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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Patrick Michael Duffy, United States 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 Budnik, and Robert Lauderman d/b/a Coral Resorts, 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.

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Charles Olenick and Karen Maniscalco, Plaintiffs,

S.C. SUPREME COURT

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.

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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

This matter comes before the Court upon its Order agreeing to answer certified questions posed by the District Court of South Carolina.

Plaintiffs attended timeshare sales presentations in Hilton Head Island, South Carolina, offered by Defendants, a group of related timeshare development and sales companies and individuals. Following the sales presentations, Plaintiffs entered into contracts with Defendants for the purchases of timeshare interests.

Plaintiffs thereafter brought six separate lawsuits, both individually and as class actions, against Defendants in the United States District Court for the District of South Carolina.^{1,2} Plaintiffs generally allege that (1) the registration for the relevant vacation time sharing ownership plan(s) lapsed, expired, or became unregistered when Plaintiffs purchased

¹ Chenard was filed on 8/19/14, Nichols was filed on 10/1/14, Renckovsky was filed on 11/22/14, Curry was filed on 2/4/15, Olenick was filed on 2/11/15, and Ross was filed on 6/16/15 (as a class action).

² Another group of Defendants' timeshare purchasers brought similar lawsuits (the "State Court cases") against Defendants in South Carolina's Court of Common Pleas and Magistrates Court. These State Court cases are presently consolidated and assigned exclusively to the Honorable J. Derham Cole by Order of the South Carolina Supreme Court, dated October 22, 2014.

their interests, (2) that the time sharing plan documents utilized in Plaintiffs' transactions were deficient under the Timeshare Act and/or were not approved by the Commission, (3) that Defendants failed to maintain certain information in their business records as required by the Timeshare Act, (4) that certain representations allegedly made during Plaintiffs' timeshare sales transactions ran afoul of the Timeshare Act, and (5) that there were certain issues with the closings for the timeshare interests. Plaintiffs ultimately seek to void their purchases pursuant to the Timeshare Act.

Plaintiffs assert various statutory and common law causes of action arising from their timeshare purchase transactions, including causes of action for (1) fraud/intentional misrepresentation, (2) violation of the Timeshare Act, (3) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.*, (4) negligent misrepresentation, (5) breach of fiduciary duty, (6) declaratory judgment, (7) negligent hiring, (8) negligent training, (9) negligent supervision, and (10) negligent retention.

In response, Defendants filed Motions to Dismiss asserting, *inter alia*, that the District Court lacks subject matter jurisdiction over Plaintiffs' Timeshare Act claims insofar as the Commission maintains exclusive jurisdiction over alleged violations of the Timeshare Act.

Although the District Court was not fully convinced by Defendants' 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 their Statement of the Case, Defendants assert that they are single-site timeshare developers that have brought in tens of thousands of families to Hilton Head Island, added millions of dollars to the local tourism economy, and provided work to hundreds of individuals in the Hilton Head Island area. [Def. Brief, p. 2]. Defendants' timeshare fraud victims are people –not corporations– and they are residents of South Carolina, other states in the United States of America, and even citizens of foreign nations. While Defendants may contract with endless independent contractor timeshare salespeople and bring revenue to the Hilton Head Island area, Defendants' rampant and brazenly fraudulent business practices for decades have eroded the tourism industry on Hilton Head Island and the good reputation of South Carolina.

Defendants further assert in their Statement of the Case that Plaintiffs filed their lawsuits between August 2014 and February 2015. [Def. Brief, p. 2]. The cases presently before the Court are only six of the dozens upon dozens of similar lawsuits filed against the Defendants in South Carolina's unified court system for violations of the Timeshare Act. The first of said lawsuits was filed on October 30, 2012, more than four years ago in Albert LaFleur and Eileen LaFleur v. Coral Resorts, LLC, et al., 2012-CP-07-3746. To date, Defendants have failed and refused to file an answer.

In their Argument, Defendants indicate that Plaintiffs James and Irene Nichols first purchased a timeshare with Defendants in 2010, and that the Nicholsons returned to Hilton Head in 2011. [Def. Brief, p. 3]. In 2011, Plaintiffs Nichols returned to Hilton Head in an effort to address the fraud from the 2010 contract, and, as indicated by Defendants, the Nicholsons purchased a second timeshare with Defendants. Unfortunately, the Nicholsons were

further defrauded by Defendants in their second timeshare purchase. Ultimately, despite not receiving what Defendants promised, and as indicated by Defendants, the Nicholsees did make efforts to realize whatever value they could from their disappointing “investment.” The Nicholsees' fact pattern is not representative of all of the dozens upon dozens of lawsuits filed against Defendants alleging outrageous and fraudulent business practices.

A full review of the Nicholsees' Amended Complaint³ demonstrates that the Nicholsees were first victims of “bait-and-switch,” wherein the Nicholsees were shown a newer timeshare complex (Island Links) and were instead sold a unit at an older timeshare complex (Port O' Call) on a different part of Hilton Head Island. After the Nicholsees realized Defendants' deceit the first time and returned to Hilton Head in an effort to remedy the issue, the Nicholsees were defrauded by Defendants a second time through false promises of rental income and profit.

Defendants next attempt to describe the review and regulation of timeshare developers and sellers that the Real Estate Commission undertakes including licensing and registration issues. [Def. Brief, p. 4]. 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. Defendants fail to acknowledge the plain language of the controlling statute, the clear legislative intent, and the public policy of South Carolina.

Defendants next describe the Timeshare Act's requirement that a timeshare developer

³ Nichols v. Hilton Head Island Development Company, LLC, et al., 9:14-cv-03838, ECF 46-1, Paragraphs 10 - 34.

notify and seek additional approval of the Commission of any substantial change in their timeshare plans. [Def. Brief, p. 4-5]. However, Defendants fail to advise the Court that during the lifetime of Defendants' four timeshare plans, the entities selling the timeshares and the selling documents have changed multiple times without contemporaneous notification to the Commission.⁴

On January 23, 2013, the Commission curiously retroactively re-instated Defendants' four timeshare plan registrations despite that the Commission had not received renewal fees or any notifications of the various substantial changes that Defendants had made to the plans over a seven year period. Quite notably, one such substantial change in their timeshare purchase contracts, which is still in effect, includes an overly-burdensome commercial arbitration provision with a class action prohibition. Upon information and belief, the same provision was designed to be financially prohibitive to Defendants' timeshare fraud victims and to prevent the victims from standing up for their rights.

Finally, Defendants next reference Fullbright v. Spinnaker Resorts, Inc., App. Case No. 2016-001765. [Def. Brief, p. 5-6]. In response, Plaintiffs reference and rely upon the briefs submitted by Plaintiffs Paula and Mark Fullbright regarding same.

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

In Plaintiffs' Brief to this Court, Plaintiffs show that they have a private right of action not limited by any Commission responsibilities, and that the Commission does not

⁴ See page 67 of the January 23, 2013 South Carolina Real Estate Commission hearing transcript, available at <http://www.islandpacket.com/latest-news/article33255645.ece/BINARY/Transcript:%20SC%20Real%20Estate%20Commission's%20Jan.%202023,%202013,%20Administrative%20Hearing%20re%20Coral%20Resorts>

have exclusive jurisdiction over claims of violations of the Timeshare Act. [Pl. Brief, p. 3-5].

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 Defendants’ assertion that the Commission’s responsibilities limit a timeshare purchaser’s private right of action

Defendants’ 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. [Def. Brief, p. 7-13]. Instead, Defendants argue that “the administrative structure created by the Timeshare Act vests solely the Commission with broad authority to regulate the timeshare industry.” [Def. Brief, p. 7]. Lacking candor to the tribunal, Defendants cite only a portion of S.C. Code § 27-32-130 which supports their assertion. [Def. Brief, p.7]. Defendants exclude the final sentence that squarely contradicts Defendants’ 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).

Defendants then attempt 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 (Ct. App. 2003) ("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.

Defendants list 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. [Def. Brief, p. 11]. Plaintiffs assert that they have discovered various business practices of Defendants 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. Defendants hope to avoid liability for their violations of the law and 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 by 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 § 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.")

Defendants further assert 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." [Def. Brief, p. 11].

However, because two of Hilton Head Island's local timeshare developers fear they cannot sustain judicial review of their 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, these Defendants simply do not want to face the potential liabilities from their 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.”

Defendants’ argument in Section I.B. fails to contain any quotations supporting its assertions as to the holdings and findings in *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), and Defendants’ representations of the same are inaccurate. [Def. Brief, p. 13-15]. Lacking candor to the tribunal, Defendants fail to cite the holdings in *Tench* that squarely contradict Defendants’ 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.**

Tench (citing S.C. Code § 27-32-130 (Supp. 1997) (emphasis added)). Defendants argue precisely the opposite:

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 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).” *Tench* (citing S.C. Code § 27-32-130 (Supp. 1997)).

Contrary to Defendants' 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. *Id.* 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., Defendants note that the Timeshare Act provides recourse through arbitration under the Commission's Vacation Time Sharing Recovery Fund ("Recovery Fund"), the same which was de-funded and defunct⁵. [Def. Brief, p. 15-17]. Defendants' argument then somehow morphs into the application of an inapplicable bankruptcy court decision which just happens to mention the Timeshare Act. [Def. Brief, p. 16 (discussing *In re Internationale Resort & Beach Club*, 36 B.R. 189 (Bankr. D.S.C. 1983))]. A *non sequitur*, Defendants ultimately conclude that the Recovery Fund and a bankruptcy court decision support Defendants' argument that the Commission has exclusive jurisdiction over Plaintiffs' allegations of Timeshare Act violations. [Def. Brief, p. 17].

Defendants confuse the Certified Questions and the alleged support for their 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

⁵ 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.

court. Defendants' conclusion is not supported by the existence of the Commission's non-mandatory, non-exclusive, and non-limiting Recovery Fund. Defendants' 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.

Defendants failed to disclose that 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.

As if anticipating Defendants' 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, Defendants argue 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. [Def. Brief, p. 15]. Simply stated, Defendants argue 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 Defendants included such argument or arbitration recourse as a condition precedent in their timeshare contracts instead of in their arguments today to the Court, Defendants 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, Defendants audaciously ask that the Court waive Plaintiffs’ inalienable private right of action, the same which the legislature specifically prohibited Defendants from doing themselves in S.C. Code § 27-32-110(10).

Defendants further 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. Defendants’ hopeful argument squarely contradicts Plaintiffs’ statutory right to a full refund of all monies paid to Defendants under the contract without a five thousand dollar or other monetary limitation. S.C. Code § 27-32-120(C) (“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.”).

While Defendants’ argument is certainly inequitable, Defendants’ section I.C. is also a *non sequitur* that is non-responsive to the Certified Questions. Defendants contend that the same somehow supports their conclusion that the Commission has exclusive jurisdiction

over Plaintiffs' allegations of violations of the Timeshare Act. [Def. Brief, p. 17]. 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 section I.D., Defendants argue that the separation of powers doctrine requires that the Commission have exclusive jurisdiction over claims for violations of the Timeshare Act. [Def. Brief, p. 17-19]. Defendants cite *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. [Def. Brief, p. 17, 18].

Defendants again attempt 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.**" *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979) (emphasis added). 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 Commission, nor do they seek for the Court to invalidate Defendants' timeshare registrations. Plaintiffs seek only for the Court to adjudicate their claims for Defendants' Timeshare Act violations.

Defendants state: "[T]he language in the 'Timeshare Act [] states [Plaintiffs] are not limited 'to bring[*sic*] a private action to enforce the provisions of this chapter.' Plaintiffs,

however, misconstrue the prerequisites and parameters of the 'private action.'" [Def. Brief, p. 18-19 (*citing* S.C. Code Ann. § 27-32-130)]. Defendants are bravely arguing that these "prerequisites" and "parameters" are not limitations in hopes of, in fact, limiting Plaintiffs' private right of action and subjecting Plaintiffs with claims for Timeshare Act violations to Defendants' inventive procedure for making claims for Timeshare Act violations. However, such imaginative procedures vaguely described by Defendants do not exist, and the Timeshare Act does not require engaging in 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.").

"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*, 274 S.C. 81, 86, 261 S.E.2d 303, 305 (1979). Plaintiffs submit that 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.

Defendants next argue in section I.E. that the analysis of subject matter jurisdiction is

a distinct analysis from the existence of a private right of action. [Def. Brief, p. 19-20]. Defendants define 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. 19-20 (quoting *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 151, 678 S.E.2d 430 (S.C. 2009))]. Defendants further assert 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. 20]. However, Defendants fail to articulate the alleged conflict between the Court’s subject matter jurisdiction and Plaintiff’s private right of action.

Defendants cite an inapplicable case, *Dema*, in support of their argument in section I.E. [Def. Brief, p. 19-20]. The *Dema* Court decided whether a private right of action is *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 instant question is not addressed in *Dema*. Further, no one has asked the Court to imply a private right of action as was 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, it 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 section I.F., Defendants argue that the courts lack subject matter jurisdiction because Plaintiffs cannot demonstrate the existence of causation, a necessary prerequisite to standing. [Def. Brief, p. 21-22]. However, insofar as Plaintiffs purchased timeshare properties from Defendants, Plaintiffs have standing regarding their statutory claims for Timeshare Act violations associated with their timeshare purchases. Further, Defendants' 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.

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.

Defendants argue 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, Defendants fail to reconcile their argument with the statutory provision that squarely contradicts their 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, Plaintiffs assert 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.” S.C. Code § 27-32-130.

Defendants contend that “this Court should hold . . .” 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. [Def. Brief, p. 22 (citing S.C. Code § 27-32-130)]. However, Defendants quote no language in S.C. Code § 27-32-130 in support of their position. Defendants further cite *Dema, supra*, attempting to draw an analogy between the Timeshare Act and the CON Act, which Defendants assert are “conceptually the same.” [Def. Brief, p. 22-23].

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 not an express private right of action. Defendants again insist upon a fantastical procedure for making claims for Timeshare Act violations without any statutory support.

Defendants failed to disclose that the arbitration recourse under the Commission’s Recovery Fund is not mandatory and is merely permissive. *See* 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. The Timeshare Act does not require individuals to engage in or exhaust any administrative remedies prior to exercising their private right of action.

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 § 27-32-130 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 Commission determinations. "Virtually every activity is regulated to some degree," and that the timeshare industry is regulated does not make them 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, supra*.

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).” *Tench*. Not only is there no condition precedent, but the private right of action exists both in the absence of any preceding finding of a violation by the Commission, as well as 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. of their brief, Defendants fail to contest the position in Plaintiffs’ Brief, and Defendants fail 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, Defendants engage sidestepping the law and fearmongering. Defendants allege that Plaintiffs' private right of action would result in a Doomsday scenario, including baselessly alleging "no limit on the number of lawsuits this would enable," threats to the very existence of timeshares owned by others, the proverbial "open[ing] of the floodgates," and "a negative precedent that could have disastrous effects on the regulated business community in South Carolina." [Def. Brief, p. 27]. Defendants threaten Doomsday for South Carolina.

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

Defendants argue 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). [Def. Brief, p. 28-29]. Defendants also discuss in detail the insurance and bankruptcy industries and allege that, if this Court holds 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 economy of South Carolina. [Def. Brief, p.29-31].

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 Defendants' analogy as to same is misplaced. Defendants are 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.

Defendants argue 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). [Def. Brief, p. 32-33]. Defendants allege that determinations of Timeshare Act violations lie squarely within the Commission's competence and, therefore, Courts should stay their hands regarding same. [Def Brief, p. 33]. Defendants have now arrived at their final contingency argument.

Defendants apparently argue that even if the Court finds that the Commission does not have exclusive jurisdiction over claims for violations of the Timeshare Act, the Court should apply the doctrine of primary jurisdiction to deprive timeshare purchasers of their private right of action. However, Defendants ignore 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, Defendants purportedly rely upon several United States Supreme Court cases involving interstate commerce and travel, including *United States v. Western Pacific Railroad Company*, 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." *United States v. Western Pacific Railroad Company*, 352 U.S. 59, 63-64 (1956). Significantly, as *Tench, supra*, 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:

Matters 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.

Tench (quoting S.C. Code § 27-32-130). Defendants further cite 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 Defendants' 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 Defendants will not be furthered if they are held legally responsible for fraudulent, unconscionable, and illegal actions is not a legal 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 their fraudulent timeshare business with impunity, Defendants now face potential civil liability. Not unexpectedly, Defendants now seek to convince the Court that their 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 the reasons discussed herein, the Court should answer all three certified questions in the negative.

Respectfully submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Patrick Michael Duffy, United States District Judge

Appellate Case No. 2016-001766

Paul Chenard, et al,

Plaintiffs,

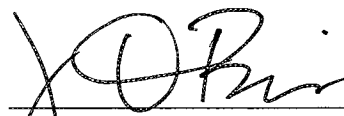
v.

Hilton Head Island
Development Company, LLC
d/b/a Coral Resorts, et al,

Defendants.

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
NAERT AND DUBOIS, LLC

November 30, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
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Plaintiffs,

v.

Hilton Head Island
Development Company, LLC
d/b/a Coral Resorts, et al,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated he served counsel for the Defendants 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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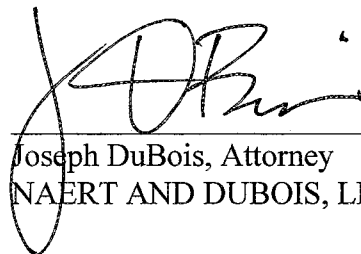
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