No. _____

In The
Supreme Court of the United States

RENAISSANCE RENTAL PARTNERS, LLC, d/b/a RENAISSANCE CONDOMINIUM PARTNERS II, and LOUIS R. CAPPELLI,

Petitioners,

v.

BRUCE BERLIN and NANCY BERLIN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Interstate Land Sales Full Disclosure Act ("ILSA") was adopted in 1968 "to prevent false and deceptive practices in the sale of unimproved tracts of land by requiring developers to disclose information needed by potential buyers." *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 778 (1976). ILSA applies to subdivision of "any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan." 15 U.S.C. § 1701(3).

ILSA does not define "lot." By regulation in 1973, HUD defined "lot" as an "interest in land . . . if the interest includes the right to the exclusive use of a specific portion of the land." 24 C.F.R. § 1710.1(b). The Second Circuit held that a condominium unit that does not include the "exclusive use" of any "specific portion" of "the land" is nonetheless a "lot" within the meaning of ILSA. It did so explicitly in deference to a 1996 HUD policy "guidance" on the meaning of HUD's 1973 regulation, as well as a brief and argument below explaining the guidance. (App. 21).

The question presented is:

Whether the Court of Appeals over-extended or misapprehended the doctrine of "*Auer* deference" (*Auer v. Robbins*, 519 U.S. 452 (1997)) in deferring to informal agency guidance about the ILSA regulation,

QUESTION PRESENTED – Continued

which confines the agency's authority to sales of exclusive interests in "land," where the agency position to which the court deferred eviscerates the plain text of the regulation while allowing the agency to regulate the sale of condominium units that have no such exclusive interest in "land."

PARTIES

Petitioners, Renaissance Rental Partners, LLC, d/b/a Renaissance Condominium Partners II, and Louis R. Cappelli (collectively, "Seller") were the appellants in the court below. Respondents Bruce and Nancy Berlin (the "Buyers") were the appellees in the court below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in Renaissance Rental Partners, LLC, d/b/a Renaissance Condominium Partners II.

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The opinion of the Court of Appeals is reported at 723 F.3d 119 (2d Cir. 2013) and is reproduced in the appendix at App. 1-33. The opinion of the Court of Appeals denying rehearing en banc is reported at 2014 WL 1316770 (2d Cir. 2014), and is reproduced in the appendix at App. 53-59. The opinion of the United States District Court for the Southern District of New York granting summary judgment to Respondents is reproduced in the appendix at App. 36-52.

JURISDICTION

The judgment of the Second Circuit was entered on May 6, 2013. Petitioners filed a motion for rehearing en banc on May 17, 2013, which was denied on April 3, 2014. (App. 54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Petition involves the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq*. ("ILSA"), and in particular a regulation of the United States Department of Housing and Urban Development ("HUD"), 24 C.F.R. § 1710.1(b) (App. 75-82), now at 12 C.F.R. § 1001.1, as well as a guidance of that Department, 61 Fed. Reg. 13,596 (1996) (App. 83-84).

STATEMENT OF THE CASE

A. The Facts

The pertinent facts are undisputed.

Mr. and Mrs. Berlin (the "Buyers") reside in Scarsdale, New York. On September 17, 2007, Seller executed an agreement with the Buyers to sell them a unit on the sixteenth floor in a 185-unit condominium tower, the Residence at the Ritz-Carlton, then being built in White Plains, New York. The purchase price was $1.34 million; the Buyers paid a 12.5% deposit.

Under the condominium offering plan, the Buyers were entitled to exclusive occupancy of the apartment that they contracted to purchase. The purchase agreement did not give them any exclusive right to use or occupy any portion of the land on which the apartment building was being built. Instead, the land is owned in common by all of the condominium unit owners in the building.

In 2009, after the financial crash and in a declining real estate market, the Buyers sought to rescind their purchase agreement and to have their deposit returned. They contended that, under ILSA, they were entitled to rescind their purchase because the Seller did not file a Statement of Record with HUD, as required by ILSA; the Buyers did not receive a copy of a Property Report before the purchase agreement was signed, also required by ILSA; and, the Buyers sought rescission within two years of the signing of their purchase agreement.

B. ILSA and the HUD Regulation

This case concerns the scope of a disclosure statute adopted "to prevent false and deceptive practices in the sale of *unimproved tracts of land*. . . ." *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 778 (1976) (emphasis added). If ILSA applies, a property report must be provided before a purchaser signs a contract to buy a "lot." 15 U.S.C. § 1703(a)(1)(B). If ILSA is violated, a buyer has a statutory right to rescind a purchase agreement within two years. 15 U.S.C. § 1703(c).

ILSA does not contain a definition of the pivotal statutory term "lot." HUD, the agency then charged with enforcing ILSA, defined "lot" in the 1973 regulation that is central to this case. A "lot" covered by ILSA is "any portion, piece, division, unit, or undivided interest in *land* located in any State or foreign country, if the interest includes the right to the exclusive use of a specific portion of the *land*." 24 C.F.R. § 1710.1(b) (App. 81) (emphasis added). In 2011, the Consumer Financial Protection Bureau ("CFPB") was charged with enforcing ILSA, and adopted without change HUD's regulation defining a "lot." 12 C.F.R. § 1001.1. That language has not changed in four decades.

In 1996, HUD issued a limited agency "guidance" which CFPB claims enlarged the reach of ILSA to include condominium apartments where a buyer does not acquire the exclusive right to use any portion of land. This position is at variance with the plain text of the statute it purports to enforce, as well as the

plain text of the agency regulation it purports to explicate. The Court of Appeals incorrectly deferred to the agency action.

C. The ILSA Property Report

An ILSA property report must contain the disclosures specified by regulation, set forth at 24 C.F.R. § 1710.100 *et seq*. Consistent with ILSA's focus on preventing fraud in the sale of lots in Western deserts and Southern swamps, those regulations require disclosures alerting purchasers to whether the land being sold is appropriate for future development. For example, the property report must bear the header "Risks of Buying Land" and warn purchasers that "any value which your lot may have will be affected if the roads, utilities and all proposed improvements are not completed." 24 C.F.R. § 1710.107.

The ILSA regulations refer to "house[s]," "lots," and "subdivisions," and they require detailed, extensive disclosures with respect to land. See, *e.g.*, 24 C.F.R. § 1710.109(g)(2). The "title to the property and land use" section of the property report includes disclosures regarding the reservation of "oil, gas, and mineral rights," 24 C.F.R. § 1710.109(b)(4); the general topography and the major physical characteristics of the land in the subdivision, such as the presence of any steep slopes, rock outcroppings, unstable or expansive soil conditions, 24 C.F.R. § 1710.115(a); whether there are any nuisances that may adversely affect the subdivision, such as animal

pens, stagnant ponds, marshes, or race tracks, 24 C.F.R. § 1710.115(3)(f); whether the "plats" (maps of land parcels that depict actual or proposed features) of the property have been approved by the necessary authorities, 24 C.F.R. § 1710.109(g)(1); whether sewage disposal and electric services are available at the "subdivision," 24 C.F.R. §§ 1710.111(b), (c); whether the property has been surveyed, 24 C.F.R. § 1710.109(g)(3); and how water is to be supplied (*e.g.*, central system or individual wells), 24 C.F.R. § 1710.111(a)(1). These are plainly not matters of concern to a prospective purchaser of a unit in a high-rise apartment building.

The federally required property report does not, on the other hand, address the basic aspects of condominium ownership, such as the difference between units; common elements, and limited common elements; the calculation and payment of common charges; the respective rights and obligations of the unit owners, condominium sponsor, and board of managers; or any risks that are reasonably likely to affect unit owners in the future. Those issues are, however, comprehensively covered in public offering plans mandated by state laws.

Circuit Judge Jacobs cited the obvious mismatch between ILSA's required disclosures, which are focused on issues relevant to a buyer of unimproved land, and the concerns of urban apartment buyers. He viewed this mismatch as one reason to conclude that ILSA does not apply to urban, high-rise apartments at all. Sales of apartments in such buildings

(whether organized as condominiums or co-operative housing corporations) do not involve the concerns that led Congress to adopt a statute aimed at fraudulent sales of land in Southern swamps and Western deserts.

In this case, the extensive offering plan required under state law supplied the information important to a purchaser of such an apartment, and an ILSA property report would have been a pointless formality. A prospective purchaser of a condominium apartment would not obtain any consumer protection by extension of ILSA to such transactions. Tellingly, no one – not the Buyers, not the Consumer Financial Protection Bureau, and not the Panel majority below – has suggested that an ILSA property report serves any useful disclosure function in transactions of this kind.

STATEMENT OF PRIOR PROCEEDINGS

The Buyers brought suit for rescission under ILSA, 15 U.S.C. § 1709. On April 27, 2012, the District Court granted summary judgment to the Buyers, finding that ILSA applied to their agreement to purchase a condominium apartment and that the Seller had failed to comply with ILSA's requirements. (App. 36-52).

In May 2013, the Second Circuit affirmed the District Court's judgment by divided vote, with the Panel majority holding that a condominium unit that

did not include the exclusive use of a specific portion of "the land" was a "lot" within the meaning of ILSA. It did so explicitly in deference to HUD's 1996 policy "guidance" on the meaning of HUD's 1973 regulation, as well as CFPB's brief explaining that guidance in the Court of Appeals. (App. 21).

The dissent by then-Chief Judge Jacobs faulted the agencies' and the Panel majority's reasoning:

> It goes without saying that condominium ownership is one way to hold a lot of land. So the Land Sales Act may of course apply to the sale of a condominium unit on a lot of land. But it does not follow that it applies to all property held in condominium form.

(App. 32-33).

The dissent found untenable the agency's "guidance" and its letter brief below declaring all condominium units to be "lots" of "land," and concluded that a reviewing court "owe[s] no deference to HUD's interpretive guidance if it contradicts the statute and HUD's own regulations." (App. 30). The agency, the dissent stated, "jumbles together its various semi-literate guidelines and interpretations to expand its regulatory reach." (App. 33).

The Court of Appeals denied Petitioners' motion for rehearing en banc, with Circuit Judge Jacobs, joined by Circuit Judge Wesley, dissenting.

REASONS FOR GRANTING THE WRIT

I. Overview of reasons for granting the Writ

This case presents an important issue of the extent to which federal courts owe deference to substantive agency action taken under the rubric of interpreting a regulation by an agency's "guidance" or litigation stance. The Second Circuit majority held that deference is owing here due to such informal agency analysis. This Court, however, has in recent years expressed interest in revisiting the foundation on which such deference is based. This case squarely presents that opportunity.

"Land," the term used in HUD's regulation, is not an ambiguous one requiring agency clarification by agency "guidance." CFPB's supposed clarification is that all condominium "unit" owners necessarily have the right to exclusive use of a "lot" of "the land." This clarification of a purported ambiguity is inconsistent not only with condominium transactional documents, a fact that was demonstrated and not disputed below. It is also inconsistent with the text of the HUD regulation. It is at odds too with other Circuits' rejection of the HUD guidance generally.

The holding below is an unwarranted extension of *Auer* doctrine. *Auer v. Robbins*, 519 U.S. 452 (1997). HUD and the CFPB did not employ any agency expertise in enlarging the definition of "land." See *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006). Federal courts owe no deference to an agency interpretation of a statute expanding the agency's authority beyond

the limits of the organic statute and valid regulations it is purporting to enforce. Several Justices of this Court have noted that the rules requiring judicial deference to agency action under *Auer* should be reconsidered and clarified by this Court.

This case also merits review because of the practical impact that the lower court's ruling will have. CFPB's proposed over-broad application of ILSA has adversely affected and will continue to impact the market for the construction and development of condominium projects in urban centers throughout the country. ILSA, as expanded especially by the ruling below, "has become an increasingly popular means of channeling buyer's remorse into a legal defense. . . ." *Stein v. Paradigm Mirasol, LLC*, 586 F.3d 849, 851 (11th Cir. 2009). A broad application of ILSA has the potential to turn purchase agreements for new high-rise condominiums in urban centers into one-sided options, rescindable at the buyer's choice for the slenderest of reasons, with adverse consequences for the market.

II. The statute and regulation cover the sale of a condominium only where the buyer acquires an exclusive right to use a specific portion of "the land."

In enacting ILSA, Congress sought to "protect purchasers from unscrupulous sales of undeveloped homes sites, frequently involving out-of-state sales of land purportedly suitable for development but actually

under water or useful only for grazing." *Winter v. Hollingsworth,* 777 F.2d 1444, 1447 (11th Cir. 1985). ILSA is accordingly directed at the sale of "*lots*" in real estate "*subdivisions,*" terms Congress repeatedly used in ILSA. 15 U.S.C. § 1701(3), (5), (6), (7), (10), (11); § 1702(1)-(8) (emphasis added).

Congress did not define the critical statutory term "lot" in ILSA. Exercising its rule-making authority under ILSA, 15 U.S.C. § 1711, HUD in 1973 defined "lot," as used in The Interstate **Land** Sales Full Disclosure Act, by reference to interests in "land":

> Lot means any portion, piece, division, unit, or undivided interest in *land* located in any State or foreign country, if the interest includes the right to the exclusive use of a specific portion of the *land*.

24 C.F.R. § 1710.1 (emphasis added).

It follows that HUD's definition of "lot" does not encompass a condominium where purchasers have exclusive use of their "unit" but not "exclusive use of a specific portion" of the "land." The Panel majority, however, held otherwise based on *Auer* deference to agency views, discussed below, that were first expressed decades after the regulation's adoption. 723 F.3d at 127.

From 1973 to 1996, ILSA was deemed to cover condominium "lot[s]" but not all of them, and certainly not those sold in luxury high-rise urban towers. In 1996, HUD expanded what it considered a "lot" by means of agency "guidance." The guidance

was expressly stated to be only for limited purposes relating to the scope of statutory exemptions under ILSA. 61 Fed. Reg. 13,596, 13,601-13,602 (1996) (App. 83). "This is an interpretive rule, not a substantive regulation . . . ," HUD cautioned. 61 Fed. Reg. 13,601 (App. 84). For that limited purpose relating to exemptions, which are not at issue here, HUD, adding the words "or unit" after the defined term "lot," redefined a "lot" as an interest that "includes the right to the exclusive use of a specific portion of the land *or unit*." *Id*., 61 Fed. Reg. 13,602 (emphasis supplied).

The Court of Appeals accepted CFPB's view that "lot" and "land" together mean any interest having the "indicia" of "realty" or "real estate," including a condominium "unit," whether or not any exclusive use of land is granted to the buyer. (App. 14-15). As stated by the Panel majority, CFPB's definition of "land" includes "'anything that might be classed as real estate or real property.'" (App. 9 nn. 5, 12). This CFPB statement enlarged HUD's guidance, which had itself enlarged HUD's regulatory term "land" and therefore also enlarged the statutory term "lot."

The Panel majority in so doing accepted this HUD guidance limited to exemptions and the CFPB statement of its position in this litigation as accomplishing what HUD itself foreswore in issuing the guidance: generally broadening the definition of "lot," as used in ILSA, to apply to all transactions involving

"condominium units in multi-story buildings." (App. 21). This was deference unbounded.[1]

"Guidances" and letter briefs establishing the scope of coverage of a familiar statute do not supplant regulations properly adopted under the Administrative Procedure Act. Such informal agency action is entitled to limited deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). In 2007, the President reined in the practice of using such substantive "guidances" as back-door regulations. See 72 Fed. Reg. 3432 (2007), Final Bulletin for Agency Good Guidance Practices.

III. Because "land" is not an ambiguous term that requires agency interpretation, judicial deference to that interpretation is unwarranted under *Auer*.

Auer deference is warranted only where the regulatory term construed by the agency is ambiguous. *Christensen v. Harris County*, 529 U.S. at 588; *Mullins v. City of New York*, 653 F.3d 104, 113 (2d Cir. 2011). The majority below accepted the CFPB

[1] The Panel also deferred to HUD's interpretation of the preamble to its 1973 regulation, which is ambiguous but is not the substantive text. (App. 8).

view that "land," as used twice by HUD in its 1973 regulation defining what is a covered "lot," 24 C.F.R. § 1710.1, is a "term of art referring to 'real estate'. . . ." (App. 12; see also App. 67 n. 5).

The Court of Appeals did not, however, determine initially that "land," as used in the HUD regulation, is ambiguous. Without such a foundation, *Auer* deference is also without a doctrinal basis. The CFPB did not even argue in its letter brief that "land" is ambiguous, although, as the dissent notes, the CFPB made that contention on oral argument. (App. 25). *Cf. Auer*, 519 U.S. at 461-462. It is this oral argument below by the CFPB to which the Court of Appeals apparently accorded deference.

The lower court should instead have given "land," as used in the statute and the 1973 regulation, its plain, ordinary meaning, as the dissent observed: "We look to plain meaning, and few words have a meaning as plain as 'land.'" *Id*. "Land" is, in common and legal understanding, a three-dimensional space identified with respect to the earth's surface that is immovable, immutable and indestructible. (App. 26 & n. 2). Neither the agency nor the Panel majority referenced a single statute or federal case declaring that "land" is an ambiguous term that can mean any "real estate interest" (CFPB letter brief, App. 67 n. 5). On the contrary, it is a term with which the law, judges, lawyers and the public have long been familiar. *U.S. v. King,* 48 U.S. 833 (1849) (plain meaning of "lands included in this grant"); *Kinney v. Clark*, 43 U.S. 76 (1844).

The Court of Appeals proceeded, in circular fashion, to state that "land," as used in the HUD regulation, must be given a broad reading that carries out the federal interest in curbing abuses in the sale of real estate. (App. 14-15). That is another way of saying that the court declined to give "land" its plain, ordinary meaning. Instead, the Panel majority invented a new, expansive "federal common law"[2] meaning of "land." "Land" can be any "real estate" interest, a term that was not defined and is itself ambiguous. This judicial expansion was avowedly intended to accommodate the agency's assertion of new powers. (App. 16 & n. 9). The Court of Appeals thus accepted the agency's position that a covered "condominium" may be one that entails exclusive use of a dwelling unit but not of "the land." (App. 16). That definition, however, is flatly at odds with HUD's own definition of a covered "lot." (App. 81).

[2] A threshold difficulty with attempting to construe what "land" means, if it is deemed an ambiguous term, is whether state law or the "federal common law" of property, should govern the meaning of "land." The Court of Appeals accepted CFPB's litigation stance that federal law controls what "land" means under ILSA. (App. 16 & n. 9). However, neither the court below nor CFPB supplied any authority on what the supposed federal common law definition of "land" is.

IV. Because CFPB's interpretation is inconsistent with the Regulation and with ILSA, judicial deference to that interpretation is unwarranted under *Auer*.

Federal courts do not defer to a federal agency's interpretation of its regulation if that interpretation is plainly erroneous or inconsistent with the regulation itself. *Auer v. Robbins*, 519 U.S. at 461; *Decker v. Northwest Environmental Defense Center*, 133 S. Ct. 1326, 1337 (2013);[3] *Christopher v. SmithKline Beecham Corp*., 132 S. Ct. 2156, 2166 (2012); *Talk America, Inc. v. Michigan Bell Telephone Co*., 131 S. Ct. 2254, 2261 (2011). In this case, what was termed *Auer* deference is both inconsistent with the regulation and plainly erroneous.

To the extent the 2013 CFPB interpretation of the 1996 HUD guidance, as expressed in the agency's letter brief, is consistent with the 1973 regulation, *Auer* deference is appropriate. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Auer*, 519 U.S. at 461. On the other hand, "if the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an amicus brief will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank USA,* 131 S. Ct. at 882. CFPB's interpretation of HUD's regulation, adopted by the

[3] Chief Justice Roberts and Justice Alito in concurrence and Justice Scalia in dissent stated in *Decker* that the time had come to reevaluate *Auer* deference, with the latter declaring there is "no good reason" for it. 133 S. Ct. at 1338.

majority below, is at variance with the plain text of the regulation itself.

Indeed, as the dissent below noted, the agency's "guidance" created a referential process in which the word "land" is broadened to mean almost anything. (App. 27). The agency's "guidance" thus created "an essentially limitless grant of authority" to itself. *Sackett v. E.P.A.,* 132 S. Ct. 1367, 1375 (2012) (concurring opinion of Justice Alito).

This less than plain construction creates a problem of clarity that did not exist in the first place. It does so as it untethers the 1973 regulation and the Interstate Land Sales Full Disclosure Act from any connection to land, even though both refer to "land." Then-Chief Judge Jacobs termed this linguistic feat "gravity-defying, literally." (App. 30). Invoking *Auer*, the dissent observes that "we owe no deference to HUD's interpretive guidance if it *contradicts* the statute and HUD's own regulation." (App. 31) (emphasis in original).

CFPB's legal position itself demonstrates the inconsistency between HUD's guidance and its own regulation. CFPB contended below that by adding in its 1996 guidance the phrase "or unit" after the word "land," HUD enlarged its authority to include the offering of condominium units in high-rise urban towers. However, HUD in 1996 stated that the guidance was "an interpretive rule, not a substantive regulation . . . ," applicable only to exemptions. 61 Fed. Reg. 13,602. HUD presumably used this cautionary

language because the added words might otherwise appear to enlarge the coverage of the 1973 regulation. Such a change would have required formal agency rule-making, which HUD, for whatever reason, eschewed for decades. In thus torturing the common meaning of "land" in the 1973 regulation, the Panel holding rests on a faulty process of reasoning, noted by the dissent.

> The argument that HUD spins from its "guidance" – and that the majority opinion adopts – rests uneasily on a classic false syllogism: *Land is real estate; all condominiums are real estate; therefore, all condominiums are land*.

(App. 33) (emphasis in original). That is the illogical path of reasoning, via a "fallacy of the undistributed middle," that the Panel majority nonetheless followed.

V. CFPB's position does not merit *Auer* deference because it is at odds with HUD's inaction.

Another important *Auer* factor the Court of Appeals failed to consider is HUD's "very lengthy period of conspicuous inaction." *SmithKline Beecham Corp*., 132 S. Ct. at 2168 (*Auer* deference not warranted where Department of Labor policy changed long-time agency practice); *Barnhart v. Walton*, 535 U.S. 212, 219 (2002) (Social Security Administration regulation construing statutory term "inability" to

mean one of at least a year's duration had long been in agency's manuals and applied by staff).

For decades, HUD did not apply what CFPB claims was always HUD's view of ILSA's applicability.[4] See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 520 (1994) (dissenting opinion of Justice Thomas, joined by Justice Ginsburg) (for two decades, agency's "acquiescence (if not approval), gave [the regulation] precisely the same substantive effect as I would – none"). HUD took no action, regulatory or legal, while tens of thousands of condominium units in urban high-rise apartment buildings were sold. The "'more plausible hypothesis'" for HUD's inaction is that HUD did not think the industry practice of selling such condominium units without filings under ILSA was unlawful. This is another reason not to accord *Auer* deference. *Decker*, 133 S. Ct. at 1337.

Furthermore, CFPB, as HUD's successor, has virtually no institutional experience in housing regulation or ILSA enforcement. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), cited in *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) ("courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position . . . ") (footnotes

[4] HUD had, and CFPB has, authority to investigate ILSA violations and seek injunctions against violators, 15 U.S.C. § 1714, to impose civil penalties, 15 U.S.C. § 1717a, and to bring criminal charges, 15 U.S.C. § 1717. CFPB does not claim this authority was ever exercised.

omitted). Not only is CFPB's view at variance with accepted industry practice, but it offers no tangible benefit to consumers. *SmithKline Beecham Corp*., 132 S. Ct. at 2167; *Decker*, 133 S. Ct. at 1337-1338. It comes as an "unfair surprise" that "lacks the hallmarks of thorough consideration." *SmithKline Beecham Corp*., 132 S. Ct. at 2169. ILSA "targeted deceptive and fraudulent sales of undeveloped lots of land," particularly swampland, to "unsuspecting people." (App. 27-28). Then-Chief Judge Jacobs observed that the regulatory text "is drawn to reach the evils that Congress wished to curb, and those evils do not include subjecting the Berlins to life at the Ritz-Carlton in Westchester." (App. 27).

VI. Other Circuits reject the agency guidance to which the Second Circuit gave deference.

The deference accorded by the Second Circuit to the guidelines at issue here sharply contrasts with the holding of several other Courts of Appeals. Those courts have found the HUD 1996 guidance, of which the expanded notion of "land" is but a part, to be unpersuasive on the subject it does principally address: the statutory exemptions from ILSA's registration requirements. The Fourth Circuit held that those guidelines are not persuasive and therefore not entitled to deference. The Court noted that "HUD did not intend its guidelines to have binding effect; in fact, the beginning of the guidelines reads, 'This is an interpretive rule, not a substantive regulation.'"

Nahigian v. Juno-Loudoun, LLC, 677 F.3d 579, 587 (4th Cir. 2012). The Fourth Circuit found the guidelines interpreting exemptions under ILSA to be inconsistent with the plain language of ILSA itself. Even if ILSA's language were viewed as ambiguous, the court held, HUD's interpretation is not convincing in light of the purpose of ILSA "and the practical effects of the agency's interpretation. . . ." *Id*. at 587 n. 6.

The Fifth Circuit reached the same conclusion that the guidelines as to exemptions are not persuasive. *Nickell v. Beau View of Biloxi, L.L.C.,* 636 F.3d 752 (5th Cir. 2011). Both *Nahigian* and *Nickell* expressly relied on a Second Circuit decision that had also reached the same conclusion, without discussing the guidelines. *Bodansky v. Fifth on Park Condo, LLC*, 635 F.3d 75, 83 (2d Cir. 2011). In *Dolphin LLC v. WCI Communities, Inc*., 715 F.3d 1243, 1248 (11th Cir. 2013), the Fifth Circuit held that the same guidelines' explication of what is a "common promotional act," as that term is used in ILSA, was likewise unpersuasive and, under *Christensen* and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 865-866 (1984), therefore not entitled to deference.

It was wholly inappropriate for CFPB and in turn the Second Circuit to rely on a peripheral part of the 1996 guidance, namely, HUD's adding the phrase "or unit" after "land" as a gloss on what a "lot" is under ILSA, when HUD stated that this language applies only for interpretive purposes to statutory

exemptions under ILSA. It seems particularly incongruous that the Second Circuit accorded *Auer* deference to this interpretation of what the plain word "land" means when other Circuits have disregarded the guidelines entirely as unpersuasive with regard to the very issue to which they explicitly do speak, exemptions.

VII. Several Justices have noted that *Auer* deference needs to be reconsidered or clarified.

In *Decker*, Chief Justice Roberts and Justice Alito stated "there is some interest in reconsidering" the basis and scope of *Auer* deference. 133 S. Ct. at 1339. Justice Scalia went further: "It is time for us to presume (to coin a phrase) that an agency says in a rule what it means, and means in a rule what it says there." *Id*. at 1344; *Talk America, Inc.*, 131 S. Ct. at 2266 (concurring opinion of Justice Scalia).

This case presents such an opportunity for this Court to reconsider the expansion of both agency authority and *Auer* deference to it and, perhaps, to reexamine the foundations of *Auer* itself. The Panel majority deferred to agency action in the least compelling of circumstances. Here, the regulatory term ("land") is a common word in general usage, readily understood and not at all ambiguous. The agencies' guidance and brief turned this clear word "land" into an unclear concept: "anything that might be classed as real estate or real property." (App. 9 n. 5). What

resulted from doing so reflects a change in agency policy and enforcement practice without public rule-making and after decades of inaction. The holding disrupts accepted industry practice even as it requires "disclosures" of no value to consumers. Correcting this undue deference warrants the Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.[5]

Dated: June 5, 2014

Respectfully submitted,

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[5] The Court of Appeals authorized and the District Court awarded substantial attorneys' fees to Buyers under 15 U.S.C. § 1709(c) in both the District Court and Court of Appeals because it regarded the legal issue here as well-settled. (App. 19-21). Petitioners seek review of that issue in the event the Court grants this Petition on the principal legal issue here presented.

723 F.3d 119

Bruce BERLIN, Nancy Berlin, Plaintiffs-Appellees,

v.

RENAISSANCE RENTAL PARTNERS, LLC, d/b/a Renaissance Condominium Partners II, Louis R. Cappelli, Defendants-Appellants,

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, Defendant.*

Docket No. 12-2213-cv.

United States Court of Appeals,
Second Circuit.

Argued: March 19, 2013.

Decided: May 6, 2013.

Robert Hermann, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, NY, for Defendants-Appellants.

Lawrence C. Weiner, Wilentz, Goldman & Spitzer, P.A., Woodbridge, NJ, for Plaintiffs-Appellees.

Nandan M. Joshi (Meredith Fuchs, General Counsel, To-Quyen Truong, Deputy General Counsel, David Gossett, Assistant General Counsel for Litigation, on the brief), Consumer Financial Protection Bureau, Washington, DC, for the Consumer Financial Protection Bureau, Amicus Curiae in Support of Appellees.

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* The Clerk of the Court is directed to amend the official caption in this case to conform to the listing of the parties above.

Before: JACOBS, CABRANES, and STRAUB, Circuit Judges.

JOSÉ A. CABRANES, Circuit Judge:

The Interstate Land Sales Full Disclosure Act ("ISLA") [sic], 15 U.S.C. § 1701 *et seq.,* "protects individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments, including condominiums, by mandating that developers make certain disclosures." *Bacolitsas v. 86th & 3rd Owner, LLC,* 702 F.3d 673, 676 (2d Cir.2012). The question presented in this appeal is whether a single-floor condominium unit in a multi-story building is a "lot," thus triggering ILSA's protections. *See* 15 U.S.C. § 1703(a)(1) (statutory requirements apply to the "sale or lease of any lot" that is not otherwise exempt).

The Consumer Financial Protection Bureau ("CFPB") and the Department of Housing and Urban Development ("HUD") – the agencies presently and formerly charged, respectively, with administering ILSA[1] – have defined the term "lot" to mean "any portion, piece, division, unit, or undivided interest in land located in any state or foreign country, if the

[1] "Following passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, . . . the rulemaking and other authority historically vested in [the Department of Housing and Urban Development ("HUD")] under the Interstate Land Sales Full Disclosure Act was transferred to the newly created Consumer Financial Protection Bureau." *Bacolitsas*, 702 F.3d at 675-76 n. 1.

interest includes the right to the exclusive use of a specific portion of the land." 12 C.F.R. § 1010.1(b).[2] As relevant here, the CFPB and HUD have consistently maintained that this definition applies to condominium units, including single-floor units in multi-story buildings. In particular, the CFPB and HUD have interpreted the phrase "exclusive use of . . . land" to mean exclusive use of realty, *see, e.g.,* CFPB Letter Br. at 6, thus concluding that the statutory term "lot" applies to condominiums,[3] because they "carry the

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[2] 12 C.F.R. § 1010.1 was promulgated by the Consumer Financial Protection Bureau in 2011. The provision duplicates the same definition appearing at 24 C.F.R. § 1710.1, promulgated in 1973 by HUD.

[3] We use the term "condominium" to refer to "[a] single real-estate unit in a multi-unit development in which a person has both separate ownership of a unit and a common interest, along with the development's other owners, in the common areas." BLACK'S LAW DICTIONARY 336 (9th ed. 2009); *see also, e.g.,* Michael H. Schill, et al., *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 277 (2007) ("The condominium owner owns his or her unit in fee simple absolute and shares an undivided interest in the common elements (for example, sidewalks, hallways, pools, clubhouse, storage place) as a tenant in common with the other condominium owners."). New York law recognizes this form of ownership in the Condominium Act, *see* N.Y. REAL PROP. § 339-d *et seq*., which provides, in part, that "[e]ach unit, together with its common interest, shall for all purposes constitute real property," *id.* § 339-g, and that "[e]ach unit owner shall be entitled to the exclusive ownership and possession of his unit," *id.* § 339-h. New York law also provides for common ownership, among unit owners, of "[t]he common interest appurtenant to each unit," *id.* § 339-i(2); *see* Gerald Lebovits & James P. Tracy, *Cooperatives and Condominiums in the New York City*

(Continued on following page)

indicia of and in fact are real estate," Land Registration, Formal Procedures, and Advertising Sales Practices, and Posting of Notice of Suspension, 38 Fed. Reg. 23,866, 23,866 (Sept. 4, 1973).

We hold that the CFPB and HUD have reasonably interpreted their own definition of the term "lot." Accordingly, the United States District Court for the Southern District of New York (Frederick P. Stamp, Jr., Judge of the United States District Court for the Northern District of West Virginia, sitting by designation) properly granted summary judgment to the plaintiffs. We also hold that the District Court did not err or "abuse its discretion" by awarding attorneys' fees.

Housing Court, 36 N.Y. REAL PROP. L.J. 45, 47 (2008) (summarizing condominium law in New York); *see also* note 6, *post* (discussing the history of condominium law). "Typically, the rules of a condominium association do not restrict to whom an owner may sell his or her apartment, although the association may maintain a seldom used preemptive right of first refusal to purchase the apartment." Schill, *ante,* at 281. By contrast, in the "housing cooperative" form of property ownership, which long antedated condominium law in the United States, *see* note 6, *post,* "the owner of the building . . . is the cooperative corporation," which is owned by shareholder-tenants who obtain leases to their respective apartments, Schill, *ante,* at 277, and who typically must first obtain the approval of the board of directors of the cooperative before being allowed to purchase cooperative shares and to become tenants, *id.* at 282; *see also* Lebovits & Tracy, *ante,* at 45 (summarizing the applicable law regarding cooperatives in New York).

BACKGROUND

The facts in this case are straightforward and undisputed. In 2007, plaintiffs-appellants Bruce and Nancy Berlin (jointly, "Berlin") contracted to purchase a condominium unit on the sixteenth floor of The Residence at The Ritz-Carlton, Westchester – a building then under construction in White Plains, New York – from the developer, defendant-appellee Renaissance Rental Partners, LLC, and its principal, defendant-appellee Louis R. Cappelli (jointly, "Renaissance"). Two years later, and before title was transferred, Berlin renounced the agreement and demanded a full refund of the $167,625 deposit. Berlin argued that the contract was voidable because Renaissance had not furnished a "printed property report," as required by 15 U.S.C. § 1703(a)(1)(B).[4] When

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[4] As relevant to this case, ILSA provides in 15 U.S.C. § 1703:

> **(a) Prohibited activities**
>
> 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 –
>
> **(1)** with respect to the sale or lease of any lot not exempt under section 1702 of this title –
>
> **(A)** to sell or lease any lot unless a statement of record with respect to such lot is in effect in accordance with section 1706 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

(Continued on following page)

Renaissance refused the rescission and denied the refund request, Berlin brought this suit pursuant to 15 U.S.C. § 1709, which provides a right of action "at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title." *Id.* § 1709(a).

Applying principles of agency deference, the District Court granted summary judgment to Berlin in a memorandum decision and order dated April 27, 2012. *See Berlin v. Renaissance Rental Partners, LLC,* 09 Civ. 8477(FPS), slip op. at 8-12 (S.D.N.Y. Apr. 27, 2012) ("Dist. Ct. Op."). The Court explained that the agency definition of the term "lot" does not reveal "any intention to limit the application of ILSA to 'horizontal' condominiums, and to exclude high-rise or 'vertical' condominiums." *Id.* at 8. Because "'condominiums carry the indicia of and in fact are real

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> any contract or agreement by such purchaser or lessee; . . .
>
> . . .
>
> **(c) Revocation of contract or agreement at option of purchaser or lessee where required property report not supplied**
>
> In the case of any contract or agreement for the sale or lease of a lot for which a property report is required by this chapter and the property report has not been given to the purchaser or lessee in advance of his or her signing such contract or agreement, such contract or agreement may be revoked at the option of the purchaser or lessee within two years from the date of such signing, and such contract or agreement shall clearly provide this right.

estate,'" *id.* at 10 (quoting 38 Fed. Reg. at 23,866), the Court continued, "the proper focus regarding the analysis of whether a unit has exclusive rights to the use of land under 24 C.F.R. § 1710.1 is whether the purchase of the unit gave the purchasers the exclusive right to a unit, or any type of 'realty,'" *id.* (referencing *Winter v. Hollingsworth Props., Inc.,* 777 F.2d 1444, 1448 (11th Cir.1985)). Finally, the Court noted the marked absence of "an opinion by *any* court which has found that ILSA is inapplicable to any type of condominium, much less a high-rise condominium in particular." *Id.* at 14.

Also relevant to this appeal, the District Court's decision and order partially granted Berlin's motion for attorneys' fees by awarding fees incurred "from the date of this Court's memorandum decision and order denying the defendants' motion to dismiss on August 19, 2011 until the date of this memorandum decision and order." *Id.* at 15. In support of its decision to award fees, the District Court explained that Renaissance's argument that the condominium unit was not a "lot" within the meaning of ILSA "had been all but foreclosed by other case law interpreting ISLA [sic]." *Id.*

On appeal, Renaissance asserts that ownership of a condominium unit in a multi-story building does not include the right to "the exclusive use of a specific portion of the land," 12 C.F.R. § 1010.1(b), because the term "land" refers to the "tangible surface of the earth," Appellants' Br. 14. Renaissance also contests the District Court's decision to award attorneys' fees.

After receiving the parties' briefs, we invited the CFPB, which did not participate in the District Court proceedings, to submit a letter brief offering its views. The CFPB responded by letter brief on March 12, 2013, explaining, in part:

> HUD explained when it promulgated the definition of "lot" in 1973 that "condominiums carry the indicia of and in fact are real estate." 1973 Rule, 38 Fed. Reg. at 23866. Accordingly, "the proper focus regarding the analysis of whether a unit has exclusive rights to the use of land under 24 C.F.R. § 1710.1 is whether the purchase of the unit gave the purchasers the exclusive right to a unit, or any type of 'realty.'" [Dist. Ct. Op. at 10.] In that regard, the preamble to the 1973 Rule makes clear that a condominium is "equivalent to a subdivision, *each unit being a lot.*" 38 Fed. Reg. at 23866 (emphasis added). Because the condominium unit is itself a lot for purposes of ILSA, a purchaser of the unit need not have a separate interest in "raw land" to be entitled to the protections of ILSA's disclosure and anti-fraud requirements.
>
> . . . As HUD explained in 1973, the "application of [ILSA] to condominiums has been consistent [HUD] policy since the issue was first raised in 1969" – the year that ILSA took effect. 1973 Rule, 38 Fed. Reg. at 23866; *see* ILSA § 1422, 82 Stat. at 599

(effective date provision).[5] HUD consistently reaffirmed that determination in subsequent guidance documents. *See, e.g.,* 40 Fed. Reg. at 47166 ("For jurisdictional purposes, a condominium 'unit' is a 'lot.'"); 1996 Guidance, 61 Fed. Reg. at 13596 (stating that the definition of "lot" applies to the "sale of a condominium or cooperative unit"). . . .

. . .

. . . Appellants argue that the 1973 regulation, by using the term "land," was intended to apply only to condominiums that were "horizontal developments and . . . campgrounds," Br. 7 (quoting 1973 Rule, 38 Fed. Reg. at 23866), and not "condominiums where purchasers have [only] exclusive use of their 'unit,'" *ibid.* That argument is contradicted by contemporaneous HUD statements that demonstrate its understanding that ILSA applies to multistory condominium developments. In the preamble to the 1973 rule, HUD made clear that ILSA would apply to "condominiums intended as primary residences in metropolitan areas" that did not qualify for the two-year construction exemption. 1973 Rule, 38 Fed. Reg. at 23866. As the district court found, HUD's discussion

[5] In a footnote, the CFPB explained that, "although the term 'land' might refer merely to the 'ground, soil, or earth,' in a legal sense, it 'signifies everything which may be holden,' including 'anything that may be classed as real estate or real property.'" CFPB Letter Br. at 7 n. 5 (quoting BLACK'S LAW DICTIONARY 1019 (4th ed. 1968)).

> of condominiums "in metropolitan areas" reflected its view that ILSA's protections extend to purchasers of "high-rise or 'vertical' condominiums." [Dist. Ct. Op. at 8.] Indeed, less than six months after issuing the 1973 Rule, HUD removed any doubt on the matter by issuing guidelines designed to accommodate "the realities of condominium construction, especially *high-rise construction.*" 1974 Guidance, 39 Fed. Reg. at 7824 (emphasis added). The 1974 Guidance thus makes clear that the term "lot" is not confined to "horizontal developments" and "campgrounds."
>
> . . . Appellants argue (Br.13) that the definition of the term "land" used in 24 C.F.R. § 1710.1 is determined by New York state property law, which they claim defines "land" to exclude "structures or improvements constructed on the land." As this Court observed, however, ILSA creates "a *national standard* to guarantee full disclosure for the benefit of prospective buyers." *Bacolitsas,* 702 F.3d at 682 (emphasis added). ILSA's national reach requires that the meaning of the federal regulatory term "land" be determined under federal law.

CFPB Letter Br. at 6-7, 10-11. The CFPB also participated in oral argument.

DISCUSSION

A.

The only merits dispute at issue in this appeal is whether a single-floor condominium in a multi-story building "includes the right to the exclusive use of a specific portion of *the land,*" 12 C.F.R. § 1010.1(b) (emphasis supplied), thus qualifying as a "lot" within the meaning of ILSA. We review this legal question *de novo. See Maslow v. Bd. of Elections in N.Y.C.,* 658 F.3d 291, 295-96 (2d Cir.2011).

The consistent and longstanding view of the CFPB, HUD, and all courts that have considered this issue is that a single-floor condominium unit in a multi-story building is a "lot" within the meaning of ILSA when ownership of the unit includes the right to exclusive use of the unit. "It is well established that an agency's interpretation need not be the only possible reading of a regulation – or even the best one – to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.,* ___ U.S. ___, 133 S.Ct. 1326, 1337, 185 L.Ed.2d 447 (2013) (internal quotation marks omitted). We conclude that the interpretation by the CFPB and HUD of their own regulation is reasonable and therefore warrants deference.

In common usage, the term "land" brings to mind the surface of the earth. In legal parlance, however, "land" can have a different meaning. The term "land"

is sometimes used to mean "[a]n estate or interest in real property," a concept that "'is not restricted to the earth's surface, but extends below and above the surface.'" BLACK'S LAW DICTIONARY 955 (9th ed. 2009) (quoting PETER BUTT, LAND LAW 9 (2d ed. 1988)). Moreover, ownership of "land," in this technical sense, does not require ownership of soil or other physical matter tied to the earth. "'Ultimately, as a juristic concept, "land" is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth's surface.'" *Id.* (quoting the same).

Inasmuch as "land" is sometimes used as a term of art referring to "real estate," the CFPB and HUD have reasonably concluded that their own definition of "lot" applies to a condominium unit in a multi-floor building. Condominium ownership had only emerged in the continental United States in the 1960s,[6] but by

[6] American condominium ownership emerged in Puerto Rico (by way of Cuba) in the 1950s, and quickly spread to the continental United States in the 1960s, following Puerto Rico's successful lobbying efforts to amend the National Housing Act to provide for federal insurance of condominium mortgages. *See* Curtis J. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 987-88 & n. 4 (1963) (noting the influence of Puerto Rican lobbying); Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 502 (1997) (observing that, "[a]lthough antecedents of the condominium concept existed in Medieval times," condominium statutes first appeared in Civil Law countries in the first half of the twentieth century). Largely because of economic advantages associated with condominium ownership, the condominium has become the dominant form of apartment ownership

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the time HUD promulgated its definition of "lot" in 1973, the agency was already applying ILSA to sales of condominium units on the basis that those units are real estate. As HUD explained at that time:

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in the United States. Schill, *ante,* note 3, at 275-77. In New York City, however, cooperative apartments, or "co-ops," have existed since the nineteenth century and still make up the vast majority of common-interest apartment buildings, due in part to the exclusivity permitted through ownership by a cooperative corporation that reviews applications of putative co-owners. *Id.* at 275-79, 284-85, 313-14; *see also* note 3, *ante* (summarizing the basic differences between condominiums and housing cooperatives). One of the earliest of these co-ops was the Amalgamated Cooperative Houses in the Kingsbridge Heights neighborhood of the Bronx, built by Sidney Hillman's Amalgamated Clothing Workers Union in the 1920s "to create a community that represented universal humanistic values" with "no single ideology." Christopher John Farah, *For a Working-Class Dream, a New Day,* N.Y. TIMES, May 4, 2003, at Section 14; *see also* RICHARD PLUNZ, A HISTORY OF HOUSING IN NEW YORK CITY 153-55 (1990). Today the world's largest co-op complex, spanning 35 buildings, is Co-op City in the Baychester neighborhood of the Bronx, built by the United Housing Foundation, "a nonprofit membership corporation established for the purpose of aiding and encouraging the creation of adequate, safe and sanitary housing accommodations for wage earners and other persons of low or moderate income." *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 840-43, 95 S.Ct. 2051, 44 L.Ed.2d 621 (1975) (internal quotation marks omitted); *see also* Christopher Gray, *An Innovation, Packed With Artists*, N.Y. TIMES, Apr. 7, 2013, at RE9 (discussing other co-operatives in New York City); Samuel G. Freeman, *American Radicals as Co-op Housing Pioneers,* N.Y. TIMES, Apr. 26, 2009, at C3 (same).

> The application of the Act to condominiums has been consistent OILSR[7] policy since the issue was first raised in 1969. The bases for this position are that condominiums carry the indicia of and in fact are real estate, whether or not the units therein have been constructed. A condominium is accordingly viewed by OILSR as equivalent to a subdivision, each unit being a lot. Adverse comment, particularly from builders, asserts that condominiums are equivalent to houses and the sale of houses was not intended to be covered by the Act. However, the right to condominium space is a form of ownership, not a structural description. This condominium concept is employed as an ownership form for completely horizontal developments and even for campgrounds. Congress recognized the need to exempt professional builders from the Act and provided an appropriate exemption [in 15 U.S.C. § 1702(a)(2)]. For a condominium unit sale to be exempted from the Act, it must accordingly qualify for exemption; i.e., either it must be completed before it is sold, or it must be sold under a contract obligating the seller to erect the unit within two years from the date the purchaser signs the contract of sale.

38 Fed. Reg. at 23,866. In other words, a right to exclusive use of a condominium unit is a right to

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[7] The Office of Interstate Land Sales Registration (OILSR) was formerly designated by the Secretary of HUD to administer ILSA. *See Winter*, 777 F.2d at 1447 n. 9. Congress later transferred that function to the CFPB. *See* note 1, *ante*.

exclusive use of real estate, and therefore a condominium unit – whether in a multi-story building or even in "completely horizontal developments" and "campgrounds" – is a "lot" within the meaning of ILSA.[8]

The relevant agencies – originally HUD and now the CFPB, *see* note 1, *ante* – have consistently maintained this understanding ever since the issue was first raised in 1969. *See, e.g.,* CFPB Letter Br. at 5-13; 61 Fed. Reg. 13,596, 13,602 (1996 HUD Guidance) ("lot" includes "a condominium or cooperative unit"). Congress has at least implicitly recognized that interpretation. *See Winter,* 777 F.2d at 1449 n. 12 ("Congress did more than acquiesce in HUD's longstanding interpretation; Congress took specific action in 1978 to exempt the sale of some condominiums from the Act's scope," implying "that, absent such an exemption, [ILSA] must apply to the sale of condominiums."). And courts, too, "have consistently held that a 'condominium unit' constitutes a 'lot.'" *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 127 F.3d 478, 481 (6th Cir.1997). Finally, this interpretation accords with the text and purposes of ILSA. As

[8] HUD's reference to "completely horizontal developments" does not cast doubt on this conclusion. In context, HUD was simply explaining that ILSA's application to "condominiums" applies *not only* to condominium units in multistory buildings but also to horizontal developments and even campgrounds. 38 Fed. Reg. at 23,866.

the Court of Appeals for the Eleventh Circuit explained:

> [ILSA] was intended to curb abuses accompanying interstate land sales. The Act accomplishes that goal by including within it all sales of lots and then exempting a number of transactions, including sales of fully improved property. It is reasonable to conclude, as HUD did, that the term "lot" was used to refer generally to interests in realty. The legislative history supports this construction, employing the terms "lot," "land," and "real estate" in discussing the Act. This construction is also reasonable in terms of the purpose of the statute. A fraudulent out-of-state sale of land is not rendered any less fraudulent if the condominium form of ownership is utilized.

Winter, 777 F.2d at 1448. For these reasons, we defer to the agency rule defining "lot" and to the consistent and longstanding agency understanding that this rule applies to single-floor condominium units in multi-story buildings when ownership of those units includes the right to exclusive use of those units.[9]

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[9] In doing so, we reject Renaissance's argument that the term "land" obtains meaning by reference to state law. A state need not recognize condominium ownership as a matter of state property law, but once a state recognizes that form of property, federal law supplies "a national standard," *Bacolitsas*, 702 F.3d at 682, to determine whether a condominium can be a "lot" within the meaning of ILSA. A contrary conclusion would upset the uniform application of federal law as well as the federal interest

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On appeal, Renaissance has not asserted any other defense to Berlin's action to revoke the contract pursuant to 15 U.S.C. § 1703(c), *see* note 4, *ante,* and we therefore affirm the District Court's grant of summary judgment to Berlin.

B.

Renaissance also argues that the District Court erred or "abused its discretion" by awarding attorneys' fees to Berlin. Before reaching the merits of this claim, however, we must address Berlin's argument that we lack appellate jurisdiction to consider the District Court's fees award because Renaissance filed a premature notice of appeal – after the entry of judgment ordering an award of particular costs and fees, but prior to the District Court's actual calculation of that award amount.[10]

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in curbing abuses in the sale of real estate. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979) ("Undoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." (internal quotation marks omitted)).

[10] The District Court first entered judgment on April 30, 2012, awarding Berlin summary judgment on the merits along with an unspecified amount of attorneys' fees. In an Amended Judgment, entered on May 18, 2012, the District Court adjusted the damages award to account for prejudgment interest but still did not specify precise award amounts. Renaissance filed a notice of appeal on May 30, 2012. On June 14, 2012, the District Court issued a Second Amended Judgment awarding Berlin $26,950 in attorneys' fees and $1,194.31 in costs. Renaissance

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In the circumstances of this case, we have jurisdiction to review the District Court's decision to award fees.[11] It is true that "[a] non-quantified award of attorneys' fees and costs is not appealable until the amount of the fees has been set by the district court," *O & G Indus., Inc. v. Nat'l R.R. Passenger Corp.,* 537 F.3d 153, 167 (2d Cir.2008), and therefore Renaissance's appeal of the fees award was premature, *see* FED. R.APP. P. 4(a)(1)(A) (period for filing notice of appeal starts *after* entry of appealable order or judgment). Nonetheless, "a premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice." *Houbigant, Inc. v. IMG Fragrance Brands, LLC,* 627 F.3d 497, 498 (2d Cir.2010) (quotation marks omitted). These two conditions have been met here. Following Renaissance's notice of appeal, the District Court amended the judgment to account for

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did not file a notice of appeal with respect to this Second Amended Judgment until September 21, 2012, well beyond the 30-day notice period, *see* FED. R.APP. P. 4(a)(1)(A), but, as we explain, the earlier notice of appeal filed on May 30, 2012, ripened upon entry of the final costs order and is therefore valid.

[11] The appellants contest only the District Court's decision to award fees – not its *calculation* of the fees amount. Additionally, the appellees did not file a cross-appeal contesting the District Court's decision to limit fees to those incurred "from the date of [its] memorandum decision and order denying the defendants' motion to dismiss on August 19, 2011 until the date of th[e] memorandum decision and order [granting summary judgment]," Dist. Ct. Op. at 15, and therefore we do not consider that issue.

the fees amount, *see* note 10, *ante,* and we detect no prejudice to Berlin. Accordingly, we proceed to the merits of the decision to award fees. *See, e.g., LaForest v. Honeywell Int'l Inc.,* 569 F.3d 69, 73 (2d Cir.2009) ("Because there is now an appealable final order regarding fees and costs, that order is ripe for review."); *Iberiabank v. Beneva 41-I, LLC,* 701 F.3d 916, 920-21 n. 7 (11th Cir.2012).[12]

ILSA provides district courts with wide discretion in fashioning a suitable monetary award. According to the statute, "[t]he amount recoverable in a suit authorized by this section may include . . . interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot." 15 U.S.C. § 1709(c). The statutory authorization that a district court "may" award attorneys' fees "'clearly connotes discretion,'" *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 136, 126 S.Ct. 704, 163 L.Ed.2d 547 (2005) (quoting *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 533, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994)), and we therefore review a district court's

[12] Though Rule 4(a)(4)(B)(i) of the Federal Rules of Appellate Procedure does not address this precise situation, it is consistent with treating a premature notice of appeal, filed after the entry of a judgment but before the judgment is amended to account for the specific fees award, as effective once the judgment is amended to account for the fees amount. *See* FED. R.APP. P. 4(a)(4)(B)(i) ("If a party files a notice of appeal after the court announces or enters a judgment – but before it disposes of any motion listed in Rule 4(a)(4)(A) – the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.").

decision whether to award attorneys' fees under ILSA for abuse of discretion, *see Barbour v. City of White Plains,* 700 F.3d 631, 634 (2d Cir.2012) ("We review a district court's award of attorneys' fees for abuse of discretion."); *see also In re Sims,* 534 F.3d 117, 132 (2d Cir.2008) (a district court abuses its discretion if it "base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence, or render[s] a decision that cannot be located within the range of permissible decisions" (internal citation and quotation marks omitted)).

In this case, the District Court acted well within its discretion by awarding attorneys' fees. In its careful and well-reasoned memorandum decision and order, the Court reasonably and correctly concluded that it has been the longstanding and unanimous view of the CFPB, HUD, and various courts that ILSA can apply to condominium units in multi-story buildings. *See* Part A, *ante.* To be sure, Renaissance's legal argument is not frivolous; the term "land" can, in some contexts, refer specifically to the earth's surface, and prior to this opinion we had not yet ruled directly on this question. But ILSA does not limit fee awards to circumstances where a defendant's legal position was entirely without merit. *Cf., e.g., Martin,* 546 U.S. at 138, 126 S.Ct. 704 (rejecting an argument that a discretionary fees provision should only apply "on a showing that the unsuccessful party's position was 'frivolous, unreasonable, or without foundation' "). We think it is enough, as the District Court explained, that the question presented "was far from

an emerging or unexplored issue, but had rather been all but directly disallowed by HUD and courts within and outside of [the Southern District of New York] and [Second Circuit]." Dist. Ct. Op. at 14. In other words, Renaissance was on notice that the condominium unit at issue was a "lot" within the meaning of ILSA. On this basis, the District Court exercised reasonable judgment by concluding that Berlin should be compensated for its attorneys' fees.

CONCLUSION

To summarize:

(1) We afford agency deference both to the rule promulgated by the Consumer Financial Protection Bureau and the Department of Housing and Urban Development defining the statutory term "lot," and to those agencies' consistent and long-standing interpretation of that definition as applying to condominium units in multi-story buildings.

(2) In light of this settled agency interpretation, as well as the unanimous view of courts that have considered the same issue, we also conclude that the District Court did not err or "abuse its discretion" by awarding attorneys' fees to the plaintiffs.

Accordingly, the judgment of the District Court is **AFFIRMED**.

Chief Judge JACOBS dissents in a separate opinion.

DENNIS JACOBS, Chief Judge, dissenting:

I respectfully dissent.

The Berlins contracted to purchase unit 16D in one of the residential condominium towers of the Ritz-Carlton Hotel in White Plains. After the market crashed in 2008, they demanded rescission of the $1.34 million contract and return of their deposit, citing the Interstate Land Sales Full Disclosure Act (the "Land Sales Act"), 15 U.S.C. § 1701 *et seq.,* which allows buyers in certain land transactions to seek rescission and a refund if the seller failed to make pre-sale filings and disclosures. The primary issue in this appeal is whether the Land Sales Act applies to this transaction. (The Berlins are certainly not invoking equity.)

I

The statute and its implementing regulation make clear enough that the Act governs only transactions in land (whether the interest is fee simple, a condominium, or a leasehold). *See* 15 U.S.C. § 1703(a)(1); Land Registration, Formal Procedures, and Advertising Sales Practices, and Posting of Notices of Suspension, 38 Fed. Reg. 23,866, 23,876 (1973) (codified at 24 C.F.R. § 1710.1). The Land Sales Act regulates only "the sale or lease of any lot." 15 U.S.C. § 1703(a)(1). The Department of Housing and Urban

Development ("HUD") promulgated a regulation in 1973 – which remains in force – that defines a "lot" as "any portion, piece, division, unit, or undivided interest in land . . . *if the interest includes the right to the exclusive use of a specific portion of the land.*" 24 C.F.R. § 1710.1(b) (emphasis added).

HUD, which appeared *amicus* by brief and at oral argument, supports the Berlins, and relies chiefly on its interpretive pronouncements (and its own "intent") to expand the regulatory scope so that HUD can regulate transactions in high-rise condominium units that do not sit on "land" and that are therefore not "lots."[1] I decline to "give effect to a reading of [the] regulations that is not the most natural one, simply because [the agency] says that it believes the unnatural reading is right." *Decker v. Nw. Envtl. Def. Ctr.,* ___ U.S. ___, 133 S.Ct. 1326, 1339, 185 L.Ed.2d 447 (2013) (Scalia, *J.,* dissenting).

The only way to read the Land Sales Act and the implementing regulation is that the Act applies only to the sale (or lease) of a lot that, by definition, includes a right to use of land that is exclusive. An

[1] Under Dodd-Frank, responsibility to implement the Land Sales Act shifted from HUD to the Consumer Financial Protection Bureau ("CFPB"). *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 11-203 (2010) (relevant provision codified at 12 U.S.C. § 5581). I use the term HUD here to refer to both HUD and the CFPB. HUD's rules are enforceable by the CFPB, and the CFPB claims HUD's regulations and interpretations as its own. *See* HUD Br. 1.

exclusive right is one that excludes all others. For example, each owner in a gated community of condominiums or townhouses may have a unit that sits on land from which land the owner can exclude all the world. That is not so with Apartment 16D. Unless a condominium unit sits upon land, some portion of which is land reserved exclusively to the use of the owner, it is not a "lot" within the meaning of the statute and implementing regulation.

A condominium by definition entails both an exclusive right to use a unit and a non-exclusive right to use common areas. *See, e.g., Black's Law Dictionary* 336 (9th ed. 2009). So if a condominium unit sits on its own exclusive parcel of land, it is a "lot" notwithstanding that, within a development or gated community, there are amenities such as roads, clubhouses, pools, and sports facilities that are held in common by all the unit owners. By the same token, a condominium unit that is a slice of a multistory residential building cannot be a "lot" of "land" within the meaning of the statute and governing regulation. *What* the Land Sales Act regulates is property that is or includes an exclusive interest in land; *how* that interest is held, whether a fee simple, a leasehold, or a condominium (for example), does not bear upon the scope of regulation.

When a condominium unit is a horizontal slice of a high-rise residential building, the owner of each unit has an exclusive right to her own unit only, without any exclusive right to use of a lot on land. This is easily demonstrated. Land entails rights above and

below the surface (subject of course to covenants and zoning); but the owner of 16D cannot build up or down, because (at the risk of being obvious) that expansion would oust the unit owners of 15D or 17D. Apartment 1D may be at the plane of the land, but its owner likewise cannot build up or down – so that, if (hypothetically) 1D has an exclusive outdoor patio, the owner has no right to build up from it, let alone mine it or drill for oil.

At oral argument, counsel for *amicus* HUD argued that the very word "land" is itself "ambiguous." True, the word "land" has its nuances; so it can be said that unit 16D is "on land" as opposed to "at sea," or "in orbit." But the word is not ambiguous in the context of the Land Sales Act and the governing regulation. Whether what is sold is a "lot" of "land" can be grasped by any child. We look to plain meaning, and few words have a meaning as plain as "land." Textual ambiguity cannot be manufactured by efforts of litigants and bureaucrats to distort, misunderstand, and overreach.

Relying on the purported ambiguity of the word "land," the majority opinion accedes to HUD's view that "exclusive use of land" actually means "exclusive use of realty." Maj. Op. at 121. The majority opinion quotes *Black's Law Dictionary* 955 (9th ed. 2009): "[t]he term 'land' is sometimes used to mean '[a]n estate or interest in real property,' a concept that 'is not restricted to the earth's surface, but extends below and above the surface.'" Maj. Op. at 125. True, the right to use "land" typically includes use of the air

above and the earth below; but it also surely includes use of the surface. An "interest" in land may be limited to use above (air rights) or below (drilling rights), but the holder of such rights who does not also have use of the surface cannot be said to have "exclusive use" of the "land," which is the defined scope of the Land Sales Act.

The fuller text of that definition (set out in the margin[2]) reflects that land is "immovable" and "indestructible." Given that land is indestructible, it cannot be multiplied (or demolished). It is proverbial that they are not making any more of it. That is why a twenty-story building on a one-acre footprint does not constitute twenty acres of "land"; and at oral argument, HUD refused to say that it does, although that is the absurd conclusion compelled by HUD's interpretation. However broad the definition of land, there is no reasonable basis for HUD's contention that the term "land" includes any interest that may have "indicia of real estate." *See* Maj. Op. 126.

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[2] "Ultimately, as a juristic concept, 'land' is simply an area of three-dimensional space, its position being identified by natural or imaginary points located by reference to the earth's surface. *'Land' is not the fixed contents of that space, although, as we shall see, the owner of that space may well own those fixed contents. Land is immoveable, as distinct from chattels, which are moveable; it is also, in its legal significance, indestructible.* The contents of the space may be physically severed, destroyed or consumed, but the space itself, and so the 'land', remains immutable." *Black's Law Dictionary* 955 (9th ed. 2009) (emphasis added) (quoting Peter Butt, *Land Law* 9 (2d ed. 1988)).

The definition of plain words should reveal meaning, not drain it, or explode it. Congress used the word "lot," and the regulation defines "lot" as an interest that includes the "exclusive use of . . . land." 24 C.F.R. § 1710.1(b). HUD issued "guidance" that says the word "land" includes condominiums because they "carry the indicia of and in fact are real estate." 38 Fed. Reg. at 23,866. The majority opinion endorses the claim that the "exclusive use of land" means "exclusive use of realty." Maj. Op. 121. But if "land" means any "realty," we are led into a rabbit hole, because "realty" can also be defined as "property," *see Black's Law Dictionary* 1379 (9th ed. 2009), and "property" is defined as "the right to possess, use, enjoy a determinate thing," which in turn is "[a]ny external thing over which the rights of possession, use, and enjoyment are exercised," *id.* at 1335-36. That is not a useful process of definition.

II

Extension of the Land Sales Act to high-rise condominiums by administrative fiat is, as demonstrated, untenable as a textual matter. This was no drafting error by Congress: the text is drawn to reach the evils that Congress wished to curb, and those evils did not include subjecting the Berlins to life at the Ritz-Carlton in Westchester.

The Act targeted deceptive and fraudulent sales of undeveloped lots of land, transactions which (in the 1960s) were often carried out by mail or by telephone.

Promoters duped unsuspecting people, often senior citizens, into purchasing, sight unseen, "land in swamps, deserts, high arid plateaus, mountains, remote valleys, jungles and lava beds." Note, *S. 275 – The Interstate Land Sales Full Disclosure Act,* 21 Rutgers L. Rev. 714, 714 (1967); *see also Frauds & Quackery Affecting the Older Citizen: Hearing Before the Senate Special Comm. on Aging,* 88th Cong. 203 (1963) (Statement of J. Fred Talley, Ariz. State Real Estate Comm'r) (referencing home-sites "so far from anywhere" that "a jackrabbit would need a canteen to get there"); *id.* at 183 (Statement of Sen. Goldwater, Member, Senate Special Comm. on Aging) (describing "land swindles" in Arizona where so-called "subdivisions" had no water, and in some cases, no roads or power).

President Johnson endorsed the Act because some senior citizens had "wasted much of their life savings on a useless piece of desert or swampland." To Protect the American Consumer – Message from the President of the United States, H.R. Doc. No. 57, 90th Cong., 1st Sess., *reprinted in* 113 Cong. Rec. 3527, 3529 (Feb. 16, 1967). Shortly after its passage, the Supreme Court confirmed that the Land Sales Act was "designed to prevent false and deceptive practices in the sale of *unimproved tracts of land.*" *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.,* 426 U.S. 776, 778, 96 S.Ct. 2430, 49 L.Ed.2d 205 (1976) (emphasis added).

The proper scope of the Act is illustrated by HUD's own disclosure requirements. HUD's regulations specify

that in the property report (required by Section 1707 of the Land Sales Act) developers must disclose to buyers whether "oil, gas or mineral rights have been reserved" by the developer. 24 C.F.R. § 1710.109(b)(4). Likewise, the property report must describe the "general topography and the major physical characteristics" of the land. *Id.* § 1710.115(a); *see also id.* (requiring developer to disclose whether "any lots in the subdivision have a slope of 20% or more"); *id.* § 1710.115(b)-(c) (requiring developer to disclose whether the lot is "covered by water" and whether the lot requires "draining or fill prior to being used"). However, since unit 16D has no subterranean resources, no slope, no wetlands, and no topographical features of any kind, such disclosure – like the Act itself – has no application to it.

III

At oral argument, counsel for HUD pressed us to recognize "HUD's intention." However, it is the intent of Congress that matters, not that of the agency. We defer to an agency only because it is presumed to have expertise in filling gaps that Congress left open, not because it has ambition to expand the limited scope of regulation Congress confided to it. *See Decker,* 133 S.Ct. at 1340 (Scalia, *J.,* dissenting) ("The implied premise of this argument – that what we are looking for is the agency's *intent* in adopting the rule – is false.").

HUD does not seek deference to the Land Sales Act or to HUD's 1973 regulations; together, they actually foreclose HUD's argument. HUD is demanding deference to its own overreading of the regulatory preamble, which says that "*condominiums carry the indicia of and in fact are real estate* whether or not the units therein have been constructed." 38 Fed. Reg. at 23,866 (emphasis added). But HUD's argument begs the question whether the preamble is referencing a condominium *that has exclusive use of land and is thereby on a lot.* Insofar as HUD construes this guidance in a way inconsistent with its regulations, we owe it no deference. *See Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997).

True, the agency's reading of its own regulations need not be the best one, *see* Maj. Op. at 124-25; but even if the word "land" were ambiguous, HUD's interpretation of the word is gravity-defying, literally. The majority emphasizes that HUD has "consistently maintained this understanding ever since the issue was first raised in 1969." Maj. Op. at 126. But a misunderstanding is not improved by consistency.

The majority opinion adopts the arguments made in HUD's letter to this Court, which cites chiefly to HUD's self-serving guidance. *See* HUD Br. 10. Twenty years after the regulation at issue was promulgated, the Office of Interstate Land Sales Registration ("OILSR") purported to "streamline" the land sales registration program, and offered interpretive guidance as to some of the Land Sales Act's exemptions.

See Federal Housing Commissioner; Interstate Land Sales Registration Program; Streamlining Final Rule, 61 Fed. Reg. 13,596, 13,596, 13,602 (1996). This guidance could not alter the regulation, let alone the statute itself. Indeed, the self-limited goal of the guidelines accompanying the "streamlining" was to clarify the scope of certain exemptions: "This is an interpretive rule, not a substantive regulation." *Id.* at 13,601.

OILSR's streamlining guidelines defined a "lot" as "any portion, piece, division, unit, or undivided interest in land if such interest includes the right to the exclusive use of a specified portion of the land *or unit. This applies to the sale of a condominium* . . . as well as a traditional lot." *Id.* at 13,602 (emphases added). HUD and the Berlins now rely on this "guidance" to support their expansive view, *see* HUD Br. 4, 9-10; but we owe no deference to HUD's interpretive guidance if it *contradicts* the statute and HUD's own regulation. *See Auer,* 519 U.S. at 461, 117 S.Ct. 905.

In any event, this streamlining would not delink coverage under the Land Sales Act from land itself, because it is altogether unclear what, if anything, it adds. The 1973 regulation defines "lot" as any portion, piece, division, or unit of land (or undivided interest in land), if – and only if – the portion, piece, division, unit, or undivided interest includes the right to "exclusive use of a specific portion of the land." 24 C.F.R. § 1710.1(b). The 1996 guidance adds "or unit" to the second clause, which HUD argues expands coverage of the Land Sales Act to any "unit"

that includes exclusive use of that unit.[3] That reading is untenable. The natural way to read this addition – sloppy and incoherent as it is – is that a unit of land is a "lot" if it includes the right to exclusive use of that unit of land. That much was already clear from the 1973 regulation.[4]

HUD's *ipse dixit* that the definition of lot "applies to the sale of a condominium" also adds nothing. *See* 61 Fed. Reg. at 13,602. It goes without saying that condominium ownership (like a fee or leasehold) is one way to hold a lot of land. So the Land Sales Act may of course apply to the sale of a condominium unit

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[3] Relevant portions of the 1973 regulations and the 1996 guidance are set out below:

> Lot means any portion, piece, division, unit, or undivided interest in land located in any State or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land.

24 C.F.R. § 1710.1(h) (1973) (currently codified at 24 C.F.R. § 1710.1(b)).

> Lot means any portion, piece, division, unit or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of the land or unit. This applies to the sale of a condominium or cooperative unit or a campsite as well as a traditional lot.

61 Fed. Reg. at 13,602 (1996).

[4] The second reference to "unit," which purportedly gives HUD authority when there is "exclusive use of a . . . unit" adds nothing because the first clause of the sentence continues to define a "lot" as a portion, piece, division, unit, or undivided interest "*in land.*"

on a lot of land. But it does not follow that it applies to all property held in condominium form.[5]

Although it plainly defined "lot" to require the exclusive use of "land," HUD jumbles together its various semi-literate guidelines and interpretations to expand its regulatory reach. The argument that HUD spins from its "guidance" – and that the majority opinion adopts – rests uneasily on a classic false syllogism: *Land is real estate*; *all condominiums are real estate*; *therefore, all condominiums are land.*

[5] HUD points to another regulatory guidance, from a 1974 "guideline" regarding the applicability of certain exemptions under the Land Sales Act, which references OILSR's "'aware[ness] of the realities of condominium construction, especially high-rise construction.'" HUD Br. 10-11 (quoting *Condominium and Other Construction Contracts Guidelines*, 39 Fed. Reg. 7,824, 7,824 (1974)). This "awareness" could not change the text of the Land Sales Act or of the governing regulation – which covers only exclusive interests in land. And a full reading of the 1974 guidance makes evident that it was addressing the problem of HUD property reports being delivered to potential buyers before subdivisions were even registered with HUD, giving unscrupulous developers a spurious imprimatur of HUD approval.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

BRUCE BERLIN, and
NANCY BERLIN

Plaintiffs,

-against-

RENAISSANCE RENTAL PARTNERS, LLC d/b/a Renaissance Condominium Partners II, LOUIS R. CAPPELLI and DEBELLO [sic] DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP.,

Defendants.

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09 CIVIL 8477 (FPS)

SECOND AMENDED JUDGMENT

12,0136. WP

Whereas, on April 27, 2012, the Honorable Frederick P. Stamp, Jr., United States District Judge, sitting by designation, having handed down his Memorandum Decision and Order (Doc. #39) granting plaintiffs' motions for summary judgment, attorney's fees, and pre-judgment interest; denying defendants' cross-motion for summary judgment, and the Clerk having entered Judgment on April 30, 2012, and,

Whereas, the Court, on June 7, 2012, having issued an Order directing the Clerk to enter an Amended Judgment to include the return of plaintiffs' full deposit plus interest in the amount of $168,075.00; the payment of prejudgment interest to the plaintiffs in the amount of $39,885.05; the

requested attorney fees in the amount of $26,590.00, and costs of $1,194.31, it is,

ORDERED, ADJUDGED AND DECREED: That an Amended Judgment is entered granting plaintiffs' motions for summary judgment, attorney's fees, and pre-judgment interest; denying defendants' cross-motion for summary judgment; ordering defendants to return plaintiffs' full deposit plus interest in the amount of $168,075.00; awarding plaintiffs $39,885.05 in pre-judgment interest, $26,950.00 in attorney's fees and $1,194.31 in costs, for a total judgment amount of $235,744.36.

Dated: June 11, 2012

/s/ Frederick P. Stamp, Jr.
Frederick P. Stamp, Jr.
United States District Judge

/s/ Ruby J. Krajick
RUBY J. KRAJICK
Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRUCE BERLIN and NANCY BERLIN, Plaintiffs, v. RENAISSANCE RENTAL PARTNERS, LLC,: d/b/a RENAISSANCE CONDOMINIUM PARTNERS II, LOUIS R. CAPPELLI and DELBELLO DONNELLAN WEINGARTEN: WISE & WIEDERKEHR, LLP, Defendants.	09 Civ. 8477 (FPS) **MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. Procedural History

Plaintiffs Bruce and Nancy Berlin filed this civil action in this Court against the above-named defendants alleging violations of the Interstate Land Sales Full Disclosure Act ("ILSA"), 15 U.S.C. § 1701. The plaintiffs seek to rescind an agreement to purchase a condominium unit at The Residence at The Ritz-Carlton, Westchester in White Plains and to recover the purchase deposit tendered to the developer.

The defendants filed a motion to dismiss, in which they contended that the Act does not apply in

this case.[1] This Court denied that motion, and also dismissed an amended complaint filed by the plaintiffs without leave of court. After the parties engaged in discovery, the plaintiffs filed a motion for summary judgment, which has now been fully briefed. The defendants also filed an untimely cross-motion for summary judgment which has also now been fully briefed.[2] For the reasons set forth below, this Court will grant summary judgment in favor of the plaintiffs.

II. Facts[3]

Defendant Louis R. Cappelli ("Cappelli") was and is the principal of Renaissance Rental Partners LLP ("RRP"). RRP and Cappelli, as its principal, sponsored, developed, marketed, offered for sale and/or participated in the offering for sale and/or contracted for sale of units at The Residence at The Ritz-Carlton, Westchester, in White Plains, New York. As part of

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[1] On November 16, 2009, the plaintiffs voluntarily dismissed defendant Delbello Donnellan Weingarten Wise & Wiederkehr, LLP.

[2] Despite the fact that this motion was untimely, it also served as the defendants' response to the plaintiffs' motion for summary judgment, and is thus considered in this capacity.

[3] All of the facts given in this opinion are taken directly from the parties' Joint Statement of Undisputed Material Facts, filed with this Court under Local Civil Rule 56.1. (ECF No. 30.) This Court notes that the parties have agreed to all material facts relevant to this action, and further agree that the only contended issues are those of law.

the defendants' efforts in this capacity, Cappelli executed a Certification of Sponsor and Sponsor's Principals representing that the primary responsibility for compliance with all laws and regulations as may be applicable as it relates to the offering for sale of units in the condominium lied with Cappelli.

The Residence at The Ritz-Carlton consists of two towers. Tower I consists of 187 units and Tower II consists of 185 units. All of these units are residential, and pursuant to the New York Offering Plans filed on behalf of RRP with the New York Attorney General's Office, those in Tower I were available for sale to the general public after June 23, 2006, and those in Tower II were available after April 19, 2007.

On September 17, 2007, the plaintiffs contracted to purchase Unit 16D in Tower II for $1,341,000.00. The original purchase agreement required the plaintiffs to make a down payment of 10% of the purchase price, or $134,000.00. However, in consideration for an additional deposit of 2.5% of the purchase price, the purchase agreement was amended to ensure closing on the unit no later than February 10, 2009, "time of the essence." Accordingly, the plaintiffs paid the developer a $167,625.00 deposit. The defendants did not seek nor obtain an exemption order from the Department of Housing and Urban Development ("HUD") or any state government agency regarding any exemption available under the Interstate Land Sales Full Disclosure Act, 17 U.S.C. § 1701, *et seq*. ("ILSA").

At the time that the plaintiffs purchased the unit, it had not been completed, was not habitable, and had not yet received a temporary certificate of occupancy ("TCO") from the City of White Plains.[4] A TCO for the unit was issued on December 11, 2008, making it available for habitation and lawful occupancy after that date.

The defendants never filed a statement of record for the Condominium with HUD under 15 U.S.C. §§ 1703(a)(1)(B) and 1707, and the plaintiffs were not provided a "property report" under 15 U.S.C. §§ 1703 (a)(1)(B) and 1707. On September 9, 2009, before the plaintiffs closed title on the unit, they informed the defendants of their intent to rescind their purchase agreement within two years of executing the agreement, pursuant to 15 U.S.C. § 1703(c). The defendants refused the plaintiffs' rescission and declined to return their deposit on the unit. The plaintiffs subsequently filed the instant action seeking the right to rescind the agreement and regain their $167,625.00 deposit, plus all accrued interest.

III. Applicable Law

Under Rule 56(c) of the Federal Rules of Civil Procedure,

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[4] The City of White Plains issued a separate TCO for each residential unit within The Residence at The Ritz-Carlton.

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986).

The parties in this action have agreed that there are no genuine issues of material fact in this case, and that the only issues which remain are those of the application of law to the facts to which the parties have agreed. (*See* ECF No. 38.) Accordingly, whether summary judgment is appropriate is not an [sic] matter that this Court must consider. Rather, the parties only dispute is with regard to whom summary judgment should be awarded.

IV. Discussion

A. Summary Judgment

Congress enacted ILSA as part of the Housing and Urban Development Act of 1968. Pub. L. N. 90-448, Title XIV. 82 Stat. 590 (1968). Congress amended the Act in 1979. Pub. L. No. 96-153, Title IV. 93 Stat. 1122 (1979). The Act was "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." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.,* 426 U.S. 776, 778 (1976).

ILSA contains registration and disclosure provisions which require developers of "'subdivisions'"[5] to file a statement of record with HUD and to develop a "property report." *Id*. (internal citations omitted).The property report contains "a condensed version of the statement of record filed with HUD, including a legal description of the property, information about the title to the land, and other required disclosures." *Id*. at 353.

The developer must deliver this property report to the purchaser of any qualifying "lot" within the

[5] Subdivision is defined as, "'any land which is located in any State and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as a common promotional plan." *Griffith v. Steiner Williamsburg, LLC,* 760 F. Supp. 2d 345, 352 (S.D.N.Y. 2010) (internal citations omitted).

subdivision prior to the signing of the purchase agreement. If the developer fails to file a statement of record with HUD or fails to provide the purchaser with the report, the sale "'may be revoked at the option of the purchaser . . . within two years from the date of such signing,' and the purchaser is entitled to a refund of all monies paid by the purchaser under the contract." *Id*. (citing 15 U.S.C. § 1703(c), (e)).

The plaintiffs argue that the condominium unit that they purchased within The Residence at The Ritz-Carlton qualifies as a "lot" under ILSA, and that the defendants failed to file a statement of record or deliver a property report prior to closing. The defendants, however, argue as they did in their previously denied motion to dismiss, that the plaintiffs did not purchase a "lot," and, as a result, the requirements of the Act do not apply. As this Court previously held, HUD guidelines and the Southern District of New York have made clear that a condominium unit may qualify as a "lot" under ILSA. *Griffith,* 760 F. Supp. 2d at 353; *see also* Guidelines for Exemptions Available Under ILSA, 61 Fed. Reg. 13,596, 13,602 (Mar. 27, 1996). The defendants now concede this fact, but argue that the plaintiffs' specific unit does not qualify as a "lot" under ILSA, because it does not include "the right to exclusive use of a specific portion of the land"

as is necessary under the definition of the term developed by HUD.[6] 24 C.F.R. § 1710.1.

The defendants maintain that, while the plaintiffs are entitled to exclusive use of a "unit" within the building, there is no access to "land." They argue that the application of the Act to high-rise condominiums where purchasers' unit is not attached to any portion of "land" whatsoever has never been properly examined in the United States Court of Appeals for the Second Circuit, and those courts which apply the Act to such buildings have done so without assessing the issue. The plaintiffs argue in response that the defendants' arguments ignore this Court's previous order denying the defendants' motion to dismiss, and that ILSA does apply to condominiums.

While this Court is not prepared to assert that the defendants have ignored the law of this case in making the arguments asserted in opposition to the plaintiffs' motion for summary judgment,[7] it does

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[6] The Act does not define the term "lot" as it is used in the statute's definition of "subdivision." Accordingly, and in line with the Eleventh Circuit's determinations in *Winter v. Hollingsworth Properties,* 777 F.2d 1444 (11th Cir. 1985), this Court defers to the HUD's reasonable interpretations of the term. *See Chevron v. NRDC, Inc.,* 467 U.S. 837 (1984); and *Christensen v. Harris County,* 529 U.S. 576, 587 (2000).

[7] This Court notes that, in its opinion regarding the defendants' motion to dismiss, it indicated that a condominium "may" be a "lot" under ILSA. There was no conclusive decision that the actual condominium at issue in this case was a "lot" for purposes of the Act.

agree that the unit purchased by the plaintiffs qualifies as a "lot" under ILSA, and that the Act does then apply to the plaintiffs' unit, thus entitling them to summary judgment.

Title 24, Code of Federal Regulations, Section § 1710.1, the regulation upon which the defendants rely, gives no indication of any intention to limit the application of ILSA to "horizontal" condominiums, and to exclude high-rise or "vertical" condominiums. In the preamble to 24 C.F.R. § 1710.1, the Secretary of HUD remarked that ILSA applied to condominiums, and that condominiums generally are "viewed by OILSR [Office of Interstate Land Sales Registration – designated by the Secretary of HUD to administer the Act] as equivalent to a subdivision, each unit being a lot." 38 Fed. Reg. 23,866 (1973). It was further remarked that the term "condominium" is intended to include a wide variety of types of structures and that, in the application of the term to ILSA, refers to a "form of ownership, not a structural description." *Id*. It was even noted that "most high-rise metropolitan condominiums would be exempt since many are completed within two years after the contract for sale is signed." *Smith v. Myrtle Owner, LLC,* 2011 U.S. Dist. LEXIS 71899 *24, (E.D.N.Y. Feb. 9, 2011) (adopted by *Sanz v. Myrtle Owner, LLC,* 2011 U.S. Dist. LEXIS 59799 (E.D.N.Y., July 5, 2011)). This Court notes that "an agency's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *United Airlines, Inc. v. Brien,* 588 F.3d 158, 172 (2d

Cir. 2009) (quoting *Auer v. Robbins,* 519 U.S. 452, 461 (1997)). This Court does not find the above interpretations of 24 C.F.R. § 1710.1 to be plainly erroneous or inconsistent with the regulation.

The language of ILSA itself likewise does not support the defendants' narrow interpretation. As noted by the Eleventh Circuit in *Winter,* the only circuit court of appeals to engage in an in-depth examination of the application of ILSA to condominiums, Congress, despite its focus on protecting purchasers from fraudulent sales of unimproved land, did not limit ILSA's application to "raw land," but extended it to "lots," and in the legislative history, utilized both the terms "land" and "real estate," to describe covered "lots" under the Act. 777 F.2d at 1447. The limitations placed upon the Act's scope are in the form of exemptions of certain lots and sales, rather than blanket limitations of the Act's applicability to certain types of real estate.

Clearly, "condominiums carry the indicia of and in fact are real estate." 38 Fed. Reg. 23,866 (1978). Accordingly, this Court believes that the proper focus regarding the analysis of whether a unit has exclusive rights to the use of land under 24 C.F.R. § 1710.1 is whether the purchase of the unit gave the purchasers the exclusive right to a unit, or any type of "realty." *See Winter,* 777 F.2d at 1448. To limit the inquiry to a narrow definition of whether the purchaser has exclusive use of "raw land," when the statute itself applies to "real estate" generally would lead to nonsensical results.

It is also important to note that this Court has been unable to uncover, and the defendants have not presented it with any examples of an opinion by *any* court which has found that ILSA is inapplicable to any type of condominium, much less a high-rise condominium in particular. Although the defendants state without support that many cases applying ILSA to condominiums do so to "horizontal" condominiums, it appears that much of the case law from this district actually applies ILSA to high-rise, or vertical, condominiums, and this Court found no example of a refusal to do so. *See Bodansky v. Fifth on the Park Condo, LLC,* 635 F.3d 75 (2d Cir. 2011); *Pasquino v. Lev Parkview Developers, LLC,* 2011 U.S. Dist. LEXIS 112460 No. 09 Civ. 4255 (S.D.N.Y., Sept. 29, 2011); *Cruz v. Leviev Fulton Club, LLC,* 711 F. Supp. 2d 329 (S.D.N.Y. 2010); *Griffith v. Steiner Williamsburg, LLC,* 760 F. Supp. 2d 345 (S.D.N.Y. 2010); *Indomenico v. 123 Washington, LLC,* 813 F. Supp. 2d 403 (S.D.N.Y. 2011).

This Court agrees with the defendants that the possible difference of ILSA's application to vertical-styled condominiums as opposed to a horizontal-style condominium building based upon the exclusive use of land requirement is not largely discussed in these opinions, and that parties often stipulate to ILSA's application. However, in *Indomenico,* a court in this district did directly address this issue, and found that ILSA applied to high-rise condominiums. In that case, the defendant argued that ILSA did not apply to high-rise condominiums because such condominium

units were not "parcels or pieces of 'land,'" as described in the Act's definition of "subdivision." *Id*. at 410. The court rejected this argument, in part citing deference to the above described positions consistently advanced by HUD, but also drawing attention to multiple differing and accepted definitions of the word "land" which would include ownership of a high-rise condominium. The *Indomenico* court took specific notice of a definition of "land" from *Black's Law Dictionary* (9th ed. 2009), "which alternatively defines land as 'an estate or interest in real property,' a definition that would encompass an interest in a condominium unit." *Id.* (internal citations omitted).

The defendants encourage this Court to reject not only the wealth of authority which lends itself to a broad interpretation of the term "land," but also the *Indomenico* court's finding that multiple differing definitions exist for the term, at least one of which would include high-rise condominiums, and to adopt what they consider to be the New York property law definition of the term. In New York, the defendants assert, "the term 'land' in context means, 'the raw land' and not the structures or improvements constructed on the land." (ECF No. 34 *8.) (quoting *New York Overnight Partners, L.P. v. Gordon,* 217 A.D.2d 20, 29, 633 N.Y.S.2d 288 (1st Dept. 1995), aff'd, 88 N.Y.2d 716 (1996)). However, for the reasons described above, this Court declines to adopt this definition for the application of ILSA. Notwithstanding the fact that "land" is not directly defined within the Act, the statutory history, along with the reasonable

interpretations of it by HUD, clearly show that, in the context of ILSA, the definition of land is intended to be more broad than "raw land." Accordingly, the requirements of the Act apply in this case, and because the parties stipulate that the defendants have not complied with the requirements of ILSA, the plaintiffs are entitled to summary judgment against the defendants, rescission of the purchase agreement, and refund of their deposit and all accrued interest.

B. Motion for Attorneys' Fees

The plaintiffs have also requested that this Court grant statutory attorneys' fees in their favor under § 1709 of ILSA, because they argue that defendants have been aware that their claims that ILSA did not apply were without merit, but have nonetheless continued to litigate the case, raising no defenses in their response to the plaintiffs' motion for summary judgment which had not already been foreclosed in this Court's denial of the defendants' motion to dismiss. The defendants respond, maintaining that an award of attorneys' fees under ILSA is discretionary, and inappropriate in this instance. They argue that while the Second Circuit opinion in *Bodansky,* 635 F.3d 75, foreclosed the arguments raised in the defendants' motion to dismiss, which was filed before the Second Circuit had ruled on *Bodansky,* the arguments raised in response to the plaintiffs' motion for summary judgment, and in continued defense of the plaintiffs' ILSA claim, were driven largely by facts unique to the instant situation, and were not addressed

by this Court's memorandum decision and order denying the defendants' motion to dismiss. Thus, they argue, their continued defense of this action was not frivolous.

Section 1709(c) of ILSA grants courts the power to award "court costs, and reasonable amounts of attorneys' fees . . . " to the prevailing party in a civil action brought under the Act. Very little case law exists delineating any factors to consider when determining the appropriateness of such an award. *See Bacolitsas v. 86th & 3rd Owner, LLC,* 2010 U.S. Dist. LEXIS 137144, No. 09 civ 7158 (S.D.N.Y. Dec. 17, 2010). However, generally, an award of attorneys' fees is considered to be appropriate when the position advanced by the unsuccessful party is without merit, frivolous, or appears to be advanced in bad faith. *Id*. at * 3-5. After consideration of the defendants' arguments throughout this case, this Court agrees with the defendants that, at the time that they filed their motion to dismiss, and until this Court entered its memorandum decision and order denying that motion and finding that the Second Circuit's decision in *Bodansky* foreclosed the defendants' defenses to this action, the defendants' continued defense in this case was not frivolous nor without merit. However, after the defendants became aware of *Bodansky*'s application to this case, the continued defense of this action became untenable.

This Court recognizes that the defendants raised a new defense in response to this motion for summary judgment which was not raised in their motion to

dismiss. However, this argument, regarding the exclusive use of "land" requirement, had been all but foreclosed by other case law interpreting ILSA. The defendants argue that their defense in this regard was based upon the unique facts of this case, and that the issue had never been properly explored within the Second Circuit. This Court disagrees. The defendants' defense to the motion for summary judgment was dealing with all vertical-style condominiums generally, and as is described above, was far from an emerging or unexplored issue, but had rather been all but directly disallowed by HUD and courts within and outside of this district and circuit. Accordingly, this Court finds it appropriate to award the plaintiffs attorneys' fees for the continued litigation of this case from the date of this Court's memorandum decision and order denying the defendants' motion to dismiss on August 19, 2011 until the date of this memorandum decision and order.

C. Pre-Judgment Interest

The plaintiffs have also requested that this Court award them pre-judgment interest on their deposit which must now be refunded to them by the defendants. They argue that they have been without the use and time-value of their deposit funds since September 9, 2009, the day that they exercised their revocation right, and thus are entitled to pre-judgment interest beginning on that date. The defendants have not objected to this request, and this Court finds it to be appropriate. *See Alfano v. CIGNA*

Life Ins. Co. of N.Y., 2009 U.S. Dist. LEXIS 28118 *17-18 (S.D.N.Y. Apr. 2, 2009) (GEL) (discussing the importance of the time value lost in the plaintiff's inability to access funds to which he was entitled for a time period of over three years). Accordingly, the plaintiffs are also awarded, in addition to interest which has accrued on the plaintiffs' deposit funds in escrow, pre-judgment interest beginning on September 9,2009 and continuing until the date of judgment for the plaintiffs in this case at the New York State statutory rate of 9%. N.Y. CPLR § 5004.

V. Conclusion

For the reasons stated above, the plaintiffs' motion for summary judgment is hereby GRANTED. The defendants' cross-motion for summary judgment is DENIED both on the merits and as untimely. The plaintiffs' motion for attorneys' fees is also GRANTED AS FRAMED, for the time period beginning with this Court's August 19, 2011 memorandum decision and order denying defendants' motion to dismiss and concluding on the date of this memorandum decision and order. Counsel for the plaintiffs are DIRECTED to itemize and calculate the attorneys' fees requested as to the above time period, and submit them in detail to this Court and to defense counsel on or before ***May 11, 2012***. Any response to plaintiffs' submission shall be filed on or before ***May 25, 2012***. Further, the plaintiffs' motion for pre-judgment interest is hereby GRANTED in the New York statutory amount of 9% for the time period beginning on

September 9, 2009 and continuing until the date of judgment in this matter. The parties are DIRECTED to meet and confer regarding the calculation of pre-judgment interest, and present this Court with the amount sought on or before ***May 11, 2012***. Should the defendants dispute the calculation of pre-judgment interest, a response should be filed on or before ***May 25, 2012***. This Court will enter an amended judgment order defining pre-judgment interest and attorneys' fees following the receipt of all necessary information. Finally, post-judgment interest shall be allowed pursuant to 28 U.S.C. § 1961.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit a copy of this memorandum decision and order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: April 27, 2012

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES
DISTRICT JUDGE
SITTING BY DESIGNATION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of April, two thousand fourteen.

PRESENT: **ROBERT A. KATZMANN,**
Chief Judge,
DENNIS JACOBS,
JOSE A. CABRANES,
ROSEMARY S. POOLER,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

– x

BRUCE BERLIN, NANCY BERLIN,

Plaintiffs-Appellees,

- v. - **12-2213**

RENAISSANCE RENTAL PARTNERS, LLC, D/B/A RENAISSANCE CONDOMINIUM PARTNERS II, LOUIS R. CAPPELLI,

Defendants-Appellants,

DELBELLO DONNELLAN WEINGARTEN WISE & WIEDERKEHR, LLP,

Defendant.

– x

For Plaintiffs-Appellees:	Lawrence C. Weiner, Wilentz, Goldman & Spitzer, P.A., Woodbridge, NJ.
For Defendants-Appellants:	Robert Hermann, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains, NY.
For Amicus Curiae Real Estate Board of New York, Inc.:	Richard H. Dolan, Schlam Stone & Dolan LLP, New York, NY.
For Amicus Curiae Consumer Financial Protection Bureau:	Nandan M. Joshi, Meredith Fuchs, To-Quyen Truong, David Gossett, Consumer Financial Protection Bureau, Washington, DC.

ORDER

Following disposition of this appeal on May 6, 2013, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED.**

Dennis Jacobs, *Circuit Judge,* joined by Richard C. Wesley, *Circuit Judge,* dissents by opinion from the denial of rehearing *en banc.*

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
CLERK

[SEAL]

/s/ Catherine O'Hagan Wolfe

2014 WL 1316770

DENNIS JACOBS, Circuit Judge, I joined by RICHARD C. WESLEY, Circuit Judge, dissenting from the denial of in banc review:

The statutory word "lot" in the Interstate Land Sales Full Disclosure Act ("Land Sales Act") is defined by regulation to mean "exclusive use of a specific portion of the land." 12 C.F.R. § 1010.1(b). The Department of Housing and Urban Development ("HUD"), which promulgated the regulation, and the Consumer Financial Protection Bureau ("CFPB"), HUD's successor in this respect, claim *Auer* deference in aid of their project to transmute the regulation's wording to mean "any interest in real estate," or "realty." See *Auer v. Robbins,* 519 U.S. 452, 461 (1997). In that way, HUD has created its jurisdiction to regulate the sale of individual high-rise condominium apartments, which obviously *share* the "use of . . .

land" rather than "exclusive [ly] use" it. 12 C.F.R. § 1010.1(b).

I would sit *in banc* to consider whether the agency's interpretation of its own regulation is reasonable and, since I think it is not, I would withhold *Auer* deference. But whether or not the agency's reading of its own regulation is reasonable, the majority opinion rests upon *Auer* deference in a way that illustrates how the doctrine can conflate (i) an agency's explanation of its text in light of its expertise with (ii) the agency's expansion of its power to suit its ambition.

The majority opinion neatly sets out "[t]he only merits dispute on issue in this appeal": "whether a single floor condominium in a multi-story building 'includes the right to the exclusive use of a specific portion of *the land,*' 12 C.F.R. § 1010.1(b) (emphasis supplied)," and thereby qualifies as a "lot" within the meaning of the Land Sales Act. *Berlin v. Renaissance Rental Partners, LLC,* 723 F.3d 119,124 (2d Cir.2013). The word "land" is held to be ambiguous (which is itself remarkable) and is subjected to a sequence of mutations from statute to regulation to guidance letter and amicus submission, so that (as I demonstrate in my dissent) it loses any fixed meaning whatsoever. *See id.* at 131. The agency's claimed jurisdiction morphs from "lots" to "land" to seemingly any conceivable real estate interest.

How this works can be demonstrated step-by-step through direct quotations (with my emphasis

added) from the majority opinion and the CFPB's *amicus* filing on which the opinion relies:

> • "The question presented in this appeal is whether a single-floor condominium unit in a multi-story building is a '*lot,*' thus triggering ILSA's protections." Id. at 121.
>
> • "The [CFPB] and [HUD] have defined the term 'lot' to mean 'any portion, piece, division, unit, or undivided interest in land located in any state or foreign country, if the interest includes the right to the *exclusive use of* a specific portion of the *land.*' 12 C.F.R. § 1010.1(b)." *Id.*
>
> • "[T]he CFPB and HUD have interpreted the phrase 'exclusive use of . . . land' to mean exclusive use of *realty, see, e.g.,* CFPB Letter Br. at 6, thus concluding that the statutory term 'lot' applies to condominiums." *Id.*
>
> • "The CFPB . . . letter brief . . . explain[ed], in part: 'HUD explained when it promulgated the definition of "lot" in 1973 that "condominiums carry the indicia of and in fact are *real estate.*" 1973 Rule, 38 Fed.Reg. at 23866. Accordingly, "the proper focus regarding the analysis of whether a unit has exclusive rights to the use of land . . . is whether the purchase of the unit gave the purchasers the exclusive right to a *unit,* or *any type of* [Dist. Ct. Op. at 10.]' " *Id.* at 123.
>
> • "We hold that the CFPB and HUD have reasonably interpreted their own definition of the term 'lot.' " *Id.* at 122. "Inasmuch as

> 'land' is sometimes used as a term of art referring to 'real estate,' the CFPB and HUD have reasonably concluded that their own definition of 'lot' applies to a condominium unit in a multi-floor building." *Id.* at 125.
>
> • "We conclude that the interpretation by the CFPB and HUD of their own regulation is reasonable and therefore warrants deference." *Id.* "In other words, a right to *exclusive use of a condominium unit* is a right to *exclusive use of real estate,* and therefore a condominium unit . . . in a multi-story building . . . is a 'lot' within the meaning of ILSA." *Id.* at 126.

This heavy lifting allows the word "land" to mean anything on earth (literally) that HUD wants to regulate.

One potential reason to forgo *in banc* review is that Congress is at work reining in HUD's pretension to regulate high-rise condominiums as "lots of land" (although a statutory amendment would be of no help to the seller in this case). A House bill, passed September 26, 2013, would amend the Land Sales Act to say that the Act's registration and disclosure requirements "shall not apply to . . . the sale or lease of a condominium unit. . . ." H .R. 2600, 113th Cong. (2013). (The Senate has not yet voted on the bill.) But it seems to me that we need to better understand the scope of *Auer* deference, even if it may transpire that this specific act of overreaching is eventually checked by Congress.

Some measure of discipline is needed to keep an agency from commanding *any* level of deference when the agency creates the very jurisdiction it claims to occupy. An agency is not like the busy spider, which can stand upon its own spun web.

cfpb Consumer Financial
Protection Bureau

1700 G Street NW, Washington, DC 20552

March 12, 2013

Ms. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Berlin v. Renaissance Rental Partners,*
No. 12-2213

Dear Ms. Wolfe:

The Consumer Financial Protection Bureau (Bureau or CFPB) respectfully submits this letter brief in response to the Court's order of February 19, 2013, inviting the United States Department of Housing and Urban Development (HUD) to submit its views in this case. On July 21, 2011, the authority to implement the Interstate Land Sales Full Disclosure Act (ILSA), 15 U.S.C. § 1701 *et seq.,* was transferred from HUD to the Bureau pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1955 (2010). *See* 12 U.S.C. § 5581(b)(7); 15 U.S.C. § 1718. On that date, the Bureau published a notice stating that HUD's ILSA regulations – including 24 C.F.R. § 1710.1 – "will be enforceable by the CFPB" and that the "official commentary, guidance, and policy statements issued [by HUD] prior to July 21, 2011 . . . will

be applied by the CFPB pending further CFPB action." 76 Fed. Reg. 43569 (July 21, 2011); *see also* 12 U.S.C. § 5583(i). On December 21, 2011, the Bureau republished 24 C.F.R. § 1710.1 without material change as a CFPB regulation, 12 C.F.R. § 1010.1.[1] *See* 76 Fed. Reg. 79486 (Restatement Rule). As the agency currently charged with implementing ILSA and the regulations promulgated thereunder, the Bureau has a substantial interest in, and is in the best position to offer this Court an authoritative position on, the principal question presented in this case: whether a condominium unit is a "lot" that is subject to the statute's disclosure and anti-fraud requirements.[2]

BACKGROUND

Enacted in 1968, "ILSA protects individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments, including condominiums, by mandating that developers make certain disclosures." *Bacolitsas v. 86th & 3rd Owner, LLC,* 702 F.3d 673, 676 (2d Cir. 2012). Modeled after the "full disclosure provisions and philosophy of the Securities Act of 1933," *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.,* 426 U.S. 776, 778 (1976), ILSA "protects consumers by requiring certain land developers

[1] Because 24 C.F.R. § 1710.1 was the rule in effect during the relevant events in this case, this brief will refer to HUD's regulation rather than the Bureau's republished rule.

[2] The Bureau advised the clerk's office by telephone of its intent to submit this brief in lieu of HUD.

to register their plans and to provide prescribed disclosures to prospective purchasers," Restatement Rule, 76 Fed. Reg. at 79486. Specifically, a developer may not sell or lease a lot unless "a statement of record with respect to such lot" has been filed with the CFPB (previously HUD) and become effective. 15 U.S.C. § 1703(a)(1)(A). A developer also must furnish the purchaser or lessee with "a printed property report . . . in advance of the signing of any contract." 15 U.S.C. § 1703(a)(1)(B). Neither the statement of record nor the property report may contain "an untrue statement of material fact" or exclude any information required to be disclosed. 15 U.S.C. § 1703(a)(1)(C). And the developer of a lot may not "employ any device, scheme, or artifice to defraud" or "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)(A), (C).

ILSA defines a "developer" 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." 15 U.S.C. § 1701(5). A "subdivision," in turn, is defined as "any land which is . . . divided or is proposed to be divided into lots." 15 U.S.C. § 1701(3). The term "lot" is not defined in the statute.

In 1973, HUD promulgated a definition of "lot" that in all relevant respects remains in effect today. A "lot" was defined as "any portion, piece, division, unit, or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of

the land." 38 Fed. Reg. 23866, 23876 (Sept. 4, 1973) (1973 Rule); *see also* 12 C.F.R. § 1010.1 (current definition). In the preamble to the 1973 rule, HUD explained that this definition "demonstrates the nature of the interest which is subject to [ILSA]," and specifically concluded that the definition covered condominium units. 38 Fed. Reg. at 23866. As HUD explained, "condominiums carry the indicia of and in fact are real estate, whether or not the units therein have been constructed," and, therefore, they are "viewed by [HUD] as equivalent to a subdivision, each unit being a lot." *Ibid.* HUD observed that the "application of [ILSA] to condominiums [had] been consistent [HUD] policy since the issue was first raised in 1969," and that defining "lot" to include condominiums was "a valid exercise of [HUD's] regulatory authority." *Ibid.*

The preamble also discussed the application of HUD's definition of "lot" to "condominiums intended as primary residences in metropolitan areas." 1973 Rule, 38 Fed. Reg. at 23866. HUD explained that such condominiums often would not be subject to ILSA, not because their units were excluded from the definition of "lot," but because "most professional builders would qualify for [an] exemption inasmuch as they are able to deliver a completed unit to a purchaser within two years after the contract for sale has been signed." *Ibid.*; *see* 15 U.S.C. § 1702(a)(2) (exempting from ILSA certain transactions involving constructed buildings and those in which the seller is

contractually obligated to construct the building within two years).

In 1974, HUD issued guidance to "re-emphasiz[e] attention to the applicability of [ILSA] to the offer and sale of condominiums and other structures." 39 Fed. Reg. 7824, 7824 (Feb. 28, 1974) (1974 Guidance). In elaborating on how to apply the two-year construction exemption, HUD explained that it sought to address "the realities of condominium construction, especially high-rise construction." *Ibid.* HUD reiterated, however, that "[b]uilders are not automatically exempt from [ILSA] by virtue of their primary occupations or the type of buildings they erect." *Ibid.*

In the ensuing years, HUD has consistently reaffirmed its determination that ILSA applies to the sale or lease of nonexempt condominium units. *See* 40 Fed. Reg. 47166, 47166 (Oct. 8, 1975) ("For jurisdictional purposes, a condominium 'unit' is a 'lot.'"); 61 Fed. Reg. 13596, 13602 (Mar. 27, 1996) (1996 Guidance) (stating that the definition of "lot" applies to the "sale of a condominium or cooperative unit"). When the Bureau republished HUD's ILSA regulations in 2011, it similarly recognized the longstanding application of ILSA and HUD's regulations to the sale or lease of "unconstructed condominiums." Restatement Rule, 76 Fed. Reg. at 79487.

DISCUSSION

As framed by Appellants, the principal issue presented in this case is whether the purchaser of a

condominium unit has acquired a "lot," as defined in 24 C.F.R. § 1710.1, if the purchaser's interest in the unit does not include the exclusive use of what Appellants call "raw land" or the "tangible surface of the earth."[3] Br. 13-14. Because that question turns on the interpretation of a federal regulation adopted pursuant to statutory rulemaking authority conferred upon HUD (and now the CFPB),[4] the "administrative interpretation" of the regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bruh v. Bessemer Venture Partners III L.P.,* 464 F.3d 202, 207 (2d Cir. 2006) (quoting *Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 413-414 (1945)), *cert. denied,* 549 U.S. 1209 (2007). In determining the "administrative construction of the regulation," the Court may look to the preamble of the agency's rulemaking decision. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 158 n.13 (1982); *see also Ramos v. Baldor Specialty*

[3] The Bureau takes no position on the nature or extent of Appellees' property interests in this case. Nor does the Bureau take any position on the district court's decision to award attorney's fees to Appellees.

[4] When an "agency has statutory authority to issue regulations," its regulations "interpret[ing] ambiguous statutory terms" are entitled to deference. *Fed. Express Corp. v. Holowecki,* 552 U.S. 389, 395 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843-845 (1984)). Accordingly, to the extent Appellants have raised a challenge to 24 C.F.R. § 1710.1, the Court should uphold the regulation unless the statute "unambiguously forbids" it or the agency's interpretation of the statute otherwise "exceeds the bounds of the permissible." *Barnhart v. Walton,* 535 U.S. 212, 218 (2002).

Foods, Inc., 687 F.3d 554, 559 (2d Cir. 2012) (stating that the Court would "consider and defer to the Department of Labor's interpretation of a regulation – including the regulatory preamble included in the Federal Register"). In addition, this Court "ordinarily give[s] deference to an agency's interpretation of its own ambiguous regulations, even if that interpretation appears in a legal brief." *Union Carbide Corp. & Subsidiaries v. Comm'r of Internal Revenue,* 697 F.3d 104, 109 (2d Cir. 2012). For the reasons set forth below, the Court should defer to HUD's consistent and longstanding view (which the CFPB has adopted) that a condominium unit to which a purchaser or lessee has a right of exclusive use is a "lot" for purposes of 24 C.F.R § 1710.1 and ILSA.

1. Appellants contend that the condominium unit at issue in this case is not a "lot" under 24 C.F.R. § 1710.1 because the purchasers did not have "the right to the exclusive use of a specific portion of the land." Asserting that "land" under New York law refers to the "raw land" or the "tangible surface of the earth," Appellants argue that a purchaser's right to the exclusive use of an upper-floor condominium unit cannot by itself constitute an interest in "land" for purposes of § 1710.1. Br. 13-18.

The district court correctly rejected Appellants' argument. As the district court observed (SPA-10), HUD explained when it promulgated the definition of "lot" in 1973 that "condominiums carry the indicia of and in fact are real estate." 1973 Rule, 38 Fed. Reg. at 23866. Accordingly, "the proper focus regarding the

analysis of whether a unit has exclusive rights to the use of land under 24 C.F.R. § 1710.1 is whether the purchase of the unit gave the purchasers the exclusive right to a unit, or any type of 'realty.'" SPA-10. In that regard, the preamble to the 1973 Rule makes clear that a condominium is "equivalent to a subdivision, *each unit being a lot.*" 38 Fed. Reg. at 23866 (emphasis added). Because the condominium unit is itself a lot for purposes of ILSA, a purchaser of the unit need not have a separate interest in "raw land" to be entitled to the protections of ILSA's disclosure and anti-fraud requirements.

HUD's definition of "lot" to include condominium units is entitled to "particular deference" because it reflects "an agency interpretation of 'longstanding' duration." *Barnhart,* 535 U.S. at 220. As HUD explained in 1973, the "application of [ILSA] to condominiums has been consistent [HUD] policy since the issue was first raised in 1969" – the year that ILSA took effect. 1973 Rule, 38 Fed. Reg. at 23866; *see* ILSA § 1422, 82 Stat. at 599 (effective date provision).[5] HUD consistently reaffirmed that determination

[5] At the time of ILSA's enactment, the term "lot" referred broadly to "[a] share; one of several parcels into which property is divided" or "[a]ny portion, piece, division or parcel of land." Black's Law Dictionary 1096 (rev. 4th ed. 1968). Likewise, although the term "land" might refer merely to the "ground, soil, or earth," in a legal sense, it "signifies everything which may be holden," including "anything that may be classed as real estate or real property." *Id.* at 1019. HUD reasonably interpreted those statutory terms when it concluded that condominiums "carry the indicia of and in fact are real estate" subject to ILSA's disclosure

(Continued on following page)

in subsequent guidance documents. *See, e.g.,* 40 Fed. Reg. at 47166 ("For jurisdictional purposes, a condominium 'unit' is a 'lot.' "); 1996 Guidance, 61 Fed. Reg. at 13596 (stating that the definition of "lot" applies to the "sale of a condominium or cooperative unit"). The courts have upheld that interpretation as within HUD's authority,[6] and this Court and others have repeatedly applied ILSA in Private actions against condominium developers. *See Bacolitsas,* 702 F.3d at 680 (evaluating compliance with 15 U.S.C. § 1703(d)); *Bodansky v. Fifth on the Park Condo, LLC,* 635 F.3d 75, 83 (2d Cir. 2011) (considering availability of 100-lot exemption in 15 U.S.C. § 1702(b)(1)); *see also Markowitz v. Ne. Land Co.,* 906 F.2d 100, 106 (3d Cir. 1990); *Venekiase v. Bridgewater Condos, L.C.,* 670 F.3d 705, 709 (6th Cir. 2012).[7]

Congress likewise "was aware of, and approved of, HUD's construction" of ILSA. *Winter,* 777 F.2d at

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and anti-fraud provisions. 1973 Rule, 38 Fed. Reg. at 23866. That interpretation is entitled to deference. *See, supra,* note 4

[6] *See, e.g., Nickell v. Beau View of Biloxi, L.L.C.,* 636 F.3d 752, 754 (5th Cir. 2011); *Winter v. Hollingsworth Properties. Inc.*, 777 F.2d 1444, 1449 (11th Cir. 1985); *Indomenico v. 123 Washington, LLC,* 813 F. Supp. 2d 403 (S.D.N.Y. 2011); *Smith v. Myrtle Owner, LLC,* 2011 WL 2635717 (E.D.N.Y. Feb. 9, 2011), *report and recommendation adopted sub nom. Sanz v. Myrtle Owner, LLC,* 2011 WL 2635647 (E.D.N.Y. July 5, 2011).

[7] Courts have applied ILSA to cases involving high-rise condominiums since as early as 1985, *Grove Towers, Inc. v. Lopez,* 467 So. 2d 358 (Fla. Dist. Ct. App. 1985), and most recently in 2012. *See Rae v. WB Imico Lexington Fee, LLC,* 851 F. Supp. 2d 615 (S.D.N.Y. 2012).

1449 (footnote reference omitted). Congress amended ILSA in 1978 to add an express reference in the construction exemption for condominiums. *See* Housing and Community Development Amendments of 1978, Pub. L. No. 95-557, Title IX, § 907(a)(1), 92 Stat. 2080, 2127. As the Eleventh Circuit observed, by taking "specific action in 1978 to exempt the sale of some condominiums," the "implication to be drawn" is that ILSA "must apply to the sale of condominiums" as a general matter. *Winter,* 777 F.2d at 1449 n.12. In 1979, moreover, Congress amended ILSA's definition of "subdivision." Housing and Community Development Amendments of 1979, Pub. L. No. 96-153. Title IV, § 401, 93 Stat. 1101, 1122. In doing so, Congress did not disturb HUD's application of ILSA to condominiums. Even if these actions do not "amount to congressional ratification" of HUD's view, "Congressional silence in the face of administrative construction of a statute lends support to the validity of that interpretation." *United States v. Chestman,* 947 F.2d 551, 560 (2d Cir. 1991) (en banc).

2. Notwithstanding HUD's longstanding view that "each unit" in a condominium development is a "lot," 38 Fed. Reg. at 23866, Appellants offer various arguments for why the particular unit at issue in this case is not covered by ILSA. None of them has merit.

First, Appellants suggest (Br. 7-9) that the definition of "lot" did not extend to condominium units (as opposed to "land") until 1996, when HUD issued the 1996 Guidance to "clarify agency policies and positions with regard to [ILSA's] exemption provisions."

61 Fed. Reg. at 13601. In that guidance document, HUD explained that a "lot" includes property interests that confer on the purchaser "the exclusive use of a specific portion of the land or unit," including units sold in "a condominium." *Id.* at 13602. Appellants contend (Br. 9) that the term "or unit" (which does not appear in the text of 24 C.F.R. § 1710.1) and other explanatory material in the guidance document reflect HUD's "acknowledgement that its regulation defining lot' does *not* cover condominiums" in which the purchaser's right to exclusive use extends only to the unit and not to the "raw land."

Appellants are mistaken. At the outset, even if the 1996 Guidance were the first statement by HUD on the meaning of "lot," it would still be entitled to deference. *See Lopes v. Dep't of Soc. Services,* 696 F.3d 180, 187 (2d Cir. 2012) ("The interpretive guidance of an administrative agency . . . constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' ") (quoting *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)). In any event, the 1996 Guidance did not articulate a new interpretation of the scope of "lot" HUD's statement in the 1973 preamble that "each unit" in a condominium constitutes a "lot" under ILSA settled the question whether a purchaser needs to acquire additional property interests (*e.g.*, interests in the "raw land") to receive ILSA's protections, with HUD concluding that the purchaser's right to exclusive use of the unit alone would suffice. The 1996 Guidance merely "repeated" that longstanding interpretation in the course of providing guidance on

ILSA's exemption provisions. 1996 Guidance, 61 Fed. Reg. at 13602.

Second, Appellants argue that the 1973 regulation, by using the term "land," was intended to apply only to condominiums that were "horizontal developments and . . . campgrounds," Br. 7 (quoting 1973 Rule, 38 Fed. Reg. at 23866), and not "condominiums where purchasers have [only] exclusive use of their 'unit,'" *ibid.* That argument is contradicted by contemporaneous HUD statements that demonstrate its understanding that ILSA applies to multistory condominium developments. In the preamble to the 1973 rule, HUD made clear that ILSA would apply to "condominiums intended as primary residences in metropolitan areas" that did not qualify for the two-year construction exemption. 1973 Rule, 38 Fed. Reg. at 23866. As the district court found, HUD's discussion of condominiums "in metropolitan areas" reflected its view that ILSA's protections extend to purchasers of "high-rise or 'vertical' condominiums." SPA-8. Indeed, less than six months after issuing the 1973 Rule, HUD removed any doubt on the matter by issuing guidelines designed to accommodate "the realities of condominium construction, especially *high-rise construction.*" 1974 Guidance, 39 Fed. Reg. at 7824 (emphasis added). The 1974 Guidance thus makes clear that the term "lot" is not confined to "horizontal developments" and "campgrounds."

Third, Appellants argue (Br. 13) that the definition of the term "land" used in 24 C.F.R. § 1710.1 is determined by New York state property law, which

they claim defines "land" to exclude "structures or improvements constructed on the land." As this Court observed, however, ILSA creates "a *national standard* to guarantee full disclosure for the benefit of prospective buyers." *Bacolitsas,* 702 F.3d at 682 (emphasis added). ILSA's national reach requires that the meaning of the federal regulatory term "land" be determined under federal law. *Cf. RTC v. Diamond,* 45 F.3d 665, 671-673 (2d Cir. 1995) (rejecting argument that "terms not expressly defined" in the statute "must be construed according to New York law" and concluding instead that "Congress is presumed to have intended the *common-law* meaning of terms it uses without express definition"). As the district court found, "the statutory history, along with the reasonable interpretations of it by HUD, clearly show that, in the context of ILSA, the definition of land is intended to be more broad than 'raw land.'" SPA-12.

Finally, Appellants contend (Br. 5) that "Congress in 1968 was concerned with deceptive practices in the sale of unimproved tracts of land." As the Eleventh Circuit noted, however, [a]lthough Congress may have been primarily concerned with the sale of raw land, it struck a balance by making the statute applicable to *all* lots and providing an exemption, not for all improved land, but for improved land on which a residential, commercial, condominium, or industrial building exists or where the contract of sale obligates the seller to erect such a structure within two years." *Winter,* 777 F.2d at 1447. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably

comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 79 (1998). The district court correctly concluded that the "limitations placed upon the Act's scope are in the form of exemptions of certain lots and sales, rather than blanket limitations of the Act's applicability to certain types of real estate." SPA-9.[8]

3. The district court also correctly observed (SPA-10) that Appellants' interpretation of the term "lot" would lead to "nonsensical results." If ILSA only applied to sales or leases of a portion of the "surface of the earth" (Br. 14), a ground-floor condominium with an outdoor patio would be covered by ILSA, while the unit immediately above with a balcony would not. Likewise, the purchaser of an upper-floor unit whose deed includes a surface-level parking spot

[8] Appellants' reliance (Br. 12) on *Tencza v. Tag Court Square, LLC,* 803 F. Supp. 2d 279 (S.D.N.Y. 2011), is misplaced. The district court in that case recognized that "HUD has interpreted the term 'lot' to refer to condominium units" and that "with certain exceptions . . . , the requirements of [ILSA] generally apply to condominium units such as the [upper-floor] Unit Plaintiffs purchased." 803 F. Supp. at 283. Indeed, although the court considered whether the term "land" as used in 15 U.S.C. § 1702(a)(2) permitted a developer to invoke the construction exemption for upper-floor condominium units, the court did not have to decide that question because it concluded that the developer in that case would not qualify for the exemption in any event. *Id.* at 294. In sum, *Tencza* is consistent with the uniform view of the courts that ILSA applies to upper-floor condominium units.

would be entitled to the disclosures ILSA requires; her next-door neighbor whose unit does not come with a parking spot would not. Appellants do not even attempt to explain how these arbitrary outcomes would be consistent with ILSA's aim to "protect[ ] individual buyers or lessees who purchase or lease lots in large, uncompleted housing developments, including condominiums." *Bacolitsas,* 702 F.3d at 676.

CONCLUSION

For the foregoing reasons, the Court should conclude that the definition of "lot" in 24 C.F.R. § 1710.1 includes a condominium unit to which a purchaser enjoys the right of exclusive use, regardless of whether the purchaser has exclusive use of any surface-level property.

Respectfully submitted,

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PART 1710 – LAND REGISTRATION

§ 1710.1 Definitions.

(a) *Statutory terms.* All terms are used in accordance with their statutory meaning in 15 U.S.C. 1702 or with part 5 of this title, unless otherwise defined in paragraph (b) of this section or elsewhere in this part.

(b) *Other terms.* As used in this part:

Act means the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701.

Advisory opinion means the formal written opinion of the Secretary as to jurisdiction in a particular case or the applicability of an exemption under §§ 1710.5 through 1710.15, based on facts submitted to the Secretary.

Available for use means that in addition to being constructed, the subject facility is fully operative and supplied with any materials and staff necessary for its intended purpose.

Beneficial property restrictions means restrictions that are enforceable by the lot owners and are designed to control the use of the lot and to preserve or enhance the environment and the aesthetic and economic value of the subdivision.

Date of filing means the date a Statement of Record, amendment, or consolidation, accompanied by the applicable fee, is received by the Secretary.

Good faith estimate means an estimate based on documentary evidence. In the case of cost estimates, the documentation may be obtained from the suppliers of the services. In the case of estimates of completion dates, the documentation may be actual contracts let, engineering schedules, or other evidence of commitments to complete the amenities.

Lot means any portion, piece, division, unit, or undivided interest in land located in any State or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land.

OILSR means the Interstate Land Sales Registration program.

Owner means the person or entity who holds the fee title to the land and has the power to convey that title to others.

Parent corporation means that entity which ultimately controls the subsidiary, even though the control may arise through any series or chain of other subsidiaries or entities.

Principal means any person or entity holding at least a 10 percent financial or ownership interest in the developer or owner, directly or through any series or chain of subsidiaries or other entities.

Rules means all rules adopted pursuant to the Act, including the general requirements published in this part.

Sale means any obligation or arrangement for consideration to purchase or lease a lot directly or indirectly. The terms "sale" or "seller" include in their meanings the terms "lease" and "lessor".

Senior Executive Officer means the individual of highest rank responsible for the day-to-day operations of the developer and who has the authority to bind or commit the developing entity to contractual obligations.

Site means a group of contiguous lots, whether such lots are actually divided or proposed to be divided. Lots are considered to be contiguous even though contiguity may be interrupted by a road, park, small body of water, recreational facility, or any similar object.

Start of construction means breaking ground for building a facility, followed by diligent action to complete the facility.

Rules and Regulations

[13602] *Part II – Definitions*

The following definitions are included here because of the importance each has to the explanation and understanding of HUD's interpretations of the exemption requirements. Furthermore, with the exception of "lot", "sale", "common promotional plan", and "subdivision", these definitions are not set forth elsewhere. The definitions of "lot" and "sale" are repeated here because of their extraordinary importance to the exemptions.

(a) *Anti-Fraud Provisions* means the provisions of the Act that prohibit the use of any sales practices, advertising or promotional materials that: would be misleading to purchasers; contain any misrepresentation of material facts or untrue statements; or would operate as a fraud or deceit upon a purchaser. Also prohibited are representations that roads, sewer, water, gas or electric services or recreational amenities will be provided or completed by the developer without so stipulating in the contract. The relevant provisions are set forth in 15 U.S.C. 1703(a)(2). The regulations that implement the anti-fraud provisions are set forth in 24 CFR part 1715, subpart B.

(b) *Common Promotional Plan* means any plan undertaken by a single developer or a group of developers acting together to offer lots for sale or lease. A common promotional plan is presumed to exist if land is offered by a developer or a group of developers acting in concert and the land is contiguous or is

known, designated, or advertised as a common development or by a common name. The number of lots covered by each individual offering has no bearing on whether or not there is a common promotional plan.

Other characteristics that are evaluated in determining whether or not a common promotional plan exists include, but are not limited to: a 10% or greater common ownership; same or similar name or identity; common sales agents; common sales facilities; common advertising; and common inventory. The presence of one or more of the characteristics does not necessarily denote a common promotional plan. Conversely, the absence of a characteristic does not demonstrate that there is no common promotional plan.

Two essential elements of a common promotional plan are a thread of common ownership or developers acting in concert. However, common ownership alone would not constitute a common promotional plan. HUD considers the involvement of all principals holding a 10 percent or greater interest in the subdivision to determine whether there is a thread of common ownership. If there is common ownership or if the developers are acting in concert, and there is common advertising, sales agents or sales office, a common promotional plan is presumed to exist. Experience has led to the conclusion that sales agents generally will direct a prospective purchaser to any or all properties in inventory to make a sale.

The phrase "common promotional plan" is most often misunderstood by those who believe that "promotion" implies an enthusiastic sales campaign. Any method used to attract potential purchasers is, in fact, the "promotional plan". For example, direct mail campaigns and free dinners may be the promotional plan of one developer while another developer's promotion may be limited to classified advertisements in a local newspaper.

Brokers selling lots as an agent for any person who is required to register are required to comply with the requirements of the Act for those sales. Brokers selling lots for different individuals who do not own enough lots to come within the jurisdiction established by the Act generally would not be considered to be offering lots pursuant to a common promotional plan as long as they are merely receiving the usual real estate commission for such sales. If the broker has an ownership interest in the lots or is receiving a greater than normal real estate commission, the broker may be offering lots pursuant to common promotional plan and may be required to comply with the requirements of the Act.

(c) *Delivery of Deed* means the physical transfer of a recordable deed, executed by the seller to the purchaser, to the purchaser's agent or to the appropriate governmental recording office. If the transfer (i.e., delivery) is to an agent or to a recording office, there must not be any conditions imposed upon the purchaser or any further action to be taken by either the purchaser or the seller. If delivery is to the place

of recordation, it must be accompanied by the proper recordation fees.

(d) *Lot* means any portion, piece, division, unit or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of the land or unit. This applies to the sale of a condominium or cooperative unit or a campsite as well as a traditional lot.

If the purchaser of an undivided interest or a membership has exclusive repeated use or possession of a specific designated lot even for a portion of the year, a lot, as defined by the regulations, exists. For purposes of definition, if the purchaser has been assigned a specific lot on a recurring basis for a defined period of time and could eject another person during the time he has the right to use that lot, then the purchaser has an exclusive use.

(e) *Sale* means any obligation or agreement for consideration to purchase or lease a lot directly or indirectly. The time of sale is measured from when a purchaser signs a contract, even if the contract contains contingencies beyond the control of the seller. For example, if a developer uses a contract which states that the sale is contingent upon obtaining an exemption from HUD, a sale, for the purposes of this definition, occurred when the purchaser signed the contract. The terms “sale” and “seller” include the terms “lease” and “lessor” for the purposes of the regulations and these Guidelines.

(f) *Site* means a group of contiguous lots whether such lots are actually divided or proposed to be divided. Lots are considered to be contiguous even though contiguity may be interrupted by a road, park, small body of water, recreational facility or any similar object.

(g) *Subdivision* means any land that is located in any state or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan. Any number of lots, whether divided by the previous owner, divided by the current owner, or merely proposed to be divided may constitute a subdivision. "Proposed to be divided" includes the developer's intention to subdivide land, as well as the developer's intention to add additional land or units.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Housing – Federal Housing Commissioner; Interstate Land Sales Registration Program; Streamlining Final Rule

24 CFR Parts 1700, 1710, and 1715

[Docket No. FR-3987 – F-01]

RIN 2502-AG63

AGENCY: Office of the Assistant Secretary for Housing – Federal Housing Commissioner, HUD.

ACTION: Final rule.

* * *

Part I – Introduction

The Interstate Land Sales Registration Division (also known as OILSR) is offering these Guidelines to clarify agency policies and positions with regard to the exemption provisions of the Interstate Land Sales Full Disclosure Act (the Act), Pub. L. 90-448 (15 U.S.C. 1701 through 1720), and its implementing regulations, 24 CFR parts 1710 through 1730. The regulations comply with the Paperwork Reduction Act of 1980, as evidenced by Office of Management and Budget approval number 2502-0243. These Guidelines are intended to assist a developer in determining whether or not a real estate offering is exempt from any or all of the requirements of the Act. They supersede any Guidelines previously issued by this Office.

This is an interpretive rule, not a substantive regulation. Not every conceivable factor of the exemption process is covered in these Guidelines and variations may occur in unique situations. Examples are given, but the examples do not in any way exhaust the myriad possibilities occurring in land development and land sales activity, nor do they set absolute standards.

* * *

Part II – Definitions

The following definitions are included here because of the importance each has to the explanation and understanding of HUD's interpretations of the exemption requirements. Furthermore, with the exception of "lot", "sale", "common promotional plan", and "subdivision", these definitions are not set forth elsewhere. The definitions of "lot" and "sale" are repeated here because of their extraordinary importance to the exemptions.

* * *

(d) *Lot* means any portion, piece, division, unit or undivided interest in land if such interest includes the right to the exclusive use of a specific portion of the land or unit. This applies to the sale of a condominium or cooperative unit or a campsite as well as a traditional lot.