

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a
Coral Resorts and Sunrise Vacation Properties, Ltd. d/b/a
Coral Resorts, Defendants.

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S.C. SUPREME COURT

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

Coral Resorts, LLC and Sunrise Vacation Properties, Ltd.
d/b/a Coral Resorts, Defendants.

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith, David
Watson, and Sheldon Stanhope, Defendants.

**FINAL BRIEF OF CORAL RESORTS, LLC, HILTON HEAD ISLAND
DEVELOPMENT COMPANY, LLC, SUNRISE VACATION PROPERTIES, LTD.,
SHERRI J. SMITH, DAVID WATSON, SHELDON STANHOPE, AND
ROBERT LAUDERMAN**

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CERTIFIED QUESTIONS

- I. Does the South Carolina Real Estate Commission (Commission) have exclusive jurisdiction to determine whether a violation of the Timeshare Act has occurred?
- II. Is the Commission's determination of a violation of the Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act?
- III. Are the Commission's determinations as to whether the Act was violated binding on the courts of the Judicial Branch?

STATEMENT OF THE CASE

This matter arises out of a series of lawsuits initiated by counsel for Plaintiffs regarding the sale of vacation timeshare interests in South Carolina. The corporate Defendants in these matters have been involved in the development, management, and sale of vacation timeshare resort properties located exclusively in Hilton Head Island, South Carolina since the 1980s. They are South Carolina single-site developers, not national chains. Their four resort properties are Coral Sands Resort, Coral Reef Resort, Port O'Call Resort, and Island Links Resort, all of which are located on Hilton Head Island. In all, these businesses have brought in tens of thousands of families to the island, have added millions of dollars to the local tourism economy, and provided work to hundreds of individuals in the Hilton Head Island area. Plaintiffs are individuals who have purchased timeshare interests from the Defendant timeshare developers.

Plaintiffs filed their separate lawsuits in the United States District Court for the District of South Carolina between August 2014 and February 2015. In each case, Plaintiffs complain of their purchase of a timeshare interest from Defendants. Defendants moved to dismiss Plaintiffs' complaints, which motions were granted in part and denied in part. Defendants have answered Plaintiffs' Complaints. However, both Plaintiffs and Defendants moved the district court to certify questions to this Court regarding the scope of the South Carolina Real Estate Commission's (Commission) authority to enforce the South Carolina Vacation Time Sharing Act (Timeshare Act). These questions are now before this Court.

STANDARD OF REVIEW

This Court applies the following standard of review when considering certified questions of law:

In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.

McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47, 644 S.E.2d 43, 46 (2007) (citing *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006)).

ARGUMENT

Plaintiffs James and Irene Nichols' (Plaintiffs Nichols) purchase history provides a useful example of the purchase process.¹ On October 3, 2010, Plaintiffs Nichols entered into a contract to purchase a vacation timeshare interest at the Port O'Call Resort. (1st Am. Compl. ¶¶ 14-23, Dkt. No. 95; Port O'Call Horizontal Property Regime Purchase Contract No. 11339-POC, executed October 3, 2010 (excerpt), Dkt. No. 19-3.) A year later on October 5, 2011, Plaintiffs returned to Hilton Head Island and entered into another contract to purchase a vacation timeshare interest at the Port O'Call Resort. (1st Am. Compl. ¶¶ 25-32, Dkt. No. 95; Port O'Call Horizontal Property Regime Purchase Contract No. 11797-POC, executed October 5, 2011, Dkt No. 19-4.) It is undisputed that Plaintiffs Nichols received notice of their five-day statutory right to cancel each of their purchase transactions, pursuant to S.C. Code Ann. § 27-32-40(A)(5)(a), but did not do so. It also cannot be disputed that the Nichols used their timeshare interests or the exchange points from them at least five times between

¹ Docket references in this paragraph are to *James Nichols and Irene Nichols v. Hilton Head Island Development Company, LLC et al.*, CIA No. 9:14-cv-3838.

October 2010 and October 2014, when they filed a lawsuit seeking to void their purchase contract and to receive a total refund. Their lawsuit alleges among other things, that certain Defendants violated the Timeshare Act, S.C. Code Ann. §§ 27-32-10 to 410.

The Timeshare Act is the statutory framework by which the Commission regulates not only the sale of vacation timeshare interests, but also the registration of persons² and plans involved in the timeshare industry. Pursuant to the Timeshare Act, individuals selling timeshare interests must be licensed by the Commission and are subject to discipline by the Commission. S.C. Code Ann. § 27-32-180. In addition, timeshare sellers must register their timeshare plans with the Commission before selling timeshare interests in South Carolina. S.C. Code Ann. § 27-32-190. The registration process includes the Commission's review and approval of particular documents that sellers must use in the timeshare purchase transaction such as the purchase contract, S.C. Code Ann. § 27-32-40, and the public offering statement, S.C. Code Ann. § 27-32-100. The Commission has the exclusive authority to review timeshare plan applications (including an exemplar purchase contract and public offering statement). S.C. Code Ann. §§ 27-32-20 and 190(A). The Commission is charged with determining that the requirements of the Timeshare Act have been met before entering an Order of Registration. S.C. Code Ann. § 27-32-190(A)(2)(a).

After initial registration, sellers cannot make a "substantial change" in the timeshare plan without seeking prior written approval from the Commission. S.C. Code Ann. § 27-32-190(B)(5)(a). "All books, files, accounts, and other documents pertaining

² Defendants use the term "person" throughout to refer to corporate entities as well as individuals. S.C. Code Ann. § 27-32-10(2).

to the advertisement and sale” of timeshare interests are subject to examination by the Commission at any time. S.C. Code Ann. § 27-32-150(B). The Commission’s involvement in registration and oversight of timeshares is pervasive and comprehensive.

As a result of the Commission’s omnipresence in the life of a timeshare plan, its seller, and other timeshare registrants, the stability of the timeshare industry depends on registrants’ ability to rely on the Commission’s determinations in order to conduct the most basic aspect of their business—selling timeshare interests. In direct contradiction to this need for stability, Plaintiffs seek to call into question the Commission’s determinations on registration of Defendants’ timeshare plans, approval of statutorily-required documents, and its authority to determine whether regulated persons have violated the provisions of the Timeshare Act. If Plaintiffs or any other timeshare purchaser are permitted to undertake such attack on the Commission, regulated persons, including Defendants, will have no ability to predict how, when, or why their registrations and statutorily-required documents might be called into question. The timeshare industry would be crippled in South Carolina.

Defendants are not the only persons facing these issues. A similar issue is presented in another case before this Court on the same certified questions. *Fulbright v. Spinnaker Resorts, Inc.*, App. Case No. 2016-001765. Like the corporate Defendants, Spinnaker Resorts, Inc. is also a timeshare developer and sellers in South Carolina. The Plaintiffs in the Fulbright case are represented by the same attorneys as the cases involving these Defendants. The *Fulbright* plaintiffs also seek to attack the registration status of Spinnaker’s timeshare plans despite a determination by the

Commission that the timeshare plans were properly registered. The specific issue before the Commission regarding Spinnaker was the registration status of three separate timeshare plans. At its August 20, 2015, meeting, the Commission held the initial registration of two of the Spinnaker timeshare plans to be retroactive to 2006 and accepted their renewal payments of \$250.00 per year for the period 2006 to 2015.³ For the third Spinnaker timeshare, the Commission accepted annual renewal payments for the period 2007 to 2015. The Commission did not find that there had been any violation of the Timeshare Act. In its Orders, the Commission concluded Spinnaker was at all times registered.⁴ The *Fulbright* matter presents a concrete example of Plaintiffs' concerted attempt to undermine the authority of the Commission by bringing a collateral attack on the Commission's orders.

The Commission's exclusive authority under the Timeshare Act to make determinations regarding licensing, registration, and document sufficiency has never been examined in South Carolina. For this reason, both Plaintiffs and Defendants moved that the district court certify various questions to this Court.

³ The minutes of the Commission hearing on the registration status of these three Spinnaker timeshare plans are available online for the Court's review at <http://www.llr.state.sc.us/POL/REC/Minutes/August%2019,%202015.pdf>.

⁴ A copy of the Commission's Order can be found attached to memorandum of Defendant Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc. in support of its second Motion to Dismiss the Amended Complaint, C/A No. 9:15-cv-1476, Dkt. No. 35-1.

I. **The South Carolina Real Estate Commission (Commission) has exclusive jurisdiction to determine whether a violation of the Timeshare Act has occurred.**

A. **The administrative structure created by the Timeshare Act vests solely the Commission with broad authority to regulate the timeshare industry.**

Throughout the course of this litigation, Defendants have reiterated their position that the Commission has **exclusive jurisdiction** to determine matters within its administrative and regulatory authority. The Commission's pervasive role in regulating the timeshare industry must exclude other courts, agencies, or tribunals from undertaking its regulatory functions.

When “determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute.” *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (quoting *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)). In regulation of the timeshare industry, the relevant statute is the Timeshare Act, which provides that the Commission has jurisdiction over the administrative and regulatory aspects of the creation and sale of timeshares. This authority is stated in section 27-32-130 of the South Carolina Code, which states, “[t]he Real Estate Commission is responsible for the enforcement and implementation of the [Timeshare Act] and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under” the Act.

Under the Timeshare Act, the Commission, as regulator, serves many critical functions that the General Assembly has determined are necessary for “the economic health and continued stability of the vacation time sharing industry” in this state. S.C.

Code Ann. § 27-32-405(M). Pursuant to the Commission's statutory mandate, the Commission is responsible for "scrutiniz[ing] the practices and procedures of persons developing or selling interests in vacation time sharing plans in this [s]tate." S.C. Code Ann. § 27-32-405(L).

One of the Commission's responsibilities is to register persons who are engaged in the sale of timeshare interests on behalf of a timeshare seller. S.C. Code Ann. § 27-32-180.

The Timeshare Act also requires that the Commission scrutinize and approve or disapprove timeshare plans from which a seller may sell timeshare interests. S.C. Code Ann. § 27-32-190(A). A timeshare plan is a complex real estate creation "in which the purchaser receives an ownership interest in real property and the right to use accommodations or facilities, or both, for a period or periods of time during a given year, but not necessarily for consecutive years, which extends for a period of more than one year." S.C. Code Ann. § 27-32-10(7). The timeshare plan must be registered by the Commission before a seller can sell interests in it. S.C. Code Ann. § 27-32-20(1). In order to register a timeshare plan, a timeshare seller must submit a great deal of information to the Commission, including but not limited to the following:

- A copy of the contract for the purchase of a timeshare interest, which contract must set forth the rights and obligations of the purchaser and seller.
- A description of the type of entity through which interests in the timeshare plan will be sold.
- A copy of contracts between seller and persons providing accommodations to purchaser.
- All rules, regulations, conditions, or limitations on the use of accommodations or facilities under the timeshare plan.
- Projected budget of recurring expenses that may become the responsibility of all purchasers.

S.C. Code Ann. § 27-32-20(2). Upon receipt of these materials, the Commission must examine the plan and associated documents to determine their “sufficiency and satisfactory compliance with this chapter.” S.C. Code Ann. § 27-32-20(3). The Commission must also “initiate an examination to determine that” the requirements of the Timeshare Act have been fulfilled, that promotional material is not misleading, that accommodations and facilities to be conveyed are free of encumbrances, and assurances that they will remain free of encumbrances. S.C. Code Ann. § 27-32-190(A)(1).

Within thirty days, the Commission must act on the application to approve or reject it. S.C. Code Ann. § 27-32-190(A)(2). If the Commission “affirmatively determines, upon inquiry and examination” that the registration application meets the requirements of the Timeshare Act, it must issue an order registering the plan. S.C. Code Ann. § 27-32-190(A)(2)(a). If the Commission determines that more information is needed about the proposed plan, it can request such information and corrections to the plan and associated transaction documents such as the purchase contract, public offering statement, rules and regulations, or projected budgets. Review of timeshare plan applications is a time-consuming, detailed procedure that requires the specialized institutional knowledge of the Commission.

As industry regulator, the Commission is also charged with reviewing and approving documents used by sellers in timeshare transactions. Two of the timeshare purchase transaction documents required by the Timeshare Act and scrutinized by the Commission prior to registration of a timeshare plan are the purchase contract and the public offering statement. S.C. Code Ann. §§ 27-32-40, -100. The Timeshare Act does

not merely require these documents in the abstract, it sets forth the specific provisions that must be contained within each document before they will be approved by the Commission. The timeshare purchase contract must contain the following: (1) actual date the contract is executed by all parties, (2) name and address of seller, (3) total financial obligation of the purchaser, (4) specific term of the contract, and (5) a statement that the purchaser may cancel the contract within five days of execution or receipt of the public offering statement, whichever is later. S.C. Code Ann. § 27-32-40(A). There are also specific statutory requirements for the public offering statement that must be met before the Commission can determine its sufficiency, which are found at S.C. Code Ann. § 27-32-100(1) – (13).

The Commission's regulatory mandate does not end when the Commission initially registers a timeshare plan. After initial registration, sellers are required to seek prior written approval of the Commission before making a substantial change in the plan of development and sale of timeshare interests. S.C. Code Ann. § 27-32-190(B)(5)(c). The Commission also has broad and exclusive authority to discipline persons engaged in the sale of timeshare interests and discipline sellers and time sharing plans including the investigation of alleged Timeshare Act violations, the issuance of cease and desist orders, and importantly the revocation of a time sharing plan's registration. S.C. Code Ann. §§ 27-32-120, -190(b). **Notably, the only entity in this State with the authority to revoke a timeshare plan's registration and cause it to become unregistered is the Commission. S.C. Code Ann. § 27-32-190(B)(7). The Timeshare Act does not grant any other person or agency in this state such authority.**

The comprehensive authority to regulate the timeshare industry shows that the General Assembly intended to grant the Commission **exclusive authority** to determine whether a registrant has violated the Timeshare Act. This exclusive authority is necessary because of the havoc and uncertainty that could occur if courts were to reach inconsistent determinations regarding the same or similar Timeshare Act issues. Moreover, if any purchaser could individually challenge the validity of a plan's registration in court, then the courts could face a situation where they are asked to consider the same question of registration or document sufficiency over and over again.

The economic health and continued stability of South Carolina's timeshare and tourism industry depends upon the expertise, institutional knowledge, and consistency of decisions that only the Commission can provide. S.C. Code Ann. § 27-32-405(M). To interpret the Timeshare Act in a manner that would permit the various state and federal courts and arbitrators to wade into regulated waters and determine whether a violation of the Timeshare Act has occurred improperly subjects Commission-regulated persons to the possibility of inconsistent determinations. This intrusion into an agency's province would adversely affect the continued stability of South Carolina's timeshare industry.

The danger of instability extends to the other owners in the same timeshare plan who may have no complaint or desire to challenge the Commission's determinations. As owners of Defendants' timeshares, Plaintiffs become members of a homeowners association. This association is charged with the upkeep of the resort property and pays for that upkeep by assessing maintenance fees. If some disgruntled owners can convince a court to void their purchase contracts based on rulings contradictory to the

Commission's review and approval of the seller's registration and form documents, then the remaining owners of that timeshare plan will bear the brunt of this harm. This is because they will have to pay a larger portion of the costs to maintain the resort such as pool maintenance, roof replacement, lawn care, appliance upgrades, etc. It is these other timeshare owners who are ultimately harmed. Those individuals could face the failure of the plan in which their interest exists and the loss of a real estate asset.

As set forth in the Timeshare Act, the Commission is the only entity charged with investigating alleged violations of the Timeshare Act. It is indisputable that the General Assembly expressly vested the power to prosecute timeshare violations solely in the Commission through the South Carolina Department of Labor, Licensing and Regulation (LLR), not any individual (or court). However, the General Assembly protects the individual by making it clear that the Timeshare Act does "not limit" a purchaser's right "to bring a private action to enforce the provisions of [the Timeshare Act]" (i.e. to carry out, if necessary, the findings and conclusions of the Commission by bringing an action based on Timeshare Act violations already determined by the Commission to have occurred). S.C. Code Ann. § 27-32-130. In other words, the General Assembly provides that Commission/LLR must determine if a violation has occurred. If there is a violation, the purchaser then has the right to enforce the decision of the Commission/LLR.

A purchaser maintains all rights and claims at common law to seek redress for any perceived harm. Plaintiffs are aware of this as demonstrated by the claims alleged in their Complaints. Again, Plaintiffs Nichols' Amended Complaint contains numerous causes of action seeking relief from the same alleged wrongs they otherwise attribute to

a violation of the Timeshare Act: fraud/intentional misrepresentation; negligent misrepresentation; breach of fiduciary duty; and negligent hiring, training, supervision, and retention. (*Nichols v. Hilton Head Island Development Company, LLC et al.*, C/A No: 9:14-cv-3838, Dkt. No. 95.)

Nor does the Timeshare Act empower purchasers to forum shop in order to launch collateral attacks regarding the sufficiency of Commission-scrutinized practices, procedures, and approved documents in the trial courts and other tribunals.⁵ This regulatory scheme shows that the General Assembly has vested the Commission with broad authority to register, investigate, and sanction timeshare plans and registrants as may be necessary. It further illustrates the General Assembly's recognition and respect for the Commission's specific knowledge and expertise in this complex area of timeshare regulation.

B. The South Carolina Administrative Law Court (ALC) has determined that the Commission has exclusive jurisdiction over regulated activity.

Although not binding on this Court, it is instructive to consider a case in which the South Carolina Administrative Law Court (ALC) determined that jurisdiction of certain matters is reserved to the Commission. *Tench v. S.C. Dep't of Labor, Licensing and*

⁵ Plaintiffs' counsel have sought to bring similar actions in numerous fora. Plaintiffs' counsel brought the first of these cases against certain of these Defendants in the Beaufort County Court of Common Pleas. *E.g., Albert R. LaFleur and Eileen LaFleur v. Coral Resorts, LLC, et al.*, C/A No. 2012-CP-07-3746, filed on October 30, 2012. Thereafter, Plaintiffs' counsel explored filing certain claims with the Beaufort County Magistrate's Court. *E.g., Michael Adams and Shonnie Adams v. Coral Resorts, LLC et al.*, C/A No. 2014-CV-07-10300299, filed on February 25, 2014. Plaintiffs' counsel then sought recourse in the District Court, filing the instant *Chenard* matter August 19, 2014. Despite their exploration of multiple judicial forums, more than half of the cases brought by Plaintiffs' counsel are subject to arbitration and are now pending before the American Arbitration Association (AAA). *E.g., Sondra Ettliger v. Coral Resorts, LLC*, AAA case no. 01-14-0001-3739.

Regulation, No. 98-ALJ-11-0041-JJ, 1998 WL 320770 at *1 (S.C. A.L.C., May 27, 1998). In *Tench*, the ALC addressed its subject matter jurisdiction over certain timeshare claims. In 1986 and 1987, Tench purchased timeshares located in Westminster, South Carolina. *Tench*, 1998 WL 320770 at *1. In 1995, Tench filed a complaint with the Commission seeking a refund of his payments made toward his timeshare property. *Id.* Tench's complaint alleged fraud and mismanagement of the timeshare property but no Timeshare Act violations. *Id.* The Commission determined there were no violations of any statutes coming within the Commission's jurisdiction. *Id.* Tench then sought relief from the ALC, outlining the facts and allegations he had raised to the Commission and requesting the ALC's assistance in recovering the monies paid toward Tench's timeshare property. *Id.* The Commission was the respondent to the *Tench* complaint in the ALC. *Id.*

The ALC held it lacked jurisdiction to order a refund of the monies Tench paid for the timeshares in question. *Id.* Rather, the ALC noted its jurisdiction over Commission decisions is limited to matters relating to disciplinary proceedings conducted by the Commission. *Id.* **The ALC specifically cited section 27-32-190 of the South Carolina Code which pertains to the initial registration of timeshare plans as an administrative matter over which it would have jurisdiction.** *Id.* As explained above, this section addresses in great detail the Commission's role in the registration of vacation time sharing plans, and the Commission's investigatory and enforcement powers in disciplining sellers for violating the provisions of the Timeshare Act, including registration-related matters. *Id.* The ALC concluded it lacked jurisdiction to consider any action based on fraud or to award any damages to Tench. As elucidated in *Tench*,

determination of the status of a timeshare plan's registration is of an administrative, ministerial, and/or disciplinary nature; thus, it falls within the exclusive jurisdiction of the Commission. See *Tench*, 1998 WL 320770 at *1; see also, S.C. Code Ann. § 27-32-120(A); *id.* § 27-32-190.

C. The Timeshare Act also provides a statutory basis for timeshare purchasers to bring a private arbitration action for violation of the Timeshare Act through the Vacation Time Sharing Recovery Fund.

In addition to there being no limit on a Plaintiff's ability to (1) file a complaint with the Commission and, if successful, pursue damages in court or (2) bring a common law claim for the type of activities proscribed by the Timeshare Act, Plaintiffs also have arbitration as an avenue of private action under Timeshare Act. The broad administrative structure of the Timeshare Act provides a forum for the resolution of purchaser disputes through creation of the Vacation Time Sharing Recovery Fund ("Fund"). S.C. Code Ann. §§ 27-32-200 - 230. These provisions create an arbitration process by which timeshare purchasers can recover monetary damages. "A person aggrieved by the conduct of a registrant or licensee" can initiate an arbitration proceeding to recover from the Fund under the Timeshare Act. S.C. Code Ann. § 27-32-210(A)(1). Such person must demonstrate that he or she has made a demand upon the timeshare registrant for recovery and has been denied. S.C. Code Ann. § 27-32-210(A)(2). The application for recovery must be made within one year of the loss. S.C. Code Ann. § 27-32-210(A)(4). The claim is submitted to the Board of Arbitrators, which has the authority to determine if a violation has occurred. The Board of Arbitrators' decision is final and binding. S.C. Code Ann. § 27-32-230(A).

A South Carolina bankruptcy court has examined the effect of arbitration pursuant to the Fund on the bankruptcy court's jurisdiction and determined that the bankruptcy court did not have jurisdiction over a timeshare dispute. *In re Internationale Resort & Beach Club*, 36 B.R. 189, 190–91 (Bankr. D.S.C. 1983). The Internationale Resort and Beach Club (Internationale) filed for Chapter 11 bankruptcy. *Id.* at 190. While Internationale was in bankruptcy, the Caldwells filed a claim with the Fund, alleging that Internationale had violated section 27-32-100 of the Timeshare Act, which addresses matters to be disclosed in the timeshare interest purchase contract. *Id.* at 191. The bankruptcy trustee sought to remove the case to the bankruptcy court. *Id.* at 192. The bankruptcy court held that it did not have jurisdiction over the claim, reasoning that the arbitration proceeding under the Fund did not meet the requirements for removal under the bankruptcy code sections 28 U.S.C. § 1471(a) or (b). *Id.* at 193.

The bankruptcy court went on to consider whether it would have jurisdiction if the requirements of 28 U.S.C. § 1471(a) were met. The court found it still would not have jurisdiction because timeshare sales is a regulated industry:

it is evident that the South Carolina Real Estate Commission is a Unit of the Government of South Carolina (§§ 40–57–50 and 27–32–130, South Carolina Code.) § 27–32–130 places on the Commission the responsibility for the enforcement and implementation of Chapter 32 of Title 27, including the responsibility to grant and suspend licenses to sell or lease Time Sharing Units in the State of South Carolina. It is this Title and Chapter which includes the sections establishing the recovery fund and the procedures for recovery from the fund, including the revocation of the license of the offending seller (§§ 27–32–200 through 27–32–230). In proceeding with this claim, the Real Estate Commission is clearly acting to enforce the powers and responsibilities granted it as a Governmental Unit of the State.

Id. Thus, the bankruptcy court recognized the exclusivity of the Commission's authority to determine violations of the Timeshare Act and to impose discipline on registrants.

Although the scope of the Commission's exclusive jurisdiction has not been addressed by South Carolina's appellate courts, the bankruptcy court's decision in *Internationale* and the ALC's order in *Tench* indicate that the Commission's exclusive jurisdiction includes administrative, ministerial, or matters of a disciplinary nature. In fact, the ALC specifically cited section 27-32-190 of the Timeshare Act—outlining the process for the registration of timeshare plans—as an example of matters over which the ALC **would** have jurisdiction pursuant to The Administrative Procedure Act. *Tench* at *1.

D. The separation of powers doctrine requires that exclusive jurisdiction over alleged Timeshare Act violations be vested in the Commission.

The General Assembly's assignment of broad regulatory authority to the Commission, an administrative body of the executive branch of government, is consistent with the doctrine of separation of powers as set forth in South Carolina's Constitution. See S.C. Const. art. I § 8; S.C. Const. art. III § 1; S.C. Const. art. IV § 1; S.C. Const. art. IV § 15; S.C. Const. art. V § 1.

This Court examined the separation of powers between the judicial and executive branches in *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304–05 (1979). The present situation is analogous. In *Yonce*, the Chief Justice appointed a circuit court judge to preside over the Public Service Commission. *Id.* The Attorney General sought to have the arrangement declared an unconstitutional violation of the separation of powers doctrine. *Id.* This Court explained the separation of powers doctrine as follows:

One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents

the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws.

Id. at 84, 261 S.E. 2d at 304-305. This Court further explained:

Under a republican government such as ours, sovereignty lies in the people. This sovereignty is delegated by the people under the Constitution to the three departments of government, executive, judicial and legislative, which are co-ordinate and independent, and it must follow that each is supreme as to matters within its own sphere of action, subject alone to the limitations, checks and balances provided in the Constitution. This general rule is easy to state, but some difficulty arises in its application.

Id. at 81, 85–86, 261 S.E.2d at 305 (quoting *State ex rel Rawlinson v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907)). A violation of separation of powers occurs “where one department of government attempts to exercise powers exclusively delegated to another.” *Id.* This Court determined that permitting a circuit court judge to preside over the Public Service Commission was unconstitutional because, while some overlap among the branches of government is tolerated, the degree of involvement of the circuit court in matters delegated to the Public Service Commission was impermissible. *Id.* And so it is in this case.

Here, Plaintiffs are essentially requesting that the judicial branch be permitted to take the place of the Commission, to look behind the Commission’s decisions in administrative and regulatory matters for which the Commission has specialized institutional knowledge, experience, and ability. Such action crosses the line of permissible overlap between the branches of government and violates the separation of powers doctrine.

Plaintiffs base their argument upon the language in the Timeshare Act that states they are not limited “to bring a private action to enforce the provisions of this chapter.”

S.C. Code Ann. § 27-32-130. Plaintiffs, however, misconstrue the prerequisites and parameters of the “private action.” To the extent a private right of action exists, it must be reconciled with the conclusion above that only the Commission (or LLR if the Commission so requests) has authority to prosecute a violation under the Timeshare Act, register timeshare plans, revoke a registration, approve or disapprove the form of statutorily-required documents in the timeshare purchase transaction, and discipline registrants for violations of the Timeshare Act. Once the Commission finds a violation of the Timeshare Act in response to a complaint from Plaintiffs, Plaintiffs then may seek assistance of the courts to recover from a timeshare registrant for said violation. No Defendant disputes Plaintiffs’ rights to pursue all rights and remedies at common law. These include causes of action Plaintiffs have asserted in their Complaints including fraud, negligent misrepresentation, and breach of contract. Section 27-32-130 expressly states that its provisions “do not limit” such rights of action. Defendants simply contend that Plaintiffs can have no recourse to the courts to attack regulated activity. Rather, Plaintiffs can file a complaint with the Commission. As outlined in Section II, when and if the Commission determines a violation occurred, then Plaintiffs can seek damages in a court or in arbitration through the Fund and would be limited to a refund of consideration under the Timeshare Act.

E. Evaluation of subject matter jurisdiction is a matter distinct from the existence of a private right of action.

Plaintiffs appear to argue that if a private right of action exists it must necessarily confer subject matter jurisdiction on a federal or state court. (Br. of Plfs. at 5.) In fact, subject matter jurisdiction and the existence of a private right of action are two separate analyses. Subject matter jurisdiction is the power of a court to hear and determine

cases of the general class to which the proceedings belong. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 678 S.E.2d 430, 433 (S.C. 2009). It “represents the extent to which a court can rule on the conduct of persons or the status of things.” *Carlsbad Tech., Inc., v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). Conversely, “inquiries about whether the statute at issue confers a cause of action encompassing a particular plaintiff’s claim go, not to subject-matter jurisdiction, but rather to the merits.” *District of Columbia Nurses Assoc. v. Brown*, --- F. Supp. 3d ---, 2016 WL 29252, at *2 (D.D.C. Jan. 4, 2016) ((internal alterations and quotation marks omitted) (quoting *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S.Ct., 1377, 1387 (2014))); *Verizon Maryland, Inc. v. Public Serv. Com’n of Maryland*, 535 U.S. 635, 644 (2002) (“Indeed, [the statute] does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action.”)⁶ In *Dema*, this Court held, “Whether the CON Act creates a private cause of action or whether a party may maintain an independent civil private cause of action seeking damages as a result of CON Act violations, both cases over which a trial court would have subject matter jurisdiction an discussed infra, is a distinct issue from whether a healthcare facility violated the CON Act, a case over which DHEC has exclusive subject matter jurisdiction.”

Thus, if a conflict between subject matter jurisdiction and the existence of a private right of action exists, the determination on subject matter jurisdiction must control. In this case, the Commission must have exclusive jurisdiction to determine if there is a violation of the over Timeshare Act.

⁶ The Supreme Court has “on occasion referred to [the inquiry of whether a party has a cause of action] as ‘statutory standing’ but has recognized that that label too, is misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court’s statutory or constitutional power to adjudicate the case.” *Lexmark Intern.*, 134 S.Ct. at 1387 n. 4.

F. The courts lack subject matter jurisdiction because Plaintiffs cannot demonstrate the existence of causation, a necessary prerequisite to standing.

Subject matter jurisdiction also requires a demonstration of standing as a prerequisite. Our Fourth Circuit sister state of North Carolina has directly addressed this issue. *Am. Oil Co. v. AAN Real Estate, LLC*, 232 N.C. App. 524, 526, 754 S.E.2d 844, 846 (2014) (“Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims.”) A necessary element of standing is that “a causal connection must exist between the injury and the challenged conduct.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014). Thus, Plaintiffs must demonstrate some causal connection between the Timeshare Act violations they allege and the losses they allege to have sustained. If they are unable to establish this causal connection, they lack standing. If Plaintiffs lack standing, the courts of this state cannot have subject matter jurisdiction of Plaintiffs’ claims.

In summary of the forgoing sections, the courts do not have subject matter jurisdiction to rule on the status of a person’s registration or whether a timeshare plan’s statutorily-required purchase documents are in compliance with the Timeshare Act. Moreover, the courts do not have subject matter jurisdiction to determine whether a registrant or licensee has violated the provisions of a practice act, which is a purely disciplinary determination. Accordingly, there can be no private right of action in the courts for a determination of a violation of the Timeshare Act.

Based upon the regulatory framework created by the Timeshare Act, this Court should hold that the Commission has exclusive jurisdiction to make determinations

regarding whether a violation of the Timeshare Act has occurred, including the Commission's authority to make determinations regarding the registration status of timeshare plans and statutorily-required transaction documents. Such a decision would "best comport with the law and public policies of the state." *McCullough*, 373 S.C. at 47, 644 S.E.2d at 46.

II. **The Commission's determination of a violation of the Timeshare Act is a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act.**

To the extent this Court determines a court may have subject matter jurisdiction over the types of claims at issue, this Court should hold that the Commission must make a determination of a violation of the Timeshare Act as a condition precedent to a party bringing "a private action to enforce the provisions of [the Timeshare Act]." S.C. Code Ann. § 27-32-130.

The requirement of an administrative determination as a condition precedent is examined in this Court's decision in *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430 (2009). *Dema* addressed the South Carolina Department of Health and Environmental Control's (DHEC) exclusive authority to make determinations regarding whether a violation of the Certificate of Need (CON) Act had occurred. In *Dema*, the trial court dismissed an administrative law matter for lack of subject matter jurisdiction, finding DHEC had exclusive jurisdiction to determine whether a violation of the CON Act had occurred. *Id.* at 121, 678 S.E.2d at 433; S.C. Code Ann. § 44-7-140 (providing that "[DHEC] is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities . . . under this article."). This Court reversed the trial court, holding that

although DHEC had exclusive jurisdiction to determine whether a violation of the CON Act occurred, it did not have subject matter jurisdiction to hear civil claims for damages resulting from those violations. *Id.* The “control and administration” language of the CON Act and the “enforcement and implementation” language of the Timeshare Act, S.C. Code Ann. § 27-32-130, are conceptually the same. Accordingly, where the General Assembly has granted authority to an administrative body for “control and administration” or “enforcement and implementation,” that administrative body should have exclusive jurisdiction over those matters.

In these cases, Plaintiffs ultimately seek a judicial determination that Defendants violated provisions of the Timeshare Act, including claims that Defendants sold Plaintiffs timeshare interests with unregistered timeshare plans and that there were certain defects in their regulator-approved purchase contracts or public offering statements. However, Plaintiffs do not allege that the Commission—the sole administrative body with the authority to make determinations concerning whether a violation of the Timeshare Act has occurred—has determined the alleged violations actually occurred. Indeed, the Commission has made no such determination as to Defendants. Just as the *Dema* court held that the trial court had jurisdiction to hear civil claims for damages resulting from violations of the CON Act, which DHEC had already determined the defendants had committed, a court would have jurisdiction over claims brought by a timeshare owner to award a refund of compensation after the Commission’s determination that Timeshare Act violations had occurred and the owner was damaged as a result.

This analysis comports with the language of the Timeshare Act. Section 27-32-190(B)(1) gives the Commission the authority to conduct an investigation to determine if a registered person has violated or is about to violate the provisions of the Timeshare Act. If the Commission finds a person to be in violation, it must so inform that person. S.C. Code Ann. § 27-32-120(A)(1). The Commission can then impose a monetary fine on the registrant or require other remedial steps, in its discretion. S.C. Code Ann. § 27-32-120(A)(2).

The only possible remedy for a purchaser found in the Timeshare Act is also found in this section. Section 27-32-120(C) provides that “a contract for the sale of an interest in a vacation time sharing plan in violation of this chapter is voidable at the option of the purchaser and entitles the purchaser to a refund of all consideration paid by him pursuant to the contract.” The only reasonable reading of this provision is that a purchaser is only entitled to a refund of consideration if there is a determination that the **contract** itself contains some violation of the Timeshare Act. There are three reasons this limitation is the only reasonable reading of this section. First, the section is entitled, in relevant part, “effect on contract,” indicating that the focus of the section is the contract and whether it is in conformance with the Timeshare Act. Second, any other reading of the section would make the phrase “contract for the sale of an interest in vacation time sharing plan” superfluous. See *CFRE, LLC v. Greenville County Assessor*, 395 S.C.67, 74, 716 S.E.2d 877, 881 (“We must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.”) Third, had the Legislature intended for every violation of the Timeshare Act to entitle a

purchaser to a refund of consideration, it could have done so rather than narrowed this section to address only the timeshare purchase contract.

The question then becomes what is a contract in violation of the Timeshare Act? Because the form of the contract has necessarily been approved by the Commission and determined to be in compliance with the Timeshare Act prior to the sale of timeshare interests, the only manner in which a contract can be in violation of the Timeshare Act is if there are alterations to the form that do not comply with the terms of the Timeshare Act or if the approved form was not used.

If a purchaser receives a determination by the Commission that his or her timeshare purchase contract is in violation of the Timeshare Act, the purchaser is entitled to a refund. If the timeshare seller refuses to refund the consideration, the purchaser will need an avenue for obtaining such recovery. At that point resort can be had via a "private action." Reading Sections 27-32-120 and 130 together demonstrates that, as in *Dema*, a determination of a violation by the Commission would be a condition precedent to a purchaser initiating a private action for recovery under the Timeshare Act, to the extent any such right of action otherwise exists.

Plaintiffs' counsel is well aware of how to file a complaint with the Commission to obtain such a determination. For instance, on June 30, 2011, Plaintiffs' counsel DuBois submitted a complaint to LLR's Office of Investigation and Enforcement to "scrutiniz[e] the practices and procedures" associated with five clients' purchases of timeshare interests from certain of Defendants. (*Paul Chenard and Rebecca Chenard v. Hilton Head Island Development Company, LLC et al.*, C/A No. 9:14-cv-03347, Letter from Joseph DuBois, Esq., to LLR, Dkt. No. 84-6.) Following an investigation by LLR and

review by the Commission, the Commission dismissed the complaints and informed Plaintiffs' counsel DuBois of this by letter dated August 30, 2012. (*Paul Chenard and Rebecca Chenard v. Hilton Head Island Development Company, LLC et al.*, CIA No. 9:14-cv-03347, Letter from Tracey McCarley to Joseph DuBois, Esq., Dkt. No. 84-6.) It was only when the Commission dismissed their complaint against certain Defendants that Plaintiffs' counsel began bypassing this process and the Commission's jurisdiction by initiating lawsuits in the courts of this State. The statutory framework of the Timeshare Act requires a determination from the Commission as a condition precedent to a purchaser seeking to enforce a claim for damages for violation of the Timeshare Act in a judicial tribunal.

III. **The Commission's determinations as to whether the Act was violated are binding on the courts of the Judicial Branch.**

This Court should hold that the Commission's determinations as to whether the Act was violated are binding on the courts of the judicial branch. The most important reason for this is the fact that regulated persons must have confidence that they can rely upon the final determinations of their regulators. This promotes the stability, uniformity, and finality necessary for regulated industries to conduct business.

It is also important for the decisions of the Commission to be binding upon the courts of the Judicial Branch for the protection of the tens of thousands of other individuals who have purchased timeshare interests from Defendants and who own those interests still. Timeshare plans are a form of horizontal property regime in which "the purchaser receives an ownership interest in real property and the right to use accommodations or facilities, or both, for a period or periods of time during a given year, but not necessarily for consecutive years, which extends for a period of more than one

year.” S.C. Code Ann. § 27-32-10(7). Timeshare interests are interests in real estate.
Id.

Not only do the timeshare sellers rely upon the Commission’s determinations, but so do the owners of timeshare interests in Defendants’ “vacation time sharing ownership plans.” S.C. Code Ann. § 27-32-10(7). Calling into doubt the validity of Plaintiffs’ purchases threatens the existence and value of the interests owned by thousands of individuals other than Plaintiffs. Such doubt threatens the solvency of the homeowners associations that operate the timeshare properties.

Permitting Plaintiffs to sidestep the Commission’s authority could lead to a proliferation of litigation in the various courts of the State. If the courts are not bound by the Commission’s determinations, neither would they be bound by another court’s rulings before differing Plaintiffs. This poses two problems. First, every disgruntled purchaser, whether a current owner or future owner, would have the ability to challenge every determination of the Commission—for example, the registration of the timeshare plan in which they each own an interest. There would be no limit on the number of lawsuits this would enable, now and in the future, which could unnecessarily burden the courts of this State. Second, the multiplicity of lawsuits would lead to the serial litigation and re-litigation of the validity of a Commission regulatory determination with the possibility of inconsistent and conflicting determinations on the requirements for compliance with the Timeshare Act. In that case, a timeshare registrant would not have the confidence to conduct business based on Commission review and approval. This is because a regulated entity could never anticipate if the courts would reach a different conclusion on the requirements for compliance with the Timeshare Act.

A. Other regulated industries could be negatively affected by a ruling that the Commission does not have exclusive jurisdiction to determine violations of the Timeshare Act.

The need for confidence in the determinations of administrative bodies is illustrated by the filed rate doctrine, the seminal case of which in South Carolina is *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005). In *Edge*, this Court explained the filed rate doctrine as follows:

“The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.” *Amundson & Assocs. Art Studio v. Nat’l Council on Comp. Ins.*, 26 Kan.App.2d 489, 988 P.2d 1208, 1213 (1999). Many courts have held the rationale underlying the federal filed rate doctrine applies equally to regulations by state agencies. See e.g. *Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2nd Cir.1994). The filed rate doctrine bars only collateral attacks brought by private parties and not direct reviews in ratemaking cases or actions brought by a governmental agency. *Commonwealth v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 53–4 (Ky.Ct.App.1999).

Id. at 517, 623 S.E.2d at 391. This Court went on to explain the policy reasons underpinning the filed rate doctrine.

We find the policy reasons behind the filed rate doctrine persuasive. The filed rate doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741, 745 (1995).

Id. at 519, 623 S.E.2d at 392. The same policy reasons apply here: stability, uniformity, and finality.

The impact of a decision by this Court regarding the finality of determinations by the Commission on matters of registration could have ripple effects outside the timeshare industry. There are numerous other agency-regulated industries in South Carolina. A decision by this Court permitting Plaintiffs to call into question earlier

determinations by the Commission could open the floodgates for litigants to ignore the regulatory authority of other administrative bodies. This could have dire consequences on the economy of South Carolina by destabilizing those industries as well.

One regulated industry that is roughly analogous to the timeshare industry in terms of regulation by an administrative agency is the insurance industry. Chapter 5 of Title 38 of the South Carolina Code provides the requirements for an insurer to transact business in South Carolina. Similar to registration of a timeshare plan under the Timeshare Act, the Insurance Code requires insurers to be licensed. S.C. Code Ann. § 38-5-10. In order to become a licensed insurer, an insurer must comply with the following regulator-mandated requirements, among others:

- The insurer is duly qualified to transact business under the laws of this State.
- The insurer has filed with him an affidavit of its president or other chief officer that it has not violated this title in the past year and that it accepts the terms and obligations of this title as part of the consideration for license.
- The insurer pays all taxes and performs all duties required by law.
- The reserves of the insurer are adequate for the protection of policyholders of this State.
- The insurer's directors and officers are competent, trustworthy, and have a good business reputation and that none of the directors and officers have been convicted of a crime in any jurisdiction involving fraud, dishonesty, or like moral turpitude or convicted of violating an insurance statute of any jurisdiction.
- The insurer has employed one or more persons residing in this State with adequate experience and training to manage properly its business and affairs.
- The insurer has not entered into any management contract, agency agreement, or other agreement which may materially affect its financial condition so as to render its proceedings hazardous to the public or to its policyholders.
- The insurer has made adequate reinsurance arrangements if required.
- The insurer's proposed method of operation, when considered in light of its financial condition and the absence of any prior operating

experience, will not likely render its proceedings hazardous to the public or to its policyholders.

- The reserve basis to be used by the insurer will be adequate for the protection of policyholders in this State.
- The insurer's principal place of business and primary executive, administrative, and home offices and all original books and records of the insurer are located and maintained in this State.

S.C. Code Ann. § 38-5-80. Similar to the Commission's authority to investigate violations of the Timeshare Act and hold hearings, so too must the director of insurance or his designee provide a proper opportunity for the subject insurer to be heard prior to revoking or suspending a certificate of authority. S.C. Code Ann. § 38-5-140. Just as the Commission can revoke a timeshare plan registration, so too may the director of insurance or his designee revoke or suspend a certificate of authority for an insurer to conduct business in South Carolina for the following reasons:

- The insurer is in an unsound condition.
- The insurer has not complied with the law or with the provisions of its charter.
- The officers or agents of an insurer refuse to submit to examination or to perform a legal obligation relative to an examination.
- The insurer has not complied with a lawful order of the director or his designee.
- The condition of the insurer renders the continuance of its business hazardous to the general public, its creditors, or its policyholders.

S.C. Code Ann. § 38-5-120.

Banking is another industry that is highly regulated at the state and federal level and has a similar structure for licensing regulated entities. The State Board of Financial Institutions (BFI) is responsible for the supervision, licensing, and examination of all State chartered banks. The Office of the Commissioner of Banking (SCOCB), which is a division of the BFI created by statute, S.C. Code Ann. § 34-1-80, regulates state chartered banks, savings banks, savings and loan associations, credit unions and trust

companies. SCOCB determines whether these institutions are in compliance with South Carolina's laws and regulations, and it monitors the operations of these institutions. BFI has extensive regulatory authority over banking practices, including the power to initiate criminal prosecutions against banks violating a statute or regulation. S.C. Code Ann. § 34-1-60.

The bank chartering process begins with the submission of a detailed application, which enables the SCOCB to determine "whether or not the applicants have complied with all the provisions of law, whether in the judgment of the [BFI] they are qualified to operate the institution and whether the establishment of the bank . . . would serve the public interest, taking into consideration local circumstances and conditions at the place where it proposes to do business." S.C. Code Ann. § 34-1-70. The procedure for applying for a state banking charter is within the BFI's discretion, as no statutes or regulations deal with the process. 10 S.C. Jur. Banks and Banking § 30. Once the application is submitted, BFI begins the investigation process, the scope and formality of which is entirely within the discretion of BFI. The South Carolina Secretary of State formally issues a bank's charter after the BFI has approved the application in writing. S.C. Code Ann. § 34-1-70.

If this Court permits Plaintiffs to disregard the determinations of the Commission regarding registration and document form approval, it would be analogous to permitting an insured to collaterally attack the status of a licensing decision made by the director of insurance or his designee or a customer to attack the charter of a State-chartered bank. This would set a negative precedent that could have disastrous effects on the regulated business community in South Carolina.

B. The Commission has primary jurisdiction over review of alleged violations of the Timeshare Act.

Further authority for finding Commission determinations to be binding on the courts is found in the doctrines of primary jurisdiction. The doctrine of primary jurisdiction dates back to the United States Supreme Court's 1907 decision in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and has been frequently employed by the Supreme Court, the lower federal courts, and courts of other states. The South Carolina Court of Appeals has recognized and applied the doctrine in *Med. Univ. of S. Carolina v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987), where it held that the circuit court erred by not refraining from granting declaratory and injunctive relief in a case where a pivotal issue was being considered by the administrative agency. *Id.* at 105, 362 S.E. 2d at 884-85. Under the primary jurisdiction doctrine, "courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970). In *United States v. Western Pacific Railroad Company*, 352 U.S. 59 (1956), the Supreme Court offered the following exposition of the doctrine:

[L]ike the rule requiring exhaustion of administrative remedies, ["primary jurisdiction"] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an

administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63–64.

“A court should delay forging ahead when there is a likelihood that agency action may render a complex fact pattern simple or a lengthy judicial proceeding short. . . . [It] should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern.” *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994). According to the Supreme Court in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), “where the regulatory regime is administered by an agency, the . . . court will stay its hand to permit institution of administrative proceedings if they are likely to make a meaningful contribution to the resolution of [the] law-suit.” *Id.* at 306 (internal quotation marks omitted).

Here, determination of the registration status and document approval of the pertinent timeshare plan lies squarely within the Commission's competence. This Court should recognize the exclusive and/or primary jurisdiction of the Commission. This is not only because “the construction of a statute by those charged with its execution should be followed,” *CBS v. FCC*, 453 U.S. 367, 392 (1981), but also because, otherwise, the uniformity of the regulatory scheme for timeshare industry in this State would be disturbed.

CONCLUSION

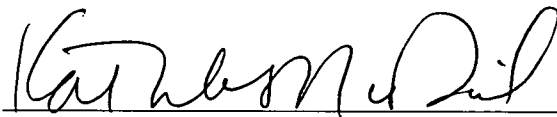
Based upon the foregoing, Defendants reiterate their position that the Commission has exclusive jurisdiction to determine whether violations of the Timeshare Act have occurred, including matters of registration and whether statutorily-required timeshare purchase transaction documents comply with the provisions of the Timeshare

Act. To the extent this Court would find that the Commission does not have exclusive jurisdiction to make such determinations, a ruling by the Commission on whether or not a violation had occurred would be a condition precedent to bringing a private action in the courts. Finally, any decisions of the Commission should be binding on the courts because of the necessity for stability, uniformity, and finality. In the alternative, this Court should find that the Commission has primary jurisdiction binding on courts and requiring them to defer to its expertise and specialized knowledge.

CERTIFICATE OF COUNSEL

We hereby certify that this Brief of Defendants filed and served on November 18, 2016 complies with Rule 211(b), SCACR.

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Columbia, South Carolina

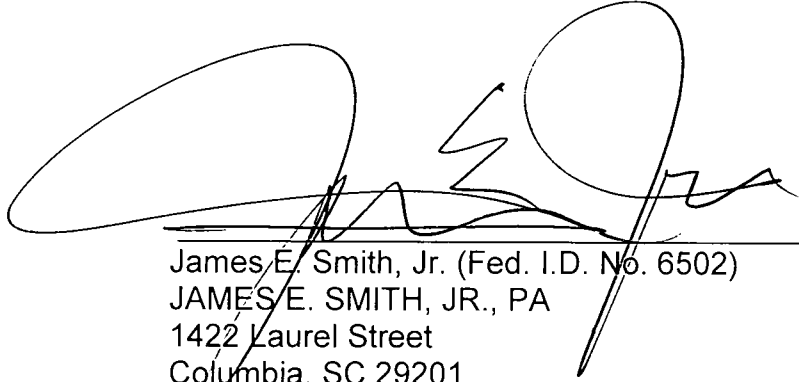


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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS
United States District Court for the District of South Carolina

Patrick Michael Duffy, Senior U.S. District Judge

Appellate Case No. 2016-001766

Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a
Coral Resorts and Sunrise Vacation Properties, Ltd., d/b/a
Coral Resorts, Defendants.

James Nichols and Irene Nichols, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith,
Patrick Budnick, and Robert Lauderman, Defendants.

Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, LLC, and Sunrise Vacation Properties
Ltd. d/b/a Coral Resorts, Defendants.

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a
Coral Resorts and Sunrise Vacation Properties, Ltd. d/b/a
Coral Resorts, Defendants.

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

Coral Resorts, LLC and Sunrise Vacation Properties, Ltd.
d/b/a Coral Resorts, Defendants.

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith, David
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PROOF OF SERVICE

I certify that I have served the BRIEF OF DEFENDANTS on the following by causing a copy to be mailed via U.S. Mail, postage pre-paid, to Counsel for the Plaintiffs on November 18, 2016, at the addresses shown below:

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