalities," copies of documents reflecting the legal

---

[1] Frauds and Deceptions Affecting the Elderly, Investigations, Findings, and Recommendations: Report of the Senate Subcomm. on Frauds and Misrepresentations Affecting the Elderly to the Special Comm. on Aging, 89th Cong. 27 (Jan. 31, 1965).

[2] *Id.* at App'x 2, p. 366 (written testimony of Prof. William D. Warren, School of Law, University of California, Los Angeles); *see also* Interstate Land Sales Full Disclosure Act, Hearings on S. 2672 Before the Comm. on Banking and Currency and Subcomm. on Securities, 89th Cong. 28 (Jun. 21-22 & Aug. 18, 1966) ("I think we should recognize that people who are buying this land . . . are not going to real estate brokers or lawyers or title companies or anything, and they need to have this information spelled out clearly[.]") (testimony of Samuel T. Frear, Former Journalist with Eugene (Or.) Register-Guard)); *id.* at 79 ("[O]ne of the most crucial needs of our bill [is] to be sure that the information provided to the prospective purchaser is in such a form that a reasonably endowed layman can understand the bad as well as the good facts.") (remarks of Sen. Mondale).

structure of the developer (if the developer is not a natural person), and various other disclosures set forth in the regulations. 15 U.S.C. § 1705; 12 C.F.R. § 1010.22; 12 C.F.R. Part 1010, Subpart B; *see also* 24 C.F.R. § 1710.22 (2009); 24 C.F.R. Part 1710, Subpart B (2009).[3]

The developer must also prepare a "property report," containing some of the information that the regulations require to be included in the statement of record. 15 U.S.C. § 1707(a) (stating that the property report shall contain the information contained in the Statement of Record "as the Director may deem necessary, but need not include the documents referred to in paragraphs (7) to (11), inclusive, of section 1705 of this title"); 12 C.F.R. Part 1010, Subpart B; *see also* 24 C.F.R. Part 1710, Subpart B (2009). ILSA generally prohibits a "developer or agent" from

[3] Congress initially granted the Department of Housing and Urban Development (HUD) the "authority and responsibility for administering [ILSA]" and the "authority . . . to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon [HUD]." 15 U.S.C. §§ 1715, 1718 (1970). Pursuant to that authority, HUD published regulations to implement ILSA. *See, e.g.,* 24 C.F.R. Parts 1710, 1715, and 1720 (2009). On July 21, 2011, the authority to administer and implement ILSA was transferred from HUD to the Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. No. 111-203, sections 1061(b)(7) and 1098A, 124 Stat. 1955, 2038, 2105 (2010)*, codified at* 12 U.S.C. § 5581(b)(7) *and* 15 U.S.C. §§ 1715, 1718 (2012). On December 21, 2011, the Bureau republished parts 1710, 1715, and 1720 as a CFPB regulation in Regulations J, K, and L. 12 C.F.R. Parts 1010, 1011, and 1012*; see* 76 Fed. Reg. 79486 (Dec. 21, 2011). Because all relevant events in this case occurred before the effective transfer date, this brief cites HUD's regulations or, where useful, both HUD's regulation and the corresponding Bureau regulation.

selling or leasing any lot unless a property report has been "furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee." 15 U.S.C. § 1703(a)(1)(B). If the property report has not been furnished to the purchaser in accordance with § 1703(a)(1)(B), the statute provides the purchaser with a right of revocation within two years from the date of the signing of the contract. 15 U.S.C. § 1703(c) (providing a right of revocation within two years of the signing of a purchase contract if the "property report has not been given to the purchaser or lessee in advance of his or her signing such contract or agreement").

2. The HUD regulations in effect during the relevant time period in this case reiterated the statutory requirement that "[i]n non-exempt transactions, the developer must give each purchaser a printed Property Report, meeting the requirements of [24 C.F.R. Part 1710], in advance of the purchaser's signing of any contract or agreement for sale or lease." 24 C.F.R. § 1710.3. The regulations also spelled out in detail the types of information that must be contained in the property report for a lot, including the financial risks involved and information about roads, utilities, and other characteristics of the development. *See* 24 C.F.R. §§ 1710.100-.118. The regulations further specified that each property report must have a cover page advising purchasers to "READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING" and providing consumers with other disclosures. 24

C.F.R. § 1710.105(b), (c). To ensure that the property report can be "readily understood by purchasers who are unfamiliar with real estate transactions," *id.* § 1710.102(f), the regulations provided that the property report must be written in a "narrative form using plain, concise, everyday language" and that "the pronouns 'you' and 'your' shall generally be used in referring to the prospective purchaser and the pronouns 'we', 'us', and 'our' shall generally be used in referring to the developer," *id.*; *see also id.* § 1710.106(b). For evidence that the property report has been delivered, the regulations required the developer to attach a "purchaser receipt" to the property report, stating that:

> We must give you a copy of this Property Report and give you an opportunity to read it before you sign any contract or agreement. By signing this receipt, you acknowledge that you have received a copy of our Property Report.

24 C.F.R. § 1710.118(a), (b). "Upon demand," the developer was required to "make copies of these receipts" available to HUD (now the Bureau) for review. *Id.* § 1710.118(b).

B. Factual Background

This case arises from a real estate transaction between Aviral Rai and Sangeeta Rai (collectively, the "Purchasers" or the "Rais") and WB Imico Lexington Fee, LLC ("WB Imico"), for the purchase of a unit in the Lucida, a

condominium building in Manhattan.[4] On October 29, 2007, after the Rais expressed interest in purchasing a unit in the Lucida while it was under construction, WB Imico's legal assistant sent a group of documents related to the purchase of the unit, including the property report and a Purchase Agreement, to the Rais' attorney and asked him to review the documents with his clients. JA 312, 314-18. The Purchase Agreement was executed by the Rais and WB Imico on November 12, 2007. JA 24-50. On November 9, 2009, the Rais' new attorney sent a letter to WB Imico stating that the Rais were exercising their right under § 1703(c) of ILSA to revoke the Purchase Agreement because they had not received a copy of the property report. JA 51-53. On November 18, 2009, the Rais filed a complaint in district court seeking rescission of their Purchase Agreement and return of their deposit, alleging that WB Imico had violated § 1703(a)(1)(B) and (c) of ILSA because a property report had not been furnished to them in advance of the execution of the Purchase Agreement. JA 17-23.

On September 27, 2013, the district court issued an order granting the Rais' motion for summary judgment and concluding that the Rais could exercise their right to revoke the transaction. In the lower court, it was undisputed that, although

---

[4] After the time period relevant to this case, Congress exempted from ILSA's registration and disclosure requirements sales or leases of condominium units that are not exempt under 15 U.S.C. § 1702(a). *See* Exemption for Residential Condominium Units, Pub. L. 113-167, 128 Stat. 1882 (Sept. 26, 2014).

the Rais' attorney had received the property report, the Rais were not provided with and did not personally review the property report and that they did not execute any receipt verifying that they were provided the property report. JA 441, n.21. Observing that ILSA defines "purchaser" to mean "an actual or prospective purchaser or lessee of any lot in a subdivision," JA 439 (quoting 15 U.S.C. § 1701(10)), the district court concluded that a property report delivered to a purchaser's attorney has not been "furnished to the purchaser" within the meaning of § 1703.

The district court rejected WB Imico's argument that "common law principles of agency" should apply in determining whether the property report was "furnished to the purchaser." JA 439. In the district court's view, because ILSA defines "agent" in terms of persons who represent a developer, and excludes from the definition of "agent" an "attorney at law whose representation of another person consists solely of rendering legal services," (JA 439) Congress overrode common law agency principles with respect to attorneys acting on behalf of purchasers. The court also concluded that requiring developers to ensure that purchasers and not their agents receive property reports will make it more likely that purchasers will receive the information contained in the report. JA 440.

The district court also relied on the ILSA regulations promulgated by HUD. Those regulations spell out the disclosures that developers must include with the

property report, and those disclosures are written in the second person. According to the district court, that language confirms that, in HUD's view, "developers are to provide property reports to purchasers, not merely to agents of the purchaser." JA 441.

SUMMARY OF ARGUMENT

The district court erred in concluding that delivering a property report to a purchaser's attorney violates § 1703 of ILSA.

I. The operative language of § 1703 requires a property report to be "furnished to the purchaser" before the purchaser signs a purchase agreement for an ILSA-covered lot. Contrary to the district court's view, that language does not preclude a developer from complying with § 1703 by delivering a property report to counsel authorized to act on the purchaser's behalf. When the purchaser is an entity, for instance, delivery to an agent is typically how a property report would be furnished. Nothing in the statutory language suggests that a different rule must apply when the purchaser is an individual represented by counsel.

Nor do ILSA's regulations address whether a property report may be delivered to counsel. The regulations on which the district court relied simply ensure that a property report is written in plain language that will be understood by lay consumers.

II. Given the absence of a federal regulation on point, the Court should interpret § 1703 to permit a developer to provide a property report to counsel. Such a rule would provide purchasers with the flexibility to appoint counsel to act on their behalf in a transaction. That rule would also be consistent with traditional common-law agency principles.

Contrary to the district court's view, nothing in ILSA abrogates those common-law agency principles. It is true that ILSA defines the term "agent" only in terms of the developer's representative. But that is because ILSA uses the term "agent" to make clear that a developer's representative is subject to obligations under ILSA. Because ILSA does not impose any statutory obligations on purchasers' agents, Congress had no need to address their role in a transaction. But that silence does not suggest that Congress thereby took away purchasers' ability to appoint counsel to act on their behalf under traditional common-law agency principles.

Finally, allowing purchasers to appoint agents to manage their ILSA-covered transactions is consistent with the purpose of the statute. ILSA requires developers to file a statement of record with the Bureau and provide the purchaser with a property report that accurately sets forth relevant information about the lot being sold. These protections ensure that unsophisticated consumers receive a complete, accurate, and legally binding description of the property before deciding

whether to purchase the lot. But these purposes are equally served when a purchaser hires counsel to receive and review the property report. Requiring a consumer to receive the property report directly is unnecessary to advance ILSA's principal objectives.

ARGUMENT

Section 1703(a)(1)(B)'s Requirement that a Property Report be "Furnished to the Purchaser" is Satisfied When a Developer Delivers the Property Report to the Purchaser's Attorney

Section 1703 of ILSA generally makes it "unlawful for any developer or agent . . . to sell or lease any lot unless a printed property report . . . has been furnished to the purchaser or lessee in advance of the signing of any contract." 15 U.S.C. § 1703(a)(1)(B). Section 1703 further provides that, if "the property report has not been given to the purchaser or lessee in advance of his or her signing such contract," the purchaser has a two-year period in which to revoke the contract. *Id.* § 1703(c). The district court concluded that the Rais could invoke § 1703's revocation remedy because the property report in this case was delivered to an attorney that the Rais appointed to represent them in this purchase transaction but was never received by the Rais themselves. That conclusion was mistaken.

A. Neither ILSA nor its implementing regulations unambiguously address how property reports are to be furnished to purchasers who are represented by counsel

1. As noted, the operative language in ILSA requires that a property report be "furnished to the purchaser" or "given to the purchaser" (terms that we will treat

as synonymous in this brief). Contrary to the district court's view (JA 438-439), the use of these statutory terms does not preclude an interpretation of ILSA under which a developer can satisfy its § 1703 obligation by delivering a property report to an attorney authorized by the purchaser to receive it. Both "furnish" and "give" generally mean to "provide" or "supply."[5] The term "purchaser," which is defined to mean "an actual or prospective purchaser or lessee of any lot in a subdivision," 15 U.S.C. § 1701(10), is silent on how a purchaser's agent should be treated. *See* Restatement (Second) of Agency § 17, cmt. a (1958) ("For most purposes, a person can properly create a power in an agent to achieve the same legal consequences by the performance of an act as if he himself had personally acted."). Thus, it is reasonable to conclude that, where a purchaser has elected to engage in a transaction through counsel who is authorized to act on the purchaser's behalf (including by receiving disclosures required under ILSA), a developer "provides" or "supplies" a property report to a purchaser, for purposes of § 1703, by

---

[5] For "furnish," see, *e.g.*, Webster's Third New International Dictionary 923 (2002) ("to provide or supply with what is needed, useful, or desirable"); Merriam-Webster's Collegiate Dictionary 508 (11th ed. 2009) ("to provide with what is needed"); New Oxford American Dictionary 705 (3d ed. 2010) ("supply someone with (something); give (something) to someone"). For "give," see, *e.g.*, Webster's Third New International Dictionary 959 (2002) ("to provide or supply one with;" "to put into the possession of another for his use," "to offer for the consideration, acceptance, or use of another"); Merriam-Webster's Collegiate Dictionary 529 (11th ed. 2009) ("to put into the possession of another for his or her use;" "to offer for consideration, acceptance, or use"); New Oxford American Dictionary 735 (3d ed. 2010) ("cause or allow (someone or something) to have (something); provide or supply with," "freely transfer the possession of (something) to (someone))."

delivering it to the purchaser's designated agent as the purchaser has effectively directed.

The need to interpret "furnished to the purchaser" as permitting delivery to the purchaser's agent is especially apparent when the purchasers of a lot are not unrepresented natural persons (which were the type of purchasers with whom Congress was primarily concerned when it enacted ILSA). If the purchaser is a natural person without an attorney or agent, then it is clear that the developer must deliver the property report directly to that individual. But where the purchaser is an entity, the property report must generally be delivered to an agent of the entity because entities generally can act only through agents. If "furnished to the purchaser" were interpreted as unambiguously precluding delivery of the property report to agents, then complying with § 1703 where the purchaser is an entity would become unduly cumbersome, if not altogether impossible.

For these reasons, the district court erred in concluding that § 1703 requires a developer to bypass the purchaser's attorney and deliver the property report directly to the purchaser. JA 439. Where the purchaser is an individual who (like an entity) acts in a purchase transaction through counsel, then, as in the case of entities, ILSA is broad enough to permit a developer to comply with § 1703 by

delivering the property report to the purchaser's designated agent.[6] The fact that the "definition of 'purchaser' does not reference agents" (JA 439) does not mean that the definition addresses whether an agent may receive a property report; rather, it simply means that the definition is silent on the question whether a purchaser may authorize an agent to act on the purchaser's behalf in an ILSA-covered transaction.

2. The district court believed that the regulations "confirm[ed] that . . . in HUD's view . . . developers are to provide property reports to purchasers, and not merely to agents of the purchaser." JA 441. That conclusion is unfounded. Although such a regulation would be a permissible means of implementing § 1703, the ILSA regulations that HUD adopted (and that the Bureau republished in 2011) do not purport to address the method by which a property report must be delivered to purchasers who have hired an attorney to represent them. The applicable regulation simply stated that "the developer must give each purchaser a printed Property Report, meeting the requirements of [24 C.F.R. Part 1710], in advance of the purchaser's signing of any contract or agreement for sale or lease." 24 C.F.R.

---

[6] This is also consistent with the general principle that, where a person is represented by counsel in connection with a specific matter, the law often encourages or even requires parties to contact that person through his or her counsel. *See, e.g.*, 15 U.S.C. § 1692c(a)(2) (under FDCPA, generally prohibiting debt collector from contacting consumer if debt collector knows consumer is represented by counsel); Model Rule of Prof. Conduct 4.2 (prohibiting attorney from contacting person who is known to be represented by counsel).

§ 1710.3. The regulatory text thus does not resolve the ambiguity in § 1703 about how a property report must be furnished or given when the purchaser is represented by counsel.

The district court focused on the regulations that specify how the content of the property report must be prepared. JA 441. As the district court noted, the cover page on a property report must include several advisories for purchasers, including: "READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING," 24 C.F.R. § 1710.105(b); and the regulations require the property report to use the pronouns "you" and "we" to refer to the purchaser and developer, respectively, *id.* §§ 1710.102(f), .106(b). The regulations governing property reports are designed to ensure that *every* property report is written in "plain, concise, everyday language which can be readily understood by purchasers who are unfamiliar with real estate transactions." 24 C.F.R. § 1710.102(f). Thus, the same plain-language rules apply regardless of whether the purchaser is an unrepresented individual or a sophisticated entity. The rules are designed to ensure, for instance, that the Rais, if they had received the property report from their attorney, would have been able to understand the information contained therein, free from unnecessary legalese or technical jargon. But these rules say nothing about how the developer should furnish the property report to the Rais where the Rais have retained counsel to act on their behalf. The district court's

reliance on the regulations governing the preparation of property reports was misplaced.[7]

B. This Court should conclude that delivering a property report to the purchasers' attorney satisfied ILSA § 1703

1. Given the absence of a federal regulation directly addressing the manner of delivery of a property report to a represented individual, this Court should interpret ILSA to permit a developer to furnish a property report to an attorney authorized by the purchaser to act on the purchaser's behalf in the transaction. Such a rule would provide purchasers greater flexibility in deciding the extent to which they will rely on counsel to represent their interests in ILSA-covered transactions. It would also be consistent with background principles of common-law agency, which generally provide that "a principal is subject to liability upon a transaction conducted by his agent, whom he has authorized or apparently authorized to conduct it in the way in which it is conducted, as if he had personally entered into the transaction." Restatement (Second) of Agency § 140, cmt. a (1958); *see also Gerrish Corp. v. Univ. Underwriters Ins. Co.*, 947 F.2d 1023, 1028 (2d Cir. 1991), *cert. denied*, 504 U.S. 973 (1992). Under common-law

[7] For similar reasons, the district court erred (JA 441) in relying on the use of "you" and "we" in the "purchaser receipt." *See* 24 C.F.R. § 1710.118. And although the court noted that no receipt was produced in this case (JA 441, n.21), it was apparently undisputed that the purchasers' counsel received the property report and that the purchasers themselves did not receive the property report. JA 437, n.14. The parties' dispute, therefore, centers on the legal sufficiency of providing the report to the purchasers' attorney.

agency principles, "a notification given to an agent is notice to the principal" if the agent was actually or apparently authorized to receive it or was generally authorized to conduct the transaction. Restatement (Second) of Agency § 268 (1958); *see also Veal v. Geraci*, 23 F.3d 722, 725 (2d Cir. 1994) ("whether or not Veal himself heard Geraci's testimony, Veal's attorney plainly had knowledge of the conduct giving rise to Veal's present claim, and under traditional principles of agency the attorney's knowledge must be imputed to Veal"). Applying these principles here, this Court should conclude that the delivery of a property report to a purchaser's attorney satisfies the developer's obligation to ensure that the property report is "furnished to the purchaser" within the meaning of § 1703.

2. The district court declined to apply these background agency principles for two reasons. First, the district court believed that, by defining the term "agent" in ILSA, Congress implicitly rejected application of common-law agency principles to purchasers' attorneys. JA 439. Second, the district court concluded that requiring a developer to deliver a property report directly to a purchaser would better serve ILSA's statutory purposes. JA 440. Neither of these rationales provides a basis for rejecting application of common-law agency rules with respect to purchasers' counsel.

a. ILSA defines "agent" to mean "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; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services." 15 U.S.C. § 1701(6). The term "agent" is used in various sections of ILSA to impose responsibilities and prohibitions on developer's agents akin to those imposed on developers themselves and to make clear that agents are subject to the Bureau's jurisdiction under ILSA. *See id*. § 1703(a) (making it "unlawful for any developer or agent" to engage in certain activities); § 1706(e) (authorizing the Bureau to access the books and papers of "the developer, any agents, or any other person"); § 1709(a) (authorizing private actions against "a developer or agent"). Congress thus defined "agent" in ILSA to ensure that, if a person (other than an attorney) does in fact represent or act for or on behalf of a developer in connection with the sale or lease of lots, then such person will be subject to certain ILSA obligations that are also imposed on developers. Because ILSA does not impose statutory obligations on purchasers, Congress had no need to address the liability of purchasers' agents in lot-purchase transactions.[8] The district court erred in concluding that ILSA's lack of specific reference to the rights and obligations of

[8] For similar reasons, the exclusion of attorneys from ILSA's definition of "agent" has no relevance. *See* JA 440. The exclusion simply means that attorneys will not be held liable as "agents" under ILSA; it does not suggest that attorneys cannot act as a purchaser's agent with respect to the receipt of property reports from a developer.

purchasers' agents (JA 440) demonstrates that Congress intended to abrogate traditional principles of common-law agency and applicable state law.

In reaching the contrary conclusion, the district court misapplied the principle of statutory construction that the use of "certain language in one part of the statute and different language in another . . . assumes different meanings were intended." JA 440 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004)). It is true that ILSA does not say anything about the role of purchasers' agents, while developers' representatives are addressed in the definition of "agent." But that difference is best explained by the fact that Congress intended to impose statutory obligations on both developers and their representatives, but did not intend to grant any statutory rights to agents working on behalf of purchasers. The question here, however, is not whether the Rais' counsel has any statutory rights (or obligations) under ILSA, but whether the Rais may validly authorize their counsel to act on their behalf in an ILSA-covered transaction. Contrary to the district court's view, it is not "anomalous" for Congress to remain silent on that question simply because it chose to impose independent duties on "agents" of the developer.

Likewise, the Rais' reliance (Appellees' Br. 19) on the canon of statutory construction *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is misplaced. That canon "does not apply to every statutory

listing or grouping; it has force only when the items expressed are members of 'an associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). In ILSA, however, there is not even a "group or series" to which the *expressio unius* cannon can be applied. *See id.* at 168 ("The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded.") (internal quotation marks and brackets excluded). As discussed above, the "sensible inference" to be drawn from Congress's decision to define "agent" in terms of developers' representatives but to say nothing about purchasers' agents is that Congress sought to define those parties who would have rights and responsibilities under ILSA. Because the legal rights and obligations of purchasers' attorneys do not derive from ILSA, but instead from their relationship with purchasers under applicable state agency law, there was no reason for Congress to add a reference to purchasers' agents in the statute.[9]

---

[9] The Rais' reliance (Appellees' Br. 17 n.5) on *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078 (9th Cir. 2007), is misplaced. In that case, the Ninth Circuit held that an attorney seeking medical records on behalf of an individual was not entitled to a fee reduction under regulations implementing the Health Insurance Portability and Accountability Act of 1996 because the term "individual" in the regulations did not include individuals' attorneys. In reaching that conclusion, the court observed that the regulations treated only "individual[s]" and their "personal

b. Contrary to the district court's conclusion, allowing purchasers the flexibility to appoint agents to manage their ILSA-covered transactions is consistent with ILSA's statutory purpose. ILSA "is designed to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers." *Bacolitsas*, 702 F.3d at 680 (quoting *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 778 (1976)); *see also* 1968 Report at 109 (explaining that ILSA's principal purpose is to ensure that consumers who buy land are informed "not only of the desirable aspects but of any undesirable aspects" of what they are purchasing). The principal mechanisms by which ILSA achieves its purpose is by requiring developers to file a "statement of record" with the Bureau, 15 U.S.C. §§ 1704-1705, and furnish a property report to the purchaser, *id.* § 1703(a)(1)(B). Both the statement of record and the property report contain important information about the lot being purchased, including a legal description of the land, the availability of utilities, access to water, and the state of the title to the land, 15 U.S.C. §§ 1705, 1707, and neither may contain an "untrue statement of a material fact" or omit a

---

representative[s]" as an "individual" for purposes of the fee reduction, *id.* at 1085, and that the agency had expressly considered and rejected extending the reduced-fee provision more broadly to an individual's legal representative, *id.* at 1087. By contrast, neither the statute nor the regulations expressly address the role of purchasers' agents under ILSA § 1703.

material fact that is required under ILSA or the regulations, *id.* § 1703(a)(1)(C); *see* 12 C.F.R. § 1010.22 & Part 1010 Subpart B & Appendix A.

The legislative history of ILSA shows that these protections were aimed at consumers who were often unrepresented in lot-purchase transactions. *See supra* pp. 1-2 & n.1-2. Unsophisticated consumers would be lured by brochures or other advertisements into purchasing property based on promises of future development that never materialized. *See supra* pp. 1-2. In many cases, the purchase prices were not significant enough to justify consumers seeking the assistance of counsel. *See supra* p. 2 & n.2. By requiring that a property report be furnished to the consumer, ILSA ensures that consumers are provided a complete, accurate, and legally binding description of the property so that they may make an intelligent choice about their decision whether or not to purchase the lot.

None of these purposes are undermined if, instead of reviewing the property report directly, the consumer elects to hire counsel to receive and review the relevant materials. Regardless of whether a purchaser's counsel handles a particular transaction, the developer still must file a statement of record and furnish a property report, and the information provided therein still must be complete and accurate. The district court concluded that "[r]equiring developers to ensure that purchasers — as opposed to their agents — receive property reports makes it more likely that 'potential buyers [will actually receive] the information they need to

make an informed decision about their purchase.'" JA440 (brackets in original) (quoting *Bacolitsas*, 702 F.3d at 680). But consumers retain the ability to confer with their attorneys about the content of a property report, and attorneys retain the ability to bring particular concerns about the report to their clients' attention. Where a consumer has decided to hire counsel to manage the purchase transaction, there is no reason to believe that requiring the consumer to receive the property report directly will advance ILSA's principal objectives.

CONCLUSION

For the foregoing reasons, this Court should hold that a developer can satisfy § 1703(a)(1)(B) of ILSA by sending a property report to a purchaser's attorney.

Respectfully submitted,

Dated: August 14, 2015

/s/ Jessica Rank Divine

Meredith Fuchs
General Counsel
To-Quyen Truong
Deputy General Counsel
John R. Coleman
Assistant General Counsel
Nandan M. Joshi
Jessica Rank Divine
Litigation Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7863 (telephone)
(202) 435-7024 (facsimile)
jessica.divine@cfpb.gov

Counsel for Amicus Curiae
Consumer Financial Protection Bureau

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,531 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Jessica Rank Divine
Jessica Rank Divine

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Jessica Rank Divine
Jessica Rank Divine