

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2013-CFPB-0002

In the Matter of:

3D RESORTS-BLUEGRASS, L.L.C.

**PREHEARING BRIEF OF 3D RESORTS-BLUEGRASS, L.L.C.,
BY AND THROUGH THOMAS M. DUDDY, CHAPTER 11 TRUSTEE**

Pursuant to the July 3, 2013 Order Following Scheduling Conference, Respondent, 3D Resorts-Bluegrass, L.L.C. (“3D Resorts-Bluegrass”), by and through Thomas M. Duddy, the Chapter 11 Trustee of its bankruptcy estate (the “Trustee”), submits this Prehearing Brief.

A. Appearance of the Trustee in this Case

On November 16, 2011, 3D Resorts-Bluegrass filed a Chapter 7 bankruptcy petition in the Western District of Texas, Case No. 11-54001. On December 8, 2011, the Texas bankruptcy court converted the case to a Chapter 11 case, ordered the appointment of a Chapter 11 bankruptcy trustee, and transferred venue of the case to the Western District of Kentucky. On January 11, 2012, Thomas M. Duddy was appointed Trustee for the bankruptcy estate of the debtor 3D Resorts-Bluegrass.

As Trustee, Mr. Duddy is the “representative of the estate of the debtor” in lieu of former management of the debtor, 3D Resorts-Bluegrass. 11 U.S.C. §323(a). The Trustee has certain statutory obligations under the bankruptcy code, including the duty to “examine proofs of claims

and object to the allowance of any claim that is improper.” 11 U.S.C. §704(a)(5). The Trustee represents all unsecured creditors and therefore performs the role of examining claims and objecting to those that are improper. Collier on Bankruptcy (16th Ed.), ¶704.08. The Trustee appears in this action to defend against the claims asserted by the Consumer Financial Protection Bureau (“CFPB”).

While the bankruptcy estate has very limited assets, all of which are subject to a first priority claim of PlainsCapital Bank, any civil money penalties awarded in this administrative proceeding will negatively impact the amount of the bankruptcy estate available to other unsecured, general creditors of 3D Resorts-Bluegrass, including many lot owners who have asserted claims against the estate. Therefore, the Trustee appears in this case to defend against the claims asserted by CFPB in order to maximize the estate for all creditors.

B. Factual Background

This administrative proceeding concerns a Notice of Charges filed against 3D Resorts-Bluegrass by the CFPB regarding the offering, marketing, and sale of undeveloped property consisting of approximately 2,000 acres located in Grayson and Breckinridge Counties, Kentucky, known as “Green Farm Resort.”

GF Resort, L.P. (“GF Resort”), a Texas limited partnership, was formed in 2001. After its formation, GF Resorts purchased this 2,000 acres of undeveloped land for the purpose of developing a resort that would include an 18 hole championship golf course, a bed & breakfast, cabins, and numerous residential lots, which it named “Green Farm Resort.” GF Resort’s purchase and development costs were financed by PlainsCapital Bank (“PCB”).

In December 2008, 3D Resorts-Bluegrass was formed. It is a Kentucky limited liability company whose sole member is 3D Resorts Communities, L.L.C. 3D Resorts Communities, L.L.C. is the sole member of 3D Resorts-Bluegrass, L.L.C. Ronald G. Newman, Jr. (“Newman”) owned a 55% interest in 3D Resorts Communities, L.L.C., and his partner, Jasen Miller, owned an approximate 45% interest (May 8, 2013 investigational hearing testimony of Newman (“Newman”) at 36-37). On December 22, 2008, 3D Resorts-Bluegrass purchased Green Farm Resort from GF Resort, assumed GF Resort’s obligations to PCB, and borrowed additional monies from PCB to continue development of the resort.

The December 22, 2008 acquisition by 3D Resorts-Bluegrass was also part of a settlement with the Kentucky Attorney General of litigation brought against GF Resort for alleged violations of the Kentucky Consumer Protection Act. This settlement was memorialized in a Settlement Agreement dated December 22, 2008 (the “2008 Settlement Agreement”), which settled claims of individual lot owners who purchased lots from GF Resort.

Based on the real estate records of the Grayson County Clerk’s Office¹, 3D Resorts-Bluegrass currently owns 340 lots, and 572 lots are owned by others. According to the property description in the December 22, 2008 deed, GF Resort sold 379 lots before it sold Green Farm Resort to 3D Resorts-Bluegrass. According to the Grayson County real estate records, 3D Resorts-Bluegrass sold 253² lots from early 2009 through the summer of 2011. Seven of these 253 transactions involved re-sale of a previously sold lot that was conveyed back to 3D Resorts-

¹ The trustee is not aware of the sale of any lots located in Breckinridge County.

² This number includes four lots sold by National Resorts Marketing Corporation (“NRMC”), who handled all marketing, sales, and development at Green Farm from October 2010 until activities ceased in the summer of 2011. However, as discussed later in this brief, 3D Resorts-Bluegrass denies that NRMC acted as its agent when doing so or that it is liable for any violations committed by NRMC. In addition, the Trustee does not deny that there may be other lot sales by 3D Resorts-Bluegrass, but the Trustee could not confirm any other sales.

Bluegrass. Therefore, only 246 current lot owners were sold lots by 3D Resorts-Bluegrass. Thus, this action only concerns the marketing and sales activity of 3D Resorts-Bluegrass from early 2009 through the summer of 2011 involving 246 lots.

At least since the appointment of the Trustee on January 11, 2012, all marketing and sales activity of Green Farm Resort has ceased. The Trustee does not currently intend to engage in the development, marketing, or sale of residential lots at Green Farm Resort. There is no imminent threat of continued violations of the Interstate Land Sales Full Disclosure Act and, thus, there is no need for an enforcement proceeding to protect the public interest. Indeed, the public interest would be better served if the resources of the parties were focused on a prompt resolution in the bankruptcy case.

Additionally, 3D Resorts-Bluegrass has no unencumbered assets with which to satisfy any civil money penalties or other monetary award that the CFPB might obtain. Moreover, it is virtually certain that 3D Resorts-Bluegrass will not continue doing business following conclusion of the bankruptcy case. Thus, orders for rescission, refund, restitution, payment of monetary damages, limits on activity, and civil money penalties will have little or no legal effect against a defunct entity with no unencumbered assets.

The best outcome attainable through the bankruptcy process is a negotiated sale of the assets of 3D Resorts-Bluegrass under an arrangement that would pay all the administrative expenses of 3D Resorts-Bluegrass and create a fund to pay a partial dividend on unsecured claims. That fund is not likely to be substantial enough to pay more than a modest dividend. After payment of allowed priority claims, if any, all unsecured creditors would share pro rata in such a fund.

CFPB's claims against 3D Resorts-Bluegrass for restitution, rescission, and money penalties are unsecured claims that would entitle the CFPB to share pro rata with other unsecured creditors. See In re: First Alliance Mortgage Co., 263 B.R. 99 (9th Cir. BAP 2001). The Trustee is not aware of any legal authority providing that CFPB's monetary claims would be entitled to priority treatment over other unsecured creditors. Many of the lot owners have filed claims in the bankruptcy. If CFPB obtains a monetary penalty in this action and seeks to recover it in the bankruptcy, CFPB will be harming the very people it intends to protect by dissipating the funds available for the claims of lot owners.

Based on the foregoing, the Trustee disputes the efficiency and judicial economy of this action and whether pursuit of the action is in the best interest of any interested parties.

C. 3D Resorts-Bluegrass is not responsible for the acts or omissions of National Resorts Marketing Corporation

Many of CFPB's claims concern matters that occurred after October 29, 2011, which is when 3D Resorts-Bluegrass ceded all control of marketing, sales and development of Green Farm Resort to National Resorts Marketing Corporation ("NRMC"). 3D Resorts-Bluegrass maintains that it is not liable for any violations that occurred after October 29, 2011.

The "Green Farm Resort Management Agreement" executed by 3D Resorts-Bluegrass and NRMC on October 29, 2011 (CFPB_C11Trustee_0082963-0382967) contains the following provision:

1.02 Authority and Duties. The Agent shall have complete authority in connection with all Operations at the Resort.... Owner hereby irrevocably makes, constitutes, and appoints Agent, through its officers, its true and lawful attorney-in-fact to execute and deliver such instruments, as are necessary to evidence or effect the consummation of the services described above.

It is the intent of the parties hereto that Agent have total control over all management, operation and sales functions at the Resort and the involvement of

Bluegrass shall be limited solely to an advisory role in connection with any such management, operation and sales functions. (emphasis added).

Thus, 3D Resorts-Bluegrass retained absolutely no control over NRMC.

The definition of agency under federal common law is adopted from the Restatement (Second) of Agency. Steinberg v. Mikkelsen, 901 F.Supp. 1433, 1437 (E.D.Wis. 1995). The factual elements of agency are:

1. A manifestation of consent by the principal that the agent will act for it;
2. A consent to act by the agent; and
3. Subjection to control of the principal. (emphasis added).

Id., citing Restatement (Second) of Agency §1(1) (agency existed because agent agreed to abide by several of the principal's rules). In the instant case, NRMC is not the agent of 3D Resorts-Bluegrass because NRMC took over "total control" of all operations of Green Farm Resort and was not subject to the control of 3D Resorts-Bluegrass, which, at best, was relegated to a "advisory" role. Therefore, any violations that took place after October 29, 2010, the date of the Management Agreement, are not the responsibility of 3D Resorts-Bluegrass.

D. The Charges Asserted by CFPB

In its Notice of Charges filed on or about June 14, 2013, the CFPB asserted against 3D Resorts-Bluegrass nineteen counts of violations of the Interstate Land Sales Full Disclosure Act ("ILSFDA"), 15 U.S.C. §1701-§1720, and its implementing regulations.

Most of the charges concern three Property Reports prepared by 3D Resorts-Bluegrass as required by ILSFDA. See, e.g., 15 U.S.C. §§ 1704, 1705 and 1707. The Property Reports are dated (1) February 26, 2009 (the initial report), (2) January 13, 2010 (a consolidated report filed pursuant to 12 C.F.R. §1010.22(b) when lots were added to the common promotional plan of 3D Resorts-Bluegrass), and (3) "March 22, 2010."

The "March 22, 2010" Property Report is dated January 13, 2010 on its cover page and was not filed with HUD because the only changes made were non-material changes requested by the Kentucky Attorney General in a March 2, 2010 letter (CFPB_C11Trust_0143328-29). Presumably, CFPB calls it the March 22, 2010 Property Report because that report was provided to the Kentucky Attorney General with a reply letter from 3D Resorts-Bluegrass dated March 22, 2010 (CFPB_C11Trust_0143472-504). 3D Resorts-Bluegrass does not dispute that it started using this Property Report some time between March 3 and March 22, 2010.

The charges also involve other alleged misrepresentations and the alleged failure to file certain documents with HUD. Each count in the charges is addressed below.

Count I - Untrue statements of material fact in February 26, 2009 Property Report.

15 U.S.C. §1703(a)(1)(C) provides:

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means of instruments of transportation or communication in interstate commerce, or the mail- -

(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title - -

(C) to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder....

CFPB claims a violation of this statute because the February 26, 2009 Property Report contained the following untrue statements of material fact:

1. That 3D Resorts-Bluegrass escrowed sufficient funds in Leitchfield Deposit Bank to assure completion of electrical service lines in Section 2 of Green Farm Resort, where in fact, such funds were not escrowed (Notice of Charges, ¶47).

2. That a septic tank installation fee would cost approximately \$260.00 to the consumer, where in fact, the cost of such installation was more than 10 times this amount (Id., ¶48).

In regard to the escrow of funds for completion of electrical service in Section 2, William Palmer, the in-house attorney for 3D Resorts-Bluegrass who prepared the February 26, 2009 Property Report, admits that he made a mistake when stating on page 13 of the report:

We have escrowed sufficient funds with Leitchfield Deposit Bank in Leitchfield, Kentucky to assure completion of the electric lines in Sections 1 and 2 of the subdivision....

Mr. Palmer noted in his March 22, 2010 letter to the Kentucky Attorney General that this was a scrivener's error and was not an intentional misstatement (CFPB_C11Trust_143472). The 2008 Settlement Agreement with the Kentucky Attorney General required escrow of funds sufficient to install all utilities to Section 2 except electrical service, and Mr. Palmer forgot about this exception.

The mistake concerning escrowed funds for electric lines in Section 2 is not a misstatement of a material fact. The 2008 Settlement Agreement provides in paragraph 4(b) regarding electrical service to Section 2:

[Electrical service] shall be completed...so as to make electrical service connection available and practicable to any and all lots in Phase³ II; service lines to individual lots may be completed on an "as-needed" basis at the request of the lot owner when house construction is scheduled to begin. Electrical service line shall be installed at 3D Resorts-Bluegrass' expense to the front of the property owner's lot line in Phase II within forty-five (45) days of the date the property owner requests such service....

³ The term "Phase" is used interchangeably with the term "Section" when referring to Sections 1, 2, 3 and 4 of Green Farm Resort.

(CFPB_C11Trust_0147959) (emphasis added). This language was included because it would take years for substantial home construction in Section 2. Therefore, there was a plan in place to extend electric lines from the nearest existing electrical line to the lots in Section 2 “as needed.” 3D Resorts-Bluegrass could have provided electric service to any lot owner in Sections 2, 3, or 4 (Newman at 52-53). No property owner in Section 2 has requested electrical service to date. Since electrical service to Section 2 was guaranteed via the this 2008 Settlement Agreement, the scrivener’s error is not material.

In addition, after receiving a March 3, 2010 letter from the Kentucky Attorney General identifying this issue, and out of an abundance of caution, 3D Resorts-Bluegrass amended page 14 to state that no funds were escrowed to pay for electrical service to any section other than Section 1 (CFPB_C11Trust_0083077).

Regarding the identification of septic tank fees, item 3 of the Cost Sheet appearing on page 23 of the February 26, 2009 Property Report accurately states the “Septic Tank installation fee of \$260.00” (CFPB_C11Trust_0083022). This fee consists of two fees noted on page 13, \$115.00 for a site analysis and \$145.00 for a license fee (CFPB_C11Trust_0083012). Thus, this was a true statement.

Page 13 of the Report also clearly states, “The approximate cost to you for an individual septic system is approximately \$3,000.00 though unusual rock or soil conditions may result in higher costs.” Even if this cost to install a septic system should have been disclosed as part of the “septic tank installation fee” on page 23, its inclusion on page 13 of the report cures any potential problem.

In any event, the January 13, 2010 Property Report amended the Cost Sheet on page 23 to include a septic tank installation cost of \$6,000.00 which, as noted on page 13 of that report, was updated from \$3,000.00 in the previous report (CFPB_C11Trust_0083036 and 0083046).

Count II - Untrue Statements of Material Fact in the January 13, 2010 Property Report.

CFPB claims the January 13, 2010 Property Report violated 15 U.S.C. §1703(a)(1)(C) because:

1. It contained the same statement concerning escrow of funds to complete electric lines in Section 2 (§55);
2. It stated that 3D Resorts-Bluegrass had secured a loan from PCB to construct any required electric lines in Section 3 (§56);
3. It stated that a central sewage treatment plant was scheduled for construction (§57);
4. It stated that the water lines in Section 2 of the resort property were complete when Grayson County Water District had refused to accept them as of September 14, 2010 (§58);
5. It estimated that construction of water lines for Section 4 would begin on or about April 1, 2010 and were expected to be completed by December 31, 2011, when this was not the intent at the time the statements were made (§59); and
6. It stated that eight rental cabins were completed and available for use, when they were not (§60).

3D Resorts-Bluegrass adopts the same response it provided to the allegation in Count I regarding provision of electrical service to Section 2.

3D Resorts-Bluegrass maintains that it did secure financing from PCB that included construction of electric lines in Section 3 (Newman at 103-04). Therefore, this statement was true when made.

3D Resorts-Bluegrass planned to construct the central sewage treatment plant for Section 4 (Id. at 109-11). PCB approved this system in October or November of 2009 (Id. at 114). Therefore, this statement was true when made.

In regard to the water lines in Section 2, they were completed, tested and put into service on or before March 1, 2010 (Id. at 71). 3D Resorts-Bluegrass acknowledges there were some minor reclamation issues to be completed before the Grayson County Water District accepted the lines into its system. However, the water lines were complete and the statement in the report was true. In any event, there was no untrue statement of a material fact.

Regarding the estimated beginning and ending dates of construction of the water lines in Section 4, these were true statements when made based on the budget proposed to PCB by 3D Resorts-Bluegrass and meetings concerning this work (Id. at 112).

Regarding the eight rental cabins, all eight cabins were substantially completed, but they were not available for use. The cabins were built but the interior of some of them was not finished (Id. at 151). 3D Resorts-Bluegrass submits that this was not an intentional or materially untrue statement, since their condition was readily apparent on touring the resort.

Count III - Improper use of unfiled Property Report created March 22, 2010.

Count III alleges a violation of 15 U.S.C. §1703(a)(1)(B) and §1707(b), which provide:

§1703(a)(1)(B). It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means of instruments of transportation or communication in interstate commerce, or the mail- -

(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title - -

(B) to sell or lease any lot unless a printed property report meeting the requirements of section 1707 of this title, has been furnished to the purchaser or lessee in advance of the signing of any contract or agreement by such purchaser or lessee;...

Section 1707(b). This property report shall not be used for any promotional purposes before the statement of record becomes effective and then only if it is used in its entirety....

The CFPB claims that the use of the March 22, 2010 Property Report violates these statutes because 3D Resorts-Bluegrass never filed it with the CFPB, thereby making it effective.

However, 12 C.F.R. 1010.23 only requires a developer to file amendments to a property report if the amendments involve a “representation of material fact.” The only changes made in the March 22, 2010 Property Report involved (1) removal of the statement on page 14 that funds were escrowed to complete electric lines in Section 2, (2) increase of the water connection fee on page 23 from \$450.00 to \$550.00, and (3) notation that the “Central Sewer Connection” fee only applied to Phase 4. 3D Resorts-Bluegrass contends that these changes made to the January 13, 2010 Property Report were not material, and therefore there was no need to file the March 22, 2010 Property Report with the CFPB.

Specifically, the change regarding escrow or lack thereof for electric lines in Section 2 was not material because (1) few lots were sold within Section 2 during this time, (2) no property owner requested electric service because a residence was built thereon, (3) only three houses have been constructed in Green Farm Resort, and (4) in any event, 3D Resorts-Bluegrass was required by the 2008 Settlement Agreement to pay for extension costs from the nearest electric line to any lot in Section 2 that requested electric service. Therefore, 3D Resorts-Bluegrass did not violate the above statutes.

Count IV - Untrue Statements of Material Fact in the March 22, 2010 Property Report.

The CFPB claims that the March 22, 2010 Property Report contained the following untrue statements of material fact in violation of 15 U.S.C. §1703(a)(1)(C):

1. A central sewage treatment plant was scheduled for construction when none was ever undertaken or reasonably expected to be undertaken (§71).
2. The water lines in Section 2 of the resort property were complete when Grayson County Water District had refused to accept them as of September 14, 2010 (§72);
3. That construction of water lines for Section 4 would begin on or about April 1, 2010 and were expected to be completed by December 31, 2011, when this was not the intent at the time the statements were made (§73);
4. That eight rental cabins were completed and available for use, when they were not (§74);
5. That a general store was completed and available for use when it had been destroyed in a fire on February 6, 2010 (§75).

3D Resorts-Bluegrass addressed the allegations in paragraphs 1-4 in response to Count II, supra, since these statements were also contained in the January 13, 2010 Property Report.

Regarding the general store destroyed by fire on February 6, 2010, the sole purpose of the changes contained in the March 22, 2010 Property Report was to address issues raised by the Kentucky Attorney General in a March 3, 2010 letter. The Kentucky Attorney General did not mention the general store in the March 3, 2010 letter, and 3D Resorts-Bluegrass did not catch its inclusion in the Property Report. Indeed, at the time, Newman thought he would receive insurance funds to rebuild the store (Id. at 167). However, the store was not listed as an insured building in the applicable insurance policy, and coverage was denied (Id. at 167-68).

3D Resorts-Bluegrass denies that any representation regarding the general store was material since all actual purchasers or prospective purchasers went on a tour of Green Farm Resort before being asked to execute any sales contract, and such a tour revealed destruction of the general store by fire. The absence of the general store was open and obvious to all.

Counts V-VIII Fraud Claims.

The claims of fraudulent misrepresentations asserted in Counts V - VIII, discussed below, involve proposed amenities or facilities to Green Farm Resort, such as an 80 acre lake (Count V), RV Park (Count VI), centralized sewage system (Count VII), and water lines (Count VIII). 3D Resorts-Bluegrass made it clear in numerous documents that there was no guarantee as to proposed amenities or facilities. At each closing, a Property Owner Questionnaire was completed by the purchasers, in which they acknowledged the following:

I understand that any amenities or recreational facilities not presently completed are proposed only and that the rules, regulations, and fees for proposed facilities (if and when completed) are not presently established.

(CFPB_C11Trust_0083093).

In addition, paragraph 8 of the form Real Estate Sales Contract, after listing certain completed and uncompleted facilities and amenities, included the following language:

Seller makes no representations that it is obligated to complete facilities and amenities other than those listed above.

(CFPB_C11Trust_0083089).

Paragraph 23 of the Real Estate Sales Contract provided:

23. **AUTHORITY OF SELLER'S REPRESENTATIVE.** The authority of Seller's representatives is limited to securing purchasers for the Property upon the terms and conditions that are set forth herein and not otherwise, and the sales representatives have no power or authority to make any change, alteration, modification, stipulation, inducement, promise or any representation whatsoever, other than those stated herein. This Agreement constitutes the full and final

agreement between the parties hereto and cannot be contradicted by any alleged prior agreement between the parties hereto, whether oral or written....

(CFPB_C11Trust_0083091). Thus, all purchasers were notified that no sales representative had authority to make any representations about amenities or facilities not contained in the Real Estate Sales Contract.

The February 26, 2009 Property Report contained the following disclaimers on page 5:

In the future, we may construct parks, rental cabins, RV parks, a recreational center with a swimming pool, Jacuzzi and exercise facilities, a bowling alley, and other amenities in the subdivision, in accordance with our general plan. These facilities, however, will only be constructed after a successful sale of sufficient lots to justify their construction and will be built in such sequence as we determine to be most advantageous to us and the lot owners.

“WE MAY CONSTRUCT ADDITIONAL RECREATIONAL AMENITIES IN THE SUBDIVISION, BUT WE ARE NOT CONTRACTUALLY OBLIGATED TO DO SO AND THERE IS NO GUARANTEE ANY OF THESE FACILITIES WILL BE COMPLETED. CONSEQUENTLY, YOU SHOULD CAREFULLY CONSIDER YOUR DECISION TO PURCHASE A LOT IF IT IS BASED UPON THE ASSUMED COMPLETION OF ANY OF THESE FACILITIES.”

(CFPB_C11Trust_0083004).

The January 13, 2010 and March 22, 2010 Property Reports included a similar provision on page 5:

In the future, we may construct additional rental cabins, expand the existing park and construct one or more additional parks, construct an RV Park, construct a lodge with rental suites, the restaurant, the Jacuzzi and exercise facilities, construct one or more additional swimming pools, and construct one or more tennis courts, basketball courts, and other amenities in the subdivision, in accordance with our general plan. These facilities, however, will only be constructed after a successful sale of sufficient lots to justify their construction and will be built in such sequence as we determine to be most advantageous to us and the lot owners.

“WE MAY CONSTRUCT ADDITIONAL RECREATIONAL AMENITIES IN THE SUBDIVISION, BUT WE ARE NOT CONTRACTUALLY OBLIGATED TO DO SO AND THERE IS NO GUARANTEE ANY OF THESE FACILITIES WILL BE COMPLETED. CONSEQUENTLY, YOU SHOULD CAREFULLY CONSIDER YOUR DECISION TO PURCHASE A LOT IF IT IS BASED UPON THE ASSUMED COMPLETION OF ANY OF THESE FACILITIES.”

(CFPB_C11Trust_0083004).

These clearly worded and displayed warnings disclaim any representation that is inconsistent with those contained in the documents, and 3D Resorts-Bluegrass relies on them in defense of Counts V - VII, further addressed below.

Count V - Fraud in Offering and Sale of Lots.

Count V alleges violation of 15 U.S.C. §1703(a)(2)(A)(B) & (C), which provide:

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails - -

(2) with respect to the sale or lease, or offer to sell or lease, any lot not exempt under section 1702(a) of this title - -

(A) to employ any device, scheme, or artifice to defraud;

(B) to obtain money or property by means of any untrue statement of 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.

This count concerns representations by 3D Resorts-Bluegrass that it intended to build an 80 acre lake on Green Farm Resort. However, this representation was not false because 3D Resorts-

Bluegrass did intend to build the lake when the representations were made. Indeed, a 25-30 acre lake already existed, and the plan was to expand this existing lake to 80 acres.

In paragraph 4(d) of the 2008 Settlement Agreement with the Kentucky Attorney General (CFPB_C11Trust_0147960), 3D Resorts-Bluegrass agreed it would bring in dirt to raise the elevation of certain lots located in the flood plain. 3D Resorts-Bluegrass decided to take dirt from a certain area to build up the lots, and construct a lake in the area where it took the dirt (Id. at 126). PCB approved funding for the building of this lake (Id. at 136). 3D Resorts-Bluegrass discussed the lake with land surveyor Richard Solis (Id. at 129-130). Again, this was a true statement. There certainly was no fraudulent intent to deceive third parties.

In addition, 3D Resorts-Bluegrass adequately explained and disclaimed any representations regarding this amenity in its Property Owner Questionnaire, Real Estate Sales Contract and Property Reports, discussed above.

Count VI - Fraud in Offering and Sale of Lots.

Count VI claims 3D Resorts-Bluegrass fraudulently represented that an RV Park would be constructed on Green Farm. This representation is not false because 3D Resorts-Bluegrass did intend to build the RV Park. The RV Park was in the original plans of 3D Resorts-Bluegrass (Id. at 143). 3D Resorts-Bluegrass started work on the RV Camp in spring 2009 after cleaning up damage from the January 2009 ice storm (Id. at 162-63). PCB had approved the funds for the RV Park because it was in the master plan submitted to PCB (Id. at 164).

In addition, 3D Resorts-Bluegrass adequately explained and disclaimed any representations regarding this amenity in its Property Owner Questionnaire, Real Estate Sales Contract and Property Reports, discussed above.

Count VII - Fraud in Offering and Sale of Lots.

Count VII claims that 3D Resorts-Bluegrass fraudulently represented that a centralized sewage system would be constructed in Section 4. This representation was true, and 3D Resorts-Bluegrass did intend to construct a centralized sewage system in Section 4 (Id. at 109-12, supra). Section 4 was added to the promotional plan of 3D Resorts-Bluegrass in the January 13, 2010 Property Report. Page 13 of both the January 13, 2010 and March 22, 2010 Property Reports provides:

All lots in section 4 of the subdivision shall be served by a central sewage system....We are in the process of obtaining all the permits for the construction, operation and use of the central sewage system to serve our lots in section 4 of the subdivision. Construction of the sewage treatment plant and sewage collection lines in Section 4 of the subdivision will begin on or about April 1, 2010, and should be completed and available for use by December 31, 2011. We have not obtained financial assurance of completion of the sewage plant and sewer lines in Section 4 of the Subdivision, but are in the process of negotiating this funding with Plains Capital Bank.

NO FUNDS HAVE BEEN SET ASIDE IN AN ESCROW OR TRUST ACCOUNT AND THERE ARE NO FORMAL FINANCIAL ARRANGEMENTS TO ASSURE THAT THE CENTRAL SEWAGE SYSTEM FOR SECTION 4 OF THE SUBDIVISION WILL BE COMPLETED AT THIS TIME.

(CFPB_C11Trust_0083036). Thus, all representation concerning the central sewage system were true when made and adequately explained and disclaimed. There certainly was no fraudulent intent to deceive third parties.

Count VIII - Fraud in Offering and Sale of Lots.

Count VIII claims that 3D Resorts-Bluegrass fraudulently represented that the water lines in Section 2 of the resort property were complete and the water lines in Section 4 of the resort property would be constructed beginning on or about April 1, 2010, and were expected to be completed on or before December 31, 2011.

These representations were not false. The water lines were completed in Section 2 by March 1, 2010, but the Grayson County Water District had not yet accepted them into its system because of reclamation work that needed to be completed (Newman at 71). Also, the intentions of 3D Resorts-Bluegrass regarding completion of the water lines in Section 4 were true at the time they were made (Id. at 112).

Page 12 of the January 13, 2010 and March 22, 2010 Property Reports provides as follows concerning water lines in Sections 2 and 4:

...The water lines in Sections 1 and 2 of the subdivision are complete.... We will begin construction of the water lines in Section 4 of the subdivision on or about April 1, 2010 and expect these water lines to be completed on or before December 31, 2011.

...We have not at this time set aside specific funds in an escrow account or obtained financial assurance of completion of water lines in Section 4 of the subdivision, but are in the process of negotiating this funding with Plains Capital Bank....

NO FUNDS HAVE BEEN SET ASIDE IN AN ESCROW OR TRUST ACCOUNT AND THERE ARE NO FORMAL FINANCIAL ARRANGEMENTS TO ASSURE THAT THE WATER LINES IN SECTION 4 OF THE SUBDIVISION WILL BE COMPLETED AT THIS TIME.
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Thus, 3D Resorts-Bluegrass did not make any fraudulent representations concerning the water lines in Section 2 or Section 4, and adequately explained and disclaimed same. There certainly was no fraudulent intent to deceive third parties.

Count IX - Fraud in Offering and Sale of Lots.

Count IX claims that 3D Resorts-Bluegrass fraudulently represented that eight rental cabins were completely constructed on the resort property. In April 2009, 3D Resorts-Bluegrass executed a contract with Kuhn Bros. to construct a lodge and twenty cabins, making a down payment of \$150,000.00. While the eight cabins were not available for use and may have taken

longer to construct than anticipated, the eight cabins were substantially completed in that they had been constructed, but interior work still needed to be done. There was no intentional misrepresentation about the status of the cabins, which was readily apparent on touring the resort.

Count X - Fraud in Offering and Sale of Lots.

Count X claims that on and after February 6, 2010, 3D Resorts-Bluegrass fraudulently represented that a general store was completed and available for use, when in fact it was destroyed in a fire on February 6, 2010 and has not been reconstructed.

While there is no dispute that a fire destroyed the general store on February 6, 2010, 3D Resorts-Bluegrass denies any intentional misrepresentation about this. 3D Resorts-Bluegrass contends that it was initially led to believe by its insurance company (Philadelphia Indemnity Insurance Company) that insurance proceeds were forthcoming, but Philadelphia Indemnity Insurance Company later denied coverage (Newman at 166-68). Additionally, the destroyed general store was overt and obvious to all actual and prospective purchasers who toured Green Farm, and there is no evidence that 3D Resorts-Bluegrass or its agents ever made any misrepresentations regarding the general store after the fire.

The inclusion of the general store as an amenity listed in the March 22, 2010 Property Report was mere oversight of 3D Resorts-Bluegrass and not an intentional misrepresentation. This is evidenced by the fact that the sole purpose of the March 22, 2010 Property Report was to address issues raised by the Kentucky Attorney General in the March 3, 2010 letter. The Kentucky Attorney General did not raise any issues regarding inclusion of the general store, which is why that was not changed in the report. There certainly was no fraudulent intent by 3D Resorts-Bluegrass to deceive any third parties.

Count XI - Fraud in the Offering and Sale of Lots.

Count XI claims that 3D Resorts-Bluegrass falsely provided prospective purchasers with inflated historical sales prices of lots that had been previously sold on the property, when those lots had been sold at prices materially less than what was represented to prospective purchasers. 3D Resorts-Bluegrass is not aware of any such misrepresentations and did not authorize any of its agents to make such misrepresentations.

Count XII - Fraud in the Offering and Sale of Lots.

Count XII claims that, after receiving a Suspension Notice from HUD pursuant to 15 U.S.C. §1706(b), which operated as a suspension of the Statement of Record filed with HUD/CFPB, 3D Resorts-Bluegrass continued to market and sell lots at Green Farm Resort in violation of 15 U.S.C. §1703(a)(1)(A), which prohibits attempting to sell or lease lots when a Statement of Record is not in effect.

First, 3D Resorts-Bluegrass lost control of the marketing and sales of lots to NRMC as of October 29, 2010, and was not involved in these alleged actions. Second, 3D Resorts-Bluegrass believes that the entity in control, NRMC, was only engaging in marketing and sale of lots in Kentucky, which would be an exemption to application of ILSFDA under 15 U.S.C. §1702(b)(7).

Count XIII - April 23, 2011 Sale of Lot in Violation of Suspension Notice.

Count XIII claims that 3D Resorts-Bluegrass sold lot 955 on or about April 23, 2011 in violation of the Suspension Notice and 15 U.S.C. §1703(a)(1)(A). 3D Resorts-Bluegrass denies it is liable for this alleged sale because it lost control of the marketing and sale of lots to NRMC on October 29, 2010. In addition, it believes that NRMC was selling lots under the intrastate exemption provided by 15 U.S.C. §1702(b)(7).

Count XIV - June 5, 2011 Sale of Lot in Violation of Suspension Notice.

This claim is identical to Count XIII, except it involves the June 5, 2011 sale of lot 970. 3D Resorts-Bluegrass' defenses to this are identical to its defenses to Count XIII.

Count XV - Additional Sale of Lot in Violation of Suspension Notice.

The defenses of 3D Resorts-Bluegrass to the alleged sale of another lot that occurred between April 19, 2011 and about August 1, 2011, are the same as the defenses to Counts XIII and XIV.

Count XVI - Failure to Timely File Annual Reports.

Count XVI claims that 3D Resorts-Bluegrass failed to comply with the requirements of 24 C.F.R. §1710.310 (now 12 C.F.R. §1010.310) to file annual reports of activity on any initial or consolidated Statement of Record that is not under suspension. CFPB claims that the annual reports of activity for 2009 and 2010 were not filed in March 2010 and March 2011, respectively. In response, 3D Resorts-Bluegrass states that 12 C.F.R. §1010.22(b)(1) provides that if a developer intends to sell or lease additional lots as part of the same promotional plan with lots already registered, a Consolidated Statement of Record may be submitted for the additional lots. Because 3D Resorts-Bluegrass planned to sell additional lots, it filed a Consolidated Statement of Record on or about December 29, 2009, that added lots. The Consolidated Statement of Record included much of the information that would be included in an annual report of activity due on or about March 2010.

Regarding an annual report for 2010 that would be due March 2011, since 3D Resorts-Bluegrass lost control of the operations at Green Farm Resort on October 29, 2010, 3D Resorts-Bluegrass could not file that annual report.

In addition, 3D Resorts-Bluegrass understands that on May 5, 2011, NRMC filed annual reports for 2009 and 2010.

Count XVII - Failure to File Financial Statements.

Count XVII claims that 3D Resorts-Bluegrass failed to submit its financial statements within 120 days after the close of fiscal year for fiscal years 2009, 2010, 2011 and 2012.

12 C.F.R. 1010.212(d)(1) specifically provides that if a developer has submitted its latest financial statements with a consolidated filing since the close of its fiscal year and prior to the end of the 120 day period, a second submission is not necessary. 3D Resorts-Bluegrass filed a financial statement on December 29, 2009 with its Consolidated Statement of Record that included all of the relevant information for fiscal year 2009 through September 2009. A financial statement was filed March 29, 2011, for fiscal year 2010. Therefore, the only financial statement that has not been filed is the one for fiscal year 2011, which was after 3D Resorts-Bluegrass filed bankruptcy and ceased the marketing and sale of lots. Therefore, no financial statement was due for 2011 or thereafter.

Count XVIII - Failure to Timely File Amendments.

Count XVIII claims that 3D Resorts-Bluegrass violated 24 C.F.R. §1710.23(now 12 C.F.R. §1010.23) when it failed to disclose the October 29, 2010 Management Agreement with NRMC within 15 days after that contract was executed. CFPB notes that the Management Agreement was disclosed in the March 29, 2011, Consolidated and Amended Statement of Record.

12 C.F.R. §1010.23 requires an amendment to the Statement of Record if “any change occurs in any representation of material fact required to be stated in an effective Statement of

Record.” The amendment must be filed within 15 days of the date on which the developer knows or should have known that there has been a change in material fact.

3D Resorts-Bluegrass denies that this Management Agreement was a “material” change requiring the filing of an amendment. 3D Resorts-Bluegrass also denies that it is liable for this alleged violation because NRMC assumed control of operations of Green Farm Resort no later than October 29, 2010, and it was responsible for any such required disclosure of the Management Agreement. NRMC was not the agent of 3D Resorts-Bluegrass, as previously noted.

Count XIX - Failure to Timely File Amendments.

Count XIX claims that 3D Resorts-Bluegrass violated 12 C.F.R. §1010.23 when it failed to timely file an amendment disclosing that the general store was destroyed by fire. 3D Resorts-Bluegrass has already discussed the relevant facts surrounding the fire that destroyed the general store on February 6, 2010. As previously noted, the burned and destroyed general store was open and obvious to any prospective purchaser of lots, and no third party has been the victim of any misrepresentation regarding the general store.

E. Relief Sought by CFPB

CFPB specifically requests the following relief:

1. Rescission of the contracts and restitution of all monies paid by property owners for the purchase of the lots;
2. Unspecified injunctive relief;
3. Civil money penalties; and
4. Costs.

If 3D Resorts-Bluegrass violated the ILSFDA, rescission and restitution of any transaction would involve 3D Resorts-Bluegrass returning the purchase price as paid by the lot owner in

exchange for the lot owner returning the lot to 3D Resorts-Bluegrass. See, e.g., Nahigian v. Juno-Loudon, LLC, 677 F3d 579, 591 (4th Cir. 2012) (case involving ILSFDA). However, in this case, 3D Resorts-Bluegrass lacks the ability to repay the purchase price to the lot owners. Thus, compliance with any order of rescission is impossible.

Also, CFPB may seek rescission of notes and mortgages from certain lot purchasers to 3D Resorts-Bluegrass used to finance the purchase price of the lot. However, 3D Resorts-Bluegrass assigned these notes and mortgages to PCB as collateral for its loans, and PCB foreclosed on, and now owns, these notes and mortgages. Thus, any rescission against 3D Resorts-Bluegrass is meaningless since it no longer owns the notes and mortgages.

There is no need for injunctive relief because 3D Resorts-Bluegrass has ceased operations and is effectively out of business. Injunctive relief is moot when there is no reasonable expectation that the wrong will be repeated. Lynn v. Bidermann, 536 F.2d 820, 825 (9th Cir. 1976).

Regarding civil money penalties, two statutes may apply. First, 15 U.S.C. §1717a(a)(1) authorizes a civil money penalty against any person who “knowingly and materially violates any of the provisions of this chapter or any...regulation.” 3D Resorts-Bluegrass did not commit any knowing and material violations of the ILSFDA. Therefore, this statute does not authorize any money penalties.

The amount of the penalty under 15 U.S.C. §1717a may not exceed \$1,000.00 for each violation. Each violation constitutes a separate violation with respect to each sale or offer to sell. As to continuing violations, each day constitutes a separate violation. The penalty against any person cannot exceed \$1 million during any one-year period.

15 U.S.C. §1717a(b)(3) requires consideration of the following factors when assessing a civil money penalty:

1. Gravity of the offense;
2. History of prior offenses;
3. Ability to pay the penalty;
4. Injury to the public;
5. Benefits received; and
6. Deterrence of future violations.

Because 3D Resorts-Bluegrass lacks any ability to pay any civil money and because deterrence would serve no purpose since 3D Resorts-Bluegrass is essentially out of business, there is no basis for significant money penalties in this case.

The second statute is 12 U.S.C. §5565(c)(2), which provides three tiers of civil money penalties:

Tier 1 applies to any violation, and the penalty shall not exceed \$5,000.00 for each day during the which the violation continues.

Tier 2 applies to any person who recklessly engages in any violation, and the penalty shall not exceed \$25,000.00 for each day in which the violation continues.

Tier 3 applies to any person who knowingly engages in a violation, and the penalty shall not exceed \$100,000.00 for each day in which the violation continues.

Based on the evidence, the only possible penalties that could be assessed would be Tier 1 penalties, since 3D Resorts-Bluegrass did not engage in any reckless or knowing violations.

12 U.S.C. §5565(c)(3), sets forth the following factors to take into account when determining the appropriateness of a penalty:

1. The size of financial resources and good faith of the person in charge;
2. The gravity of the violation or failure to pay;
3. The severity of the risk to or losses of the consumer, which may take into account the number of products sold or provided;
4. The history of previous violations; and
5. Such other matters as justice may require.

In this case, perhaps the most compelling factor is that 3D Resorts-Bluegrass is bankrupt, out of business, and has no assets that could be used to pay any civil money penalty. This weighs against any significant money penalty.

Respectfully submitted this 7th day of August, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of August, 2013, I caused a copy of the foregoing to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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