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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN AND
FOR MIAMI-DADE COUNTY FLORIDA

CIRCUIT CIVIL DIVISION

CASE NO.: 2018-37446 CA 44

Stephen Hess and
Clearwater Beach Company, LLC,
Muse 1901, LLC, Muse 2101, LLC
and Muse 2201, LLC

Plaintiffs,

v.

PMG-S2 Sunny Isles, LLC

Defendant.
___________________________________/

AMENDED COMPLAINT

Plaintiffs, STEPHEN HESS ("Hess"), CLEARWATER BEACH COMPANY, LLC a Florida Limited Liability Company ("Clearwater"), Muse 1901, LLC ("Muse 1901"), Muse 2101, LLC ("Muse 2101") and Muse 2201, LLC ("Muse 2201") by and through undersigned counsel, hereby file this Amended Complaint and sue Defendant, PMG-S2 SUNNY ISLES, LLC, a Delaware Florida Limited Liability Company ("PMG"), and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. This action is (a) to recover deposits totaling $6,117,384.00 that Plaintiffs made to PMG in accordance with three residential real estate condominium purchase agreements (each a "Contract" or "Agreement" or "Purchase Agreement" and collectively the "Contracts" or "Agreements" or "Purchase Agreements"); (b) for rescission of the Purchase Agreements due to violations of Florida Statutes §718.202, §718.506, and §718.503; and (c) for equitable relief, including without limitation, common law rescission.

2. This Court has jurisdiction over this action because this Complaint seeks damages in excess of $15,000.00, exclusive of interest, attorney's fees and costs.

3. Hess is an individual over eighteen (18) years of age residing in Pinellas County, Florida, and is otherwise, *sui juris*, and subject to the personal jurisdiction of this Court.

4. Muse 1901 is a Florida registered limited liability company organized under the laws of Florida with its principal place of business in Pinellas County, Florida, and subject to the personal jurisdiction of this Court.

5. Muse 2101 is a Florida registered limited liability company organized under the laws of Florida with its principal place of business in Pinellas County, Florida, and subject to the personal jurisdiction of this Court.

6. Muse 2201 is a Florida registered limited liability company organized under the laws of Florida with its principal place of business in Pinellas County, Florida, and subject to the personal jurisdiction of this Court.

7. Clearwater is a Florida registered limited liability company organized under the laws of Florida with its principal place of business in Pinellas County, Florida, and subject to the personal jurisdiction of this Court.

8. PMG is a Delaware limited liability company registered in the State of Florida with offices in Miami-Dade County, Florida. PMG has subjected itself to personal jurisdiction in this state pursuant to Fla. Stat. §48.193(1)(a) because it operates, conducts, engages in, and carries on business in this state.

9. Venue is proper because PMG conducts business in Miami-Dade County, Florida, and this action accrued in Miami-Dade County, Florida.

BACKGROUND

10. Plaintiffs entered into the Purchase Agreements with PMG to purchase three pre-construction units (each a "Unit" and collectively the "Units") at Muse, a Condominium ("Muse", the "Condominium" or the "Project"), a Florida Condominium located in Miami-Dade County, Florida.

11. On or about December 30, 2014, Hess signed the first Purchase Agreement for the purchase of Unit 1901 for $5,050,000.00 and Hess provided deposits totaling $1,920,000.00, plus $49,225.00 in upgrades for a total of deposits of $1,969.225.00 (the "Unit 1901 Purchase Agreement"). A true and correct copy of the Unit 1901 Purchase Agreement including addendums and amendments thereto is attached hereto and marked as **Exhibit A**.

12. On or about August 12, 2015, Clearwater signed another Purchase Agreement for the purchase of Unit 2101 for $5,300,000.00 and provided deposits totaling $2,092,000.00 plus $16,166.00 in upgrades for a total of deposits of $2,108,166.00 (the "Unit 2101 Purchase Agreement"). A true and correct copy of the Unit 2101 Purchase Agreement including addendums and amendments thereto is attached hereto and marked as **Exhibit B**.

13. On or about June 26, 2016 Hess signed another Purchase Agreement for the purchase of Unit 2201 for $5,000,000.00 and provided deposits totaling $2,000,000.00 plus $39,993.00 in upgrades for a total of deposits of $2,039,993.00 (the "Unit 2201 Purchase Agreement"). A true and correct copy of the Unit 2201 Purchase Agreement including addendums and amendments thereto is attached hereto and marked as **Exhibit C**.

14. In total, Plaintiffs Hess and Clearwater paid $6,012,000.00 in deposits, plus $105,384.00 in upgrades for a total of deposits of $6,117,384.00. A true and correct copy of the account details of each escrow deposit is attached hereto and marked as **Composite Exhibit D**.

15. The Purchase Agreements for all the Units (collectively the "Purchase Agreements) were signed with PMG as the seller and developer in the transaction. The Purchase Agreements were prepared by PMG, and thus, should be interpreted against PMG in the event of ambiguity.

16. On or about May of 2018, Plaintiff Hess attempted to assign the Unit 1901 Purchase Agreement to Plaintiff Muse 1901, LLC and the Unit 2201 Purchase Agreement to Plaintiff Muse 2201, LLC, and Plaintiff Clearwater also attempted to assign the Unit 2101 Purchase Agreement to Plaintiff Muse 2101, LLC (all three assignments collectively the "Assignments"). A true and correct copy of the Assignments are attached hereto and marked as **Composite Exhibit E**.

17. To the knowledge and belief of Plaintiffs, the Assignments never became effective. According to the Purchase Agreements, the Assignments needed to be provided to PMG within 30 days from the date of applicable Purchase Agreement and the rescission rights under Florida Statute §718.503(1)(a) must have terminated; and according to the Pre-Closing Buyer Questionnaire, all parties needed to sign an assignment agreement, the assignee entity documents needed to be provided to PMG at least 10 business days before closing and the payment of an assignment fee needed to be paid at closing (all of the foregoing being collectively referred to as "Assignment Conditions"). PMG also had the right to refuse the Assignments under the Pre-Closing Buyer Questionnaire. Since none of the forgoing Assignment Conditions were never satisfied, the Assignments never became effective.

18. Plaintiffs Muse 1901, LLC, Muse 2101, LLC and Muse 2201, LLC (the "Plaintiff Assignees") have been joined as Plaintiffs in the event that Assignments are deemed effective. If the Assignments are found to deemed effective, Plaintiff Assignees shall be deemed to be the real parties in interest.

19. Plaintiffs do not assert that all Plaintiffs are entitled to relief. Plaintiffs assert that if the Assignments were effective, Plaintiff Assignees are entitled to the relief being requested in this Complaint. If the Assignments did not become effective, Plaintiffs Hess and Clearwater are entitled to the relief being requested in this Complaint.

20. Muse was offered as a condominium governed by Chapter §718 of the Florida Statutes, known as the "Florida Condominium Act". The Division of Florida Land Sales, Condominiums and Mobile Homes (the "Division") has the authority to enforce Chapter §718 of Florida Statutes, and in doing so, approves condominiums by approving all of the specific condominiums documents required to be provided to prospective buyers under the Florida Condominium Act, specifically Florida Statute §718.503 and §718.504 (the "Condominium Documents" or "Prospectus" or "Offering").

21. All conditions precedent to the filing of this action have been satisfied, waived, excused or performance would be futile.

COUNT I: ACTION TO RESCIND THE CONTRACTS PURSUANT TO FLORIDA STATUTE §718.202

22. Plaintiffs Hess and Clearwater (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), re-allege and incorporate the allegations in paragraphs 1 through 21 as if fully set forth herein.

23. This is an action to rescind the Contracts based on PMG's violation of Florida Statute §718.202.

24. Plaintiffs have provided PMG with a total of Plaintiffs Hess and Clearwater paid $6,012,000.00 in deposits, plus $105,384.00 in upgrades for a total of deposits of $6,117,384.00 consisting of the following: $1,920,000.00 plus $49,225.00 in upgrades for a total of deposits of $1,969.225.00 for Unit 1901; $2,092,000.00 plus $16,166.00 in upgrades for a total of deposits of

$2,108,166.00 for Unit 2101; and $2,000,000.00 plus $39,993.00 in upgrades for a total of deposits of $2,039,993.00 for Unit 2201.

25. Pursuant to Florida Statute §718.202(1), if a developer contracts to sell a condominium parcel and the construction of the property has not been substantially completed, the developer shall pay into an escrow account all payments up to 10 percent of the sale price received by the developer from the buyer towards the sale price.

26. Pursuant to Florida Statute §718.202(2), all payments which are in excess of the 10 percent of the sale price described in Florida Statute §718.202(1), and which have been received prior to completion of construction by the developer from the buyer on a contract for purchase of a condominium parcel, shall be held in a special escrow account and may not be used by the developer prior to the closing of the transaction, except for refund to the buyer or, if the contract so provides, the developer may withdraw escrow funds in excess of 10 percent of the purchase price when construction of improvements has begun.

27. Pursuant to Florida Statute §718.202(3), if the developer withdraws escrow funds in excess of 10 percent of the purchase price when construction of improvements has begun, then such funds may only be used in the actual construction and development of the condominium property in which the unit to be sold is located "***no part of these funds may be used for salaries, commissions, or expenses of salespersons or for advertising purposes***." (***emphasis added***)

28. Unexpectedly, and without prior notice or consent from Plaintiffs, PMG entered into the Second Amended and Restated Construction Mortgage and Security Agreement Assignment of Leases and Rents and Fixture Filing (the "Mortgage") with CAN IV MUSE, LLC ("CAN") on August 5, 2015.

29. According to this Mortgage, PMG used the Plaintiffs' deposits as collateral for a loan and pledged all money "now and hereafter held" by it, including all escrows, to CAN on August 5, 2015 in violation of Florida Statute §718.202.

30. Pursuant to Florida Statute §718.202(5), PMG's failure to comply with the provisions of Florida Statute §718.202 render the Purchase Agreements voidable by Plaintiffs.

31. Pursuant to Florida Statute §718.202(5), if Plaintiffs elect to void the Purchase Agreements, all sums deposited or advanced under the Purchase Agreements shall be refunded to Plaintiffs, with interest thereon.

32. Plaintiffs were required to hire the undersigned counsel and thereby obligated themselves to pay the undersigned counsel reasonable attorney's fees and litigation costs. Pursuant to Florida Statute §718.125, Plaintiffs are entitled to an award of reasonable attorney's fees and costs. In addition, Plaintiffs also seek to recover reasonable attorney's fees pursuant to Section 47 of the Contracts which section survives the termination of the Contracts:

> Litigation. In the event of any litigation between the parties under this Agreement, the prevailing party shall be entitled to reasonable attorneys', paralegals and para-professional fees and court costs at all trial and appellate levels. In addition, in the event of any litigation between the parties under this Agreement, the parties shall and hereby submit to the jurisdiction of the state and federal courts of the State of Florida. PURCHASER AGREES TO WAIVE THE RIGHT TO TRIAL BY JURY IN THE EVENT LEGAL PROCEEDINGS ARE INSTITUTED BY EITHER PARTY HERETO IN CONNECTION WITH THIS AGREEMENT. This Section will survive (continue to be effective after) any termination of this Agreement, but shall otherwise be deemed merged into the deed at closing.

WHEREFORE, Plaintiffs, STEPHEN HESS and CLEARWATER BEACH COMPANY, LLC (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), respectfully demand judgment against Defendant, PMG-S2 SUNNY ISLES, LLC for rescission

of the Purchase Agreements, declaring the Purchase Agreements voided, damages, interest, attorney's fees, costs, and such other and further relief as the Court deems just and proper.

COUNT II: ACTION TO RESCIND THE CONTRACTS PURSUANT TO FLORIDA STATUTE §718.506

33. Plaintiffs Hess and Clearwater (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), re-allege and incorporate the allegations in paragraphs 1 through 21 as if fully set forth herein.

34. This is an action for rescission against PMG based on Florida Statute §718.506.

35. Florida Statute §718.506 provides in relevant part as follows:

> "*Any person who, in reasonable reliance upon any material statement or information that is false or misleading and published by or under authority from developer in* ***advertising and promotional materials,*** *including, but not limited to, a prospectus, the items required as exhibits to a* ***prospectus, brochures****, and newspaper advertising, pays anything of value toward the purchase of a condominium parcel located in this state* ***shall have a cause of action to rescind the contract*** *or collect damages from developer for his or her loss prior to the closing of the transaction.*" ("***Emphasis Added"***)

36. Prior to entering into each of the Purchase Agreements, PMG's sales staff provided Plaintiffs with a hard copy sales brochures and an electronic sales brochures (hereafter collectively "Sales Brochures") which included floor plans of the Units (hereafter "Floor Plans") and a Fact Sheet (hereafter "Fact Sheet"). The Sales Materials were included within, and were part of, the Sales Brochures of PMG.

37. The Floor Plans and Fact Sheet depicted the Units as having a unit size of 3,635 square feet each. The sales staff acted within the scope of their employment and as per the instructions of PMG. The Sales Brochures, including the Floor Plans and Fact Sheet (collectively the "Sales Materials") were part of PMG's advertising and promotional materials for Muse as

published by PMG and included and made part of the Sales Brochures. *See* Sales Materials as **Exhibit F**[1] attached hereto.

38. The Sales Materials were provided to Plaintiffs to promote and sell Muse and the Units and to induce Plaintiffs to purchase the Units. The Prospectuses and Sales Materials were published by or under authority from PMG as part of its advertising and promotional materials.

39. Despite the representations in the Sales Materials, the Units were built substantially smaller than advertised by PMG.

40. PMG's sly use of the words "A/C Area" deceived the Plaintiffs into thinking that the Units were about 400 square feet bigger (i.e. *the approximate functional equivalent of almost 3 entire bedrooms measuring 12 feet by 12 feet each*).

41. The above difference of 400 square feet represents a material and adverse discrepancy between the Units' total square footage as depicted in the Sales Materials and the Units' real square footage.

42. PMG's 3,635 square footage misleading representations in the Sales Materials were based on (according to PMG) a different measurement methodology measuring the Units contrary to the boundary definitions set forth in the Declaration of Condominium. PMG's different measurement methodology in the Sales Materials also includes structural columns, corridors, balconies, other common areas and limited common elements not part of the Units.

43. However, even assuming that PMG's different measurement methodology is not misleading and deceptive, the Units still do not measure 3,635 square feet, thus making the representation also false.

[1] The Floor Plans for the 01 and 02 models were contained in a insert flap on the last page of the sales material. A true and correct photograph is attached as **Exhibit F-1**.

44. Moreover, Plaintiffs was forced to rely on the Sales Materials as Plaintiffs was not able to compute and/or confirm the actual square footage of the Units, which had not been yet built or constructed.

45. PMG used a different measurement methodology to describe the size of the Units to confuse and mislead Plaintiffs. This different and inapplicable measurement methodology used by PMG was itself misleading and designed to deceive and confuse purchasers like Plaintiffs because condominium units are measured from the inside of exterior and demising walls (i.e., *paint to paint*) as per the specific definition of the boundaries in the Declaration of Condominium and because Florida Statute 718.103(27) defines a "Unit" as a part of the condominium property which is subject to "*exclusive ownership*."

46. While PMG's exterior measurements may be used by architects for other purposes such as to measure residential houses or to determine zoning Floor Area Ratios (FAR) of buildings, it is not used for condominiums. Condominiums are a creation of statutory authority, and the only known measuring standard or authority for condominiums is in the Declaration of Condominium of the Project which is drafted in accordance with the Florida Condominium Act. The Florida Condominium Act and the subject Declaration of Condominium defines a "*Unit*" as "*a part of the Condominium Property which is subject to exclusive ownership*." Florida Statute §718.103, Fla. Stat. (defining "unit"). Common elements, by distinction, are those which are "*not included within the Unit*."

47. Moreover, PMG's use of the term "A/C Area" in the Sales Materials to describe measurements that include exterior areas, columns and the inside of walls which are not air conditioned is per se misleading and deceptive. The use of a tiny unreadable and confusing disclaimer in the Floor Plans to explain why the term "A/C Area" actually includes exterior areas

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is nothing more than proof of PMG's premeditation and intent to mislead.

48. The disclaimer that essentially states that "A/C Area" actually includes "exterior" spaces is a total contradiction, smacks of bad faith and is a classic *bait-and-switch* in violation of Florida Statutes §718.503(3)(b) and §718.103(14).

49. Even worse, the *bait-and-switch* disclaimer in the Floor Plans was not even in conspicuous type as required by Florida law. According to Florida Statute §718.103(14) "Conspicuous type" means "*bold type in capital letters no smaller* ***than the largest type****, exclusive of headings, on the page on which it appears and, in all cases, at least 10-point type. Where conspicuous type is required, it must be separated on all sides from other type and print ....*" (***Emphasis added***). However, the disclaimer used by PMG in the Floor Plans was neither bold type, 10-point type, in capital letters, nor larger than the largest type. In addition, it was not separated on all sides from other type and print. In fact, PMG typed the disclaimer in tiny type, the smallest it used in the entire Floor Plans and inserted the required statutory caveat mandated by Florida Statutes §718.503(3)(b) in the other pages containing pictures and non-pertinent information. The Fact Sheet was devoid of any disclaimer.

50. Given the infinitesimal size of the print used to negate and disclaim the size of the Units, it is only with nose-to-the-page squinting, or the aid of a magnifying glass, that one can discern what the convoluted and ambiguous disclaimer says. PMG used much larger font to announce that the "*A/C Area*" of the Unit was "3,635 SF".

51. Reasonable persons (like Plaintiffs) certainly could have understood PMG's representation in its Sales Materials that the 3,635 square feet of "A/C Area" referred to the interior living space of the Units. The Fact Sheet did not even contain the confusing, tiny and misleading *bait-and-switch* disclaimer of PMG. Moreover, reasonable persons could also have easily missed

PMG's tiny disclaimer which revealed (if one could actually see it) that PMG's measurement methodology involved counting the thickness of the walls and other common elements to reach 3,635 square feet. Indeed, if the purchaser relied on the Fact Sheet and simply perused the Floor Plans, which is what the Plaintiffs did, PMG's tiny disclaimer was not even considered.

52. To the reasonable persons (like Plaintiffs), relying on the Fact Sheet for the facts including without limitation, that the Units having 3,635 square feet of "A/C Area" is not unreasonable. Nowhere in the Fact Sheet is there any mention of PMG's measurement methodology which involves counting the thickness of the walls and other common elements to reach 3,635 square feet, nor is the confusing, tiny and misleading *bait-and-switch* disclaimer of PMG included in the Fact Sheet.

53. As a matter of common usage, "A/C Area" is space that is air conditioned thus excluding exterior spaces, and the interior walls and columns.

54. Plaintiffs agreed to pay the agreed upon Purchase Price for the Units and otherwise entered into the Purchase Agreements because of the size of the Units as represented in the Sales Materials and the misleading actions of PMG. The size of the Units was a material consideration to entering into the Purchase Agreements.

55. The difference between a unit that is 400 square feet smaller is significant and substantial. For instance, based on the $5,050,000.00 Purchase Price for Unit 1901 and the represented square footage of 3,635 as per the Sales Materials, Hess was buying the Unit at a per square foot rate of $1,389.00 (i.e., $5,050,000.00 divided by 3,635). At $1,389.00 per square feet, 400 square feet represents a difference of $555,600.00.

56. Based on the $5,000,000.00 Purchase Price for Unit 2201 and the represented square footage of 3,635 as per the Sales Materials, Hess was buying the Unit at a per square foot

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rate of $1,376.00 (i.e., $5,000,000.00 divided by 3,635). At $1,376.00 per square feet, 400 square feet represents a difference of $550,400.00.

57. Based on the $5,300,000.00 Purchase Price for Unit 2101 and the represented square footage of 3,635 as per the Sales Materials, Clearwater was buying the Unit at a per square foot rate of $1,458.00 (i.e., $5,300,000.00 divided by 3,635). At $1,458.00 per square feet, 400 square feet represents a difference of $583,218.00.

58. Had Plaintiffs known that the Units were going to be built substantially smaller than represented by PMG in the Sales Materials, Plaintiffs would not have signed the Purchase Agreements or agreed to the Purchase Prices stipulated in the Purchase Agreements.

59. The Sales Materials that PMG provided to Plaintiffs contained material statements and information that were false and/or misleading.

60. Plaintiffs reasonably relied upon the Sales Materials and tendered the deposits towards the Purchase Prices in reliance of same. In particular, Plaintiffs were reasonably justified in relying upon the Sales Materials to enter into the Purchase Agreements for the following reasons.

i. First, the Prospectus provided to Plaintiffs states in the cover page (as required by Florida Statute §718.504(1)) that a purchaser should refer to the Sales Materials for its information. It states as follows:

> **THIS PROSPECTUS CONTAINS IMPORTANT MATTERS TO BE CONSIDERED IN ACQUIRING A CONDOMINIUM UNIT.**
>
> **THE STATEMENTS CONTAINED HEREIN ARE ONLY SUMMARY IN NATURE. A PROSPECTIVE PURCHASER SHOULD REFER TO ALL REFERENCES, ALL EXHIBITS HERETO, THE CONTRACT DOCUMENTS, AND SALES MATERIALS.**

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ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING THE REPRESENTATIONS OF DEVELOPER. REFER TO THIS PROSPECTUS AND ITS EXHIBITS FOR CORRECT REPRESENTATIONS.

See Cover Page of Prospectus attached hereto as **Exhibit G**.

ii. Second, pursuant to Florida Statute §718.503(3)(b), purchasers are permitted to specifically rely on Sales Brochures. Since the Floor Plans and Fact Sheet provided to Plaintiffs were part of the "Sales Brochure" of PMG, Plaintiffs were justified in relying on the Floor Plans. Moreover, the Sales Brochure of PMG was not in compliance with the Florida Condominium Act since the Sales Materials did not contain the proper disclaimers. According to Florida Statute §718.503(3)(b), developers of condominium projects are required to place conspicuous text in all Sales Brochures stating that "… FOR CORRECT REPRESENTATIONS, MAKE REFERENCE TO THIS BROCHURE …" Florida Statute §718.503(3)(b) states as follows:

> *b) Sales brochures, if any, shall be provided to each purchaser, and the following caveat in conspicuous type shall be placed on the inside front cover or on the first page containing text material of the sales brochure, or otherwise conspicuously displayed: ORAL REPRESENTATIONS CANNOT BE RELIED UPON AS CORRECTLY STATING REPRESENTATIONS OF DEVELOPER.* ***FOR CORRECT REPRESENTATIONS, MAKE REFERENCE TO THIS BROCHURE*** *AND TO THE DOCUMENTS REQUIRED BY SECTION §718.503, FLORIDA STATUTES, TO BE FURNISHED BY A DEVELOPER TO A BUYER OR LESSEE. ...*

(Emphasis added).

iii. Third, since Muse was pre-construction and there was no unit or building built to inspect, the Sales Materials were the only source of materials that Plaintiffs could rely upon in purchasing the Units. Plaintiffs were also justified in relying on the Floor Plans and Fact

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Sheet because the materials looked official and part of the plans and specifications and the Condominium Documents of Muse.

iv. Fourth, the square footage of a unit is typically one of the most important aspects in determining the fair market value of real estate and most often forms the basis for the negotiations of the purchase price. Therefore, Plaintiffs had no reason to expect that the total actual square footage of the Units would be any different than the 3,635 square feet specifically indicated in the Floor Plans and Fact Sheet.

v. Fifth, the Floor Plans and Fact Sheet (which were part of the Sales Brochure of PMG) stated that the Units would have a total unit area of 3,635 square feet. The Floor Plans contained a small and barely readable disclaimer advising purchasers not to rely on "oral representations" and warning about the possibility that the dimensions of the floor plan of the Floor Plan were approximate dimensions. However, the Fact Sheet did not contain any disclaimer and disclaimer on the Floor Plans was in conflict with the required language of Florida Statutes §718.506, §718.504(1) and §718.503(3)(b) all of which require and permit reliance on "Sales Brochures". The disclaimer on the Floor Plans was also barely readable and was not conspicuous. In any event, the disclaimer of the Floor Plans (even if proper) merely stated that "oral representations" could not be relied upon thereby directly inferring that written representations such as the statements made within the Sales Materials could be relied upon. The disclaimer of the Floor Plans also stated that the "dimensions" of the rooms and areas were approximate, but did not state that the total square footage of the Unit could not be relied upon or was subject to change. While it is reasonable to assume that room and area dimensions may vary from room to room, it is not reasonable to anticipate that the total unit area of a unit will be less than the represented total square footage. This is particularly true since real estate is sold, valued and appraised based on its total square footage.

vi. Sixth, Florida Statute §718.506 allows purchasers (like Plaintiffs) the right to reasonably rely on promotional and advertising materials and further provides a statutory remedy of rescission to purchasers in the event such materials are false and misleading. In fact, the rights of a purchaser under Florida Statute §718.506 (like Florida Statutes §718.504(1) and §718.503(3)(b)) cannot be waived as per Florida Statute §718.303(2) which states that "***A provision of this chapter may not be waived if the waiver would adversely affect the rights of a unit owner or the purpose of the***

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> ***provision…*** (Emphasis added). Therefore, a provision in a contract whereby a purchaser agrees not to rely on promotional and advertising materials specifically would violate and nullify the letter, spirit and intent of Florida Statutes §718.506, §718.504(1) and §718.303(2). As a matter of common usage, "A/C Area" is space that is air conditioned thus excluding exterior spaces, and the interior walls and columns.

61. For the reasons stated above, Plaintiffs reasonably relied upon the Sales Materials to enter into the Contracts and tendered the deposits to PMG, and reasonably believed that they would be getting Units consisting of 3,635 square feet. As a result, Plaintiffs seek to rescind the Contracts and return of their deposits with interest thereon.

62. PMG also violated the regulations of the Division promulgated under and F.S.§718.501 and the Florida Condominium Act as it relates to Sale Brochures. According to the Division and F.S.§718.501, PMG was required to submit to the Division any Sales Brochures for approval by the Division. Part of the Division's review process in approving Condominium examines whether the disclosures in the sales brochures [are] consistent with those in the prospectus, filing statement, purchase agreement and declaration. Since PMG never submitted any sales brochure to the Division, no such consistency analysis was ever made by the Division and the Sales Brochure was never approved. However, Plaintiffs relied on the Sales Brochures believing that they had been approved by the Division, and to such extent, the unapproved Sales Brochures were further misleading.

63. Sales Brochures that also disclaim that a buyer cannot rely upon such Sales Brochures are additionally also misleading because such is contrary to F.S. §718.506, §718.503(b), §718.504(1) and §718.303(2).

64. In addition, PMG (through its counsel agent) was well aware of the Division's long standing policy and regulations, and had been previously warned by the Division in writing

through deficiency letters that provisions like section 37 in the Purchase Agreements were not permitted by the Division to imply that buyers cannot rely of sale and promotional materials as such would be offensive to Florida Statutes §718.506. Attached hereto and marked as **Exhibit H** are sample Deficiency Letters sent by the Division on other projects that clearly establish that provisions which waive reliance on promotional and sales materials impinge on F.S. §718.506, §718.503(b), §718.504(1) and §718.303(2) and are not permitted by the Division. Because the Division was never asked to review Sales Brochures and other sales materials, Plaintiffs believe that the Division did not insist on the standard contract language that preserves the buyer's non-waivable right to rely on sale materials.

65. Plaintiffs were required to hire the undersigned counsel and thereby obligated themselves to pay the undersigned counsel reasonable attorney's fees and litigation costs. According to Florida Statute §718.506(2), the prevailing party shall be entitled to recover reasonable attorney's fees. In addition, Plaintiffs also seek to recover reasonable attorney's fees pursuant to Section 47 of the Contracts.

WHEREFORE, Plaintiffs, STEPHEN HESS and CLEARWATER BEACH COMPANY, LLC (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), respectfully demand judgment against Defendant, PMG-S2 SUNNY ISLES, LLC, for rescission of the Contracts, costs, interest, the return of the deposits, reasonable attorney's fees, and such further relief as the Court may deem just and proper.

COUNT III: BREACH OF CONTRACT

66. Plaintiffs Hess and Clearwater (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), re-allege and incorporate the allegations in paragraphs 1 through 21 as if fully set forth herein.

67. This is an action to for Breach of Contract.

68. Pursuant to Florida Statute §718.502(3), [e]very developer who holds a unit or units for sale in a condominium shall submit to the division any amendments to documents or items on file with the division and deliver to purchasers all amendments **prior to closing**, but in no event, later than 10 days after the amendment. These documents include any amendments made to the contracts and prospectus according to Florida Statutes §718.503 and §718.504.

69. Additionally, section 25 of each Contract provides in accordance with Florida Statute §718.503(1)(a) that the Contract is "VOIDABLE BY BUYER BY DELIVERING WRITTEN NOTICE OF THE BUYER'S INTENTION TO CANCEL WITHIN 15 DAYS AFTER THE DATE OF RECEIPT FROM DEVELOPER OF ANY AMENDMENT WHICH MATERIALLY ALTERS OR MODIFIES THE OFFERING IN A MANNER THAT IS ADVERSE TO THE BUYER. **ANY PURPORTED WAIVER OF THESE VOIDABILITY RIGHTS SHALL BE OF NO EFFECT… BUYER MAY EXTEND THE TIME FOR CLOSING FOR A PERIOD OF NOT MORE THAN 15 DAYS AFTER THE BUYER HAS RECEIVED ALL OF THE ITEMS REQUIRED"**. (Emphasis added).

70. This notice requirement gives the purchaser the opportunity to review the changes and decide if he wish to continue with the sale. The purchaser then has fifteen (15) days after the date of receipt from the developer of any amendment which materially alters or modifies the offering in a manner that is adverse to the buyer pursuant to section 25 of the Contracts and Florida Statute §718.503

71. However, PMG failed to comply with section 25 of each Contract, the Division's instructions and Florida Statute §718.503 by failing to deliver three (3) different amendments, including without limitation, an Amendment that was approved by the Division on May, 24, 2018

(collectively the "Amendments") to Plaintiffs prior to Closing thereby effectively denying Plaintiffs their legal right to withdraw from the purchase. Rather, PMG scheduled all three Contracts for Closing on May 31, 2018 without advising Plaintiffs about any of the Amendments. A true and correct copy of the Amendments are attached hereto and marked as **Composite Exhibit I**.

72. Instead, PMG kept quiet about the Amendments hoping to surprise Plaintiffs at the Closing with the Amendments.

73. Had Plaintiffs received the Amendments prior to Closing, Plaintiffs would have had the right to extend the time for closing for a period of not more than 15 days after the Plaintiffs received all of the items required, in addition to the right to rescind the Contracts if any of the Amendments materially altered or modified the offering in a manner that was adverse to the Plaintiffs.

74. Plaintiffs did not attend the Closing as prematurely scheduled by PMG. Seller did not comply with the Purchase Agreements in scheduling the Closing, including without limitation, Section 9, which required among other things for PMG to timely provide all Amendments prior to Closing.

75. PMG was clearly required to provide all the Amendments as required by Florida law, but in no event before the May 31, 2018 Closing and before being declared in default on June 1, 2018. The letter of the Division approving the Amendment that was approved by the Division on May 24, 2018 instructed PMG that "*All amendments must be delivered to the purchasers prior to closing, but in no event, later than 10 days after the amendment*." Moreover, the form letter of PMG to buyers attaching the Amendments states that "*Florida law requires condominium developers to inform buyers any time they make changes to the offering materials*."

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76. Instead of providing Plaintiffs with the Amendments prior to Closing (particularly the Amendment that was approved by the Division on May 24, 2018) and otherwise complying with the Purchase Agreements, PMG prematurely declared Plaintiffs in default on June 1, 2018.

77. Despite prematurely declaring Plaintiffs in default, PMG nevertheless delivered the May 24, 2018 Amendment several days later on or about June 4, 2018. By the time the May 24, 2018 Amendment was delivered to Plaintiffs, Plaintiff had already been defaulted by PMG.

78. After being declared in default by PMG, the parties continued to discuss the possibility of closing on one or two of the Units at a reduced purchase price and applying the deposits of all the Units to the purchase, all as part of settlement negotiations.

79. Defendant did not reschedule the May 31, 2018 Closing for all the Units. After being declared in default, the parties attempted to reschedule the Closing of some of the Units as part of post default settlement negotiations, but the parties never concluded a settlement and no closing ever took place.

80. Shortly thereafter, on June 29, 2018, PMG sent Plaintiffs a formal default letter stating that Plaintiffs failed to close on May 31, 2018.

81. PMG's premature default letter alleging Plaintiffs in default was in direct contravention to the Purchase Agreements and Florida Statutes and itself constituted a breach of the Purchase Agreements. Because Plaintiffs were never timely provided the Amendments (particularly the Amendment that was approved by the Division on May 24, 2018) as required by Florida law, the closing on the Units on May 31, 2018 was prematurely scheduled.

82. PMG willfully withheld from the Plaintiffs the Amendments prior to the Closing scheduled for May 31, 2018 and denied Plaintiffs their legal right to void the Contracts or extend the Closing date.

83. The May 24, 2018 Amendment would have permitted rescission under Florida Statute §718.503(1)(a) had the Plaintiffs been provided with the Amendments prior to Closing.

84. PMG's premature termination of the Purchase Agreements and declaration of a default on June 1, 2018 itself constituted a default of the Purchase Agreements. At the very least, PMG was required to retract it default communication, provide Buyer with the Amendments, and reschedule the Closing date, which it failed to do. Instead, Plaintiffs were made to negotiate under the constant threat of Defendant forfeiting the escrow deposits.

85. Providing the May 24, 2018 Amendment to Plaintiffs after being declared in default without retracting the defaults and reinstating the Purchase Agreement was improper and contrary to the letter and spirit of Florida Statute §718.503.

86. Plaintiffs were required to hire the undersigned counsel and thereby obligated themselves to pay the undersigned counsel reasonable attorney's fees and litigation costs. Section 47 of the Contract which section survives the termination of the Contracts also authorizes the award of attorney's fees.

WHEREFORE, Plaintiffs, STEPHEN HESS and CLEARWATER BEACH COMPANY, LLC (or Plaintiff Assignees to the extent that they are deemed to be the real parties in interest), respectfully demand judgment against Defendant, PMG-S2 SUNNY ISLES, LLC, for recession of the Contracts, an award of costs, interest, attorney's fees under Section 47 of the Contracts, the return of the deposits, and such further relief as the Court may deem just and proper.

REQUEST FOR JURY TRIAL

Plaintiffs requests a jury trial on all issues so triable as a matter of right.

Respectfully submitted,

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