

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Beaufort Division

DEC 05 2016
S.C. SUPREME COURT

Patrick Michael Duffy, United States District Judge

Appellate Case No. 2016-001765

Paula Fullbright and Mark Fullbright.....Plaintiffs,

v.

Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc.....Defendant.

PLAINTIFFS' REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities..... iii

Statement of Issues Presented for Review..... 1

Statement of the Case..... 1

Argument..... 3

**I. THE COURT HAS SUBJECT MATTER JURISDICTION TO
ADJUDICATE PLAINTIFFS' CLAIMS OF TIMESHARE
ACT VIOLATIONS..... 4**

 A. The administrative structure of the Timeshare Act
 specifically provides timeshare purchasers with a
 private right of action, and it specifically rejects
 Defendant’s assertion that the Commission’s
 responsibilities limit a timeshare purchaser’s private
 right of action..... 4

 B. The Administrative Law Court (ALC) in *Tench* has held
 that allegations of Timeshare Act violations, including
 any investigations by the Commission other than
 disciplinary proceedings against agents or brokers,
 are “specifically reserved to jurisdiction of the Circuit Court.”..... 7

 C. The Vacation Time Sharing Recovery Fund is a
 Red Herring in jurisdictional analysis..... 9

 D. The separation of powers doctrine is inapplicable
 when the legislature specifically provides for judicial
 review of Timeshare Act violation claims and
 Plaintiffs do not seek for the Court to preside over
 the Commission..... 11

 E. The Timeshare Act confirms the Court's subject
 matter jurisdiction, as set forth in the S.C.
 Constitution, by specifically providing for a
 timeshare purchaser's private right of action..... 13

 F. To the extent standing is required, Plaintiffs have
 standing in the instant dispute..... 14

II. THE PRIVATE RIGHT OF ACTION TO ENFORCE THE PROVISIONS OF THE TIMESHARE ACT IS NOT QUALIFIED BY ANY CONDITION PRECEDENT..... 15

III. THE COURTS ARE NOT BOUND BY PRIOR ADMINISTRATIVE AND REAL ESTATE COMMISSION DETERMINATIONS..... 17

A. The *filed rate doctrine* and its reasoning are inapplicable to the Timeshare industry insofar as the Timeshare Act’s statutory scheme specifically contemplates a purchaser’s private right of action..... 18

B. The doctrine of primary jurisdiction is inapplicable to the Timeshare industry insofar as the statutory scheme created by the Timeshare Act contemplates a purchaser’s private right of action..... 20

Conclusion..... 22

TABLE OF AUTHORITIES

Constitutions

S.C. CONST. art I, 22	12, 17
S.C. CONST. art V, 1.....	4

Statutes

S.C. Code § 1-23-380.....	17
S.C. Code § 27-32-100.....	21
S.C. Code § 27-32-110.....	10, 11, 13, 14
S.C. Code § 27-32-120.....	2, 6, 11
S.C. Code § 27-32-130	passim
S.C. Code § 27-32-210.....	9, 16
S.C. Code § 27-32-220.....	2, 11
S.C. Code § 27-32-405.....	16
S.C. Code § 42-5-20.....	6
S.C. Code § 44-7-10 to -230.....	13, 14

Rules

SCACR, Rule 208.....	1
----------------------	---

Cases

<i>Dema v. Tenet Physician Services-Hilton Head, Inc.</i> , 383 S.C. 115, 678 S.E.2d 430 (2009).....	5, 13, 14, 15, 16, 18
<i>Drury Dev. Corp. v. Foundation Ins. Co.</i> , 380 S.C. 97, 668 S.E.2d 798, 800 (2008).....	3
<i>Edge v. State Farm Mut. Auto. Ins. Co.</i> , 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005).....	19
<i>Georgia-Carolina Bail v. County of Aiken</i> , 354 S.C. 18, 27, 579 S.E.2d 334 (Ct. App. 2003).....	6
<i>Internationale Resort & Beach Club</i> , 36 B.R. 189, 190-191 (Bankr. D.S.C. 1983).....	9
<i>MUSC v. Taylor</i> , 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987).....	20
<i>Peagler v. USAA Ins. Co.</i> , 368 S.C. 153, 157, 268 S.E.2d 475, 477 (2006).....	3
<i>Pennoyer v. Neff</i> , 95 U.S. (5 Otto) 714 (1878)	17

Small v. National Surety Corporation, 19 S.E.2d 658, 660 (1942).....16, 17

State ex rel. McLeod v. Yonce, 274 S.C. 81, 261 S.E.2d 303 (1979).....12, 13

State ex rel. Rawlinson v. Ansel, 76 S.C. 395, 57 S.E. 185 (1907).....12

Tench v. S.C. Dep't of Labor, Licensing & Regulation, No. 1998-ALJ-11-0041-IJ,
1998 WL 320770 (S.C. A.L.C., 1998)7, 8, 17, 20, 21

*Unisys Corp. v. SC Budget and Control Board Division of General Services Information
Technology Management Office*, 346 S.C. 158, 551 S.E.2d 263 (S.C. 2001).....18

United States v. Western Pacific Railroad Company, 352 U.S. 59 (1956).....20

Ward v. Dick Dyer and Associates, Inc., 403 S.E.2d 310, 304 S.C. 152 (S.C. 1990).....17

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the South Carolina Real Estate Commission (the “Commission”) have exclusive jurisdiction to determine whether a violation of the South Carolina Vacation Time Sharing Plans Act, S.C. Code Ann. §§ 27-32-10, *et seq.* (the “Timeshare Act”), has occurred?
2. Is the Commission's determination of a violation of the Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Timeshare Act?
3. Are the Commission's determinations as to whether the Timeshare Act was violated binding on courts of the Judicial Branch?

STATEMENT OF THE CASE

Plaintiffs’ Brief’s Statement of the Case goes to great lengths to clarify the timeline in this matter. However, the timeline has been blurred and confused by Defendant’s Statement of the Case. The timeline is critical, particularly in light of Defendant alleging that Plaintiffs are somehow “forum shopping.” [Def. Brief, p. 10]. As detailed below, after Plaintiffs filed their lawsuit, Defendant consequently shopped for a new forum with the Commission in a proceeding in which Plaintiffs were not parties or permitted to participate, Defendant sought the same to occur in a private hearing, and all while Plaintiffs’ lawsuit against Defendant was pending.

Despite that the first absolute requirement listed in SCACR, Rule 208, is that the statement of the case “shall contain, as a minimum . . . the date of the commencement of the action or matter,” Defendant fails to note the same in its Statement of the Case. Plaintiffs filed the Complaint on April, 2, 2015. Defendant’s Brief then contains a critical error in a problematic location stating that the Commission issued its retroactive decision on August 20, 2014. However, the Commission’s decision was issued on August 20, 2015, not 2014, and Defendant’s error makes the timeline appear as if the Commission issued its retroactive

decision prior to Plaintiffs filing suit. The same is false, and while this particular error changing the date from 2015 to 2014 appears particularly convenient to Defendant in its place in Defendant's Brief, Defendant does thereafter properly reference the date to be August 20, 2015.

The truth is that Plaintiffs' suit was filed on April 2, 2015, after Plaintiffs received the Order initially registering Bluewater on September 2, 2014 without any purported retroactive registration. Only thereafter did Defendant, during the pendency of Plaintiffs' lawsuit in which Defendant had appeared, go behind the backs of the Plaintiffs and the Courts to obtain the purported retroactive registration from the Commission. Furthermore, Defendant sought a private hearing with the Real Estate Commission for this determination; Plaintiffs nor any other timeshare purchasers or owners were parties; and Plaintiffs were specifically refused intervention and appeal.

Defendant further falsely asserts that the Commission can provide Plaintiffs with all the relief Plaintiffs' seek, being a rescission and refund. However, Defendant failed to disclose that the Commission's Vacation Time Sharing Recovery Fund ("Recovery Fund") contains a five thousand dollar transaction cap. S.C. Code § 27-32-220.

Defendant's hopeful argument squarely contradicts Plaintiffs' statutory right to a full refund of all monies paid to Defendant under the contract without a five thousand dollar or other monetary limitation. S.C. Code § 27-32-120(C). The Timeshare Act indisputably states: "In addition to the penalties provided in this section, a contract for the sale of an interest in a vacation time sharing plan in violation of this chapter is voidable at the sole option of the purchaser and entitles the purchaser to a refund of all consideration paid by him pursuant to the contract." *Id.*

Defendant goes on to falsely accuse Plaintiffs of omitting from their Statement of the Case the facts related to the March 15, 2006 retroactive decision by the Commission. Plaintiffs specifically include this information on Page 2 of Plaintiffs' Brief, Paragraphs 2 and 3, discussing the March 15, 2016 hearing, the Commission's retroactive registration Order, and the denial of Plaintiffs' participation in the proceedings.

The District Court denied Defendant's Motion to Dismiss Plaintiffs' causes of action for declaratory judgment and for violations of the Timeshare Act on May 17, 2016. The Court was not fully convinced by Defendant's assertions regarding subject matter jurisdiction in light of the plain language of the applicable provision of the Timeshare Act, S.C. Code § 27-32-130, insofar as the District Court sought to avoid potential inconsistency with the related State Court cases, and in the interest of judicial economy, the District Court issued the Order for Certification, which this Court has now agreed to answer.

ARGUMENT

"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." *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798, 800 (2008) (citing *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 268 S.E.2d 475, 477 (2006)).

Strangely, despite that Defendant cites the same quote from the same case for the standard in answering a certified question, Defendant's argument does not focus on the bases listed in the same to be considered in answering the Certified Questions presented today. Instead, Defendant ignores the plain language of the Timeshare Act, the legislative intent,

South Carolina public policy, and what is just and right. Defendant alternatively alludes to regulation of the banking, insurance, healthcare, and railroad industries and presents the Court with a Domsday scenario for not just Defendant but also the very economy of South Carolina, all in an effort to conceal its true purpose: preserving the financial success of the Defendant timeshare corporation alone, and denying timeshare purchasers –people– their private right of action.

I. THE COURT HAS SUBJECT MATTER JURISDICTION TO ADJUDICATE PLAINTIFFS' CLAIMS OF TIMESHARE ACT VIOLATIONS

In Plaintiffs' Brief, Plaintiffs show that they have a private right of action not limited by any Commission responsibilities, and that the Commission does not have exclusive jurisdiction over claims of violations of the Timeshare Act. The South Carolina Constitution provides for the trial courts' original jurisdiction in civil cases. S.C. CONST. art V, 1. The General Assembly unequivocally provided timeshare purchasers unique and significant consumer protections not afforded other purchasers of real property and did not grant the Commission exclusive jurisdiction over claims for Timeshare Act violations. S.C. Code § 27-32-130 (“The Real Estate Commission is responsible for the enforcement and implementation of [the Timeshare Act, but] the provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act.]”).

A. The administrative structure of the Timeshare Act specifically provides timeshare purchasers with a private right of action, and it specifically rejects Defendant's assertion that the Commission's responsibilities limit a timeshare purchaser's private right of action

Defendant's Section I.A fails to respond to Plaintiffs' Brief concerning the plain language of the Timeshare Act and the express intent of the Legislature as contained in the

Timeshare Act or Plaintiffs' constitutional rights. Instead, Defendant argues that "the administrative structure created by the Timeshare Act vests solely the Commission with broad authority to regulate the timeshare industry." [Def. Brief, p. 6]. Lacking candor to the tribunal, Defendant first cites only a portion of S.C. Code § 27-32-130 which supports its assertion.

Defendant concedes that "[i]n the South Carolina Timeshare industry, the only relevant regulatory statute is the Timeshare Act." [Def. Brief, p. 7]. Defendant further concedes that in "determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." [Def.'s Brief, p. 7 (quoting *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (quoting *Dema*, 383 S.C. at 115, 678 S.E.2d at 433 (2009)))]]. However, Defendant quite notably fails to look at the relevant statute, the admittedly the only relevant regulatory statute. Defendant excludes the final sentence that squarely contradicts Defendant's position and which expressly states that "[t]he provisions of this section **do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.**" S.C. Code § 27-32-130 (emphasis added).

Defendant then attempts to confuse the analysis as to the Court's subject matter jurisdiction over Plaintiffs' claims for violations of the Timeshare Act with the Commission's responsibility for the enforcement and implementation of the Timeshare Act. Although "[t]he Real Estate Commission is responsible for the enforcement and implementation of [the Timeshare Act,] the provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act.]" S.C. Code § 27-32-130. The Timeshare Act provides purchasers with an express private right of action, and it

expressly denies that the Commission has exclusive jurisdiction over claims by purchasers for violations of the Timeshare Act. *See* S.C. Code § 27-32-130.

Had the Legislature intended to grant the Commission exclusive jurisdiction, the Legislature could have stated the same and not precisely the opposite. *See Georgia-Carolina Bail*, 354 S.C. 18, 27, 579 S.E.2d 334 (“If the legislature had intended for the [bail bondsman] fee to be \$150 for each license, the legislature could have articulated this requisite with exactitude.”); *See also* S.C. Code § 42-5-20 (“The Workers’ Compensation Commission shall have exclusive jurisdiction of . . .”). Instead, the Legislature provided that “[t]he Real Estate Commission is responsible for the enforcement and implementation of [the Timeshare Act, but] the provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act.]” S.C. Code § 27-32-130.

Defendant lists all types of reasons why the Commission must be beyond the Court’s powers and any judicial review, notably: for the health of the timeshare industry. Plaintiffs assert that they have discovered various business practices of Defendant that are incontrovertibly in violation of the Timeshare Act, and, thus, Plaintiffs are entitled to “a refund of all consideration paid by [the purchasers] pursuant to the contract.” S.C. Code § 27-32-120. Defendant hopes to avoid liability for its violations of the law and to further oppress Plaintiffs.

However, the legislative history and plain language of S.C. Code § 27-32-130 of the Timeshare Act clearly states the General Assembly’s intention expressly conferring a private right of action to timeshare purchasers for violations of the timeshare act and specifically not conferring exclusive jurisdiction to the Commission. *See* S.C. Code § 27-32-130 (“The

provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.") ; *see also* ECF No. 111-7, Chenard v. Hilton Head Island Development Company, LLC d/b/a Coral Resorts, et al., 9:14-cv-03347-PMD (South Carolina Senate Journal entry dated July 12, 1978 of Judiciary Committee proposal of the amendment of S.C. Code Section 27-32-130 with the insertion of "*provided*, however, that the provisions of this section shall not be construed to limit in any manner the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.")

Defendant further asserts that to allow various state and federal courts and arbitrators to review Commission determinations would subject Commission regulated persons to the possibility of inconsistent determinations, and that such would adversely affect the continued stability of South Carolina's timeshare industry and others. [Def. Brief, p. 11].

However, because one timeshare developer from Florida fears it cannot sustain judicial review of its statutorily-circumscribed business practices and procedures without incurring potential liability does not necessarily mean that the South Carolina timeshare industry is in dire jeopardy. Rather, the Defendant simply does not want to face the potential liabilities from its poor business practices and other related malfeasance.

B. The Administrative Law Court (ALC) in *Tench* has held that allegations of Timeshare Act violations, including any investigations by the Commission other than disciplinary proceedings against agents or brokers, are “specifically reserved to jurisdiction of the Circuit Court.”

Defendant's argument in Section I.B. fails to contain any quotations supporting its assertions as to the holdings and findings in *Tench*, and Defendant's representations of the same are inaccurate. Lacking candor to the tribunal, Defendant references *dictum* and fails to

cite the holdings in *Tench* that squarely contradict Defendant's assertions:

Matters relating to alleged violations of the South Carolina Vacation Time Sharing Plans Act and any investigations conducted by the Commission pursuant to the act, other than disciplinary proceedings against any real estate agents or brokers involved, **are specifically reserved of the jurisdiction to the Circuit Court.**

Id. (citing S.C. Code 27-32-130 (Supp. 1997) (emphasis added)). Defendant argues the precise opposite, such that:

[m]atters relating to alleged violations of the South Carolina Vacation Time Sharing Plans Act and any investigations conducted by the Commission pursuant to the act, other than disciplinary proceedings against any real estate agents or brokers involved, **are specifically reserved to the jurisdiction of the Circuit Court Real Estate Commission.**

Tench squarely states that "Mr. Tench may pursue a civil action against those persons or entities whom he feels have wronged him. Such a civil action is specifically authorized by the South Carolina Vacation Time Sharing Plans Act at S.C. Code Ann. § 27-32-130 (Supp. 1997)." *Id.*

Contrary to Defendant's assertions, in *Tench* the ALC held that timeshare purchasers, including Mr. Tench, like Plaintiffs, should look to the Courts—not the Commission or ALC—for adjudication of their claims of Timeshare Act violations. This holding is consistent with the Commission's position regarding same. *See* ECF No. 111-9, Chenard, 9:14-cv-03347-PMD (October 1, 2013 letter from Commission asserting lack of authority to interfere and offer relief for claim of Timeshare Act violation).

C. The Vacation Time Sharing Recovery Fund is a Red Herring in jurisdictional analysis.

In Section I.C, Defendant notes that the Timeshare Act provides recourse through arbitration under the Commission's Vacation Time Sharing Recovery Fund, the same which was de-funded and defunct¹. Defendant's argument then somehow morphs into the application of an inapplicable bankruptcy court decision which just happens to mention the Timeshare Act. *See In re Internationale Resort & Beach Club*, 36 B.R. 189 (Bankr. D.S.C. 1983). *A non sequitur*, Defendant ultimately concludes that the Recovery Fund and a bankruptcy court decision support Defendant's argument that the Commission has exclusive jurisdiction over Plaintiffs' allegations of Timeshare Act violations.

Defendant confuses the Certified Questions and the alleged support for its conclusion. The question is not whether Plaintiffs may pursue recourse through arbitration under the Commission's Recovery Fund, nor is it whether the bankruptcy court has jurisdiction to remove an arbitration proceeding under the Recovery Fund to the bankruptcy court. Defendant's conclusion is not supported by the existence of the Commission's non-mandatory, non-exclusive, and non-limiting Recovery Fund. Defendant's conclusion is also not supported by the bankruptcy court's holding that it does not have jurisdiction to remove an arbitration proceeding under the Commission's Recovery Fund to the bankruptcy court.

Notably, the arbitration recourse under the Commission's Recovery Fund is not mandatory, not required to be exhausted, and is merely permissive. S.C. Code § 27-32-210(A) ("A person aggrieved by the conduct of a registrant or licensee **may** seek recovery

¹ Plaintiffs assert that the Vacation Time Sharing Recovery Fund is currently un-funded and that the Real Estate Commission currently has no arbitration processes or procedures in place for aggrieved timeshare purchasers or lessees.

from the Vacation Time Sharing Recovery Fund” (emphasis added)). As a non-mandatory recourse, the same then logically cannot be a condition precedent to Plaintiffs’ private right of action which is specifically not limited under any jurisdiction of the Commission’s Recovery Fund.

As if anticipating Defendant’s very arguments today, the legislature unequivocally clarified that the arbitration recourse under the Commission’s Recovery Fund does not limit Plaintiffs’ right to bring a private cause of action. S.C. Code § 27-32-130 (“The Real Estate Commission is responsible for the enforcement and implementation of [the Timeshare Act, but] the provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act.]”).

In juxtaposition to the Timeshare Act’s plain language in S.C. Code § 27-32-130, Defendant argues that the limited jurisdiction of the Commission’s Recovery Fund *does* somehow present a condition precedent or otherwise limits or precludes Plaintiffs’ private right of action in numerous ways. Simply stated, Defendant argues that the Timeshare Act means the opposite of what it says, such that any Commission jurisdiction “do[es] ~~not~~ limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act.]” S.C. Code § 27-32-130.

Had Defendant included such argument or arbitration recourse as a condition precedent in its timeshare contracts instead of in its arguments today to the Court, Defendant would have only further violated the Timeshare Act. S.C. Code § 27-32-110(10) (“It is a violation of this chapter for a seller of vacation time sharing plans to include in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to this chapter, or seek or solicit such a waiver during the effective period of these rules”).

Today, Defendant audaciously asks that the Court waive Plaintiffs' inalienable private right of action, the same which the legislature specifically prohibited Defendant from doing itself in S.C. Code § 27-32-110(10).

Defendant failed to disclose that the Commission's Recovery Fund prohibits punitive, special, or consequential damages or attorney's fees and has a five thousand dollar transaction cap. S.C. Code § 27-32-220. Defendant's hopeful argument squarely contradicts Plaintiffs' statutory right to a full refund of all monies paid to Defendant under the contract without a five thousand dollar or other monetary limitation. S.C. Code 27-32-120(C) ("In addition to the penalties provide in this section, a contract for the sale of an interest in a vacation time sharing plan in violation of this chapter is voidable at the sole option of the purchaser and entitles the purchaser to a refund of all consideration paid by him pursuant to the contract.").

While Defendant's argument is certainly inequitable, Defendant's Section I.C is also a *non sequitur* that is non-responsive to the Certified Questions. Defendant contends that the same somehow supports its conclusion that the Commission has exclusive jurisdiction over Plaintiffs' allegations of violations of the Timeshare Act. The arbitration recourse under the Timeshare Fund is not mandatory, is not a prerequisite to Plaintiffs' private right of action, and is a non-exclusive recourse that does not limit Plaintiff's private right of action to relief and remedies otherwise limited by the arbitration recourse under the Commission's Recovery Fund.

D. The separation of powers doctrine is inapplicable when the legislature specifically provides for judicial review of Timeshare Act violation claims, and Plaintiffs do not seek for the Court to preside over the Commission

In I.D. of Defendant's Brief, Defendant argues that the separation of powers doctrine

requires that the Commission have exclusive jurisdiction over claims for violations of the Timeshare Act. Defendant cites *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 261 S.E.2d 303 (1979) and *State ex rel. Rawlinson v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907) in purported support of this assertion. in purported support of this assertion. [Def. Brief, p. 14-15].

Defendant again attempts to confuse the issue before the Court. First, exclusive jurisdiction was not granted to the Commission, and thus the Court cannot be in violation of the separation of powers doctrine. A violation occurs “where one department of government attempts to exercise powers exclusively delegated to another.” *Yonce* at 274 S.C. 84. Further, the issue is not whether a Court presiding over the Commission would be in violation of the separation of powers doctrine. Plaintiffs do not seek for the Court to preside over the Real Estate Commission or in any arbitration, nor do they seek for the Court to invalidate Defendant’s timeshare registrations. Plaintiffs seek only for the Court to adjudicate their claims for Defendant’s Timeshare Act violations.

Defendant’s inventive procedure for making claims for Timeshare Act violations through some amalgamation of conflicting provisions of various laws, statutory framework for other industries, and non-existent procedures is inappropriate. Such imaginative procedures vaguely described by Defendant do not exist and are nonsensical, and the Timeshare Act does not require engaging or the exhaustion of any administrative remedies.

Plaintiffs further assert that judicial review of administrative agency decisions affecting private rights is expressly provided for by the South Carolina Constitution. *See* S.C. CONST. art I, 22 (“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial

review."). Defendant's potential liability does not revoke and is not a basis for negating Plaintiff's Constitutional rights.

"The principle of separation of the powers of government operates in a broad manner to confine . . . those [powers] which are judicial in character to the judiciary . . ." *Yonce* at 261 S.E.2d 305. Upon information and belief, a private right of action to enforce the provisions of the Timeshare Act, including for fraud and misrepresentation (*see* S.C. Code § 27-32-110, Prohibited Practices), seeking damages, the voiding of contracts, and conveyance of real property, among other relief, is of judicial character and thus belongs in the Courts.

E. The Timeshare Act confirms the Court's subject matter jurisdiction, as set forth in the South Carolina Constitution, by specifically providing for a timeshare purchaser's private right of action.

Defendant next argues in I.E that the analysis of subject matter jurisdiction is a distinct analysis from the existence of a private right of action. Defendant defines subject matter jurisdiction as "the power of a court to hear and determine cases of the general class to which the proceedings belong" and reference a private right of action as an independent civil private cause of action seeking damages as a result of statutory violations. [Def. Brief, p. 16 (citing *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 678 S.E.2d 430, 433 (S.C. 2009)]. Defendant further asserts that 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. [Def Brief, p. 17]. However, Defendant fails to articulate the alleged conflict between the Court's subject matter jurisdiction and Plaintiff's private right of action.

Further, Defendant cites an inapplicable case in *Dema* as alleged support. *Dema* decides whether a private right of action can be *implied* in the Certificate of Need Act (S.C.

Code §§ 44-7-110 to 44-7-230) ("CON Act") where no express private right of action is contained in the CON Act. In juxtaposition, the question here is whether Plaintiffs can bring a private right of action for violations of the Timeshare Act when the Timeshare Act contains an *express* private right of action, the same which is not addressed in *Dema*. Further, no one has asked the Court to imply a private right of action as sought in *Dema*.

In the instant case, there is both Constitutionally-conferred subject matter jurisdiction and an express statutory private right of action for claims of Timeshare Act violations. Thus, while the analysis of the two issues may be distinct, that such is the case does not result in a lack of subject matter jurisdiction or denial of Plaintiffs' rights.

F. To the extent standing is required, Plaintiffs have standing in the instant dispute.

In I.F, Defendant argues that the courts lack subject matter jurisdiction because Plaintiffs cannot demonstrate the existence of causation, a necessary prerequisite to standing. However, insofar as Plaintiffs purchased timeshare properties from Defendant, Plaintiffs have standing regarding their statutory claims for Timeshare Act violations associated with their timeshare purchases. Further, Defendant's contentions are contrary to the express language of the Timeshare Act providing a private right of action for violations of the Timeshare Act without any exclusion as to those violations of the Timeshare Act that cause no losses. *See* S.C. Code § 27-32-110 and -130. Not coincidentally, "there is no authority in South Carolina addressing [Defendant's] proposition," as conceded by Defendant. [Def. Brief, p. 17].

There is constitutional support for subject matter jurisdiction, and statutory support for a private right of action for claims of Timeshare Act violations as described hereinabove.

Defendant argues essentially that because the Commission is responsible for regulating timeshare developers there can be no judicial review of Commission actions, otherwise the timeshare industry would be crippled. Unfortunately, Defendant fails to reconcile its argument with the statutory provision that squarely contradicts its argument, namely the express, unqualified private right of action set forth in S.C. Code § 27-32-130.

II. THE PRIVATE RIGHT OF ACTION TO ENFORCE THE PROVISIONS OF THE TIMESHARE ACT IS NOT QUALIFIED BY ANY CONDITION PRECEDENT

The Timeshare Act does not create, impose, or even suggest any conditions precedent to Plaintiffs bringing a private cause of action to enforce the provisions of the Timeshare Act. Further, the applicable statute, S.C. Code § 27-32-130, specifically reserves jurisdiction to the Court to adjudicate claims for Timeshare Act violations without qualification and independent of the actions or inactions of the Commission. S.C. Code 27-32-130 provides that “[t]he provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.”

Defendant contends that the Commission must make a prior determination of a violation of the Timeshare Act as a condition precedent to bringing a private action of violations of the Timeshare Act. Defendant seemingly insinuates that the arbitration recourse’s five thousand dollar cap also negates Plaintiffs’ right to a full refund under the Timeshare Act. However, Defendant quotes no language in S.C. Code § 27-32-130 in support of its position. Defendant further cites *Dema*, attempting to draw an analogy between the Timeshare Act and the CON Act, which Defendant asserts are "conceptually the same." [Def. Brief, p. 19].

The language of S.C. Code § 27-32-130 plainly intends for a timeshare purchaser to

have a private right of action to enforce the provisions of the Timeshare Act, despite that the Commission is responsible for enforcement and implementation of the Timeshare Act. Plaintiffs further assert that the Timeshare Act and the CON Act are *not* conceptually the same insofar as the Timeshare Act plainly provides for a private right of action, while the CON Act does not. The Court in *Dema* determined whether a private right of action could be implied in the CON Act where there was none. Defendant again insists upon a fantastical procedure for making claims for Timeshare Act violations without any statutory support.

Notably, the arbitration recourse under the Commission's Recovery Fund is not mandatory and is merely permissive. S.C. Code § 27-32-210(A) ("A person aggrieved by the conduct of a registrant or licensee **may** seek recovery from the Vacation Time Sharing Recovery Fund" (emphasis added)). As a non-mandatory recourse, the same then logically cannot be a condition precedent to Plaintiffs' private right of action which is specifically not limited under any jurisdiction of the Commission's Recovery Fund pursuant to S.C. Code § 27-32-130. Timeshare Act does not require engaging or the exhaustion of any administrative remedies.

Further, as set forth in S.C. Code § 27-32-405, the Timeshare Act affords timeshare purchasers "significant and unique consumer protections" that would be inapplicable to the health care facilities and service industry. S.C. Code § 27-32-405(E). S.C. Code § 27-32-130 does not impose upon timeshare purchasers any requirement that they seek a Commission determination of a Timeshare Act violation prior to bringing a private action as to same. Further, such statute specifically indicates that the private right of action is independent of the Commission's responsibility to enforce and administer the Timeshare Act. *See* S.C. Code § 27-32-130; *See also Small v. National Surety Corporation*, 19 S.E.2d 658, 660 (1942)

("[t]he Legislature could very easily have created a condition precedent if it had so desired, in plain and unmistakable words; but it has not done so.") (emphasis added)).

III. THE COURTS ARE NOT BOUND BY PRIOR ADMINISTRATIVE AND REAL ESTATE COMMISSION DETERMINATIONS

The United State Constitution, as interpreted in *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878), the South Carolina Constitution, Article I, Section 22, and S.C. Code § 1-23-380 and S.C. Code § 27-32-130 support the Court's power and authority to rule contrary to and regardless of Real Estate Commission determinations. "Virtually every activity is regulated to some degree," and that the timeshare industry is regulated does not make Defendant immune from suit. *Ward v. Dick Dyer and Associates, Inc.*, 403 S.E.2d 310, 312, 304 S.C. 152, 156 (S.C. 1990). The ALC discussed this very issue of timeshare purchasers' private right of action to sue timeshare companies –regulated by the Commission– for violations of the Timeshare Act in *Tench*.

In *Tench*, the Commission investigated and determined that there were no violations, and the Court confirmed that despite the same the timeshare purchaser could still "pursue a civil action against those persons or entities whom he feels have wronged him. Such a civil action is specifically authorized by the South Carolina Vacation Time Sharing Plans Act at S.C. Code Ann. § 27-32-130 (Supp. 1997)." *Id.* (citing S.C. Code Ann. § 27-32-130). Not only is there no condition precedent, but the private right of action exists not only in the absence of any preceding finding of a violation by the Commission, but also when the Commission has investigated and affirmatively finds no violation.

A. The *filed rate doctrine* and its reasoning are inapplicable to the Timeshare industry insofar as the Timeshare Act's statutory scheme specifically contemplates a purchaser's private right of action.

In II.A, Defendant fails to contest the position in Plaintiffs' Brief, and Defendant fails to even mention the plain language of the Timeshare Act, the Legislative intent, the public policy of South Carolina, or the standard for determining when the Legislature has given another entity exclusive jurisdiction. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute." *Dema*, 383 S.C. at 115, 678 S.E.2d at 433. (citing *Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs. Info. Mgmt. Office*, 346 S.C 158, 175, 551 S.E.2d 263, 273 (2001)).

Instead of looking to S.C. Code § 27-32-130 to analyze the current and actual state of the law, Defendant engages in sidestepping the law and fearmongering. Defendant alleges that Plaintiffs' private right of action would result in a Doomsday scenario, including baselessly alleging ripple effects to other industries, the proverbial "open[ing] of the floodgates," dire consequences for the insurance and banking industries, and economic ruin for South Carolina." [Def. Brief, p. 23]. Defendant threatens Doomsday.

However, a full reading of Defendant's Brief shows that Defendant simply does not want to possibly be held liable for its violations of the Timeshare Act because it does not want to then actually be held liable. Defendant is arguing that denying Plaintiffs their private right of action is important to Defendant because, should Defendant have liability to Plaintiffs for Defendant's violations of the Timeshare Act, it would negatively affect Defendant financially. This is not a legal argument or a basis for denying Plaintiffs their unqualified private right of action.

Defendant argues that any Commission determinations as to whether the Timeshare Act was violated are binding on the courts pursuant to the reasoning of the *filed rate doctrine* described in *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005). Defendant also discusses the insurance and banking industries and alleges that, if this Court holds that any Commission's determinations regarding Timeshare Act violations are not binding on the courts of the Judicial Branch, such industries would be completely destabilized, resulting in dire consequences for the insurance and banking industries and the economy of South Carolina.

However, the *filed rate doctrine* and its reasoning are inapplicable to Plaintiffs' Timeshare Act claims insofar as the Timeshare Act expressly provides that timeshare purchasers such as Plaintiffs are entitled to "significant and unique consumer protections" including the expressly unqualified private right of action. This private right of action is set forth in S.C. Code § 27-32-130, the same statute that confers upon the Commission the responsibility for enforcement and implementation of the Timeshare Act. Nevertheless, S.C. Code § 27-32-130 provides that "[t]he provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter." Thus, reviewability of Commission determinations is a statutory part of the statutory scheme set forth in the Timeshare Act, rendering the *filed rate doctrine* and its reasoning inapplicable to the timeshare industry.

Further, regarding the assertion that the banking and insurance industries will be negatively impacted by a holding that the Commission determinations are reviewable, Plaintiffs suggest that such assertion is made in bad faith, insofar as the banking and insurance industries operate under an entirely different and separate statutory / regulatory

scheme, and thus Defendant's analogy as to same is misplaced. Defendant is merely adding alleged disaster to other industries to the Doomsday scenario.

B. The doctrine of primary jurisdiction is inapplicable to the Timeshare industry insofar as the statutory scheme created by the Timeshare Act contemplates a purchaser's private right of action.

Defendant argues that the Court should refrain from reviewing any Commission determinations pursuant to the doctrine of primary jurisdiction as described in *MUSC v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987). Defendant alleges that determinations of Timeshare Act violations lie squarely within the Commission's competence and, therefore, Courts should stay their hands regarding same. Defendant has now arrived at its final contingency argument.

Defendant argues that even if the Court finds that the Commission does not have exclusive jurisdiction over claims for violations of the Timeshare Act, that the Court should apply the doctrine of primary jurisdiction to deprive timeshare purchasers of their private right of action. However, Defendant ignores the plain, express, unequivocal, and non-waivable private right of action set forth in S.C. Code § 27-32-130 and the purpose and legislative intent as set forth in the Timeshare Act by the General Assembly.

In advocating this dubious position, Defendant purportedly relies upon several United States Supreme Court cases involving interstate commerce and travel, including *United States v. Western Pacific Railroad Company*, 352 U.S. 59 (1956), which provides that "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. Significantly, as *Tench* makes clear in

interpreting the plain language of the Timeshare Act, matters related to alleged violations of the Timeshare Act are specifically reserved to the jurisdiction of the Court. *Tench* holds that:

[m]atters relating to alleged violations of the South Carolina Vacation Time Sharing Plans Act and any investigations conducted by the Commission pursuant to that act, other than disciplinary proceedings against any real estate agents or brokers involved, are specifically reserved to the jurisdiction of the Circuit Court.

Id.; quoting S.C. Code § 27-32-130. Defendant further cites several miscellaneous opinions concerning a variety of non-timeshare matters, to which Plaintiffs would respond by asserting that they are simply unhelpful in analyzing the Timeshare Act's specific provision conferring a private right of action upon timeshare purchasers in South Carolina.

Despite Defendant's displeasure with the law and the rights conferred to timeshare purchasers by the General Assembly in the Timeshare Act, Plaintiffs have the "right to bring **any legal action based upon any cause of action . . .**," including to enforce violations of the Timeshare Act. S.C. Code Ann. § 27-32-100(11); *See* S.C. Code Ann. § 27-32-130. Further, that the economic success of Defendant will not be furthered if it is held legally responsible for violations of the law is not a consideration or valid argument.

The doctrine of primary jurisdiction is inapplicable to the Timeshare Act insofar as the statutory scheme regarding timeshares plainly provides for a purchaser's private action for claims of Timeshare Act violations despite the Commission's responsibility for enforcement and administration of the Timeshare Act. Thus, the statutory scheme regarding timeshare purchases, as set forth in the Timeshare Act, necessarily relies upon the Court's review of any Commission determinations, rendering the doctrine of primary jurisdiction inapplicable.

CONCLUSION

After a significant period of time during which they operated its business with impunity, Defendant now faces potential civil liability. Not unexpectedly, Defendant now seeks to convince the Court that its business practices are beyond the Court's review, despite the plain and unambiguous language of the Timeshare Act regarding the right of timeshare purchasers to bring claims for violations of the Timeshare Act. For all these reasons, the Court should answer all three certified questions in the negative.

Respectfully submitted,



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S.C. SUPREME COURT
CERTIFIED QUESTIONS FROM THE UNITED STATES SUPREME COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Beaufort Division

Patrick Michael Duffy, United States District Judge

Appellate Case No. 2016-001765

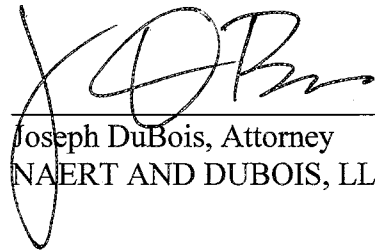
Paula Fullbright and Mark Fullbright.....Plaintiffs,

v.

Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc.....Defendant.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

The undersigned hereby certifies that the Plaintiffs' Reply Brief complies with Rule 211(b), SCACR.


Joseph DuBois, Attorney
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November 30, 2016

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

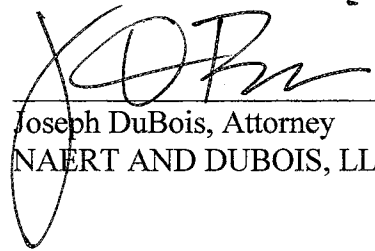
The undersigned hereby certifies that on the date indicated he served counsel of record with a copy of the Plaintiffs' Reply Brief by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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1 of 8