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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Appellate Case No. 2016-001766

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Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

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

James Nichols and Irene Nichols, Plaintiffs,

v.

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

Linda Renchkovsky, Plaintiff,

v.

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

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

v.

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

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

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

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

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

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**BRIEF OF *AMICUS CURIAE* AMERICAN RESORT DEVELOPMENT ASSOCIATION**

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ATTORNEYS FOR AMERICAN RESORT  
DEVELOPMENT ASSOCIATION

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## **STATEMENT OF THE CASE**

The American Resort Development Association (“ARDA” or “*amicus curiae*”) adopts Defendants’ Coral Resorts, LLC, et al. (“Defendants”), Statement of the Case.

## **SUMMARY OF ARGUMENT**

The last sentence of section 27-32-130 of the South Carolina Code reads: “[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.” At bottom, the issue raised in the Certified Questions is whether this sentence provides an individual with a cause of action for damages and, concomitantly, whether it gives South Carolina trial courts jurisdiction to adjudicate such a claim. Plaintiffs here say yes; Defendants say no.

However, buried in the confusing discussion surrounding this sentence lies a question far more fundamental. Even assuming the answer is “yes”—an individual can bring a claim under the South Carolina Timeshare Act (“Timeshare Act” or “the Act”), which a South Carolina trial court can then resolve—have these particular Plaintiffs, by way of their *actual pleadings*, demonstrated that *they specifically* have standing to bring this claim? The answer to that question is undoubtedly no.

In sum, the Plaintiffs’ allegations do three things. First, they explain why these Plaintiffs believe that they, or any other individual person, has the right to pursue a civil action for an alleged “violation” of the Act. Second, they explain what these Plaintiffs believe these Defendant developers did, or did not do, which they were required to do, or not do, by the Act.

Finally, Plaintiffs explain why the Defendants’ actions, or inactions, allegedly violate the Act. For example, according to the Nichols Plaintiffs, the Defendant developers

“failed to timely provide the public offering statement to Plaintiffs in violation of the South Carolina Timeshare Act.”

Notably absent from all of the Plaintiffs’ Complaints is *any* allegation that *any* of Defendants’ “violations” of the Act *actually harmed* the Plaintiffs. And, if Plaintiffs *were* harmed, they do not explain *how* that harm is connected to the Defendants’ actions directed towards Plaintiffs and not, instead, towards a third party not before this Court—the South Carolina Real Estate Commission (“REC”). In other words, Plaintiffs have not actually alleged *why* or even *that* these “violations” actually harmed them and, if so, *how*. These missing “whys” and “hows” are essential components of any standing inquiry.

Instead, the allegations here, taken as true, essentially convert the Timeshare Act into a strict liability statute and elevate these Plaintiffs to the position of a “super” Real Estate Commission. As one court has said in a similar context, these types of allegations “do not get the Plaintiffs out of the starting gate” because they do not satisfy what this Court describes as the Supreme Court’s “stringent” standing test.

#### **ARDA’S GOAL IN ADVANCING ITS STANDING ARGUMENT**

ARDA recognizes that this case is before the Court by way of 3 Certified Questions and that this Court does not have the power to summarily dismiss this case for want of standing. However, ARDA believes the distinction between the Certified Questions and the fundamental question of whether these particular Plaintiffs have standing under the Act is worthy of briefing and, ideally, discussion by this Court. ARDA’s goal in advancing its standing argument is to place the issue before the Court with the aim of this Court setting forth its views on the issue for consideration by the District Court in this case and the Courts of this State in future cases.

## ARGUMENT

### **1. Standing v. Private Right Of Action**

In *Georgetown Cty. League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011), this Court confronted a question similar to that presented by the Certified Questions here. There, the question was whether section 48-1-250 of the South Carolina Pollution Control Act created a private right of action. *League of Women Voters*, 393 S.C. at 354, 713 S.E.2d at 289. The lower court in that case said “no” but also said that the League did not have standing to bring the claim even if one existed. *Id.* at 353, 355, 713 S.E.2d at 289, 291. Three members of this Court disagreed with the circuit court on the private right of action question and said “yes,” the Pollution Control Act does indeed contain a private right of action. *Id.* at 354, 713 S.E.2d at 289-90.

Justice Hearn, joined by Justice Kittredge, concurred in part and dissented in relevant part on the private right of action question. *Id.* at 355-57, 713 S.E.2d at 290-91. Additionally, Justice Hearn advanced the proposition that standing and private rights of action are separate and distinct inquiries. *Id.* at 357, 713 S.E.2d at 291 (“While I am cognizant that the circuit court, in a later part of its order, appeared to conflate the issue of standing and the existence of a private right of action, this in no way diminishes its previous finding that the League lacks standing even if the Act creates a private cause of action.”); *see also id.* at n. 4, 713 S.E.2d at 291 n. 4 (“These two concepts are quite different. To have standing, an individual must generally have a personal stake in the litigation or qualify as a real party in interest. By contrast, the determination of whether a party has a private right of action under a particular statute is merely a matter of legislative intent.”).

Justices Hearn and Kittredge would have affirmed what they believed was the law of the case—the circuit courts’ unchallenged ruling that the League lacked standing. *Id.* at 291-92, 713 S.E.2d at 358-59. The majority declined to rule on the standing issue because it believed the issue was unpreserved—not the law of the case. *Id.* at 354 n. 2, 713 S.E.2d 289 n. 2. The majority did not, however, dispute Justice Hearn’s unremarkable and correct conclusion that the two inquiries are separate.

In sum, *League of Women Voters* sharpens the distinction *amicus curiae* advance here—even if the Timeshare Act creates a private right of action that some party may someday use to gain access to a South Carolina court—that party, like these Plaintiffs, must separately demonstrate that they personally have standing.

## **2. Standing**

### **a. Plaintiffs’ Burden**

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), first examined by this Court in *Sea Pines Ass’n for Protection of Wildlife, Inc. v. South Carolina Dep’t of Nat. Resources*, 345 S.C. 594, 550 S.E.2d 287 (2001), the Supreme Court set forth the “irreducible constitutional minimum of standing” which this Court explained is “stringent.” *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

Plaintiffs here carry the burden of demonstrating each of the three elements of standing. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291. And, because standing is “an indispensable part of the plaintiff’s case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof.” *Lujan*, 504 U.S. at 561. “Where, as here, a case is at the pleading stage, the [P]laintiff[s] must clearly allege

facts demonstrating each element.” *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (internal quotation marks omitted).<sup>1</sup>

Finally, even though Plaintiffs have standing to pursue their contract and tort claims, they must separately demonstrate standing to pursue a Timeshare Act claim. *Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167, 185 (2000) (“Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought.”); *Lewis v. Casey*, 518 U.S. 343, 358 n. 6 (“[S]tanding is not dispensed in gross.”).<sup>2</sup>

**b. The Irreducible Minimum**

To meet their burden, Plaintiffs must first allege they have suffered an “injury in fact,” i.e. “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural or hypothetical.’” *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291.

Second, there must be a causal connection between Plaintiffs’ alleged injury and the conduct complained of, i.e., “the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not

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<sup>1</sup> Because this case will return to the Federal District Court, the standard is whether the operative complaint and its relevant facts, accepted as true, establish standing. *See David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). However, this Court, like the District Court, does not “take account of allegations in the complaint labeled as fact but that constitute nothing more than ‘legal conclusions’ or ‘naked assertions.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Carnival Corp. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 74-75, 753 S.E.2d 846, 850 (2014) (reciting similar state standard); *Town of Arcadia Lakes v. South Carolina Dep’t of Health and Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (“Elements of standing, however, are not mere pleading requirements but rather an indispensable part of the plaintiff’s case. . .”).

<sup>2</sup> That some of Plaintiffs’ individual lawsuits were originally styled as a class action “adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.” *Spokeo, Inc.*, 136 S.Ct. at 1547 n. 6.

before this court.” *Id.* Third, it must be “likely” as opposed to “merely speculative” that the injury will be redressed by a “favorable decision.” *Id.*<sup>3</sup>

### 3. Plaintiffs’ Allegations

In their briefings, the Parties rely on the pleadings in the Nichols case, which can be found at Case Number 9:14-CV-03838-PMD. Because the Nichols case is illustrative of all the cases filed by Plaintiffs’ counsel, in particular in its allegations regarding the Act, *amicus curiae* does so as well. Most importantly, the operative complaint in Nichols can be found at Docket Entry Number 95 (the “Nichols Complaint”).<sup>4</sup>

The allegations regarding the Act in the Nichols Complaint can be summarized thusly: First, Paragraphs 176-178 quote verbatim from the Act and quote the last sentence of section 27-32-130. This section makes no mention of the Nichols Plaintiffs or Defendants or reference in any way their particular transaction. Second, Paragraphs 179-181 cite and recite *Tench v. S.C. Dep’t of Labor, Licensing, and Regulation*. Still no mention of the Nichols Plaintiffs or Defendants or their transaction. Third, Paragraph 182 states that “Defendants [sic - Plaintiffs] have the indisputable and inalienable statutory right to pursue the instant claims against Defendants for violations of the Timeshare Act.”

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<sup>3</sup> Plaintiffs do not claim to be and are not entitled to so-called “statutory standing.” *See ATC South, Inc. v. Charleston Cty*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (“Standing may be acquired: (1) by statute; (2) through the rubric of ‘constitutional standing;’ or (3) under the ‘public importance’ exception.”). It is undisputed that whether or not the Timeshare Act creates a private right of action, it does not separately confer standing on anyone. Indeed, the word “standing” does not appear in the statute. *See id.* (“[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party.” (quoting S.C. Code § 6-29-760(C) (2004))); *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) (“Bodman does not claim any statute confers standing upon him.”).

<sup>4</sup> For ease of reference, *amicus curiae* have reproduced in full here the section of the Nichols Complaint involving the Timeshare Act.

Fourth, Paragraph 183 says that Defendants do not believe there is a “penalty” for failing to comply with the Act, and Paragraph 184 says that Defendants are sellers of timeshares and subject to the Act.

Finally, beginning with Paragraph 185 and continuing through Paragraph 210, Plaintiffs’ barrage begins. In these 25 Paragraphs, Plaintiffs list innumerable responsibilities timeshare developers have under the Act and innumerable ways in which these Defendants allegedly violated the Act. For example:

- Defendants made representations which are “prohibited practices as set forth in [section 27-32-110] including but not limited to: [m]isrepresenting the amount of time or period of time the accommodations and facilities are available to a purchaser.” *See* Nichols Complaint, p. 29(i), ¶ 189(i);
- Defendants “fail[ed] and refus[ed] to provide Plaintiffs with a fully completed copy of the contract at the time of its execution.” *Id.* p. 30, ¶ 190(a);
- Defendants “fail[ed] and refus[ed] to timely provide Purchasers with the public offering statement.” *Id.* p. 31, ¶ 190(F) and p. 34, ¶ 207;
- “Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-40.” *Id.* p. 31, ¶192;
- “Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-180(D).” *Id.* ¶194;
- “Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-410(A).” *Id.* ¶ 195;
- “Defendants failed to pay their registration renewal fee for the year in which the timeshare was sold to Plaintiffs as of the purchase date.” *Id.* p. 34, ¶210.

The Nichols Complaint concludes that “Plaintiffs are informed and believe that they are entitled to judgment against Defendants, jointly and severally, for violation of the South Carolina Timeshare Act, for actual, incidental, and consequential damages in an amount to be determined at trial.” *Id.*, p. 34, ¶ 211.

As noted, precisely zero of Plaintiffs' Timeshare Act allegations explain *why* or *how* any of Defendants' "violations" of the Act actually harmed them or even simply that they *have suffered harm* as a result of Defendants' alleged violations. Thus, even taking all of Plaintiffs' Timeshare Act allegations as true, none sufficiently establish either element one (injury-in-fact) or element two (traceability) of the *Lujan/Sea Pines* test.

#### **4. "Injury-In-Fact"**

Plaintiffs' allegations are especially deficient with respect to the injury-in-fact requirement, "the first and foremost of standing's three elements." *Spokeo*, 136 S.Ct. at 1547.

##### **a. *Spokeo v. Robins***

In *Spokeo*, the Supreme Court discussed the principles of standing and the injury-in-fact requirement. *Spokeo* involved a class-action brought under the Fair Credit Reporting Act ("FCRA"). 136 S.Ct. at 1546. The FCRA imposes various procedural requirements on consumer reporting agencies to ensure credit reporting is fair and accurate. *See* 15 U.S.C. § 1681e. *Spokeo, Inc.*, compiles information "profiles" of persons and provides the profiles to users via its website. *Spokeo*, 136 S.Ct. at 1546. This could include the individual's "address, phone number, marital status, hobbies," etc. *Id.* The plaintiff, a private consumer, learned *Spokeo* had provided incorrect information on him to a *Spokeo* user and sued *Spokeo* for violating the FCRA's procedural requirements. *Id.* The Ninth Circuit found the plaintiff had alleged an injury-in-fact because he alleged *Spokeo* violated his statutory rights, not just the rights of other people, and because he had a personal interest in the handling of his credit information that was individualized, rather than collective. *Id.* at 1548.

The Supreme Court reversed “because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization” and explained it has “made it clear time and time again” that plaintiffs must establish *both* a particularized *and* concrete injury to show injury-in-fact. *Id.* at 1548, 1550.

With these principles in mind, *amicus curiae* demonstrates why Plaintiffs’ Complaints, which all contain a lengthy recital of the Timeshare Act and legal argument as to why it contains an individual cause of action, satisfies neither the “particularization” *or* the “concreteness” inquiry.

**b. Particularization**

For an injury to be “particularized,” it must “affect the plaintiff in a personal and individual way.” *Spokeo*, 136 S.Ct. at 1548; *Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850.

In the context of an alleged statutory violation, like those alleged here, standing “does not merely require a showing that the law has been violated, or that a statute will reward litigants in general upon showing of a violation. Rather, standing demands some form of injury—some showing that the legal violation harmed *you* in particular . . . .” *In re (SAIC) Backup Tape Date Theft Litigation*, 45 F.Supp.3d 14, 30 (D.D.C. 2014) (emphasis in original). Thus, as the Supreme Court “has repeatedly held . . . [,] an asserted right to have the [defendant] act in accordance with law is not sufficient, standing alone, to confer jurisdiction” rather, “the unlawful activity must work some harm on [p]laintiffs.” *Id.*

*Unlike* the plaintiff in *Spokeo*, Plaintiffs here have nowhere alleged that they were personally injured by Defendants’ alleged “violations” of the Act *or* that they have a

personal interest in whether or not the Defendant developers comply with the procedural and registration requirements of the Act. *For example*, nowhere in the Nichols Complaint do the Nichols state that:

- But-for Defendants' misrepresentations regarding the Timeshare Act, Plaintiffs would not have purchased their timeshare; *or*
- Defendants' misrepresentations regarding the amount of time and period of time accommodations were available, led to Plaintiffs' decision to purchase their timeshare interest; *or*
- If the Nichols had been provided a copy of the Sellers's public offering statement, the Nichols would have reviewed said statement, and declined the offer of purchase; *or*
- Plaintiffs have a personal interest in Defendants' compliance with the registration and procedural requirements of the Timeshare Act because, at the time they purchased their timeshare unit, their intention was to purchase from a developer who had fully complied with all requirements of the Timeshare Act; *or*
- Had Plaintiffs known Defendants had not paid their registration renewal fee and that Defendants' registration had expired, Plaintiffs would have realized the Defendants were predisposed to fraudulent behavior and taken their business elsewhere.

Remarkably, Plaintiffs do not even include a cursory statement that they "suffered harm and were damaged by Defendants' myriad violations of the Timeshare Act." In other words, they have failed to allege *why*, or even *that*, they personally were harmed. Consequently, Plaintiffs' claims fail at step one of the standing inquiry. *See, e.g., In Re (SAIC)*, 45 F.Supp.3d at 30 ("In terms of the alleged contravention of [regulatory] security standards, Plaintiffs have not outlined any actual or imminent harm caused by that purported violation."); *Carnival Corp.*, 407 S.C. at 79, 753 S.E.2d at 852's requirement that a private party seeking to enjoin a zoning violation must be specially damaged incorporates the particularized injury requirement of general standing doctrine as a

requirement for the statute to apply. Again, even assuming the *Fantasy* violates the City's zoning ordinances as alleged by Plaintiffs' complaint, Plaintiffs have not alleged that as a result of the violations they suffer any injury distinct from that suffered by the public generally."); *ATC South, Inc.*, 380 S.C. at 196, 669 S.E.2d at 339 ("We need go no further than the initial requirement of a concrete and particularized injury. A private person may not invoke the judicial power to determine the validity of executive or legislative action [for example an action by an executive branch agency like the REC] unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom."); *Beaufort Realty Co., Inc. v. Beaufort Cty.*, 346 S.C. 298, 302, 551 S.E.2d 588, 590 (Ct. App. 2001) ("The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats [with Beaufort County]."); *Joseph v. S.C. Dep't of Labor, Licensing, and Regulation*, 417 S.C. 436, 468, 790 S.E.2d 763, 780 (2016) (Beatty, J., dissenting) ("First, none of the Appellants have suffered or will suffer an injury that is attributable to the 2011 Position Statement.").

**c. Concreteness**

According to the *Spokeo* Court, "a concrete injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S.Ct. at 1548. Although Congress or, in this case, the South Carolina General Assembly, can create cognizable injuries by way of a statute, this does not mean that a plaintiff can "allege a bare procedural violation of [the statute], divorced from any concrete harm, and satisfy the injury-in-fact requirement." *Id.* at 1549.

By creating the Timeshare Act, the General Assembly established a comprehensive system that regulates timeshares before ground is even broken and continues through the entire life-cycle of the unit. The General Assembly, via the Act, also sought to ensure that

sellers of timeshare interests are licensed and subject to continuous monitoring with the potential for discipline by the REC.

However, “[a] violation of one [(or many) of the Act’s] procedural requirements may result in no harm.” *Spokeo*, 136 S.Ct. at 1549 (explaining, in the context of the FCRA, that “even if a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information, that information may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm.”).

Here, for example, if a timeshare seller “fails to provide a purchaser with the requisite public offering statement,” *see* Nichols Complaint p. 31, ¶ 190(F) and p. 34, ¶ 207, that offering statement may nonetheless exist and be entirely accurate—the purchaser has not suffered (nor have these Plaintiffs alleged they suffered) any harm.

Or, if a timeshare seller “fail[s] to pay their registration renewal fee for the year in which the timeshare was sold to Plaintiffs as of the purchase date,” *Id.* p. 34, ¶ 210, that failure does not impact a purchasers’ ability to use or access a unit or otherwise harm him (which, again, Plaintiffs have not alleged).

Post-*Spokeo* courts have entirely rejected attempts by similar plaintiffs to recite statutory or regulatory language, allege a violation, and effectively impose themselves as a “super-regulator” charged with enforcing a strict liability statute. *See, e.g., East Iowa Plastics, Inc. v. PI Inc.*, 832 F.3d 899, 904-05, 908 (8th Cir. 2016) (although defendant-competitor had actually violated the Lanham Act, which the court explained it did not “condone,” the plaintiff-competitor did not have standing to seek cancellation of the trademark because it had not suffered a concrete and particularized injury); *Braitberg v. Charter Comm., Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (although prior decisions “seemed

to accept” that a plaintiff could establish injury-in-fact without “the need for him to allege any actual injury arising from the [statutory violation, here the company’s violation of the Cable Communications Policy Act], *Spokeo* “rejected this absolute view”; instead, plaintiffs lacked standing because their claims alleged a “bare procedural violation, divorced from any concrete harm”); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, (D.C. Cir. 2016) (“The complaint here does not get out of the starting gate. It fails to allege that [plaintiffs] suffered any cognizable injury as a result of the zip code disclosures [in violation of the D.C. Consumer Identification Information Act and Consumer Protection Procedures Act]).<sup>5</sup>

Notably, *all* of these cases—including *Spokeo*—involved a statute with explicit language giving an individual a right to *monetary damages* if he or she suffered actual harm from the violation. *See Spokeo*, 136 S.Ct. at 1545 (“The Act also provides that any person who willfully fails to comply with any requirement [of the Act] with respect to any [individual] is liable to that [individual]” for, among other things, either “actual damages” or “statutory damages of \$100 to \$1000 per violation, costs of the action and attorney’s fees, and possibly punitive damages.”

No such language exists in the Timeshare Act. At best, the Act vaguely refuses to “limit the right of a purchaser or lessee to bring a private action to enforce the provisions

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<sup>5</sup> For additional analysis and examples, *see Romero v. Dep’t Stores Nat’l Bank et al.*, 2016 WL 4184099, at \*4-6 (S.D. Cal. Aug. 5, 2016) (holding that a debt collector placing a phone call using an automated telephone dialing system is “merely a procedural violation” of the Telephone Consumer Protection Act); *Khan v. Children’s Nat’l Health Sys.*, 188 F.Supp.3d 524, --- (D.Md. 2016) (allegations that defendants violated the Maryland Consumer Protection Act and D.C. Consumer Protection Act were bare procedural violations that did not result in standing because the plaintiffs “failed to connect the alleged statutory . . . violations to a concrete harm.”); *Jackson v. Abendroth & Russell, P.C.*, 2016 WL 4942074, at \*7-8 (S.D. Iowa Sept. 12, 2016) (collecting even more additional similar cases).

of this chapter.” Regardless, even if the Act *did* provide a robust right to damages, Plaintiffs here—like the plaintiff in *Spokeo* and the cases cited herein—would still have to demonstrate a “concrete” harm stemming from the statutory violation.

Simply put, these Plaintiffs have not done so here. Instead, they have done precisely what *Spokeo* forbids—recited a statute filled with procedural and regulatory hurdles that (potentially) also creates a cause of action, alleged that the Defendants failed to clear one or more of those hurdles, and claimed a right to damages. Plaintiffs have not, however, alleged or explained “why,” “how,” or even “that” they were harmed in a concrete way by these alleged violations. Consequently, for this reason alone, their Timeshare Act claim should fail. *See Jackson*, 2016 WL 4942074, at \*8 (no need to analyze “particularized” prong because injury not “concrete” where plaintiffs alleged statutory violations of the Federal Fair Debt Collection Practices Act unconnected to any concrete personal harm).<sup>6</sup>

## **5. Traceability**

Even if Plaintiffs have plausibly alleged both prongs of the injury-in-fact requirement, they have not sufficiently alleged the “how”—how any action (or inaction) by Defendants before the REC led to their harm. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (there must be traceability between a plaintiff’s alleged injury and the conduct complained of).

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<sup>6</sup> Counsel for Plaintiffs may argue that if their clients in particular cannot establish standing, then the alleged statutory “private right of action” is effectively superfluous. Such an argument is entirely unpersuasive. Standing is an individual responsibility for each individual plaintiff to satisfy—either these Plaintiffs have it, or they do not. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974) (“The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”).

Plaintiffs' Timeshare Act claim is built entirely around the alleged errors and misrepresentations in submissions made by Defendants to the REC, which the REC then reviewed, assessed, and acted on. No harm the Plaintiffs complain of (to the extent they complain of any) is traceable to those submissions. The harm they believe they have suffered (again, if any), occurred when they interacted with the Defendant developers and their sales representatives. Essentially, the Plaintiffs in all of the consolidated cases allege that they did not receive what they thought they would receive after attending a timeshare presentation. However, *all* of those alleged harms are traceable to alleged actions taken, or misrepresentations made, by the Defendant developers and their sales representatives *towards and to the Plaintiffs*—not to any actions Defendants took, or misrepresentations they made, *towards and to the REC*.

Thus, to the extent Plaintiffs allege they have suffered any harm at all, that harm came from interactions between Plaintiffs and Defendants, not between Defendants and a third-party not before this Court—the REC. *See, e.g., Town of Arcadia Lakes*, 404 S.C. at 532, 745 S.E.2d at 394 (finding no traceability between alleged injuries and conduct giving rise to the complaint because plaintiff “conceded that much of her dissatisfaction with prior construction in the area was due to violations of the applicable permits rather than the permits themselves”); *Beaufort Cty.*, 346 S.C. at 303, 551 S.E.2d at 590 (“Moreover, the League does not allege injuries traceable to the challenged action of Beaufort Realty. Mere filing of plats in itself does not work any injury on the League’s members or the public at large. Therefore, the filing of the plats and the alleged harm to League members are not causally connected.”).

Furthermore, whatever misrepresentations or fraudulent behavior the Plaintiffs believe Defendants engaged in, no amount of claims filed under the Timeshare Act will change the past decisions of the REC vis-a-vie Defendants' obligations under the Act. *See Bailey v. S.C. Dep't of Health*, 388 S.C. 1, 7, 693 S.E.2d 426, 429–30 (Ct. App. 2010) (upholding administrative law court's finding of "no causal connection between [plaintiff's] alleged injury and the permitted conversion of the fixed dock into a floating dock [by DHEC] because the boats had been docked there for years, and they would continue to be docked there regardless of the permitting decision.").

For this additional reason, Plaintiffs here cannot establish the requisite standing under the Timeshare Act.

### **CONCLUSION**

For the reasons set forth above, Plaintiffs in this case do not have standing under the South Carolina Timeshare Act.

**FOR A SECOND CAUSE OF ACTION**  
**(Violation of the South Carolina Timeshare Act)**

175. Plaintiffs repeat and reiterate the foregoing Paragraphs as though fully restated herein verbatim.

176. “The General Assembly declares that . . . (E) the purchaser of an interest in a vacation time sharing plan in this State is afforded significant and unique consumer protections not available to purchasers of other forms of real property [and] (F) the process involved in the purchase and sale of interests in a vacation time sharing plan is unlike traditional residential real property and, due to the provisions of this act, require unique practices and procedures . . . .” S.C. Code Section 27-32-405(E) and (F) of the Timeshare Act.

177. Dismissing and preempting any arguments of ambiguity in the legislature’s intent and concerning the right of individuals to bring a private right of action to enforce the provision so of the South Carolina Timeshare Act, the South Carolina Timeshare Act clearly and unambiguously states that “[i]n addition to the penalties provided in this section [of the Timeshare Act], a contract for the sale of an interest in a vacation time sharing plan in violation of this chapter [32] 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.” S.C. Code Section 27-32-120 of the Timeshare Act.

178. Although the Real Estate Commission is charged with the enforcement and

implementation of the Timeshare Act pursuant to South Carolina Code Section 27-32-130, “[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 [32].”

179. Upon information and belief, the case of Jimmy Tench v. SCDLLR, 98-ALJ-11-0041-IJ is the sole South Carolina case law addressing Defendants’ right to bring the instant private action for violations of the South Carolina Timeshare Act.

180. In Tench, the Court confirms 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.” (citing S.C. Code Ann. Section 27-32-230 (Supp. 1997)).

181. The Court further 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).”

182. As expressly stated by the Timeshare Act, the purpose of which is explained by the General Assembly therein, and confirmed by the Court, Defendants have the indisputable and inalienable statutory right to pursue the instant claims against Defendants for violations of the Timeshare Act.

183. Upon information and belief, Defendants assert that there is no penalty for failure to comply with certain provisions of the South Carolina Timeshare Act.

184. Defendants are sellers of a vacation time sharing plan or are in the business of selling interests in a vacation time sharing plan within the definition set forth in South Carolina

Code Section 27- 32-10, et seq.

185. The timeshare property purchased by Plaintiffs, as set forth above, was part of a vacation time sharing plan as defined in South Carolina Code Section 27-32-10, et seq.

186. The timeshare property purchased by Plaintiffs, as set forth above, was intended to be part of vacation timesharing plans as defined in the South Carolina Timeshare Act.

187. Defendants, by and through their agent, sign, acknowledge, promise, and affirm in the Order of Registration that they are jointly and severally liable with the Broker-in-Charge and/or marketing and sales agency generally and specifically under the South Carolina Timeshare Act and South Carolina Unfair Trade Practices Act.

188. Further, as set forth above, Defendants, by and through their agents, made certain representations to Plaintiffs concerning the sale of a timeshare property within the state of South Carolina.

189. Such representations made by Defendants, by and through their agents, constitute prohibited practices as set forth in South Carolina Code Section 27-32-110, including but not limited to:

- i. Misrepresenting the amount of time or period of time the accommodations and facilities are available to a purchaser;
- ii. Misrepresenting or deceptively representing the location of the offered accommodations and facilities;
- iii. Misrepresenting the size, nature, extent, qualities, or characteristics of the offered accommodations and facilities;
- iv. Misrepresenting the nature and extent of services incident to the accommodations and facilities;

- v. Making misleading or deceptive representations with respect to the contents of the contract or the purchaser's rights, privileges, or benefits under it;
- vi. Failing to honor and comply with all provisions of the contract with the purchase;
- vii. Misrepresenting the conditions under which a purchaser may exchange his rights to an accommodation in one location for rights to an accommodation in another location;
- viii. Including in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to Chapter 32, Vacation Time Sharing Plans, or seeking or soliciting such a waiver during the effective period of these rules; and
- ix. Doing any other act of fraud, misrepresentation, or failure to make a disclosure of a material fact.

190. Defendants further violated the South Carolina Timeshare Act, including but not limited to the following: (A) failing and refusing to provide Plaintiffs with a fully completed copy of the contract at the time of its execution; (B) failing and refusing to provide Plaintiffs with documents made a part of and incorporated into the contract as well as fully completed copies of the same at the time of their execution; (C) requiring that Plaintiffs waive or limit their rights and benefits under the South Carolina Timeshare Act; (D) failing and refusing to provide Plaintiffs with a public offering statement containing all of enumerated information in the South Carolina Timeshare Act; (E) requiring that Plaintiffs purport to agree to contract terms that are in violation of state law, unconscionable, and unenforceable; (F) failing and refusing to timely

provide Purchasers with the public offering statement; (G) providing Plaintiffs with various contract documents containing inaccurate information; and (H) other various violations of the South Carolina Timeshare Act as may be discovered during the investigation and prosecution of this lawsuit and as may be set forth at trial to conform to the evidence.

191. Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-30(2) and (3): “It is a violation of this chapter for a person offering vacation time sharing plans for sale to the public to fail to keep among its business records a . . . copy of the contract from each sale of the vacation time sharing plan, which contract must be retained for at least three years after parties to the vacation time sharing plan have completely performed all of their obligations under it; and list of all employees, and their last known mailing addresses, which list must include all current employees and all previous employees whose employment was terminated within the preceding three years,” upon information and belief.

192. Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-40: “It is a violation of this chapter for the seller of a vacation time sharing plan to fail to utilize and furnish the purchaser a fully completed copy of a contract pertaining to the sale at the time of its execution.”

193. Section 27-32-100(11) of the South Carolina Timeshare Act further states: “However, inclusion of this statement shall not impair the purchaser's right to bring any legal action based upon any cause of action arising from verbal statements.”

194. Defendants are in violation of the South Carolina Timeshare Act, Section 27-32-180(D): “The seller shall supervise, manage, and control all aspects of the offering and sale of a vacation time sharing plan. A violation of this chapter by a registrant employed by a seller as an independent contractor, either directly or through a third party, in connection with the offering or

sales of interests in vacation time sharing plans may be considered to be a violation by the seller as well as by the registrant who committed the violation, if the seller knew or should have known of the conduct constituting the violation.”

195. Defendants are in violation of South Carolina Timeshare Act, Section 27-32-410(A): “An attorney licensed in this State who is not an employee of the seller of the timeshare interest shall supervise the timeshare closing of a sale of an interest in a vacation time sharing plan located in this State by: (I) supervising the examination of title to the interest, (ii) physically reviewing before closing the executed transaction documents including, but not limited to, the following, as applicable: the deed, installment sales contract, mortgage, and promissory note, and (iii) supervising the recording of all instruments involved in the timeshare closing,” upon information and belief.

196. Section 27-32-120(C) of the South Carolina Timeshare Act provides that: 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.”

197. Although the Real Estate Commission is charged with enforcing the South Carolina Timeshare Act, Section 27-32-130 confirms that “[t]he provisions of this section do not limit the right of a purchaser or a lessee to bring a private action to enforce the provisions of this chapter.”

198. In violation of the South Carolina Timeshare Act, Section 27-32-110, Defendants included an unconscionable and unenforceable term in the contract attempting to limit Plaintiff’s right and benefit to pursuing all of their causes of action in a private lawsuit in violation of state

law and the South Carolina Unfair Trade Practices Act: “RECOVERY HEREUNDER BY THE PURCHASER SHALL NOT EXCEED AMOUNTS PAID BY THE PURCHASER HEREUNDER.”

199. In violation of the South Carolina Timeshare Act and in violation of the specific written instructions of the South Carolina Real Estate Commission, Defendants continue to deceptively describe their units that can be utilized only once every three years as “tri-x,” “tri-y,” and/or “tri-z.”

200. Defendants failed to provide Plaintiffs with a fully completed copy of the five page purchase contract on the date of purchase, the same containing blanks.

201. Defendants failed to provide Plaintiffs with a fully completed copy of the loan agreement on the date of purchase, the same containing blanks that, by Defendants’ design, are later completed by K. Michael Barfield.

202. Defendants failed to provide Plaintiffs with a fully completed copy of the title to equitable interest in real estate by having it fraudulently witnessed and/or notarized outside of Plaintiffs’ presence and without their knowledge.

203. Defendants required that Plaintiffs purport to waive their rights as it pertains to the contract documents outside of what Defendants purport to constitute the contract, being the five page purchase agreement and the loan agreement, despite that additional document constitute the contract and Plaintiffs have statutory rights as to the same under the South Carolina Timeshare Act.

204. Defendants required that Plaintiffs purport to waive their right to receive a fully completed copy of the loan agreement on the date of purchase and for K. Michael Barfield to have the right to complete the same at later date and then mail the same to Plaintiffs.

205. Defendants provided Plaintiffs with various contract documents listing various addresses for the seller of the timeshare in violation of the South Carolina Timeshare Act.

206. Defendants provided Plaintiffs with a public offering statement devoid of the enumerated information required to be contained in the same pursuant to the South Carolina Timeshare Act.

207. Defendants failed to timely provide the public offering statement to Plaintiffs in violation of the South Carolina Timeshare Act.

208. Defendants failed to utilize approved contract documents and/or other documents in the purchase transaction as a result of having failed to renew, update, and obtain approval of changed documents from the South Carolina Real Estate Commission for a period of several years.

209. Defendants failed to sell the timeshare to Plaintiffs with a valid registration as a result of failing to pay registration renewal fees for a period of several years.

210. Defendants failed to pay their registration renewal fee for the year in which the timeshare was sold to Plaintiffs as of the purchase date.

211. Plaintiffs are informed and believe that they are entitled to judgment against Defendants, jointly and severally, for violation of the South Carolina Timeshare Act, for actual, incidental, and consequential damages in an amount to be determined at trial.

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Appellate Case No. 2016-001766

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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.

**RECEIVED**

JAN 23 2017

James Nichols and Irene Nichols, Plaintiffs,

v.

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

S.C. SUPREME COURT

Linda Renchkovsky, Plaintiff,

v.

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

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

v.

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

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

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

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

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

**RECEIVED**

**JAN 23 2017**

**S.C. SUPREME COURT**

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that **BRIEF OF AMICUS CURIAE AMERICAN  
RESORT DEVELOPMENT ASSOCIATION** complies to the extent possible with  
Rule 211, SCACR.

  
\_\_\_\_\_  
Michael Patrick Scott

January 23, 2017

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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Appellate Case No. 2016-001766

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Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, LLC, and Sunrise Vacation  
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Defendants.

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Sherri J. Smith, David Watson, and Sheldon  
Stanhope, Defendants.

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**CERTIFICATE OF SERVICE**

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I, Michael P. Scott, hereby certify that I have served **BRIEF OF AMICUS CURIAE AMERICAN RESORT DEVELOPMENT ASSOCIATION** in the foregoing action by depositing a copy of same in the United States Mail to the following on this 23<sup>rd</sup> day of January, 2017.

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