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.

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.

PLAINTIFFS' REPLY BRIEF TO BRIEF OF AMICUS CURIAE MYRTLE BEACH AREA CHAMBER OF COMMERCE

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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

Plaintiffs incorporate by reference their previously-filed Statements of the Case.

ARGUMENT

The Myrtle Beach Chamber of Commerce's Brief fails to quote the full statutory language at issue:

> **The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter.** The commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures 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 this chapter.**

S.C. Code § 27-32-130 (emphasis added). The Myrtle Beach Chamber fails to discuss the plain language of the statute, fails to disclose that the plain language of the statute squarely contradicts the Myrtle Beach Chamber's argument, and fails to discuss or apply the rules of statutory construction. Notably, the Myrtle Beach Chamber fails to cite even a single decision in any part of its Argument. [MYB Brief, p. 2 – p. 10].

In its Argument, the Myrtle Beach Chamber instead repeatedly threatens Doomsday to all: "All businesses that rely on tourism would suffer, and the general economies of those areas would diminish." [MYB Brief, p. 7]. The Myrtle Beach Chamber further warns the Court that –considering Defendants are part of the allegedly all-important timeshare industry– merely "the risk of even a relatively small hit to such an important part of this state's economy should make the Court wary of the Plaintiffs' position." [MYB Brief, p. 6]. The Myrtle Beach Chamber's argument ignores the law, the plain language of the statute, and rules of statutory interpretation, and it instead attempts to scare its audience into agreement.

The Myrtle Beach Chamber presumptively alleges that "Defendants' interpretation of the Act is correct and the only logical way to read the Act as a whole." [MYB Brief, p. 3]. However, the Myrtle Beach Chamber appears to be unaware that every Judge, Administrator, and Arbitrator to date has –apparently illogically– ruled against Defendants' interpretation of the Timeshare Act and in favor of the plain language of the Timeshare Act:

1. *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) ("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." (*quoting* S.C. Code § 27-32-130)).

2. Jackson v. Coral Resorts, LLC, et al., 2014-CP-07-00882 (The Honorable J. Derham Cole issues Order Confirming Award of Arbitrator Richard L. Hinson in Plaintiffs' favor and finding Defendants in violation of the Timeshare Act) (Order and Award of Arbitrator attached hereto as Exhibit "A").

3. Denson v. Coral Resorts, et al., 2014-CP-07-1953 (Arbitrator Curtis Coltrane issues Award of Arbitrator finding Defendants in violation of the Timeshare Act, the parties later agreeing to dismiss the same) (Award of Arbitrator and Consent Order of Dismissal attached hereto as Exhibit "B").

4. Chenard v. Coral Resorts, LLC, et al., 9:14-cv-03347 (The Honorable Sol Blatt, Jr. denies Defendants' Motions to Dismiss Plaintiffs' causes of action for violations of

the Timeshare Act. At least four related lawsuits received the same decision from Judge Blatt, though those cases are not consolidated with Chenard) (Order representative of The Honorable Sol Blatt, Jr.'s rulings in the Federal Court denying Motions to Dismiss Plaintiffs' causes of action for violations of the Timeshare Act attached hereto as Exhibit "C").

   a. Reed, et al., v. Big Water Resort, LLC, et al., 2:14-1583 (The Honorable Sol Blatt, Jr. "notes that another case that includes claims arising under the Time Sharing Act is currently pending before the Honorable David C. Norton in this District, lending support to this Court's decision to permit Plaintiffs to proceed at this time" and cites to Reed).

5. LaFleur v. Coral Resorts, LLC, et al., 1021-CP-07-03746 (The Honorable J. Durham Cole denies Defendants' Motions to Dismiss Plaintiffs' causes of action for violations of the Timeshare Act. At least sixteen consolidated lawsuits received the same decision from Judge Cole, and those cases are consolidated with LaFleur by Order of the Supreme Court) (Order representative of the sixteen additional Orders denying Defendants' Motions to Dismiss Plaintiffs' causes of action for violations of the Timeshare Act attached hereto as Exhibit "D").

CONCLUSION

The Myrtle Beach Chamber contributes no meaningful information, arguments, or legal authority to the Certified Questions before the Court. For the all the reasons previously set forth by Plaintiffs, the Court should answer the three Certified Questions in the negative.

Respectfully submitted,

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Exhibit "A"

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

Michael JACKSON and Barbara JACKSON,)
)
Plaintiffs,)
)
-vs-)
)
Coral Resorts, LLC, Island Links Owners)
Association, Inc., Sunrise Vacation)
Properties, LTD., Sherri J. Smith, Michael)
C. Lee, and Robert Lauderman,)
)
Defendants.)

Civil Action No. **2014-CP-07-00882**

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ORDER

Confirming Award of Arbitrator

This matter is before this Court on motion of the plaintiffs for confirmation by this court of an arbitration award made by a designated arbitrator after an evidentiary hearing held pursuant to an arbitration provision of an agreement entered into between the parties.

Based upon a consideration of the record in this case, including the "Award of Arbitrator" attached herewith and incorporated by reference herein, this Court finds that the award granted pursuant to arbitration in this matter should be and therefore is confirmed.

It Is Therefore Ordered that the **Award of Arbitrator** of Richard L. Hinson dated June 19, 2015 **is** hereby **confirmed**.

IT IS SO ORDERED!

J. Derham Cole, Presiding Judge

January 11, 2016

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal
Case # 01-14-0001-4226

In the Matter of the Arbitration between

Re:

Michael and Barbara Jackson, Claimants,

-vs-

Coral Resorts, LLC, Sherri J. Smith, Michael C. Lee, Robert Lauderman and Sunrise Vacation Properties, Ltd., Respondents.

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into among the above-named parties (Claimants represented by Naert and DuBois, LLC; Respondents represented by Callison, Tighe & Robinson, LLP, and Sowell, Gray, Stepp, & Laffitte, LLC, respectively) having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby AWARD as follows:

By consent of the parties at the evidentiary hearing: (a) all claims against the Respondent Sherri J. Smith are dismissed with prejudice; and (b) the counterclaim of the Respondent Coral Resorts, LLC, is dismissed with prejudice.

As to the Claimants' causes of action for Fraud, Intentional Misrepresentation, Violation of the South Carolina Unfair Trade Practices Act, and Breach of Contract/Implied Covenant of Good Faith and Fair Dealing, I find in favor of the Respondents.

As to the Claimants' causes of action for Violations of the South Carolina Timeshare Act and Negligent Misrepresentation, I find in favor of the Claimants against all Respondents.

As to the Claimants' cause of action for Declaratory Judgment, I find in favor of the Claimants.

With regard to the findings in favor of the Claimants, I order as follows:

- The Claimants are awarded actual damages against all Respondents, jointly and severally, in the amount of Four Thousand One Hundred Forty-one and 22/100 Dollars ($4,141.22), plus any additional sums paid by the Claimants since the date of the hearing.[1]; and

- The Purchase Contract and the related Purchaser Loan Agreement, both dated and entered into on or about September 18, 2013, between the Claimants and Respondent Coral Resorts, LLC, are hereby declared completely null and void and of no legal effect whatsoever.

[1] The amount of actual damages awarded is greater than claimed in the initial Demand for Arbitration filed by the Claimants. Although the Claimants never formally amended their claim, it was stipulated at the evidentiary hearing that the Claimants paid the above amount and have been making payments on an ongoing monthly basis. Evidence of the amount already paid, plus an anticipated payment for June 2015 ($118.83), was admitted without objection.

RLH

The administrative fees of the American Arbitration Association, totaling $1,950.00, shall be borne equally by the parties, and the compensation and expenses of the arbitrator, totaling $15,012.00, shall be borne equally as incurred by the parties.[2] Therefore, Sunrise Vacation Properties, Ltd., shall reimburse Michael and Barbara Jackson the sum of $325.00 and also reimburse Coral Resorts, LLC, the sum of $325.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Michael and Barbara Jackson and Coral Resorts, LLC.

The award and the above sums are to be paid within fifteen (15) days from the date of this Award.

Each party shall bear their own attorneys' fees and costs.

This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

I, Richard L. Hinson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.

6/19/15
Date

Richard L. Hinson, Arbitrator

[2] Former Respondent Island Links Owners Association, Inc., made payments toward the compensation and expenses prior to being dismissed from the arbitration pursuant to an Order dated May 4, 2015.

Exhibit "B"

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration between

Re:
Case Number: 01-14-0001-3511

Jaye and LaKeyshia Denson
-vs-
Coral Resorts, LLC,

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated August 10, 2013, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, do hereby, AWARD, as follows:

This Arbitration was held before the undersigned commencing at 10:00 o'clock, A. M., on May 8, 2015, at 3 Town Center Court, Hilton Head Island, South Carolina. The Claimants Jaye and LaKeyshia Denson were present and represented by their counsel, Joseph DuBois and Zachary S. Naert. Coral Resorts, LLC, was present and represented by its counsel, Nekki Shutt, Thornwell F. Sowell, III, Bess J. DuRant and Drew A. Laughlin.

The agreement to arbitrate is part of a written contract between the Parties dated August 10, 2013.[1] The agreement to arbitrate reads:

> Any dispute, claim or controversy arising out of or relating to this Agreement or the making, breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Beaufort County, South Carolina, or another location agreed by the parties. The arbitration shall be held before a sole arbitrator and shall be binding with no right of appeal. The arbitration shall be conducted pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be commenced by serving a demand for arbitration on the opposing party. The parties shall select an arbitrator from the list of South Carolina Bar approved arbitrators by mutual agreement within thirty (30) calendar days of the date of the demand for arbitration is filed. If the parties are unable to agree on the selection of an arbitrator within such time, the parties shall petition the Beaufort County Court of Common Pleas to appoint a member of the Beaufort County Bar as an arbitrator. The costs of the arbitration, including the arbitrator's fees shall be borne equally by the parties to the

[1] *See:* Claimants' Exhibit 2.

arbitration. The parties shall be responsible for paying their own attorneys' fees, regardless of the outcome of the arbitration. Claims may only be brought by Purchasers in their individual capacities and not as a Plaintiff or class member in any purported class or representative capacity. Further, the arbitrator may not consolidate more than one person's claims and my not preside over any form of representative or class proceeding.[2]

1. The demand for arbitration filed by Jaye and LaKeyshia Denson incorporates the allegations of a Complaint that was filed along with the demand for arbitration.[3] In the Complaint, Jaye and LaKeyshia Denson allege the following claims:

   (a) Common law Fraud.
   (b) Violations of S. C. Code Ann. § 27-32-10, *et seq.* (Supp. 2014).
   (c) Violation of S. C. Code Ann. § 39-5-10, *et seq.* (Supp. 2014).
   (d) Violation of S. C. Code Ann. § 37-1-101, *et seq.* (Supp. 2014).
   (e) Breach of Contract.
   (f) Common law Negligent Misrepresentation.
   (g) Breach of Fiduciary Duty.
   (h) Civil Conspiracy.
   (i) A claims under S. C. Code Ann. § 15-53-10 (Supp. 2014), that no valid contract exists between them and Coral Resorts, LLC.
   (j) A claim under S. C. Code Ann. § 27-23-20 (Supp. 2014).
   (k) Common law negligent hiring, training, supervision and retention.[4]

2. The claim of Jaye and LaKeyshia Denson for Common Law Fraud is founded on the claim that the representatives of Coral Resorts, LLC, with whom Mr. and Ms. Denson worked with in August of 2013 made representations to them that were untrue, and which were contracted in material ways by the terms and conditions of the written documents that were presented to them, and which they signed. In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the

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[2] Following, but separated from, the text of the agreement to arbitrate, the following text appears in all capital letters: "ANY HOLDER OF THIS CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES, WHICH THE PURCHASER COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO. RECOVERY HEREUNDER BY THE PURCHASER SHALL NOT EXCEED THE AMOUNTS PAID BY THE PURCHASER HEREUNDER." I do not interpret this text as being a part of the agreement to arbitrate. The text is set off from the paragraph of the agreement to arbitrate, and does not appear to be a part of it. Further, to the extent that the form of the document creates any ambiguity as to whether or not the all caps text is part of the agreement to arbitrate, the ambiguity is construed against the party drafting the document, which in this case is Coral Resorts, LLC. *See*: *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773 (S. C. 2010).

[3] Initially, Reba Management, LLC; B. Dean Pierce, Sunrise Vacation Properties, Ltd.; Coral Holdings, LLC; K. Michael Barfield; Spencer Fulkert; Sherri J. Smith; Timeshare Guarantee, Inc.; Island Links Owners Association, Inc.; and Coral Sands Owners Association, Inc., were named as Respondents in this arbitration. By an Order dated April 13, 2015, these named Respondents were dismissed.

[4] By an Order entered in this arbitration on April 13, 2015, causes of action (g), (h) and (j) were dismissed.

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representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.[5]

3. Failure to prove any one of required elements of fraud and deceit, based upon representation, is fatal to recovery.[6]

4. The defense of Coral Resorts, LLC, to the Common Law Fraud Claim focused on the "right to rely" element of the claim. The evidence showed that the Densons executed several documents including the Contract, the Acknowledgement of the Right to Cancel, the Purchasers Understanding and Acknowledgements.[7]

5. The Contract sets out the location of the timeshare, the fact that it is a "Bi-Ennial" interest, and all of the other terms related to the purchase of the timeshare by the Densons. Coral Resorts, LLC, argued that in light of the written contract, the Densons could not prove the "right to rely" element.

6. The right to rely is a necessary element that must be proved to sustain a cause of action for fraud.[8]

7. One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it.[9] This rule is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused. This exception is, however, very strictly interpreted by the courts in South Carolina. In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered.[10]

8. In this case, the Densons are intelligent people. In addition, they had purchased from Coral Resorts, LLC, on two occasions prior to the August 10, 2013, purchase. The purchase documentation included numerous documents, all signed by the Densons, stating the nature of the transaction and their rights under them. Based on my observation of the Densons, and having observed and considered their testimony, demeanor and affect, I do not find them to be ignorant and unwary individuals.

9. The Densons do not contend that the misrepresentations are in the Contract, rather they contend that the representatives of Coral Resorts, LLC, made misrepresentations that are different from what is included in the Contract. Because the Densons had the contract before them, the truth of the matter regarding any statements made by the representatives of Coral Resorts, LLC, could have been determined by reading the document. As a

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5 *See: Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766 (S.C. 2011).

6 *See: O'Shields v. S. Fountain Mobile Homes, Inc.*, 262 S.C. 276, 204 S.E.2d 50 (S. C. 1974).

7 *See:* Claimants' Exhibit 2; Respondent's Exhibits 3 and 4.

8 *See: Florentine Corp. v. PEDA I, Inc.*, 287 S.C. 382, 387, 339 S.E.2d 112, 114 (S. C.1985).

9 *See: Burwell v. South Carolina National Bank*, 288 S.C. 34, 340 S.E.2d 786 (S. C. 1986).

10 *See: Burwell v. South Carolina National Bank, supra.*

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result, the "right to rely" element of the common law fraud claim has not been proved. As was stated above, the failure of proof on any of the elements is fatal to the claim.

10. None of the witnesses had a distinct recollection of the details of the events of August 10, 2013. The Densons recalled some of the events, and testified as to certain statements made to them. Neither Spencer Fulkert nor Terrence Singleton had a specific recollection of the transaction with the Densons. What is undisputed, though, is the documentation that the Densons admittedly signed. Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence.[11] In this case, I do not find that there is clear, cogent and convincing evidence of fraud.[12]

11. The Densons also claim that the transaction was completed in violation of the requirements of the South Carolina Vacation Time Sharing Plans Act, codified as S. C. Code Ann. § 27-32-10, *et seq.* (Supp. 2014).[13]

12. At the hearing, the Densons' claims focused on the requirements of S. C. Code Ann. § 27-32-40 (Supp. 2014); S. C. Code Ann. § 27-32-100 (Supp. 2014); and S. C. Code Ann. § 27-32-110 (Supp. 2014). Specifically, the Densons argued that they: (a) did not receive a fully completed copy of the Contract at the Closing; and, (b) did not receive a copy of a "Public Offering Statement" that complied with the requirements of S. C. Code Ann. 27-32-100(3)(Supp. 2014). The Densons also argue that the representatives of Coral Resorts, LLC, made misrepresentations to them in violation of S. C. Code Ann. § 27-32-110(3), (4) and (7)(Supp. 2014), and committed other acts in violation of S. C. Code Ann. § 27-32-110(11)(Supp. 2014).[14]

13. S. C. Code Ann. § 27-32-40(A)(Supp. 2014), reads, in relevant part: (A) 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.

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11 *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (SCApp. 2001).

12 As is explained below, I do not believe the Densons met their burden of proof with respect to the factual question of whether misrepresentations of fact were made to them. *See:* Paragraph 42 below.

13 Coral Resorts, LLC, argued that only the South Carolina Real Estate Commission can make a determination that a time share seller has engaged in acts that violate the Act. I do not find that this argument is supported by the Vacation Time Sharing Plans Act. S. C. Code Ann. § 27-32-130 (Supp. 2014), reads:

> The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures 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 this chapter. (My emphasis).

14 As is explained below, I do not believe the Densons met their burden of proof with respect to the factual question of whether misrepresentations of fact were made to them. *See:* Paragraph 42 below.

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14. At the arbitration hearing, three items in particular were discussed at length, being the "Island Links Horizontal Property Regime Bi-Ennial Purchase Contract", the "Title to Equitable Interest to Real Estate", and the "Public Offering Statement".

15. The copy of the August 10, 2013, Contract that was given to the Densons at the Closing showed the first year of occupancy of the timeshare interest to be unit to be 2013.[15]

16. A second copy of the first page of the Contract was also introduced, and on it, the first year of occupancy of the timeshare interest has been altered. The "2013" has been crossed out, and "2015" has been written in its place.[16]

17. At the Closing, the Densons were also given a copy of a document entitled "Title to Equitable Interest to Real Estate". This document was signed by the Densons. Spencer Fulkert, acting on behalf of Coral Resorts, LLC, signed as witness to Mr. and Ms. Densons' signatures. The document included additional lines for the signatures of witnesses, and an acknowledgement to be completed by a notary public. On the copy of the document given to the Densons at Closing, the additional witness lines and the acknowledgement are blank.[17]

18. At some point following the closing, the "Title to Equitable Interest to Real Estate" was signed by an individual as an additional witness. The same person completed the acknowledgement.[18] No witness testified that the witness/notary was present when the Densons executed the document.

19. I find that the "Island Links Horizontal Property Regime Bi-Ennial Purchase Contract" was not a "fully completed" copy when the same was given to the Densons at the Closing. The only evidence is that the "Island Links Horizontal Property Regime Bi-Ennial Purchase Contract" was altered to change the first year of occupancy following the Closing, and the Densons did not receive a copy of the altered document in compliance with the requirement of S. C. Code Ann. § 27-32-40(A)(Supp. 2014).[19]

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15 *See:* Plaintiffs' Exhibit 2. The text appears on Page 1 of the Contract immediately above the centered, underlined and capitalized text reading: Purchase Terms.

16 *See:* Plaintiffs' Exhibit 3; Respondent's Exhibit 11.

17 *See:* Plaintiffs' Exhibit 2.

18 *See:* Plaintiffs' Exhibit 4.

19 In addition to "Island Links Horizontal Property Regime Bi-Ennial Purchase Contact", there were other documents delivered at the Closing that were not complete. These documents related to the financing, in the event that the Densons chose to finance. *See:* Plaintiffs' Exhibits 5 and 6. An explanation was offered as to why these documents could not be completed at the Closing, and there was argument about what documents actually constituted the "Contract". While the general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract. *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (S. C. 1977). I find it unnecessary to reach the issues regarding whether or not the financing documents constitute part of the Contract, however, because I find that the alteration of the first page of the "Island Links Horizontal Property Regime Bi-Ennial Purchase Contact" following the Closing is a violation of S. C. Code

20. S. C. Code Ann. § 27-32-100 (Supp. 2014), reads, in relevant part: It is a violation of this chapter for a person who sells or offers to sell an interest in a vacation time sharing plan subject to Section 27-32-20, to fail to provide to the prospective purchaser a separate written public offering statement regarding the vacation time sharing plan and the purchaser's rights and obligations associated with the purchase of an interest in that vacation time sharing plan. The written statement must be received by the purchaser before signing a contract for the sale of a vacation time sharing plan and must include: . . . (3) the name of a person with the right to alter, amend, or add to charges to which the purchaser may be subject and the terms and conditions under which those charges may be imposed; . . .

21. At the Closing, the Densons were given a copy of the "Public Offering Statement".[20] The text of the Public Offering Statement does not include any description of " . . . the name of a person with the right to alter, amend, or add to charges to which the purchaser may be subject and the terms and conditions under which those charges may be imposed. . ."[21]

22. The "Island Links Horizontal Property Regime Bi-Ennial Purchase Contract" was not "complete" when it was given to the Densons at Closing. The first year of occupancy, although filled in, was later changed to show a different year. The testimony regarding whether or not the year was 2015 as opposed to 2013 was conflicting. The witnesses for Coral Resorts, LLC, testified that the change in the year would have been explained to the Densons, and that it resulted from the fact that the Densons chose to make their down payment over a period of months. The Densons testified that they were told the first year of occupancy was to be 2013.

23. The conflict in the testimony is not the issue, though. The issue is whether the Densons received what they were required to receive at the Closing.

24. The "Title to Equitable Interest to Real Estate" was altered following the Closing. The second witness/Notary Public was not present at the Closing, and this person signed the document at some later time, despite the fact that this person did not witness the Densons' execution of the document.

25. As was stated above, The text of the Public Offering Statement given to the Densons at closing does not include any description of " . . . the name of a person with the right to

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Ann. § 27-32-100 (Supp. 2014). There was no dispute that the "Island Links Horizontal Property Regime Bi-Ennial Purchase Contact" was the "Contract" as that term is defined in S. C. Code Ann. § 27-32-10, *et seq.* (Supp. 2014).

[20] *See:* Plaintiffs' Exhibit 2.

[21] Coral Resorts, LLC, argued that only the South Carolina Real Estate Commission can make a determination that the Contract and Closing did not comply with the Act, or the Public Offering Statement does not comply with the requirements of S. C. Code Ann. § 27-32-100(Supp. 2014). I do not find that this argument is supported by the Act. S. C. Code Ann. § 27-32-130 (Supp. 2014), reads:

> The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures 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 this chapter. (Emphasis supplied).

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alter, amend, or add to charges to which the purchaser may be subject and the terms and conditions under which those charges may be imposed."

26. The primary rule of statutory construction is to ascertain and give effect to the legislature's intent or purpose as expressed in the statute.[22] The legislature's intent should be ascertained primarily from the plain language of the statute.[23] Unless a statute requires a different interpretation, the words used in the statute must be given their ordinary meaning.[24]

27. The language of S. C. Code Ann. § 27-32-40(A)(Supp. 2014), and S. C. Code Ann. § 27-32-100 (Supp. 2014), is plain. The seller of a timeshare interest is required to give the purchaser a fully completed copy of the contract at closing, and the seller of a time share interest is required to give a purchaser a separate Public Offering Statement in the form described in S. C. Code Ann. § 27-32-100 (Supp. 2014), prior to the execution and delivery of the contract.

28. In this case, Coral Resorts, LLC, did not give the Densons a copy of the complete contract at Closing, and the Public Offering Statement was not in the form required by S. C. Code Ann. § 27-32-100 (Supp. 2014). In addition, I find that the act of the notary public in filling out the acknowledgment on the "Title to Equitable Interest to Real Estate" without having witnessed the execution of the document is an act that violates S. C. Code Ann. § 27-32-110(11)(Supp. 2014).[25]

29. S. C. Code Ann. § 27-32-120(C)(Supp. 2014), reads: (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.

30. In this case, among other things, the Densons seek to void the August 10, 2013, Contract, and have the money they paid refunded to them. This relief is allowed under the express language of S. C. Code Ann. § 27-32-120(C)(Supp. 2014).

31. The Densons paid a total of Three Thousand Two Hundred Forty Seven and no/100 ($3,247.00) Dollars to Coral Resorts, LLC, for the time share interests they purchased. The August 10, 2013, Contract was actually the third time share interest that the Densons purchased over a period of roughly thirteen months.[26] The testimony was that the Densons upgraded their initial purchase in the second two purchases, and that the funds paid by the Densons in the first two were then applied to the third. I find that the entire Three Thousand Two Hundred Forty Seven and no/100 ($3,247.00) Dollars was applied to the August 10, 2013, Contract

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22 *See: Alton Newton Evangelistic Association, Inc. v. South Carolina Employment Security Commission,* 284 S.C. 302, 326 S.E.2d 165 (SCApp.1985).

23 *See: State v. Hendriks,* 318 S.C. 562, 459 S.E.2d 520 (SCApp. 1995).

24 *See: Hughes v. Edwards,* 265 S.C. 529, 220 S.E.2d 231 (S.C.1975).

25 *See:* S. C. Code Ann. 26-1-160 (Supp. 2014).

26 *See:* Plaintiffs' Exhibit 2; Respondent's Exhibit 2 and Respondent's Exhibit 7.

32. The Densons' claim for a violation of the South Carolina Unfair Trade Practices Act, S. C. Code Ann. § 39-5-10, *et seq.* (Supp. 2014), is founded on the claim that the Coral Resorts, LLC, representatives made misrepresentations to the Densons, and that the same sort of thing has happened in other cases.[27] The Densons sought to prove the potential for repetition by offering responses to Freedom of Information Act Requests that were served on various government agencies.[28] The responses to the FOIA requests consisted of documents purporting to be complaints related to Coral Resorts, LLC, filed by individuals. I did not allow this evidence. While I understand that the Commercial Arbitration Rules, specifically Rule 34(a), states that conformity to legal rules of evidence is not required, the evidence offered by the Densons presented a number of problems. First, there is no way to authenticate the various complaints tendered in response to the FOIA request. The person responding to the FOIA request simply delivered what was in the office's file. With respect to the documents produced, there is no way to know who actually wrote them, or the truth and accuracy of what was written. Second, there is no way for Coral Resorts, LLC, to cross examine any of the authors as to the truth of the matters in the correspondence, the bias of the author, the identity of the author, or anything else. The mere fact that someone wrote a letter or an email to a government agency is, in my view, not relevant to the point that the Densons were required to prove. Further, admitting the FOIA responses in the face of the fact that Coral Resorts, LLC, had no opportunity or ability to cross examine any of the authors or otherwise have the opportunity meet what may have been expressed in any of the letters or emails would have been unfair. In my view, the fairness of the proceeding is of paramount importance, and the text of Rule 34(a) cannot be used in such a way as to undermine the fairness of the proceeding. The various documents were also inadmissible hearsay, which again, Coral Resorts, LLC, had no way to respond to.[29] For those reasons, I declined to admit the FOIA responses.

33. The Densons also argued that Coral Resorts, LLC's practice was to have the "Title to Equitable Interest to Real Estate" documents witnessed and notarized by a person who did not see the purchaser actually sign the document.[30]

34. Coral Resorts, LLC, argued that S. C. Code Ann. § 39-5-140(a)(Supp. 2014), requires that a plaintiff show "an ascertainable loss of money or property" resulting from any alleged violation of S. C. Code Ann. § 39-5-10, et seq. (Supp. 2014), and that the

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27 As is explained below, I do not believe the Densons met their burden of proof with respect to the factual question of whether misrepresentations of fact were made to them. *See:* Paragraph 42 below.

28 The Densons also offered an affidavit into evidence that was executed by an individual named Archie Elliott that had been submitted in connection with a lawsuit brought against Coral Resorts, LLC, and others in 2004. In his affidavit, Mr. Elliott testifies to certain sales practices alleged to have been used by representatives of Coral Resorts, LLC. I do not credit this affidavit because Archie Elliot was not present at the hearing, and could not be cross examined as to his motivations, bias or anything else regarding the affidavit. Mr. Elliot's affidavit was executed in October of 2005, or more than 7 years preceding the events at issue in this case. Thus, I find Mr. Elliott's affidavit to be not relevant to the events in this case.

29 The Densons argued that the FOIA responses were not offered for the truth of the matter contained in them, but clearly they were. The fact that someone may have mailed in a complaint is, in and of itself, not relevant to the issue.

30 *See:* Plaintiffs' Exhibit 11.

CLC

Densons made no showing of any ascertainable loss arising from the improper acts of the notary.

35. There is evidence that the practice of Coral Resorts, LLC, is to have the "Title to Equitable Interest to Real Estate" documents that are part of the closings signed in the presence of the "Verification Officer" only, and to have a witness/notary complete the document at some other time. Any notary public who engages in such a practice would run afoul of S. C. Code Ann. 26-1-160 (Supp. 2014). There was, however, no evidence that this practice, in and of itself, caused any loss of money or property by the Densons.

36. For the foregoing reasons, I find that the claim under South Carolina Unfair Trade Practices Act, S. C. Code Ann. § 39-5-10, *et seq.* (Supp. 2014), fails due to lack of proof of the elements of the claim.

37. The Densons also claim a violation of Violation of S. C. Code Ann. § 37-1-101, et seq. (Supp. 2014).

38. Coral Resorts, LLC, argues that the purchase of a time share interest is exempt from the terms of the South Carolina Consumer Protection Code, under S. C. Code Ann. § 37-2-104(2)(b)(Supp. 2014).

39. In this case, the transaction was a purchase that falls within the exception of S. C. Code Ann. § 37-2-104(2)(b)(Supp. 2014).[31]

40. The Densons alleged a claim that Coral Resorts, LLC, breached the August 10, 2013, Contract. I believe that this claim is rendered moot by the ruling that the Densons are entitled to void the August 10, 2013, Contract as is set forth above.

41. The Densons claim of Common Law Negligent Misrepresentation hinges on whether or not misrepresentations were actually made in connection with the execution and delivery of the August 10, 2013, Contract. The Densons, as the claimants, bore the burden of proof on this point.

42. As was stated in Paragraph 10 above, the evidence on the interaction between the Densons and the Coral Resorts, LLC, representatives is indistinct. What is not indistinct, though, is the documentation that the Densons signed that addressed all of the terms of the transaction. So, insofar as the documentation is concerned, it is clear what the Densons were told. With respect to what may have been said to the Densons and at what time, it is not clear. I find that the Densons did not produce evidence sufficient to meet their burden of proof on this question. As a result, the Densons' claim for Common Law Negligent Misrepresentation fails.

43. The Densons alleged a claim under S. C. Code Ann. § 15-53-30 (Supp. 2014), seeking a declaratory judgment that no valid contract exists between them and Coral Resorts, LLC.

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31 Although the Densons argued that S. C. Code Ann. § 27-32-10, *et seq.* (Supp. 2014), makes references to a "consumer transaction", I do not see that as sufficient to overcome the express language in S. C. Code Ann. § 37-2-104(2)(b)(Supp. 2014).

I believe that this claim is rendered moot by the ruling that the Densons are entitled to void the August 10, 2013, Contract as is set forth above.

44. Like the Negligent Misrepresentation claim, the Densons claim for Common Law Negligent Hiring, Training and Retention hinges on whether or not the representatives of Coral Resorts, LLC, made misrepresentations in connection with the execution and delivery of the August 10, 2013, Contract, and whether or not the representatives were known to commit such acts. The Densons, as the claimants, bore the burden of proof on this point.

45. As was stated in Paragraph 42 above, I find that the Densons have not met their burden of proof on the question of whether the misrepresentations were actually made. As a result, the Densons claim for Common Law Negligent Hiring, Training and Retention fails.

46. Coral Resorts, LLC, asserted a counter claim seeking recovery of money claimed to be owed by the Densons under the terms and conditions of the August 10, 2013, Contract, and the obligations of a purchasers and owner of property in the Coral Resorts, LLC, time share development. Because I have found that the Densons are entitled to void the August 10, 2013, Contract, any claim of Coral Resorts, LLC, which is based on obligations set out or flowing from the August 10, 2013, Contract fails.

47. In this case, both the Densons and Coral Resorts, LLC, both asserted a claim for attorney's fees. The Densons' demand for arbitration incorporated a Complaint that set out the facts and causes of action that the Densons asserted. In the Complaint, the only cause of action for which attorney's fees were sought was the claim alleging a violation of the South Carolina Unfair Trade Practices Act.[32]

48. The agreement to arbitrate reads, in relevant part: "The costs of the arbitration, including the arbitrator's fees shall be borne equally by the parties to the arbitration. The parties shall be responsible for paying their own attorneys' fees, regardless of the outcome of the arbitration."

49. The question is whether or not the text of the agreement to arbitrate that obliges the parties to pay their own attorney's fees and costs of arbitration is enforceable. The Densons previously submitted an Order of the Hon. Sol Blatt, Jr., into the record, in which Judge Blatt found the limitation on attorney's fees to be unenforceable with respect to a claim for attorney's fees arising under the South Carolina Unfair Trade Practices Act [S. C. Code Ann. § 39-5-10, *et seq.* (Supp. 2014)], because Judge Blatt found that the language conflicts with the mandatory language of the statute related to attorney's fees.[33]

50. That issue is not present here, though, because I have found that the Densons' claim under the South Carolina Unfair Trade Practices Act [S. C. Code Ann. § 39-5-10, *et seq.*

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[32] The Demand and Complaint are of record.

[33] The Order of the Hon. Sol Blatt, Jr., is of record. It was not entered in this case, but in a different case. As an unpublished trial court order, Judge Blatt's Order is not binding authority, but Judge Blatt is a senior, respected Judge, and I did study his Order.

(Supp. 2014)], failed. Thus, the question remains as to whether or not the restriction on the award on attorney's fees is otherwise enforceable.

51. I find that the limitation on an award of attorney's fees and the costs of the arbitration included in the agreement to arbitrate is enforceable. The language in the agreement to arbitrate is unambiguous. While one can argue that the agreement is more beneficial to Coral Resorts, LLC, than the Densons, that fact, standing alone, does not make the agreement unenforceable.[34]

CONCLUSION

Based on the foregoing, it is Ordered:

1. Jaye and LaKeyshia Denson are awarded judgment on their claim that Coral Resorts, LLC, violated the terms of S. C. Code Ann. § 27-32-10, et seq. (Supp. 2014), in connection with the August 10, 2013, Contract. As a result, the Densons' demand that the August 10, 2013, Contract be voided is granted.

2. In addition, the Densons are entitled to a return of the money paid to Coral Resorts, LLC, in connection with the August 10, 2013, Contract. The money paid by the Densons' was in the amount of Three Thousand Two Hundred Forty Seven and no/100 ($3,247.00) Dollars. The Densons also requested interest. Under S. C. Code Ann. §34-31-20 (Supp. 2014), sums certain carry interest at Eight and Three Quarters (8.34%) percent. The final payment was made by the Densons on April 16, 2014. I calculate the interest due to be Three Hundred Thirty One and 69/100 ($331.69) Dollars. The total is Three Thousand Five Hundred Seventy Eight and 69/100 ($3,578.69) Dollars. The Densons are awarded judgment against Coral Resorts, LLC, in that amount.

3. In accordance with the agreement to arbitrate of the Parties, the administrative fees of the American Arbitration Association, totaling $2,250.00, shall be borne equally by the Parties, and the compensation and expenses of the arbitrator, totaling $7,875.00, shall be borne as incurred by the Parties. Therefore, Jaye and LaKeyshia Denson shall reimburse Coral Resorts, LLC, the sum of $150.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Coral Resorts, LLC.

4. The above sums are to be paid on or before Thirty (30) days from the date of this Award.

5. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

I, Curtis Coltrane, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

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[34] An unambiguous contract must be enforced according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (S.C. 1994); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (S.C. 1993); *Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 500, 649 S.E.2d 494, 503 (SCApp. 2007).

June 17th, 2015
Date

Curtis Coltrane, Arbitrator

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOR THE FOURTEENTH JUDICIAL CIRCUIT
Jaye Denson and Lakeyshia Denson,	)	C/A No.: 2014-CP-07-1953
	)	
Plaintiffs,	)	
	)	
-v-	)	CONSENT ORDER OF DISMISSAL
	)	
Coral Resorts, LLC, Reba Management, Inc., B. Dean Pierce, Sunrise Vacation Properties, Ltd., Coral Holdings, LLC, K. Michael Barfield, Spencer Fulkert, Sherri J. Smith, Timeshare Guarantee, Inc., Island Links Owners Association, Inc., and Coral Sands Owners Association, Inc.,	)	
	)	
Defendants.	)	

Plaintiffs filed this case on July 21, 2014 and thereafter filed a Demand for Arbitration with the AAA. The arbitration was assigned AAA Case Number 01-14-0001-3511. The arbitrator held a hearing and issued an Arbitration Award against one of the Defendants. All other Defendants were dismissed. Plaintiffs moved for confirmation of the Arbitration Award.

The Court has been advised by counsel for all parties that the parties have reached a resolution of this matter.

NOW, THEREFORE, after due consideration, and by the consent of all parties,

IT IS ORDERED, ADJUDGED AND DECREED:

1. Plaintiffs' Amended Motion to Confirm Arbitration Award is dismissed.

2. The Arbitration Award from AAA Case Number 01-14-0001-3511 is vacated.

3. This action is dismissed with prejudice as to all claims against all Defendants and all counterclaims against Plaintiffs.

AND IT IS SO ORDERED.

J. Derham Cole
Presiding Judge

_____, South Carolina

October 12, 2015

WE SO MOVE AND CONSENT

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Exhibit "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

2016 MAR 30 A 11:56

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.	)	Civil Action No. 9:14-3347-SB **ORDER**

On November 6, 2015, the Court entered an order granting in part and denying in part the Plaintiffs' motion to amend their complaint, and on November 16, 2015, the Plaintiffs filed a second amended complaint asserting the following causes of action: (1) fraud/intentional misrepresentation; (2) violation of the South Carolina Vacation Time Sharing Plans Act ("Time Sharing Act"), S.C. Code Ann. §§ 27-32-10 through 27-32-250; (3) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10 through 39-5-180; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) declaratory judgment; (7) negligent/grossly negligent hiring; (8) negligent/grossly negligent training; (9) negligent/grossly negligent supervision; and (10) negligent/grossly negligent retention.[1]

On December 14, 2015, Defendant Hilton Head Island Development Company, LLC filed a motion to dismiss and to strike certain allegations (Entry 84), and on December 14, 2015, Defendant Sunrise Vacation Properties, Ltd. filed a motion to dismiss and to strike

[1] The caption on this order reflects the caption on the second amended complaint.

certain allegations (Entry 85). The Plaintiffs filed a response in opposition on February 4, 2016, and the Defendants filed a joint reply on February 16, 2016. On March 8, 2016, the Plaintiffs filed a supplemental memorandum and submitted a copy of an order filed by Circuit Court Judge J. Derham Cole on March 7, 2016, in a state court case involving Coral Resorts, as well as a copy of Chief Justice Jean H. Toal's order, filed October 6, 2014, appointing Judge Cole to decide all matters in the state court cases involving Coral Resorts.

In their motions to dismiss and/or to strike, the Defendants generally assert: (1) that the Court does not have subject matter jurisdiction of the Plaintiffs' Time Sharing Act claim (or that the Court should abstain from considering the claim); (2) that the Plaintiffs' other causes of action fail to state a claim upon which relief may be granted: and (3) that the Court should strike certain allegations from the complaint.

BACKGROUND

The Plaintiffs entered into a contract to purchase a timeshare interest at the Island Links Resort on July 22, 2008. Subsequently, on August 20, 2011, the Plaintiffs returned to Hilton Head and entered another contract to purchase a timeshare interest at the Port O'Call Resort. The Plaintiffs applied the equity from their 2008 timeshare purchase to their 2011 timeshare purchase.

On August 19, 2014, the Plaintiffs filed this action raising claims related to both the 2008 and the 2011 timeshare purchases. The Plaintiffs then filed a first amended complaint on September 9, 2014. The Defendants moved to dismiss the Plaintiffs' first amended complaint, arguing, among other things, that the Plaintiffs' claims regarding their 2008 purchase were barred by the statute of limitations. On June 19, 2015, the Court

granted the Defendants' motions to dismiss all of the Plaintiffs' claims related to the 2008 timeshare purchase, based on the Plaintiffs' admissions that they had no claims related to their 2008 timeshare purchase.

On April 28, 2015, the Plaintiffs filed a motion to amend their complaint. As previously explained, the Court held a hearing on the Plaintiffs' motion on November 5, 2015, and filed an order on November 6, 2015, granting in part and denying in part the motion.[2] (See Entry 55.) The Plaintiffs filed their second amended complaint, which is the subject of the Defendants' motions to dismiss and to strike, on November 16, 2015.

STANDARDS OF REVIEW

I. Federal Rule of Civil Procedure 12(b)(1)

A motion brought pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges whether the district court has subject matter jurisdiction. The plaintiff bears the burden of proving that subject-matter jurisdiction properly exists in the federal court. In a 12(b)(1) motion, the court "may consider evidence outside the pleadings" to help determine whether it has jurisdiction over the case before it. Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991); see also Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp., 166 F.3d 642, 647 (4th Cir. 1999). The court should grant a Rule 12(b)(1) motion "only if the material jurisdictional facts are not in

[2] This case is related to several other cases before the Court. See Nichols v. Coral Resorts, LLC et al., Civil Action No. 9:14-3838-SB; Renchkovsky v. Coral Resorts, LLC et al., Civil Action No. 9:14-4495-SB; Curry v. Hilton Head Dev. Co. LLC et al., Civil Action No. 9:15-534; Olenick v. Coral Resorts, LLC et al., Civil Action No. 9:15-629; and Ross v. Hilton Head Island Dev. Co. et al, Civil Action No. 9:15-2446. During the hearing on November 5, 2015, the Court considered the Plaintiffs' motions to amend filed in all of the related cases (aside from Ross), ultimately granting in part and denying in part the motions as set forth in orders filed in each case.

dispute and the moving party is entitled to prevail as a matter of law." Richmond, 945 F.2d at 768.

II. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of a plaintiff's complaint. Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir.1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. Id. When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

III. Federal Rule of Civil Procedure 12(f)

Rule 12(f) of the Federal Rules of Civil Procedure permits the Court to strike "any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "Rule 12(f) motions are generally viewed with disfavor 'because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic.'" Waste Mgmt. Holdings, Inc. v. Gilmore, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Wright & Miller, Federal Practice & Procedure § 1380, 647 (2d ed.1990)).

ANALYSIS

I. The Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction of the Plaintiffs' Claim Pursuant to the South Carolina Time Sharing Act

As their second cause of action, the Plaintiffs allege a violation of the South Carolina Time Sharing Act. In their motions to dismiss, the Defendants contend that the Court lacks subject matter jurisdiction to consider this claim because the South Carolina Real Estate Commission ("REC") has exclusive or primary jurisdiction to make determinations concerning violations of the Act. Specifically, the Defendants contend that the REC is the only entity charged with investigating alleged violations of the Time Sharing Act, and the South Carolina Department of Labor, Licensing and Regulation ("LLR"), at the request of the REC, is the only entity with the authority to prosecute alleged violations of the Act. In support of their argument, the Defendants cite a case from the South Carolina Administrative Law Court, Tench v. S.C. Dep't of Labor, Licensing & Regulation, where the court addressed the issue of subject matter jurisdiction, stating:

> Petitioner's primary request is for a refund of the monies he paid for the timeshares in question. This Division clearly has no jurisdiction to order such relief. The Division's jurisdiction over decisions of the Real Estate Commission is limited to matters relating to disciplinary proceedings conducted by the Commission. See, e.g., S.C. Code Ann. § 1-23-600(D) (Supp. 1997); S.C. Code Ann. § 40-60-170 (Supp. 1997). **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.** See S.C. Code Ann. § 27-32-190 (Supp. 1997).

No. 1998-ALJ-11-0041-IJ, 1998 WL 320770, *1 (S.C. A.L.C. May 27, 1998) (emphasis added). In the alternative, the Defendants also urge the Court to abstain from ruling on this claim to avoid interfering with state regulatory affairs.

After consideration, the Court is not fully convinced by the Defendants' arguments. Although the Time Sharing Act does provide that the REC is responsible for enforcement and implementation of the Act, the Act also contemplates a private right of action to enforce the Act. Specifically, South Carolina Code Section 27-32-130 (the "enforcement and implementation chapter") provides:

> The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures 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 this chapter.**

S.C. Code Ann. § 27-32-130 (emphasis added). In addition, contrary to Tench, the plain language of the Act does not appear to limit the jurisdiction exclusively to the South Carolina Circuit Court. Although the Court recognizes the complex issues presented in this case, and the Court in no way wishes to interfere with an administrative agency, the Court is unable, at least at this time, to conclude that it lacks subject matter jurisdiction of the Plaintiffs' Time Sharing Act claim.[3] Likewise, the Court does not believe it is necessary to abstain from considering the Plaintiffs' claim at this time. Accordingly, the Defendants'

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[3] Although the issue before the Court appears to be novel, the Court notes that another case that includes claims arising under the Time Sharing Act is currently pending before the Honorable David C. Norton in this District, lending support to this Court's decision to permit the Plaintiffs to proceed at this time. See Reed et al. v. Big Water Resort, LLC et al., Civil Action No. 2:14-1583-DCN.

The Court also notes that the Defendants may be correct that the Plaintiffs failed to exhaust their administrative remedies before the REC and/or that the REC first must find a violation of the Time Sharing Act before the Plaintiffs can maintain a private cause of action. However, the Court believes these issues are more appropriate for consideration at the summary judgment stage.

motions to dismiss pursuant to Rule 12(b)(1) are denied.[4]

II. The Defendants' Motions to Dismiss for Failure to State a Claim

In their motions to dismiss, the Defendants urge the Court to dismiss all of the Plaintiffs' causes of action for failure to state a claim upon which relief may be granted. Ultimately, however, after an extensive review of the parties' arguments, and accepting as true the factual allegations in the complaint, the Court finds that the Plaintiffs have stated plausible claims for (1) fraud/intentional misrepresentation; (2) violation of the Time Sharing Act (pending potential certification of certain legal issues); (3) violation of SCUTPA; (4) negligent misrepresentation; (5) breach of fiduciary duty; (6) declaratory judgment; (7) negligent/grossly negligent hiring; (8) negligent/grossly negligent training; (9) negligent/grossly negligent supervision; and (10) negligent/grossly negligent retention. Accordingly, the Court finds that the Plaintiffs' claims survive the Defendants' motions to dismiss at this time.

III. The Defendants' Motions to Strike

As an initial matter, this Court previously granted the Defendants' motion to dismiss all of the Plaintiffs' claims related to their 2008 timeshare purchase as barred by the statute of limitations, and the Court now grants the Defendants' motion to strike the 2008 allegations from the second amended complaint.

In their motions to strike, the Defendants also ask the Court to strike certain material

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[4] As the Court indicated in its most recent order in Ross (Civil Action No. 9:15-2446), the Court will consider the Defendants' request to certify questions of law to the South Carolina Supreme Court regarding the scope and extent of the REC's jurisdiction of claims arising under the Time Sharing Act. To that end, the Court has requested that the Defendants (and the Plaintiffs, if they so desire) submit proposed questions for certification.

from the Plaintiffs' complaint, asserting that it is immaterial, impertinent, or scandalous pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Specifically, the Defendants ask the Court to strike: the Plaintiffs' RICO-based allegations, allegations against unnamed Defendants; allegations regarding the Defendants' trade secrets; allegations regarding certain unadjudicated complaints and lawsuits; allegations regarding alleged Time Sharing Act violations and the registration status of certain time sharing plans; and claims for relief not provided for by law. After review, the Court agrees with the Defendants that allegations regarding unnamed Defendants should be struck. The Court also agrees that allegations regarding the Defendants' trade secrets, which the Honorable Carmen T. Mullen previously determined to be confidential and protected from discovery, should be struck. Likewise, allegations stemming from a sealed transcript of an REC hearing should be struck. Lastly, however, the Court does not believe it is necessary to strike allegations presumably related to RICO. The Court also does not believe it is necessary to strike allegations regarding unadjudicated complaints and lawsuits or claims for relief not provided by law. The Court is aware of these issues and can resolve them at the appropriate time.

CONCLUSION

Based on the foregoing, the Court hereby grants in part and denies in part the following motions, as set forth herein: Defendant Hilton Head Island Development Company, LLC's motion to dismiss and to strike certain allegations (Entry 84) and Defendant Sunrise Vacation Properties, Ltd.'s motion to dismiss and to strike certain allegations (Entry 85). An amended scheduling order is forthcoming, thereby rendering the Plaintiffs' motion for reconsideration (Entry 79) moot. Also, in accordance with footnote 4 in this order and the Court's guidance in its recent order in Ross, the Defendants (and the

Plaintiffs, if they desire) may submit proposed questions of law for certification to the South Carolina Supreme Court within 30 days of the date of this order.

AND IT IS SO ORDERED.

Sol Blatt, Jr.
Senior United States District Judge

March 29, 2016
Charleston, South Carolina

#9

Exhibit "D"

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BEAUFORT)	
Albert R. LaFleur and Eileen LaFleur,)	
)	
Plaintiffs,)	
)	
v.)	
)	
Coral Resorts, LLC, Hilton Head)	ORDER
Hospitality, LLC d/b/a Hilton Head Guest)	
Services, Sunrise Vacation Properties, Ltd.,)	
Sherri J. Smith, Patrick Budnik, Steven)	Civil Action Number **2012-CP-07-03746**
Deutsch, Katherine Swisher, and Reba)	
Management, Inc.,)	
Defendants.)	
)	

2016 SEP -6 PM 4:25
JERRI ANN ROSEREAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter came before this court on the motions of Plaintiffs and Defendants for hearing on August 11 and 12, 2015. On March 7, 2016, this Court issued a Form 4 Order outlining its various rulings in this and associated cases and noting that this detailed Order was to come. Based upon this Court's review of the pleadings, motions, memoranda, and arguments at the hearing of this matter, I hereby find and rule as follows:

FINDINGS OF FACT

Albert R. LaFleur and Eileen M. LaFleur purchased a vacation timeshare property at the Island Links Resort on March 13, 2010, and in conjunction therewith executed an Island Links Horizontal Property Regime Tri-Ennial Purchase Contract (Contract).

The Plaintiffs' Second Amended Complaint alleges nine causes of action: fraud/intentional misrepresentation, negligent misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Act, declaratory judgment, breach of contract, breach of the duty of good faith and fair dealing, civil conspiracy, and rescission of contract. The parties filed the following motions[1] which are the subject of this Order:

1. Defendants Coral Resorts, LLC, Reba Management, Inc. ("Reba"), and Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services' ("HHH") Motion to Dismiss the Third, Fifth, Sixth, and Eighth Causes of Action of the Plaintiffs'

[1] This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which are the subject Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

Second Amended Complaint and to Dismiss all Causes of Action as to Reba and HHH Pursuant to Rule 12(b)(6), SCRCP (filed August 30, 2013);

2. Motion to Dismiss Sherri Smith (filed September 11, 2013);
3. Motion to Dismiss Katherine Swisher (filed September 11, 2013);
4. Motion to Dismiss Sunrise Vacation properties, Ltd., Patrick Budnik, and Steven Deutsch (filed September 11, 2013);
5. Plaintiffs' Motion for Partial Summary Judgment (January 11, 2014); and
6. Plaintiffs' six motions to Certify a Class (filed on September 12, 2014).

STANDARD OF REVIEW

I. Motion to Dismiss

"[A] defendant may move for the dismissal of a complaint on the basis that the plaintiff 'fail[ed] to state facts sufficient to constitute a cause of action.'" *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012) (quoting Rule 12(b)(6), SCRCP). "In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). "The [trial] court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." *Benedict Coll.*, 400 S.C. at 544, 735 S.E.2d at 521. "The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

II. Motion to Strike

Rule 12(f), SCRCP, provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous material." The Court's decision to grant a motion to strike is addressed to its sound discretion and will not be reversed absent an abuse of discretion. *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979). Although South Carolina's appellate courts have not clearly delineated what makes matter in a pleading immaterial or impertinent, federal courts have addressed these concepts n some depth, and South Carolina courts, in the absence of state precedent and where the Federal Rules of Civil Procedure are similar to the South Carolina Rules of Civil Procedure, regularly rely on federal courts' treatment of the federal rules as persuasive authority. *Dalon v. Golden Lanes, Inc.*, 320 S.C. 534, 541, 466 S.E. 2d 368, 372 (Ct. App. 1996). In ruling on 12(f) motions under the federal rules, federal courts have ruled that a motion to strike matter from a pleading will be granted if the moving party shows that the challenged material is so unrelated to the Plaintiffs' claims as to be unworthy of consideration

such that its presence in the pleading throughout the proceeding will be prejudicial to the moving party. *See Coleman v. McMillian,* No. 1:12-1916-JFA-svlt, 2012 WL 1249290 at *3 (D.S.C. Mar. 26, 2014) (quoting *McIntyre-Handy v. APAC Customer Servs.*, 2006 WL 721383 (E.D. Va. Mar. 20, 2006)).

CONCLUSIONS OF LAW

1. Defendants' motions to dismiss Plaintiffs' Second Amended Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, are denied.

2. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged fraud/intentional misrepresentation, such motions are denied at this time.

3. As to Defendants' motions to dismiss as to Plaintiffs' cause of action for alleged violation of the South Carolina Timesharing Act, such motions are denied at this time.

4. As to Defendants' motion to dismiss as to Plaintiffs' cause of action for alleged violation of the South Carolina Unfair Trade Practices Act, such motions are denied at this time.

5. As to Defendants' motions to dismiss Plaintiffs' cause of action for declaratory judgment, such motions are denied at this time.

6. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.

7. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract and rescission of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract and rescission of contract claims. Plaintiffs' claim fails because they have not alleged that any of Defendants breached any written term of the contract and because the parol evidence rule bars reliance on any alleged promises made before the parties entered into the Contract. The elements for breach of contract are the existence of a contract, its breach, and the damages caused by such breach. *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "When an agreement is reduced to writing, there is a strong implication the whole intention of the parties has been expressed and there is no agreement or intention contrary to that expressed." *Palmetto State Sav. Bank of South Carolina v. Barr*, 293 S.C. 252, 254, 359 S.E.2d 531, 532 (1987). Thus, the parol evidence rule "prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 471, 581 S.E.2d 496, 502 (Ct. App. 2003).

Moreover, where—as here—the parties include a merger clause in their written agreement, they further cement their intent to treat the writing as a complete integration of their agreement. *See Palmetto State*, 293 S.C. at 253-54, 359 S.E.2d at 532; *see also Wilson v.*

Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) ("A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement."). Plaintiffs have not alleged any breach of any term of the Contract. A plain reading of the Second Amended Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, the Contract contains a merger clause providing:

> This Sales Contract is binding upon the parties hereto and their heirs, legal representatives and assigns. This Contract will supersede any and all understandings and agreements between the parties hereto. It is mutually understood and agreed that this Contract along with the Loan Agreement represents the entire Contract between the parties hereto, and no representations or inducements prior hereto, which are not included in or embodied in this Contract shall be of any force and effect. This Contract may only be amended and modified by an instrument in writing signed by the parties hereto.

All of the alleged promises forming the basis of Plaintiffs' cause of action for breach of contract were allegedly made prior to the parties entering into the Contract. Those promises are barred by the parol evidence rule and, therefore, Plaintiffs' claim for breach of contract fails. Defendants' motion to dismiss Plaintiffs' breach of contract claim is **GRANTED**. Plaintiffs shall file and serve a Third Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

8. As to Plaintiffs' cause of action for breach of the covenant of good faith and fair dealing, such claim is subsumed under Plaintiffs' claim for breach of contract. *RoTec Services, Inc., v. Encompass Services, Inc.*, 359 S.C. 467, 471, 597 S.E.2d881 (Ct. App 2004). Because Plaintiffs' cause of action is dismissed, Defendants' motion to dismiss Plaintiffs' cause of action for breach of covenant of good faith and fair dealing is also **GRANTED.** Plaintiffs shall file and serve a Third Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged civil conspiracy, this Court grants Defendants' motion to dismiss and dismisses Plaintiffs' cause of action for civil conspiracy. "The tort of civil conspiracy has three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiffs; and (3) causing plaintiffs special damages." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to a common design." *Id.* (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006)). Furthermore, "[a] claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. Moreover, because the quiddity of a civil conspiracy claim is the special

damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id.* (internal citations omitted).

"An unexecuted civil conspiracy is not actionable. The conspiracy becomes actionable, however, once overt acts occur which proximately cause damage to the plaintiff. In a civil conspiracy claim, the plaintiff *must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint*, and the failure to properly plead such acts merits dismissal of the claim." *Id.* at 115-16, 682 S.E.2d at 874-75 (internal citations omitted) (emphasis added).

Finally, although a civil conspiracy involves acts that by their very nature are covert and not susceptible to proof by direct evidence, "a civil conspiracy cannot exist when the alleged acts arise in the context of the principal-agent relationship because by virtue of the relationship such acts do not involve separate entities." *McMillian v. Oconee Mem. Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886-87 (2006); *see also McClain v. Pactiv Corp.*, 360 S.C. 480, 486, 602 S.E.2d 87, 90 (Ct. App. 2004) (holding that "the law is clear that a corporation cannot conspire with itself").

Plaintiffs have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (2nd Am. Compl. ¶¶ 2 and 3.) However, a conspiracy cannot exist among a corporation and its agents, and South Carolina exempts entirely the principal-agent relationship from liability for civil conspiracy. Thus, Plaintiffs fail to allege facts sufficient to state the first element—a combination of two or more persons.

Second, Plaintiffs have not pled any facts indicating that Defendants or any of their agents entered into an agreement for the purpose of injuring Plaintiffs; any overt acts done pursuant to a common design; or any "additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the[ir] complaint." *Hackworth*, 385 S.C. at 115-16, 682 S.E.2d at 875. Thus, Plaintiffs fail to allege facts sufficient to state the second element, i.e. that two or more Defendants combined for the purpose of injuring them.

Even if Plaintiffs had sufficiently pled the first two elements of his civil conspiracy claim, this Court would dismiss this claim because Plaintiffs have pled no facts in support of any alleged entitlement to special damages. Although Plaintiffs has alleged they are entitled to special damages, none of the facts in their Second Amended Complaint—even if true—would differentiate their claim to general damages from a claim for special damages. *See Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim instead of specially listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Thus, Plaintiffs have not alleged facts sufficient to state a claim for civil conspiracy and Defendants' motions to dismiss are **GRANTED** and

Plaintiffs are ordered to file and serve a Third Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

10. As to Defendants' motions to dismiss Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnick, Steven Deutsch, Katherine Swisher, and Reba Management, Inc., such motions are **DENIED** at this time. However, such motions are tantamount to motions for more definite statement regarding the connection between such Defendants and Plaintiffs' claims. A more definite statement is required. Plaintiffs shall file and serve a Third Amended Complaint so as to make a more definite statement as to the acts of any individual party complained of in a particular cause of action and the identity of the person and the acts of that person complained of in a particular cause of action when alleging conduct through an agent of a corporate entity. Plaintiffs shall file such Third Amended Complaint within 30 days of receipt of notice of this Order.

11. Plaintiffs filed six motions, each styled as a Motion to Certify a Class. These motions are matters of record only in *Lafleur v. Coral Resorts, LLC, et al.*, Civil Action No. 2012-CP-07-3746. Generally, the motions seek class certification of one sort or another related either to certain documents used by Coral Resorts in the sales of timeshares at resorts on Hilton Head or specific provisions of the contracts executed by purchasers of timeshares at the time of sale. Plaintiffs also seek creation of a class regarding sales of timeshares by a particular salesman. The Court finds that Plaintiffs' motions are improper and are due to be denied.

First and most notable, this case has not been brought in a representative capacity on behalf of any group of persons. The Second Amended Complaint contains no allegations of class representation, nor are any of the numerous causes of action brought in a representative capacity. Rule 23, SCRCP, is crystal clear – "One or more members of a class may sue or be sued as representative parties on behalf of all . . . ." As Rules 3 and 8 also make clear an action commences with the filing and service of the complaint, and the complaint is the document that sets forth a plaintiff's claims and causes of actions. Nowhere in the Rules of Civil Procedure is there a mechanism for class treatment of matters in the way in which Plaintiffs suggest. Because Plaintiffs' pleadings do not comply with Rule 23 and they have not asserted claims as class representatives, their six motions for class certification must be denied.

In addition, Plaintiffs have submitted no evidence of any sort to establish their compliance with Rule 23's requirements for certification of a class. All they have submitted is a collection of bare allegations and legal conclusions. Their arguments are not based upon any evidence or any determinations by the Court or any regulatory body regarding the documents, sales practices, or regulatory status of any timeshare sales person or of the developer itself. In

short, Plaintiffs have done nothing to demonstrate the appropriateness of class certification, and on these additional grounds, their motions must be denied.

Lastly, and independent of any other reasons, Plaintiffs have brought claims alleging that "Defendants" violated the South Carolina Unfair Trade Practices Act. By its own terms the South Carolina Unfair Trade Practices Act prohibits bringing claims in a representative capacity. As such, Plaintiffs' Motions to Certify a Class must be denied.

Having considered the pleadings, motions, and memoranda, and having heard oral argument from counsel for the parties, Plaintiffs' six Motions to Certify a Class are **DENIED**.

WHEREFORE, based upon the foregoing, it is hereby ordered, adjudged and decreed:

A. Defendants' motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP are **DENIED.**

B. Defendants' motions to dismiss Plaintiffs' causes of action for fraud/intentional misrepresentation, negligent misrepresentation, declaratory judgment, alleged violation of the South Carolina Vacation Timesharing Act, and alleged violation of the South Carolina Unfair Trade Practices Act are **DENIED** at this time.

C. Defendants' motions to dismiss Plaintiffs' causes of action for alleged breach of contract, rescission, breach of the duty of good faith and fair dealing, fiduciary duty, and civil conspiracy are **GRANTED** and these causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve a Third Amended Complaint with these cause of action removed within 30 days of receipt of notice of this Order.

D. Defendants' motions to dismiss Hilton Head Hospitality, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnick, Steven Deutsch, Katherine Swisher, and Reba Management, Inc. are **DENIED** at this time pending Plaintiffs' amendment of the Second Amended Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.

E. Plaintiffs' six Motions to Certify a Class are **DENIED**.

F. Defendants shall file and serve their answers, motions, or other responses to Plaintiffs' Amended Complaint 30 days after receipt of Plaintiffs' Third Amended Complaint.

AND IT IS SO ORDERED.

J. Derham Cole, Presiding Judge

August 31, 2016

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 to Brief of *Amicus Curiae* Myrtle Beach Area Chamber of Commerce complies with Rule 211(b), SCACR.

Joseph DuBois, Attorney
NAERT AND DUBOIS, LLC

January 25, 2017

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 SERVICE

The undersigned hereby certifies that on the date indicated he served counsel for the Defendants with a copy of the Plaintiffs' Reply Brief to Brief of *Amicus Curiae* Myrtle Beach Area Chamber of Commerce by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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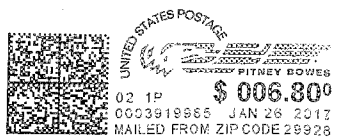
January 26, 2017



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