

the evidence is unequivocal. In this case, the provisions of the Unit Upgrade Agreement exclude the possibility that Defendant Thomas J. LeFevre was acting as agent of Defendant Bayonne, LLC. Plaintiff BCJJ, LLC could not have understood the Seller, Thomas J. LeFevre, to be acting as agent for Defendant Bayonne, LLC in negotiating the subject transaction.

The Court further notes that the Operating Agreement of Bayonne, LLC was provided to Jason Turkish and to Christopher Sullivan prior to the closing on March 27, 2007. The terms of the Operating Agreement further support the absence of an agency relationship between Defendant Thomas LeFevre and Defendant Bayonne, LLC as to the subject transaction. Where an entity has two managers, and its decisions must be made by a majority of the managers holding "managerial units", then both managers must participate in the decision for the decision bind the entity. In the event of a deadlock (one for and one against), it was Leonard Nadolski who had the right to break the deadlock, not Defendant Thomas LeFevre.

The pre-contract negotiations and the documents executed at closing establish that Defendant Thomas LeFevre did not have the authority to bind Defendant Bayonne, LLC as to the proposed transaction, and that Plaintiff BCJJ, LLC knew that Defendant LeFevre did not have the authority to bind Defendant Bayonne, LLC.

b) Apparent Agent

It is undisputed that Defendant Thomas LeFevre executed

other documents on behalf of Defendant Bayonne, LLC, such as a permit application and the Cubellis contract. Defendant Bayonne, LLC argues that there is no record evidence that establishes that Plaintiff BCJJ, LLC knew of the permit application or Cubellis contract prior to or during March, 2007, and relied on those documents. The Court has examined the record and can find no evidence that Plaintiff BCJJ, LLC knew of those documents, and relied on them, during the relevant time.

Apparent agency arises from representations of the principal, and not from the subjective understanding of the party dealing with the purported agent, or from appearances created by the purported agent. Izquierdo v. Hialeah Hosp., Inc., 709 So.2d 187 (Fla. 3d DCA 1998). In his deposition, William Turkish testified that Leonard Nadolski never told him that Defendant Thomas J. LeFevre had the authority to bind and act for Defendant Bayonne, LLC. (Dkt. 199-1, pp. 134-135). The Court finds that Plaintiff BCJJ, LLC cannot establish that Plaintiff BCJJ, LLC reasonably relied on the representations and conduct of Defendant Thomas LeFevre as the apparent agent of Defendant Bayonne, LLC in March, 2007.

After consideration, the Court finds that Plaintiff BCJJ, LLC cannot establish that Defendant Thomas LeFevre acted as the agent or apparent agent of Defendant Bayonne, LLC as to the subject transaction.

## 2) Joint Venture Relationship

Plaintiff BCJJ, LLC argues that there was a joint venture

relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC. Plaintiff BCJJ, LLC identifies only the Joint Development Agreement ("JDA") as the source of the joint venture relationship. Plaintiff BCJJ, LLC relies on paragraphs 18, 19 and 35 on the JDA to establish the right to share profits and the duty to share losses.

The JDA includes an express statement of its purpose and scope (Dkt. 148-11, p. 8). The purpose/scope paragraph includes no statement establishing the right to share profits and duty to share losses as to development and subsequent sale or other disposition of both parcels which comprise the "Total Property."

Paragraph 18 provides:

18. **Construction Timeframes.** It is anticipated that the Waterfront Project may precede, (sic) or be developed concurrently with the Commercial Project and therefore the Parties agree that it is in their respective best interests to designate Bayonne as the Party who will have the right to plan, design, implement, and develop the Shared Utilities, Access and other Improvements. Accordingly, Bayonne shall have the right to plan, design, implement, construct and develop the Shared Utilities, Access and other Improvements. Recognizing that this function will take considerable time, and will provide a considerable benefit to the Commercial Project, any party subsequently purchasing the Commercial Property for development from Bayonne Investments shall pay to Bayonne a project management fee equal to ten percent (10 %) of the gross amount(s) expended to plan, develop and construct the Access, Shared Utilities, and other Improvements payable within thirty days

following completion. However, to the extent that the Waterfront project is developed concurrently with the Commercial Project and Bayonne Investments retains title to the Commercial Property, or the construction project to be developed on the Commercial Property precedes the Waterfront Project, the Parties agree that Bayonne shall have the right, but not the obligation, to permit Bayonne Investments, its successors and or assigns, to construct the Access, Improvements and/or Shared Utilities, provided, in such instance, (a) Bayonne shall retain the right to plan and design the Access, Shared Utilities, and other Improvements, and each shall be constructed by Bayonne Investments or its successor in interest in strict accordance with plans designed by, or otherwise approved by Bayonne, in Bayonne's sole discretion; and (b) no management fee will be due either Party. If construction of the Waterfront Property precedes the construction of the Commercial Property, no management fee will be due either Party....

The above provision provides for the payment of a management fee by a subsequent owner of the Commercial Property, in the event that a subsequent owner develops the Commercial Property before Bayonne, LLC develops the Waterfront Property. In the event that Bayonne, LLC develops the Waterfront Property before or while Bayonne Investments, LLC develops the Commercial Property, no management fee is due to either party. The above provision does not establish the right to share profits or the duty to share losses that are generated within the scope of the business conducted by Bayonne, LLC and Bayonne Investments, LLC.

Paragraph 19 provides:

19. **Viacom Signage.** For as long as any leases, licenses, or other agreements exist with regard to the location of billboards or comparable signage on the Commercial Property by third parties, and such leases, licenses, or other agreements permit or otherwise reserve unto the landlord/property owner thereunder, the right to utilize any portion of such signage, the Parties agree that Bayonne, or its successors and/or assigns shall have the right to use one-half of any portion of the signage so reserved. Bayonne shall have the right to designate which portions it wishes to use, and shall have the right to design any signage which might be used exclusively by Bayonne or shared by the Parties. This provision shall not apply to signage used by occupants of the Commercial Project itself. Once the period of free rent offered by Viacom has expired, which is anticipated to be three months, all revenue from the signage leases, licenses or other agreements shall belong exclusively to Bayonne Investments.

The above contract provision provides that Bayonne, LLC shall have the right to use one half of any signage on the Commercial Property reserved to the landlord under a contract with a third party, and Bayonne Investments, LLC shall have the right to use one half of any such signage. Under an existing agreement with Viacom, after a period of free rent (which involves no revenue) all revenue from that agreement belongs only to Bayonne Investments.

The above provision establishes only the right to share reserved signage, Bayonne's right to design the signage, and that the revenue from Viacom signage agreements on the Commercial

Property belongs only to Bayonne Investments, LLC.

Paragraph 35 provides:

35. **General.** Any and all impact fee credits realized as a result of the planning, development, construction, installation, use and/or dedication of the Improvements, Shared Utilities, and/or Access shall be apportioned between the two projects in proportion to the formulae governing the apportionment of the initial cost thereof. Any other planning, development and/or construction related activities that benefit both parcels, but have not been specifically apportioned hereinabove, shall be split equally between the Parties.

An impact fee is a cost of development which is imposed by local government, and which is intended to pay for the construction or expansion of off-site capital improvements necessitated by, and which benefit, the new development. Any "impact fee credit" is a reduction of that cost. The above paragraph establishes how any such credit shall be apportioned.

The above paragraph further provides for the equal split of any other planning, development and construction related "activities" that benefit both parcels. Since the primary purpose of the JDA is to establish the parties' agreement as to sharing the cost of utilities, access and other improvements, the Court finds that paragraph 35 includes the equal sharing of the cost of any required activity that benefits both parcels and which was not specifically identified in the JDA.

The above paragraphs of the JDA do not establish the sharing

of profits and losses for the business conducted by Bayonne, LLC and Bayonne Development, LLC. The JDA is silent as to the right to share profits and the duty to share losses by Bayonne, LLC and Bayonne Investments, LLC as to the business carried on by each entity. Each entity purchased a parcel of unimproved real property with the intent to install the necessary utilities, construct condominiums or other structures, and then sell or otherwise dispose of the units constructed. The Waterfront Property was to be residential development, and the Commercial Property was to be a mixed use development. The JDA's reference to the development of each parcel pursuant to a master plan of development for the "Total Property" does not establish the intent of Bayonne, LLC and Bayonne Investments, LLC to share profits from the development of the "Total Property" and the duty to share losses from the development of the "Total Property," after considering all provisions of the JDA, including the intent of the parties to the Agreement.

The JDA specifies that its primary purpose is to document the agreement of Bayonne, LLC and Bayonne Investments, LLC as to the apportionment of the costs of shared infrastructure, including utilities, access and other improvements. The JDA expressly contemplates that the development of each parcel may proceed separately, as well as concurrently. Notwithstanding the JDA, there is overwhelming record evidence that Bayonne, LLC and Bayonne Investments, LLC were established as separate entities and remained separate entities. Undisputed record establishes that Bayonne, LLC and Bayonne Investments, LLC owned separate parcels of property, that the financial obligations of each entity were separate, and that the plans for development of each

parcel were separate. Each entity had separate bank accounts. A separate Operating Agreement controlled each entity.

After consideration, the Court concludes that Plaintiff BCJJ, LLC cannot establish a joint venture relationship that would render Defendant Bayonne, LLC vicariously liable for the acts of Bayonne Investments, LLC.

3) Unit 441 Inextricably Intertwined With Purchase Transaction

Plaintiff BCJJ, LLC argues that Defendant Bayonne, LLC was in direct privity with Plaintiff BCJJ, LLC as part and parcel of the investment transaction. Plaintiff BCJJ, LLC argues that the contemplated purchase of Unit 441 of the Residences in Grande Bay was plainly and inextricably intertwined in Plaintiff's investment, just as Defendant Bayonne, LLC's and Defendant Bayonne Investment, LLC's joint development of the two parcels were intertwined as part of the entities' joint venture, and Thomas LeFevre was Bayonne's managing member and agent.

The Court has found that Plaintiff BCJJ, LLC recognized Defendant Thomas J. LeFevre did not have the authority to act on behalf of Defendant Bayonne, LLC. Plaintiff BCJJ, LLC did not require Defendant LeFevre to execute the Purchase Agreement for Unit 441 on behalf of Defendant Bayonne, LLC. Plaintiff's proposed Purchase Agreement for Unit 441 included a signature line for Leonard A. Nadolski on behalf of Defendant Bayonne, LLC, not Defendant Thomas LeFevre. Plaintiff BCJJ, LLC included a signature line on its proposed Unit Upgrade Agreement for Defendant Thomas LeFevre to sign the Agreement as Manager for



Defendant Bayonne, LLC, but after negotiation the terms of Plaintiff's proposed Unit Upgrade Agreement were amended, and the signature line for Defendant LeFevre to sign in his capacity as Manager of Defendant Bayonne, LLC (then Bayonne Development, LLC) was deleted from the Unit Upgrade Agreement. Plaintiff BCJJ, LLC decided to proceed with the transaction and execute the Unit Upgrade Agreement in the form negotiated between the parties, which was executed by Plaintiff BCJJ, LLC and "Seller" Thomas J. LeFevre only as Trustee of Thomas J. LeFevre Living Trust.

Privity is the connection or relationship which exists between two or more contracting parties. Sumitomo Corp. of America v. M/V Saint Venture, 683 F.Supp. 1361, 1369 (M.D. Fla. 1988). Plaintiff BCJJ, LLC and Defendant Bayonne, LLC did not enter into an Agreement to Purchase Unit 441.

In his deposition, William Turkish testified that the upgrade to Unit 441 was an incentive for Plaintiff to enter into the subject transaction. Prior to the closing of the transaction, the parties expressly considered the possibility that the Agreement to Purchase Unit 441 would not be consummated, and provided that the obligation of Defendant LeFevre to repay \$400,000 would arise if Defendant LeFevre was unwilling or unable to deliver the Unit 441 Purchase Agreement to Plaintiff, or if the Purchase Agreement was unable to be consummated through no fault of Plaintiff. (Dkt. 148-5, p. 2). The Unit Upgrade Agreement further provided that Defendant LeFevre's contingent obligations were secured by Defendant's ownership interests in GLRS, LLC and TT, LLC.

The Court has further found that Plaintiff BCJJ, LLC cannot establish the presence of a joint venture relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC.

Defendant Bayonne, LLC was not in privity with Plaintiff BCJJ, LLC, as Defendant Bayonne, LLC did not execute any of the documents which comprise the subject transaction, and Plaintiff BCJJ, LLC knew that Defendant LeFevre could not bind Defendant Bayonne, LLC in signing a Contract for Purchase and Sale of Unit 441. The only security referred to in the Unit Upgrade Agreement was Defendant Thomas LeFevre's ownership interest in TT, LLC and GLRS, LLC.

After consideration, the Court finds that Plaintiff BCJJ, LLC cannot establish that the Agreement to purchase Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units in Defendant Bayonne Investments, LLC.

4. Evan Berlin as Agent for Bayonne, LLC

The undisputed record evidence shows that Defendant Thomas LeFevre approached Plaintiff seeking an investment in Defendant Bayonne Investments, LLC, to avert the foreclosure of Defendant Bayonne Investments, LLC's mortgage on the Commercial Property.

Plaintiff BCJJ, LLC was represented by counsel in negotiating the transaction between March 15, 2007 and March 23, 2007. Defendant Bayonne Investments, LLC was represented by counsel, Defendant Evan Berlin, for the proposed transaction. Defendant Berlin testified that he represented Defendant Bayonne

Investments, LLC as to the subject transaction. Defendant Evan Berlin testified that he represented Defendant Bayonne, LLC on other matters in the past.

The subject transaction was for the benefit of Bayonne Investments, LLC; Defendant Bayonne, LLC received no benefit from the transaction. As the Court discussed above, the documents executed at closing reflect William Turkish's knowledge that Defendant Thomas LeFevre could not act on behalf of Bayonne, LLC, and that Bayonne, LLC was not a party to the transaction.

Plaintiff BCJJ, LLC has not provided any evidence that Defendant Berlin was carrying out the business of Defendant Bayonne, LLC as to the subject transaction. The Court finds that the preparation of the transaction documents does not establish that Evan Berlin was acting as the agent of Defendant Bayonne, LLC during the relevant time.

B. Defendant Bayonne, LLC's Motion for Summary Judgment

1. Count I - 15 U.S.C. Sec. 1703(a)(2)  
Interstate Land Sales Full Disclosure Act ("ILSFDA")

Defendant Bayonne, LLC moves for entry of summary judgment on Count I. Plaintiff BCJJ, LLC moves for entry of summary judgment on Count I.

In Count I, Plaintiff BCJJ, LLC seeks a judgment for compensatory damages against Defendant Bayonne, LLC and other Defendants, rescission of the agreement to invest in Defendant Bayonne Investments, LLC, punitive damages, pre-judgment and

post-judgment interest, and attorney's fees and costs. Count I is based on the alleged violation of the anti-fraud provisions of 15 U.S.C. Sec. 1703(a)(2), which: 1) prohibit a developer or agent from employing a device, scheme or artifice to defraud with respect to a sale or lease, or offer to sell or lease, any lot not exempt under Sec. 1702; 2) prohibit a developer or agent from obtaining money or property by means of an untrue statement of a material fact, or omission to state a material fact which would make the statements made not misleading...with respect to any information pertinent to the lot or subdivision; and 3) prohibit a developer or agent from engaging in any transaction, or course of business which operates or would operate as a fraud on a purchaser.

Title 15 U.S.C. 1709 provides:

A purchaser or lessee may bring an 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. In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

The ISLFDA is an anti-fraud statute that is directed to advertising and marketing activities in connection with the sale

of real property or an offer to sell real property. Federal law governs the interpretation of the ISLFDA; the Court looks to state law as to relevant contract issues, but state law does not control the interpretation of the ISLFDA.

The ISLFDA is designed to protect land buyers by requiring developers to disclose material information; in addition to the specific disclosure requirements, the Act includes a general anti-fraud provision that makes it illegal to obtain money or property in connection with a development by means of a material false statement, or any omission of a material fact necessary to make the statements made not misleading.

It is undisputed that Plaintiff BCJJ, LLC entered into a contract to purchase Unit 241 of the Residences of Grande Bay from Defendant Bayonne, LLC (then known as Bayonne Development, LLC) (Dkt. 148-1, Exhibit A). That contract includes disclosures required by the ILSFDA and expressly notifies Plaintiff BCJJ, LLC of its remedies. (Dkt. 148-1, p. 19). The contract was executed by Defendant Bayonne, LLC, by Leonard P. Nadolski, in his capacity as President of Len's S Corp., Manager of Bayonne Development, LLC, the Seller, and by William Turkish, as the Purchaser, for Plaintiff BJCC, LLC. That contract expressly disclaims reliance on oral representations made by an agent for the Seller. That contract includes a clause which controls the construction of the contract (Dkt. 148-1, p. 13, par. 23) and includes an integration clause (Dkt. 148-1, p. 14, par. 24).

It is undisputed that William Turkish, as managing member of

Plaintiff BCJJ, LLC, executed a Release and Cancellation Agreement as to the Contract for Purchase and Sale of Unit 241, and the earnest money deposit of \$59,940.00 was returned to Plaintiff BCJJ, LLC.

Plaintiff BJCC, LLC did not enter into a Contract for Purchase and Sale of Unit 441. On March 27, 2007, Plaintiff BCJJ, LLC signed the "Unit Upgrade Agreement" (Dkt. 148-5) in connection with the "Purchase Agreement for Membership Interest." (Dkt. 148-2). In the Unit Upgrade Agreement, Seller, Thomas J. LeFevre, as Trustee of Thomas J. LeFevre Living Trust Dated October 8, 2001, its successors and assigns, promised to use Seller's best efforts to cause Bayonne, LLC to enter into a purchase agreement with Buyer, BJCC, LLC, for Unit 441, Residences of Grande Bay.

Plaintiff BJCC, LLC seeks rescission of Plaintiff's "Purchase Agreement for Membership Interest" and damages based on the alleged fraud of Defendant Bayonne, LLC which was carried out by Defendant Bayonne, LLC's alleged agents, Thomas J. LeFevre and Evan Berlin.

Plaintiff alleges that Defendant Bayonne, LLC participated in the offer to sell Unit 441 to Plaintiff, and the offer to sell was part of the scheme to induce Plaintiff to invest \$400,000 in Defendant Bayonne Investments, LLC, because the offer to sell Unit 441 was presented to Plaintiff as security and in consideration for Plaintiff's investment. (Dkt. 148, par. 53). Plaintiff further alleges that the Berlin Law Firm acted as the agent for Defendant Bayonne, LLC (and other entities) with

respect to the offer to sell Unit 441 to Plaintiff, in particular by preparing the documents relating to Plaintiff's investment, including the offer to sell and conducting the closing at its office. (Dkt. 148, par. 54.) Plaintiff alleges that Defendant Bayonne, LLC used the means and instruments of transportation and communication in interstate commerce, electronic mail and the U.S. Mails. (Dkt. 148, par. 55).

Plaintiff BCJJ, LLC identifies the alleged intentional misrepresentations of Defendant Bayonne, LLC in connection with the offer to sell Unit 441:

1. The misrepresentation that Thomas J. LeFevre and Thomas J. LeFevre Living Trust were authorized to pledge membership units in GLRS and TT, when they were not. (Dkt. 148, par. 56.);
2. Falsified balance sheet for Bayonne Investments, LLC presented to Plaintiff to induce Plaintiff to invest (Dkt. 148, par. 57);
3. Inflated appraisal for property owned by Bayonne Investments, LLC presented to Plaintiff to induce Plaintiff to invest (Dkt. 148, par. 57);

Plaintiff BCJJ, LLC alleges that Plaintiff reasonably relied on the above intentional misrepresentations, which proximately caused Plaintiff's damages.

The Court notes that the Purchase Agreement for Membership Interest contains the following provision:

Section 8.4 **Entire Agreement.** This Agreement (including all Exhibits hereto) contains the entire agreement among the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with respect to such matters.

(Dkt. 148-2, p. 6). The Agreement also includes Section 8.6:

Section 8.6 **Parties in Interest.** This Agreement shall insure (sic) to the benefit of and be binding upon the Parties hereto and their respective heirs, beneficiaries, legatees, legal representatives, successors and permitted assigns. Nothing in this Agreement, express or implied, is intended to confer upon any Person other than Purchaser or the Seller, or their respective heirs, beneficiaries, legatees, legal representatives, successors or permitted assigns, any rights or remedies under or by reason of this Agreement.

a. 15 U.S.C. Sec. 1703(a)(2)(A) - Scheme to Defraud in Connection With Offer to Sell

The Court notes that 15 U.S.C. 1701 defines relevant terms, including developer, agent, purchaser and offer. An "offer" includes "any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision." An "agent" "means any person who represents, acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease any lot or lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services."

The Court further notes that reasonable reliance is an



element of fraud claims brought under 15 U.S.C. Sec. 1703(a)(2). Taplett v. T.R.G. Oasis (Tower Two), Ltd., L.P., 755 F.Supp.2d 1197 (M.D. Fla. 2009). Where there is a complete omission of a material fact, a rebuttable presumption of reliance arises. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008).

The Court understands Plaintiff BCJJ, LLC to contend that, because there was a common promotional plan as to the Commercial Property and the Waterfront Property, and because Defendant Thomas LeFevre had an ownership interest in Defendant Bayonne, LLC, every act, and every representation, or omission of Defendant Thomas J. LeFevre was also the act, representation or omission of Defendant Bayonne, LLC. (Dkt. 148-1, par. 52). Plaintiff BCJJ, LLC's claim is directed to alleged misrepresentations made prior to the closing of March 27, 2007, which Plaintiff alleges were intended to fraudulently induce Plaintiff to enter into the transaction.

In general terms, the subject transaction came about because Defendant Bayonne Investments, LLC needed funds to refinance the mortgage on the Commercial Property, and Plaintiff BCJJ, LLC wanted to upgrade the condominium unit Plaintiff BCJJ, LLC had contracted to purchase, as well as to secure the return of Plaintiff's investment of \$400,000. Plaintiff BCJJ, LLC declined to proceed with the initial investment proposal until the parties reached an agreement as to the upgrade of Unit 241 to Unit 441, and an agreement as to security for the return of Plaintiff's investment of \$400,000.

The Court considers the documents which comprise the transaction which closed on March 27, 2007 to be the final expression of the parties' intentions. (Dkt. 148-2-148-8). None of those documents are signed by Defendant Bayonne, LLC, as the Contract for Purchase and Sale of Unit 241 was signed. The Unit Upgrade Agreement reflects that Defendant Thomas J. LeFevre, as Trustee of Thomas J. LeFevre Living Trust Dated October 8, 2001, the "Seller," promised to use his best efforts to cause Defendant Bayonne, LLC to enter into a purchase agreement for Unit 441 by May 1, 2007 (Dkt. 148-5, pp. 2-3). Defendant Bayonne, LLC and Plaintiff BCJJ, LLC never entered into a Contract for Purchase and Sale of Unit 441 like the Contract entered into by the parties as to Unit 241.

In the Purchase Agreement for Membership Interest, the reference to "Bayonne" means "Bayonne Investments, LLC." (Dkt. 148-2, p. 2). The Court notes that the Purchase Agreement for Membership Interest includes the following provision:

**Section 5.2      Acquisition of Units for Investment** Purchaser is not acquiring the Acquired Interest with any present intention of distributing or selling such Units in violation of federal, state or other securities laws. Purchaser agrees that it will not sell or otherwise dispose of the Units in violation of any federal, state or other securities laws, or otherwise in contravention of the terms of the Operating Agreement. Purchaser recognizes that it is acquiring an interest in Bayonne [Investments, LLC] and as a member of Bayonne each member will be subject to the terms and provisions of the Operating Agreement, which grants to members very limited voting rights, contain significant restrictions on

transfers, and provides for very specific mechanisms for the timing and amount of return of (and on) capital (if any), and therefore each Purchaser is strongly urged to consult with an attorney with regard to this Agreement and the terms and provisions of the Operating Agreement, specifically including any rights/responsibilities each member possesses under the Operating Agreement. Each Purchaser acknowledges and agrees that its acquisition of the Acquired Interest is speculative, and that no commitment, promise, guaranty, or warranty, express or implied, has been made or is made by Bayonne [Investments, LLC] or any Affiliate with regard to any expected or anticipated return on the Purchase Price and/or the Units, and to the extent Purchaser has received and/or reviewed any materials, prospectuses, brochures, literature, or marketing materials about Bayonne [Investments, LLC] (the "Written Materials"), or to the extent that any Person, Affiliate or the Company has made any statements, comments or promises that could be characterized as representations/commitments, Purchaser hereby acknowledges and agrees that this Agreement and the disclaimers set forth herein supercedes any such representation, comment, promise, commitment, or the terms and provisions of the Written Material (which terms and provisions of the Written Materials are also subject to change by Bayonne with or without notice).

(Dkt. 148-2, p. 5).

Where a Purchase Agreement expressly disclaims reliance on prior oral representations, other courts have found no reasonable reliance as a matter of law. Taplett v. TRG Oasis (Tower Two), Ltd, L.P., 755 F.Supp.2d 1197, 1203 (M.D. Fla. 2009).

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court concluded that Plaintiff BCJJ, LLC could not establish that Defendant LeFevre was acting as an agent or apparent agent of Bayonne, LLC, that the relationship between Bayonne, LLC and Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, and that Defendant Evan Berlin acted as the agent of Defendant Bayonne, LLC as to the transaction.

Plaintiff BCJJ, LLC has not shown any active participation in the offer to sell Unit 441 to Plaintiff by Leonard A. Nadolski, who was a Manager, and owned a controlling interest in Defendant Bayonne, LLC. After consideration, the Court concludes that no reasonable jury could find that, due to the common promotional plan, each act and alleged misrepresentation of Defendant Thomas LeFevre is an act and alleged misrepresentation of Defendant Bayonne, LLC, by virtue of Defendant Thomas LeFevre's ownership interest in Defendant Bayonne, LLC. Whatever representations were made to Plaintiff BCJJ, LLC, they were not the representations of Defendant Bayonne, LLC.

b. 15 U.S.C. Sec. 1703(a)(2)B) - Obtain Money or Property By Means of Misrepresentations or Omissions

It is undisputed that all of the funds paid by Plaintiff BCJJ, LLC to close the transaction on March 27, 2007 were transferred to the account of the Berlin Law Firm by Plaintiff's wire transfer, and were thereafter paid to M & I Marshall and Ilsley Bank to avert a default of the mortgage on the Commercial

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Property owned by Defendant Bayonne Investments, LLC.

Plaintiff BCJJ, LLC did not pay any money as an earnest money deposit on Unit 441, and did not pay the purchase price for Unit 441. All of the funds Defendant Bayonne, LLC held as an earnest money deposit on Unit 241 were returned to Plaintiff BCJJ, LLC.

The Court concludes that Defendant Bayonne, LLC did not obtain any money from the subject transaction, and that Defendant Bayonne Investments, LLC's receipt of the funds from Plaintiff BCJJ, LLC does not establish that Defendant Bayonne, LLC received any funds.

c. 15 U.S.C. Sec. 1703(a)(2)(C) - Transaction or Course of Business Which Operates As Fraud On Purchaser

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court concluded that Plaintiff BCJJ, LLC could not establish that Defendant LeFevre was acting as an agent or apparent agent of Bayonne, LLC, that the relationship between Bayonne, LLC and Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, and that Defendant Evan Berlin acted as the agent of Defendant Bayonne, LLC as to the transaction at issue.

Therefore, the Court concludes that Defendant Bayonne, LLC did not participate in the subject transaction or course of business.

After consideration, the Court **grants** Defendant Bayonne, LLC's Motion for Summary Judgment as to Count I, and **denies** Plaintiff BCJJ, LLC's Motion for Summary Judgment as to Count I.

2. Count II - Sec. 10b and SEC Rule 10-b(5)

A securities fraud claim under Section 10(b) and Rule 10b-5 includes the following elements: 1) a material misrepresentation or omission; 2) made with scienter; 3) a connection with the purchase or sale of a security; 4) reliance on the misstatement or omission; 5) economic loss and 6) a causal connection between the material misrepresentation or omission and the loss....Instituto de Prevision Militar v. Merrill Lynch, 546 F.3d 1340,1352 (11<sup>th</sup> Cir. 2008).

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre was acting as an agent or apparent agent of Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, or that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

The Court therefore finds that there are no material misrepresentations or omissions that can be attributed to Defendant Bayonne, LLC regarding the subject transaction.

After consideration, the Court **grants** Defendant Bayonne, LLC's Motion for Summary Judgment as to Count II, and **denies** Plaintiff BCJJ, LLC's Motion for Summary Judgment as to Count II.

3. Count III - Ch. 517.301, Florida Statutes

In E.F. Hutton v. Rousseff, 537 So.2d 978 (Fla. 1989) the Florida Supreme Court notes that buyer/seller privity is required.

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre was acting as agent or apparent agent for Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, and that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

Plaintiff BCJJ, LLC cannot establish that Defendant Bayonne, LLC was in privity with Plaintiff BJCC, LLC as to the subject transaction. Defendant Bayonne, LLC did not sign the documents, and Plaintiff BCJJ, LLC knew that Defendant Thomas J. LeFevre was not acting as agent for Defendant Bayonne, LLC.

After consideration, the Court **grants** Defendant Bayonne, LLC's Motion for Summary Judgment as to Count III, and **denies** Plaintiff's Cross-Motion for Summary Judgment as to Count III.

4. Count IV - Fraudulent Inducement

To state a claim for fraudulent inducement, Plaintiff must allege: 1) a false statement of material fact; 2) the maker of the statement knew or should have known of the falsity of the statement; 3) the maker intended that the false statement would induce another's reliance; and 4) the other party justifiably relied on the false statement to its detriment. Rose v. ADT Security Services, Inc., 989 So.2d 1244 (Fla. 1<sup>st</sup> DCA 2008).

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre acted as agent or apparent agent for Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units and that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

Plaintiff BCJJ, LLC cannot establish that any representations were made by Defendant Bayonne, LLC to Plaintiff as to the subject transaction. Plaintiff denied that Leonard Nadolski made any representations to Plaintiff as to the subject transaction, and Plaintiff knew that Defendant Thomas LeFevre was not acting as agent for Defendant Bayonne, LLC as to the transaction. Whatever representations were made to Plaintiff, they were not the representations of Defendant Bayonne, LLC.

After consideration, the Court **grants** Defendant Bayonne,



LLC's Motion for Summary Judgment as to Count IV, and **denies** Plaintiff's Cross-Motion for Summary Judgment as to Count IV.

5. Count V - Negligent Misrepresentation

To state a claim for negligent misrepresentation, a plaintiff must show: 1) the defendant made a misrepresentation of material fact that he believed to be true but was in fact false; 2) the defendant was negligent in making the statement because he should have known the misrepresentation was false; 3) the defendant intended to induce the plaintiff to rely on the misrepresentation; and 4) injury resulted to the plaintiff acting in justifiable reliance upon the misrepresentation. Specialty Marine and Industrial Supplies, Inc. v. Venus, 2011 WL 479912 (Fla. 1<sup>st</sup> DCA 2011)

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre acted as agent or apparent agent of Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, or that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

Plaintiff BJCC, LLC cannot establish that any representations were made by Defendant Bayonne, LLC to Plaintiff as to the subject transaction. Plaintiff denied that Leonard

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Nadolski made any representations to Plaintiff as to the subject transaction, and Plaintiff knew that Defendant Thomas LeFevre was not acting as agent for Defendant Bayonne, LLC as to the transaction. Whatever representations were made to Plaintiff, they were not the representations of Defendant Bayonne, LLC.

After consideration, the Court **grants** Defendant's Motion for Summary Judgment, and **denies** Plaintiff's Cross-Motion for Summary Judgment as to Count V.

6. Count XI - Ch. 501.201, Florida Statutes  
Florida Deceptive and Unfair Trade Practices Act

Ch. 501.204, Florida Statutes, declares any unfair or deceptive acts or practices in the conduct of any trade or business to be unlawful.

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre acted as agent or apparent agent of Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Defendant Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase, and that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

The Court finds that Plaintiff BCJJ, LLC cannot establish that Defendant Bayonne, LLC committed unfair and deceptive acts as to the subject transaction.

After consideration, the Court **grants** Defendant Bayonne, LLC's Motion for Summary Judgment and **denies** Plaintiff BCJJ, LLC's Cross-Motion for Summary Judgment as to Count VI.

7. Count XII - Equitable Lien

In the Second Amended Complaint, Plaintiff seeks the imposition of an equitable lien on the Waterfront Property because the Unit Upgrade Agreement shows that the purchase of Unit 441 was intended be primary security and consideration for Plaintiff BCJJ, LLC's investment of \$400,000. Plaintiff alleges that Plaintiff's investment was made under circumstances of Defendant Bayonne, LLC's fraudulent conduct and misrepresentation as to material facts.

In considering Plaintiff's Cross-Motion for Summary Judgment, the Court found that Plaintiff BCJJ, LLC could not establish that Defendant Thomas LeFevre acted as agent or apparent agent for Defendant Bayonne, LLC, that the relationship between Defendant Bayonne, LLC and Bayonne Investments, LLC was a joint venture, that the purchase of Unit 441 was inextricably intertwined with Plaintiff's purchase of investment units, or that Defendant Evan Berlin acted as agent for Defendant Bayonne, LLC as to the subject transaction.

Defendant Bayonne, LLC did not participate in the subject transaction and received no benefit from the subject transaction. Whatever representations were made to Plaintiff BCJJ, LLC, they were not the representations of Defendant Bayonne, LLC. Plaintiff

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BCJJ, LLC cannot establish any basis for the imposition of an equitable lien as to the Waterfront Property.

After consideration, the Court **grants** Defendant Bayonne, LLC's Motion for Summary Judgment and **denies** Plaintiff BCJJ, LLC's Motion for Summary Judgment as to Count XII.

The Clerk of Court shall enter a final judgment in favor of Defendant Bayonne, LLC and against Plaintiff BCJJ, LLC as to Count I, Count II, Count III, Count IV, Count V, Count XI and Count XII. The Court reserves jurisdiction for the award of attorney's fees and costs.

**DONE AND ORDERED** in Chambers, in Tampa, Florida on this 30<sup>th</sup> day of June, 2011.

  
ELIZABETH A. KOVACHEVICH  
United States District Judge

Copies to:  
All parties and counsel of record