

EXHIBIT 4

RECEIVED
JUN 14 2017
SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-07 - 03746 and consolidated cases

Albert R. LAFLEUR and Eileen LAFLEUR and consolidated cases,

CORAL RESORTS, LLC, HILTON HEAD ISLAND DEVELOPMENT COMPANY, ISLAND LINKS Owners Association, Inc., PORT O' CALL Owners Association, Inc. SUNRISE Vacation Properties, Ltd., REBA Management, Inc., K. Michael BARFIELD, B. Dean PIERCE, Sherri J. SMITH, Sheldon STANHOPE, Phil LUCCHESSE, and John BEARD,

RECEIVED

JUN 14 2017

PLAINTIFF(S)

SC Court of Appeals

DEFENDANT(S)

Submitted by: the Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 3 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

These matters are before this Court on motions of the plaintiffs pursuant to rules 23, 37, 56, SCRPC, and to appoint arbitrators, and to confirm an arbitration award, and on motions of the defendants pursuant to rules 12, 26, and 37, SCRPC.

Counsel for each party is instructed to prepare and present a joint proposed order for the Court's consideration. Counsel for the prevailing party in a particular motion shall prepare that portion of the proposed order applicable to his/her client to be included in the joint order.

RECEIVED

ORDER INFORMATION

JUN 14 2017

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

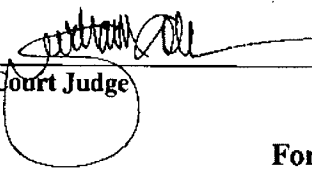
SC Court of Appeals

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
--	--	--

		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		


Circuit Court Judge

2053

Judge Code

03/03/16

Date

For Clerk of Court Office Use Only

This judgment was entered on the 7 day of March, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 7 day of Mar, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Joseph DuBois, Esq.

Zach S. Naert, Esq.

Post Office Box 7228

Hilton Head Island, South Carolina 29938

ATTORNEY(S) FOR THE PLAINTIFF(S)

James E. Smith, Jr., Esq.

1422 Laurel Street

Columbia, South Carolina 29201

Nekki Shutt, Esq.

Post Office Box 1390

Columbia, South Carolina 29202

Thornwell F. Sowell, Esq.

Bess J. Durant, Esq.

Post Office Box 11449

Columbia, South Carolina 29211

H. Cooper Wilson, III, Esq.

Post Office Box 1508

Charleston, South Carolina 29402

Drew A. Laughlin, Esq.

Post Office Drawer 21119

Hilton Head Island, South Carolina 29925

David W. Overstreet, Esq.

Post Office Box 22528

Charleston, South Carolina 29413

Angus H. Macaulay, Esq.

Post Office Drawer 2426

Columbia, South Carolina 29202

Mark Goddard, Esq.

Post Office Box 2126

Myrtle Beach, South Carolina 29578

Richard S. Dukes, Jr., Esq.

Post Office Box 22129

Charleston, South Carolina 29413

T. William McGee, Esq.

1320 Main Street

Columbia, South Carolina 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: Linda Moffitt

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

- (1) Defendants' motion to dismiss on the ground of a lack of subject matter jurisdiction is denied.
- (2) Defendants' motion to dismiss on the ground of passage of the statutory limitations period is denied without prejudice pending the parties engaging in discovery limited to the issue of when each of the plaintiffs knew or should have known that (s)he had suffered "injury" and that a claim against a party had accrued.
- (3) Defendants' motion to dismiss the cause of action for breach of contract is granted.
- (4) Defendants' motion to dismiss the action for declaratory judgment is denied.
- (5) Defendants' motion to dismiss the cause of action for fraud/misrepresentation is denied.
- (6) Defendants' motion to dismiss the cause of action based upon violation of the UTPA is denied.
- (7) Defendants' motion to dismiss the cause of action based upon violation of the TSA is denied.
- (8) Defendants' motion to dismiss the cause of action for breach of fiduciary duty is granted.
- (9) Defendants' motion to dismiss the cause of action based upon a violation of the CPC is denied.
- (10) Defendants' motion to dismiss the cause of action for civil conspiracy is granted.
- (11) Defendant's motion to dismiss the cause of action based upon a violation of the "Statute of Elizabeth" is granted.
- (12) Defendants' motion to dismiss the cause of action for negligent hiring, selection, training, and supervision is denied pending plaintiffs being required to make a more definite statement as to the person and acts complained of.
- (13) Defendants' motion to dismiss defendant RCI, LLC as a party is granted.
- (14) Defendants' motion to dismiss defendants Barfield, Pierce, CSOA, SVP, Smith, Swisher, Singleton, Stanhope, Fulkert, Reba, HHH, Coral Resorts, CRH, and Lancaster is denied pending plaintiffs being required to make a more definite statement as to the acts of an 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.
- (15) Defendants' motion to strike particular allegations of the complaints is granted.
- (16) Plaintiffs' motions to appoint arbitrators in the Ettlinger, Breton, Madden, Atkinson, Dence, McClellan, and McQuarrie matters is granted.
- (17) Plaintiffs' motion to confirm an arbitration award is granted.
- (18) Plaintiffs' motions for partial summary judgment are denied pending completion of discovery.
- (19) Plaintiffs' motion for class certification is denied.
- (20) Plaintiffs' motion to compel discovery is granted pursuant to a scheduling order to be entered into between the parties.
- (21) Plaintiffs' motion to compel discovery of "complaints" made by non-parties to any of these pending actions is granted

to the extent that they are identical or "strikingly similar" to the complaints which form the basis of these actions and provided the complainant's identifying information is redacted.

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
Albert R. LaFleur and Eileen LaFleur,)
Plaintiffs,)
v.)
Coral Resorts, LLC, Hilton Head)
Hospitality, LLC d/b/a Hilton Head Guest)
Services, Sunrise Vacation Properties, Ltd.,)
Sherri J. Smith, Patrick Budnik, Steven)
Deutsch, Katherine Swisher, and Reba)
Management, Inc.,)
Defendants.)

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals
ORDER

Civil Action Number **2012-CP-07-03746**

2016 SEP -6 PM 4:25
JERRI ANN FOSBERG
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 motions¹ 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." *Fleteau 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 in 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

42

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-svl, 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), SCRPC, 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.*

Handwritten signature

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.2d 881 (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, SCRCF, 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.

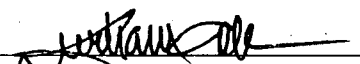
C. Defendants' motions to dismiss Plaintiffs' causes of action for alleged breach of contract, rescission, breach of the duty of good faith and fair dealing, fiduciary duty, and civil conspiracy are **GRANTED** and these causes of action are dismissed without prejudice. Plaintiffs are ordered to file 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. Deham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

John J. Meilert,

Plaintiffs,

v.

Coral Resorts, LLC, Coral Holdings, LLC,
Sunrise Vacation Properties, Ltd., Sherri J.
Smith, Port O' Call Owners Association,
Inc., Coral Reef Owners Association, Inc.,
Island Links Owners Association, Inc., and
Reba Management, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals
ORDER

Civil Action Number 2013-CP-07-01966

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

This matter came before this Court on the motions of Plaintiff 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

John J. Meilert first purchased a vacation timeshare property at the Port O'Call Resort on May 8, 2010, and in conjunction therewith executed a Port O' Call Horizontal Property Regime Purchase Contract (Contract 1). Plaintiff purchased a second vacation timeshare property at the Coral Reef Resort on April 24, 2011, and in conjunction therewith executed a Coral Reef Tri-Ennial Purchase Contract (Contract 2). On October 2, 2011, Plaintiff purchased a third timeshare property at the Island Links Resort with the equity in his Port O'Call and Coral Reef properties being applied to this purchase and in conjunction therewith executed an Island Links Horizontal Property Regime Bi-Ennial Contract (Contract 3).

On July 31, 2013, Plaintiff filed a Complaint against Defendants alleging nine causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, breach of the duty of good faith and fair dealing, negligent misrepresentation, breach of fiduciary duty, and civil conspiracy. The parties filed the following motions¹ which are the subject of this Order:

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.

1. Defendants Coral Resorts, LLC, Coral Holding, LLC; and Reba Management, Inc.'s Motion to Dismiss and Motion to Strike (filed September 12, 2013);
2. Motion to Dismiss Sherri J. Smith (filed September 13, 2013);
3. Motion to Dismiss Sunrise Vacation Properties, Ltd. (filed September 13, 2013);
4. Motion to Dismiss on Behalf of Port O' Call Owners Association, Inc., Coral Reef Owners Association, Inc., and Island Links Owners Association, Inc (filed September 26, 2013);
5. Plaintiff's Motion for Partial Summary Judgment (filed April 25, 2014); and
6. Plaintiff's 2nd Motion for Partial Summary Judgment (filed April 25, 2014).

STANDARDS 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), SCRPC). "In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, 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), SCRPC, 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 in 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 Plaintiff's 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 Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, is denied.
2. As to Defendants' motions to dismiss based upon the passage of the statutory limitations period, such motions are denied at this time without prejudice pending the parties engaging in discovery limited to the issue of when the plaintiff knew or should have known that they had suffered an "injury" and that a claim against one or more of Defendants had accrued.
3. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged fraud/intentional misrepresentation, such motions are denied at this time.
4. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
5. As to Defendants' motions to dismiss as to Plaintiff's cause of action for alleged violation of the South Carolina Unfair Trade Practices Act, such motions are denied at this time.
6. As to Defendants' motions to dismiss Plaintiff's cause of action for declaratory judgment, such motions are denied at this time.
7. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged negligent misrepresentation, such motions are denied at this time.
8. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiff's breach of contract claim. Plaintiff's claim fails because he has not alleged that any of Defendants breached any written term of the contract and because the parole evidence rule bars reliance on any alleged promises made before the parties entered into any of the Contracts. 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 parole 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."). The Plaintiff has not alleged any breach of any term of any of the Contracts. A plain reading of the Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, Contract 3 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 Plaintiff's cause of action for breach of contract were allegedly made prior to the parties entering into the Contracts. Those promises are barred by the parol evidence rule and, therefore, Plaintiff's claim for breach of contract fails. Defendants' motions to dismiss Plaintiff's breach of contract claim are **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

9. As to Plaintiff's cause of action for breach of the covenant of good faith and fair dealing, such claim is subsumed under Plaintiff's claim for breach of contract. *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 471, 597 S.E.2d 881 (Ct. App. 2004). Because Plaintiff's cause of action is dismissed, Defendants' motions to dismiss Plaintiff's included allegation of breach of the covenant of good faith and fair dealing are also **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiff's cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiff must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d

629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiff has failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiff has not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiff has not pled what action the Defendants should or could have taken to protect the Plaintiff. Finally, Plaintiff has not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiff. Consequently, Defendants' motions to dismiss Plaintiff's breach of fiduciary duty claim are **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of this Order.

11. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged civil conspiracy, this Court grants Defendants' motion to dismiss and dismisses Plaintiff's 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").

The Plaintiff here has failed to state a claim of civil conspiracy for several reasons. First, Plaintiff pleads that Defendants are agents of one another. (Compl. ¶¶ 10 and 11.) 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, Plaintiff fails to allege facts sufficient to state the first element—a combination of two or more persons.

Second, Plaintiff has not pled any facts indicating that Defendants or any of his agents entered into an agreement for the purpose of injuring Plaintiff; 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, Plaintiff fails 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 Plaintiff had sufficiently pled the first two elements of his civil conspiracy claim, this Court would dismiss this claim because Plaintiff has pled no facts in support of any alleged entitlement to special damages. Although Plaintiff has alleged he is entitled to special damages, none of the facts in his Complaint—even if true—would differentiate his 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, Plaintiff has not alleged facts sufficient to state a claim for civil conspiracy and Defendants’ motions to dismiss are **GRANTED** and Plaintiff is ordered to file and serve an Amended Complaint with this cause of action if removed within 30 days of receipt of notice of this Order.

12. As to Defendants’ Motion to Strike paragraphs 12, 45, 72, and 73 from the Complaint, based upon the argument presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motions to strike are **GRANTED** and Plaintiff shall file and serve an Amended Complaint with these paragraphs removed within 30 days of receipt of notice of this Order.

13. As to Defendants’ motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Port O’ Call Owners Association, Inc., Coral Reef Owners Association, Inc., Island Links Owners Association, Inc., 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 Plaintiff’s claims. Such more definite statement is required. Plaintiff shall file and serve an 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. Plaintiff shall file such Amended Complaint within 30 days of receipt of notice of this Order.

14. Plaintiff’s motions for partial summary judgment filed on April 25, 2014, are **DENIED** based upon the arguments presented in Defendants’ memoranda in opposition to Plaintiff’s motions for partial summary judgment and oral argument at the hearing of this matter.

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 on the basis of the expiration of the statute of limitations are **DENIED** without prejudice pending further discovery.
- C. Defendant's motions to dismiss Plaintiff's causes of action for fraud/negligent 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.
- D. Defendants' motions to dismiss Plaintiff's causes of action for alleged breach of contract, breach of duty of good faith and fair dealing, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiff shall file an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.
- E. Defendants' motions to strike paragraphs 12, 45, 72, and 73 from the Complaint are **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.
- F. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd, Sherri J. Smith, Port O' Call Owners Association, Inc., Coral Reef Owners Association, Inc., Island Links Owners Association, Inc., and Reba Management, Inc. are **DENIED** at this time pending Plaintiff's amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.
- G. Plaintiff's two motions for partial summary judgment are **DENIED**.
- H. Defendants shall file and serve their answers, motions, or other responses to Plaintiff's Amended Complaint 30 days after receipt of Plaintiff's Amended Complaint.

AND IT IS SO ORDERED.


J. DeHann Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Dennis and Margaret McCloskey,

Plaintiffs,

v.

Hilton Head Island Development Company,
LLC d/b/a Coral Resorts, LLC, Hilton Head
Hospitality, LLC d/b/a Hilton Head Guest
Services, Sunrise Vacation Properties, Ltd.,
Coral Sands Owners Association, Inc.,
Sherri J. Smith, and Sydney Karp,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals

ORDER

Civil Action Number 2013-CP-07-02835

2015 SEP -6 PM 4:25
CLERK OF COURT S.C.

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

On September 18, 2011, Dennis McCloskey and Margaret McCloskey purchased a vacation timeshare property at the Coral Sands Resort, and in conjunction therewith executed a Coral Sands Property Regime Tri-Ennial Purchase Contract (Contract).

On November 4, 2013, Plaintiffs filed an action alleging eight 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 Practices Act, breach of contract/breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, civil conspiracy, and declaratory judgment. The parties¹ filed the following motions² which are the subject of this Order:

1. Defendants' Hilton Head Island Development Company, LLC and Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services' Motion to Dismiss Complaint Pursuant to Rule 12(b)(6) and (b)(1), SCRC Motion to Strike, Pursuant to Rule 12(f), SCRC (filed February 12, 2014);

¹ Sydney Karp has not been served with the Summons and Complaint.

² This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which are the subject of Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

91

2. Motion to Dismiss Sherri J. Smith (filed February 13, 2014);
3. Motion to Dismiss Sunrise Vacation Properties, Ltd. and Sidney Karp (filed February 13, 2014);
4. Defendant Coral Sands Owners Association, Inc.'s Motion to Dismiss Complaint Pursuant to Rule 12(b)(6) and Rule 12(b)(1) (filed March 20, 2014);
5. Plaintiffs' Motion for Partial Summary Judgment (filed March 5, 2014); and
6. Plaintiffs' Second Motion for Partial Summary Judgment (filed April 15, 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 in 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 Plaintiff's 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCF, 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 Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.

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

5. As to Defendants' motions 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.

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

7. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 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 also included an allegation of the breach of the implied covenant duty of good faith and fair dealing in their cause of action for breach of contract. 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.2d 881 (Ct. App. 2004). Because Plaintiffs’ cause of action is dismissed, Defendants’ motion to dismiss Plaintiffs’ included allegation of breach of the covenant of good faith and fair dealing is also **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

8. As to Defendants’ motions to dismiss Plaintiffs’ cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs’ cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (quoting *O’Shea*

v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action the Defendants should or could have taken to protect the Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 8 and 9.) 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 have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

10. As to Defendants’ motion to strike paragraphs 33, 61, 62, and 67 from the Complaint, based upon the argument presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motion to Strike is **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

11. As to Defendants’ motions to dismiss Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Coral Sands Owners Association, Inc., Sherri J. Smith, and Sydney Karp, 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 an Amended Complaint so as to make a more definite statement as to the acts of an 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 Amended Complaint within 30 days of receipt of notice of this Order.

AG

12. Plaintiffs' motions for partial summary judgment are **DENIED** based upon the arguments in Defendants' motions, supporting memoranda, and oral arguments.

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), SCRPC are **DENIED**.

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

C. Defendants' motions to dismiss Plaintiffs' causes of action for alleged breach of contract/breach of implied covenant of good faith and fair dealing, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.

D. Defendants' motions to dismiss Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Coral Sands Owners Association, Inc., Sherri J. Smith, and Sydney Karp are **DENIED** at this time pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.

E. Defendants' motions to strike paragraphs 33, 61, 62, and 67 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.

F. Plaintiffs' two motions for partial summary judgment are **DENIED**.

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

AND IT IS SO ORDERED.


J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Alexander Haill and Rebecca Key,

Plaintiffs,

v.

Coral Resorts, LLC, Coral Sands
Owners Association, Inc., Sunrise
Vacation Properties, Ltd., Reba
Management, Inc., Sherri J. Smith,
Robert Lauderman, Frank McKinney,
Lachell Taylor, Steve Deutsch,
Phil Luchese, and Port O' Call
Owners Association, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals
ORDER

2016 SEP - 6 PM 4:25
JERRY A. ROSEBEAN
CLERK OF COURT
BEAUFORT COUNTY, S.C.

Civil Action Number **2013-CP-07-02890**

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

Alexander Haill and Rebecca Key first purchased a vacation timeshare property at the Coral Reef Resort on May 6, 2008, and in conjunction therewith executed a Coral Reef Bi-Ennial Purchase Contract (Contract 1). Plaintiffs traded in their Coral Reef vacation timeshare property and purchased a second vacation timeshare property at the Port O' Call Resort on February 23, 2009. In conjunction with their second purchase, Plaintiffs executed a Port O' Call Horizontal Property Regime Purchase Contract (Contract 2). Plaintiffs traded in their Port O' Call vacation timeshare property and purchased three vacation timeshare properties at the Coral Sands Resort on March 23, 2010, and applied the equity in their Port O' Call timeshare property to their Coral Sands vacation timeshare properties. In conjunction with these three purchases, Plaintiffs executed three Coral Sands Horizontal Property Regime Tri-Ennial Purchase Contracts (Contract 3, Contract 4, and Contract 5).

On November 12, 2013, Plaintiffs filed their Complaint alleging nine causes of action: fraud/intentional misrepresentation, violation of the South Carolina Vacation Timesharing Act, violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and violation

of the South Carolina Consumer Protection Code. The parties¹ filed the following motions² which are the subject of this Order:

1. Coral Resorts, LLC and Reba Management, Inc.'s Motion to Dismiss Pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7), SCRCP, and Motion to Strike, Pursuant to Rule 12(f), SCRCP (filed February 12, 2014);
2. Motion to Dismiss Sunrise Vacation Properties, Ltd., Robert Lauderman, Frank McKinney, Lachell Taylor, and Steve Deutsch (filed February 13, 2014);
3. Motion to Dismiss Sherri J. Smith (filed February 13, 2014);
4. Defendants Port O'Call Owners Association, Inc. and Coral Sands Owners Association, Inc.'s Motion to Dismiss Complaint; and
5. Plaintiffs' Motion for Partial Summary Judgment (filed July 17, 2015).

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." *Fleateau 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 in some depth, and South Carolina courts, in the absence of state precedent and

¹ Phil Lucchese has not been served with the Summons and Complaint.

² 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.

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 Plaintiff's 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-svt, 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC, are denied.

2. Defendants' motion to dismiss for Plaintiffs' failure to name an indispensable party, pursuant to Rule 12(b)(7), SCRPC, is denied at this time pending Plaintiffs' filing an Amended Complaint adding Coral Holdings, LLC as a defendant.

3. As to Defendants' motions to dismiss based upon the passage of the statutory limitations period, such motions are denied at this time without prejudice pending the parties engaging in discovery limited to the issue of when Plaintiffs knew or should have known that they had suffered an "injury" and that a claim against one or more of Defendants had accrued.

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

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

6. As to Defendants' motions 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.

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

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

9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of South Carolina Consumer Protection Code, such motions are denied at this time.

10. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of



contract claim. 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 any of the Contracts. 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 any of the Contracts. A plain reading of the Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, Contract 3, Contract 4, and Contract 5 contain 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 Contracts. 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** and Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs'

AA

cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED** and Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

12. 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 plaintiff; and (3) causing plaintiff 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 citation 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 13 and 14.) 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 have alleged they are entitled to special damages, none of the facts in their 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 conspiracy and Defendants’ motions to dismiss are **GRANTED** and Plaintiffs are ordered to file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

13. As to Defendants’ Motion to Strike paragraphs 17, 20, 23, 26, 27, 32, 61, 62, and 65 from the Complaint, based upon the argument presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motion to Strike is **GRANTED** and Plaintiffs shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

14. As to Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Robert Lauderman, Frank McKinney, Lachell Taylor, Steve Deutsch, Port O' Call Owners Association, Inc., Coral Sands Owners Association, Inc., 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. Such more definite statement is required. Plaintiffs shall file and serve an 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 alleged conduct through an agent of a corporate entity. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.

15. Plaintiffs' motion for partial summary judgment filed on July 17, 2015, is **DENIED** based upon the arguments presented in Defendants' motions, memoranda in opposition to Plaintiffs' motion for partial summary judgment, and oral argument at the hearing of this matter.

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' motion to dismiss for failure to name an indispensable party, pursuant to Rule 12(v)(7), SCRCP, is **DENIED** at this time pending Plaintiffs' filing and serving an Amended Complaint identifying Coral Holdings, LLC as a Defendant.

C. Defendants' motions to dismiss on the basis on expiration of the statute of limitations are **DENIED** without prejudice pending further discovery.

D. Defendants' motions to dismiss Plaintiffs' causes of action for fraud/intentional misrepresentation, negligent misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, and alleged violation of the Consumer Protection Code are **DENIED** at this time.

E. Defendants' motions to dismiss Plaintiffs' causes of action for alleged breach of contract, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice and Plaintiffs shall file and serve an Amended Complaint removing those causes of action within 30 days of receipt of notice of this Order.

F. Defendants' motions to strike paragraphs 17, 20, 23, 26, 27, 32, 61, 62, and 65 from the Complaint are **GRANTED** and Plaintiffs shall file an Amended Complaint with such paragraphs removed within 30 days of receipt of notice of this Order.

G. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Robert Lauderman, Frank McKinney, Lachell Taylor, Steve Deutsch, Port O' Call

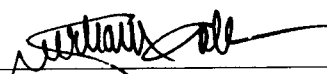


Owners Association, Inc., Coral Sands Owners Association, Inc., and Reba Management, Inc. are **DENIED** at this time pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.

H. Plaintiffs' motion for partial summary judgment is **DENIED**.

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

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

John King and Laura King,

Plaintiffs,

v.

Coral Resorts, LLC, Port O'Call Owners
Association, Inc., Island Links Owners
Association, Inc., Sunrise Vacation
Properties, Ltd., Reba Management, Inc.,
Coral Holdings, LLC, and Sherri J. Smith,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals

ORDER

Civil Action Number 2013-CP-07-02967

2016 SB-6 PH 4:25
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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:

FINDING OF FACTS

John King and Laura King first purchased a vacation timeshare property at the Island Links Resort on March 23, 2008, and in conjunction therewith executed an Island Links Horizontal Property Regime Tri-Ennial Purchase Contract (Contract 1). The Kings purchased a second vacation timeshare property at the Port O'Call Resort on February 12, 2014, and applied the equity in their Island Links timeshare property to their second purchase. In conjunction with their second purchase, Plaintiffs executed a Port O'Call Horizontal Property Regime Purchase Contract (Contract 2).

On November 11, 2013, Plaintiffs filed their Complaint, alleging nine causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and alleged violation of the Consumer Protection Code. The parties filed the following motions¹ which are the subject of this Order:

1. Defendants Coral Resorts, LLC, Reba Management, Inc., and Coral Holdings, LLC's

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

CH

Motions to Dismiss Complaint Pursuant to Rules 12(b)(6) and 12(b)(1), SCRCP, and to Strike, Pursuant to Rule 12(f), SCRCP (filed February 12, 2014);

2. Motion to Dismiss Sunrise Vacation Properties, Ltd. (filed February 13, 2014);
3. Motion to Dismiss Sherri J. Smith (filed February 13, 2014); and,
4. Defendants Port O'Call Owners Association, Inc. and Island Links Owners Association, Inc.'s Motion to Dismiss Complaint (filed February 14, 2014).

STANDARDS 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 in 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC, are denied.
2. As to Defendants' motions to dismiss based upon the passage of the statutory limitations period, such motions are denied at this time without prejudice pending the parties engaging in discovery limited to the issue of when Plaintiffs knew or should have known that they had suffered an "injury" and that a claim against one or more of Defendants had accrued.
3. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for alleged fraud/intentional misrepresentation, 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 Vacation Timesharing Act, such motions are denied at this time.
5. As to Defendants' Motion to Dismiss as to Plaintiffs' cause of action for South Carolina Unfair Trade Practices Act, such motions are denied at this time.
6. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
7. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.
8. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for alleged declaratory judgment, such motions are denied at this time.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 any of the Contracts. 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 any of the Contracts. A plain reading of the Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, Contract 2 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 Contracts. 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** and Plaintiffs are ordered to file and serve an 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 Plaintiffs’ cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs’ cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (quoting *O’Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot

be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action the Defendants should or could have taken to protect the Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. As to Defendants' Motion 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 9 and 10.) 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 have alleged they are entitled to special damages, none of the facts in their 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**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

12. As to Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Port O' Call Owners Association, Inc., Island Links Owners Association, Inc., 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 an 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 Amended Complaint within 30 days of receipt of notice of this Order.

13. As to Defendants' Motion to Strike paragraphs 59 and 60 from the Complaint, based upon the argument presented in Defendants' motions, supporting memoranda, and oral argument before this Court, Defendants' motion to Strike is **GRANTED**.

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), SCRPC are **DENIED**.

B. Defendants' motions to dismiss on the basis of expiration of the statute of limitations is **DENIED** without prejudice pending further discovery.

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

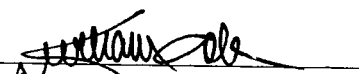
D. Defendants' motions to dismiss Plaintiffs' causes of action for alleged breach of contract, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.

E. Defendants' motions to strike paragraphs 59 and 60 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.

F. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Port O'Call Owners Association, Inc., Island Links Owners Association, Inc., and Reba Management, Inc. are **DENIED** at this time pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED.


J. Derham Cole, Presiding Judge

August 31, 2016



STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

James Wilson and Deborah Wilson,

Plaintiffs,

v.

Coral Resorts, LLC, Hilton Head Island
Development Company, LLC, Island Links
Owners Association, Inc., Port O'Call Owners
Association, Inc., Sunrise Vacation Properties,
Ltd., Reba Management, Inc., K. Michael
Barfield, B. Dean Pierce, Sherri J. Smith,
Sheldon Stanhope, Phil Lucchesse, and John
Beard,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals

ORDER

Civil Action Number **2014-CP-07-00361**

2016 SEP -6 PM 4:26
JERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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:

FACTS

On February 26, 2010, James Wilson and Deborah Wilson purchased a vacation timeshare property at the Island Links Resort, executing an Island Links Horizontal Property Regime Bi-Ennial Purchase Contract in conjunction therewith (Contract 1). On February 25, 2011, Plaintiffs upgraded their Island Links vacation timeshare property, transferring their equity and executing a new Island Links Horizontal Property Regime Bi-Ennial purchase contract (Contract 2). On March 1, 2012, Plaintiffs again upgraded their Island Links Resort vacation timeshare property, transferring their equity and executing a Port O' Call Horizontal Property Regime purchase contract. (Contract 3).

On February 19, 2014, Plaintiffs filed an action asserting nine causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and

alleged violation of the South Carolina Consumer Protection Code. The parties filed the following motions¹ which are the subject of this Order:

1. Defendants Coral Resorts, LLC, Hilton Head Island Development Company, LLC, Reba Management, Inc., and B. Dean Pierce's Motions to Dismiss Complaint and to Strike Certain Allegations from Complaint (filed March 31, 2014);
2. Defendants Island Links Owners Association, Inc. and Port O'Call Owners Association, Inc.'s Motion to Dismiss Complaint (filed April 3, 2014);
3. Defendant K. Michael Barfield's Motion to Dismiss (filed April 4, 2014);
4. Motion to Dismiss Sunrise Vacation Properties, Ltd., Sheldon Stanhope, and John Beard (filed April 7, 2014);
5. Motion to Dismiss Sherri J. Smith (filed April 7, 2014); and
6. Motion to Dismiss Phil Lucchesse (filed August 11, 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 in some depth, and South Carolina courts, in the absence of state precedent and

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.

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 Plaintiff's 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-svl, 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, are denied.
2. As to Defendants' motions to dismiss based upon the passage of the statutory limitations period, such motions are denied at this time without prejudice pending the parties engaging in discovery limited to the issue of when Plaintiffs knew or should have known that they had suffered an "injury" and that a claim against one or more of Defendants had accrued.
3. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for fraud/intentional misrepresentation, such motions are denied at this time.
4. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
5. 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.
6. As to Defendants' Motion to Dismiss Plaintiffs' cause of action for declaratory judgment, such motions are denied at this time.
7. As to Defendants' motions to dismiss Plaintiffs' cause of action for negligent misrepresentation, such motions are denied at this time.
8. As to Defendant's motions to dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 any of the Contracts. The elements

9/3

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 any of the Contracts. A plain reading of the Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, Contract 3 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 Contracts. 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs' cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty;

and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 15 and 16.) 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 their 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 have alleged they are entitled to special damages, none of the facts in their 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 state a claim for civil conspiracy and Defendants’ motions to dismiss are **GRANTED** and Plaintiffs are ordered to file and serve an Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

As to Defendants’ motion to strike paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 54, 55, 69, 70, 71, 72, 73, 81, 82, 85, 95, 97, and subheading between 17 and 18 from the Complaint, based upon the argument presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motion to Strike is **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

As

12. As to Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sheldon Stanhope, John Beard, Phil Lucchesse, Sherri J. Smith, Port O' Call Owners Association, Inc., Island Links Owners Association, Inc., K. Michael Barfield, B. Dean Pierce, 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 an 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 Amended Complaint within 30 days of receipt of notice of this Order.

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

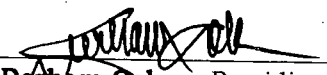
- A. Defendants' motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC are **DENIED**.
- B. Defendants' motions to dismiss on the basis of expiration of the statute of limitations are **DENIED** without prejudice pending further discovery.
- C. Defendant's motions to dismiss Plaintiffs' causes of action for fraud/intentional misrepresentation, negligent misrepresentation, declaratory judgment, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, and alleged violation of the South Carolina Consumer Protection Code are **DENIED** at this time.
- D. Defendants' motions to dismiss Plaintiffs' causes of action for breach of contract, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve Amended Complaint removing these causing of action within 30 days of receipt of notice of this Order.
- E. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sheldon Stanhope, John Beard, Phil Lucchesse, Sherri J. Smith, Port O' Call Owners Association, Inc., Island Links Owners Association, Inc., K. Michael Barfield, B. Dean Pierce, and Reba Management, Inc. are **DENIED** at this time pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.
- F. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sheldon Stanhope, John Beard, Phil Lucchesse, Sherri J. Smith, Port O' Call Owners Association, Inc., Island Links Owners Association, Inc., K. Michael Barfield, B. Dean Pierce, and Reba Management, Inc. are **DENIED** at this time pending Plaintiffs

amending the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of notice of this Order.

G. Defendants' motions to strike paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 54, 55, 69, 70, 71, 72, 73, 81, 82, 85, 95, 97 and the heading between paragraphs 17 and 18 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

Carie Olsen and Matthew Olsen,

Plaintiffs,

v.

Coral Resorts, LLC, Hilton Head Hospitality,
LLC d/b/a Hilton Head Guest Services, Reba
Management, Inc., Sunrise Vacation
Properties, Ltd., Island Links Owners
Association, Inc., Sherri J. Smith, Christopher
Ryan Byrd, Sheldon S. Stanhope, and
Matthew Hunter French,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals

ORDER

Civil Action Number 2014-CP-07-00499

2016 SEP -6 PM 4:26
JEREL ANN ROSENEAU
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

On June 16, 2011, Carie Olsen and Mathew Olsen purchased a vacation timeshare property at the Island Links resort, executing an Island Links Horizontal Property Regime Bi-Ennial Purchase Contract (Contract) in conjunction therewith. On March 5, 2014, Plaintiffs filed a Verified Complaint asserting eight 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 Practices Act, breach of contract/breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, civil conspiracy, and declaratory judgment. The parties¹ filed the following motions² which are the subject of this Order:

1. Defendant Island Links Owners Association, Inc.'s Motion to Dismiss Complaint (filed April 21, 2014);

¹ Christopher Ryan Byrd has not been served with the Summons and Complaint.

² This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which are the subject of Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

dk

2. Defendants Coral Resorts, LLC, Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, and Reba Management, Inc.'s Motions to Strike Certain Allegations and to Dismiss the Complaint or Certain Allegations and Parties (filed April 23, 2014); and
3. Motion to Dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Sheldon Stanhope, and Matthew Hunter French (filed April 25, 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 in 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 Plaintiff's 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-svl, 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC, is 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 Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.
4. As to Defendants' motions to dismiss as to Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
5. As to Defendants' motions 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.
6. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged declaratory judgment, such motions are denied at this time.
7. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 any of the Contracts. A plain reading of the 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 also included an allegation of the breach of the implied duty of good faith and fair dealing in their cause of action for breach of contract. 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.2d 881 (Ct. App. 2004). Because Plaintiffs’ cause of action is dismissed, Defendants’ motion to dismiss Plaintiffs’ included allegation of breach of the covenant of good faith and fair dealing is also **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

8. As to Defendants’ motions to dismiss Plaintiffs’ cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs’ cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (quoting *O’Shea*

CA

v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED** and Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

9. As to Defendants' Motion 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 11 and 12.) 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—a critical element of any civil conspiracy claim. Although Plaintiffs have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

10. As to Defendants' Motion to Strike paragraphs 22, 28, 33, 34, 35, 36, 37, 46, 47, 61, 61(a), 61(b), 62, 69, 81, and 87 from the Complaint, based upon the argument presented in Defendants' motions, supporting memoranda, and oral argument before this Court, Defendants' motion to Strike is **GRANTED** and Plaintiffs are ordered to file and serve an Amended Complaint with such paragraphs removed within 30 days of receipt of notice of this Order.

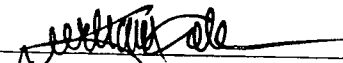
11. As to Defendants' motions to dismiss Hilton Head Hospitality, LLC d/b/a Hilton Head Guest Services, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Island Links Owners Association, Inc., Reba Management, Inc., Sheldon Stanhope, and Matthew Hunter French such motions are **DENIED** at this time. However, such motions are tantamount to motions for more definite statement regarding the connection between such Defendants and Plaintiffs' claims. Such more defined statement is required. Plaintiffs shall file and serve an Amended Complaint so as to make a more definite statement as to the acts of an 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 Amended Complaint within 30 days of receipt of notice of this Order.

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/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 an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.
- D. Defendants' motions to strike paragraphs 22, 28, 33, 34, 35, 36, 37, 46, 47, 61, 61(a), 61(b), 62, 69, 81, and 87 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.
- E. Defendants' motions to dismiss Hilton Head Hospitality, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Island Links Owners Association, Inc., Reba Management, Inc., Sheldon S. Stanhope, and Matthew Hunter French are **DENIED** pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of notice of this Order.
- F. Defendants shall file and serve their answers, motions, or other responses to Plaintiffs' Amended Complaint 30 days after receipt of Plaintiffs' Amended Complaint.

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Gregory Gurbacki,

Plaintiff,

v.

Coral Resorts, LLC; Reba Management,
Inc.; Sherri J. Smith; B. Dean Pierce;
Sunrise Vacation Properties, Ltd.;
K. Michael Barfield; Island Links Owners
Association, Inc.; Steve Deutsch; and
Patrick Pfuhl,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals
ORDER

Civil Action Number 2014-CP-07-01197

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

This matter came before this Court on the motions of Plaintiff 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

Gregory Gurbacki purchased a vacation timeshare property at the Island Links Resort on May 16, 2011, and in conjunction therewith executed an Island Links Horizontal Property Regime Bi-Ennial Purchase Contract (Contract).

On March 13, 2014, Plaintiff filed a Complaint in the Beaufort County Magistrate's Court alleging nine causes of action: fraud/intentional misrepresentation, alleged violation of the Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and alleged violation of the South Carolina Consumer Protection Act. The parties¹ filed the following motions² which are the subject of this Order:

1. Defendant K. Michael Barfield's Motion to Dismiss (filed April 16, 2014);
2. Motion to Dismiss Sunrise Vacation Properties, Ltd. and Sherri J. Smith (filed April 16, 2014);

¹ Patrick Pfuhl has not been served with the Summons and Complaint.

² This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which are the subject of Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

3. Defendants Coral Resorts, LLC, Reba Management, Inc., and B. Dean Pierce's Motion to Dismiss Complaint and to Strike Certain Allegations from Complaint (filed April 16, 2014);
4. Motion to dismiss Steve Deutsch (filed October 22, 2014); and
5. Defendant Island Links Owners Association, Inc.'s motion to dismiss complaint (filed April 17, 2014).

STANDARDS 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 in 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 Plaintiff's 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 Plaintiff's Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, are denied.
2. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged fraud/intentional misrepresentation, such motions are denied at this time.
3. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
4. As to Defendants' motions to dismiss as to Plaintiff's 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 as to Plaintiff's cause of action for declaratory judgment, such motions are denied at this time.
6. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged negligent misrepresentation, such motions are denied at this time.
7. As to Defendant's motions to dismiss Plaintiff's cause of action for alleged violation of the South Carolina Consumer Protection Act, such motions are denied at this time.
8. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiff's breach of contract claim. Plaintiff's claim fails because he has 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.”). Plaintiff has not alleged any breach of any term of the Contract. A plain reading of the 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 Plaintiff's 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, Plaintiff's claim for breach of contract fails. Defendants' motion to dismiss Plaintiff's breach of contract claim is **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

9. As to Defendants' motions to dismiss Plaintiff's cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiff's cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiff must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiff has failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiff has not identified in his Complaint any particular duty owed to him by any Defendant. Second, Plaintiff has not pled what action

Defendants should or could have taken to protect Plaintiff. Finally, Plaintiff has not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiff. Consequently, Defendants' motions to dismiss Plaintiff's breach of fiduciary duty claim are **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants' Motion to Dismiss Plaintiff's cause of action for alleged civil conspiracy, this Court grants Defendants' motion to dismiss and dismisses Plaintiff's 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 plaintiff; and (3) causing plaintiff 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").

Plaintiff here has failed to state a claim of civil conspiracy for several reasons. First, Plaintiff pleads that Defendants are agents of one another. Compl. ¶¶ 11 and 12. 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, Plaintiff fails to allege facts sufficient to state the first element—a combination of two or more persons.

Second, Plaintiff has not pled any facts indicating that Defendants or any of their agents entered into an agreement for the purpose of injuring Plaintiff; 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, Plaintiff fails 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 Plaintiff had sufficiently pled the first two elements of his civil conspiracy claim, this Court would dismiss this claim because Plaintiff has pled no facts in support of any alleged entitlement to special damages. Although Plaintiff has alleged he is entitled to special damages, none of the facts in his Complaint—even if true—would differentiate his 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, Plaintiff has not alleged facts sufficient to state a claim for civil conspiracy and Defendants' motions to dismiss are **GRANTED** and Plaintiff is ordered to file and serve an Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

11. As to Defendants' motion to strike paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 39, 42, 46, 47, 48, 49, 50, 55, 56, 57, 58, 59, 62, 63, 67, 70, 80, 81, 82, and 125 and subheading between paragraphs 13 and 14 from the Complaint, based upon the arguments presented in Defendants' motions, supporting memoranda, and oral argument before this Court, Defendants' motion to Strike is **GRANTED**. Plaintiff shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

12. As to Defendants' motions to dismiss Reba Management, Inc., Sherri J. Smith, B. Dean Pierce, Sunrise Vacation Properties, Ltd., K. Michael Barfield, Island Links Owners Association, Inc., and Steve Deutsch, 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 Plaintiff's claims. A more definite statement is required. Plaintiff shall file and serve an Amended Complaint so as to make a more definite statement as to the acts of an 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. Plaintiff shall file such Amended Complaint within 30 days of receipt of notice of this Order.

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), SCRPC are **DENIED**.

B. Defendant's motions to dismiss Plaintiff's causes of action for fraud/intentional misrepresentation, negligent misrepresentation, declaratory judgment, alleged violation

of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, and alleged violation of the South Carolina Consumer Protection Act are **DENIED** at this time.

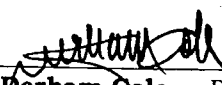
C. Defendants' motions to dismiss Plaintiff's causes of action for alleged breach of contract, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiff is ordered to file and serve an Amended Complaint removing these causes of action within 30 days of receipt of this Order.

D. Defendants' motions to dismiss Reba Management, Inc., Sherri J. Smith, B. Dean Pierce, Sunrise Vacation Properties, Ltd., K. Michael Barfield, Island Links Owners Association, Inc., and Steve Deutsch are **DENIED** at this time pending Plaintiff's amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.

E. Defendants' motions to strike paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 39, 42, 46, 47, 48, 49, 50, 55, 56, 57, 58, 59, 62, 63, 67, 70, 80, 81, 82, and 125 and the heading between paragraphs 13 and 14 from the Complaint are **GRANTED** and Plaintiffs shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Michael Adams and Shonnie Adams,

Plaintiffs,

v.

Coral Resorts, LLC, Reba Management, Inc.,
Patrick Budnik, Spencer Fulkert, Sherri J. Smith,
Lori Lucas, Dean Pierce, Sunrise Vacation
Properties, Ltd., Coral Holdings, LLC, K Michael
Barfield, Hilton Head Island Development
Company, LLC, Island Links Owners Association,
Inc., Coral Sands Owners Association, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

RECEIVED

JUN 14 2017

SC Court of Appeals
ORDER

Civil Action Number 2014-CP-07-01198

2016 SEP -6 PM 4:25
JERRI ANN ROSENEAU
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

On October 3, 2010, Michael Adams and Shonnie Adams purchased a vacation timeshare property at the Coral Sands Resort, executing a Coral Sands Horizontal Property Regime Tri-Ennial Purchase Contract (Contract 1) in connection therewith. On August 20, 2011, Plaintiffs entered into a second purchase of a Vacation timeshare property at the Island Links Resort, transferring the equity from their 2010 purchase and executing an Island Links Horizontal Property Regime Tri-Ennial Purchase Contract (Contract 2).

On February 25, 2014, Plaintiffs filed an action in the Beaufort County Magistrate's Court asserting nine causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, declaratory judgment, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, and alleged violation of the South Carolina Consumer Protection Code. The parties¹ filed the following motions² which are the subject of this Order:

¹ Patrick Budnik has not been served with the Summons and Complaint in this matter.

² 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.

[Handwritten signature]

1. Defendants Coral Resorts, LLC, Reba Management, Inc., Dean Pierce, Coral Holdings, LLC, and Hilton Head Island Development Company's Motions to Dismiss Complaint and to Strike Certain Allegations from Complaint (filed April 3, 2014);
2. Defendant[s] Island Links Owners Association, Inc. and Coral Sands Owners Association, Inc.'s Motion to Dismiss Complaint (filed April 4, 2014);
3. Defendant K. Michael Barfield's Motion to Dismiss (filed April 4, 2014);
4. Motion to Dismiss Sherri J. Smith (filed April 09, 2014); and,
5. Motion to Dismiss Spencer Fulkert, Lori Lucas, and Sunrise Vacation Properties (filed April 09, 2014).

STANDARDS 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), SCRPC). "In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, 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), SCRPC, 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 in 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 Plaintiff's 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, are denied.
2. As to Defendants' motions to dismiss based upon the passage of the statutory limitations period, such motions are denied at this time without prejudice pending the parties engaging in discovery limited to the issue of when Plaintiffs knew or should have known that they had suffered an "injury" and that a claim against one or more of Defendants had accrued.
3. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged fraud/intentional misrepresentation, such motions are denied at this time.
4. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.
5. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
6. As to Defendants' motions 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.
7. As to Defendants' motions to dismiss as to Plaintiffs' cause of action for declaratory judgment, such motions are denied at this time.
8. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. Plaintiffs' claim fails because they have not alleged that any of Defendants breached any written term of the contract and because the parole evidence rule bars reliance on any alleged promises made before the parties entered into any of the Contracts. 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 parole 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 any of the Contracts. A plain reading of the Complaint leads to the conclusion that the only allegedly breached promises were allegedly oral promises made by alleged agents of Defendants.

Furthermore, Contract 2 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 Contracts. 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs' cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of

Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged civil conspiracy, this Court grants Defendants' motions 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another. (Compl. ¶¶ 15 and 16.) 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 their 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 have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint with this cause of action removed within 30 days of receipt of notice of this Order.

12. As to Defendants’ motions to strike paragraphs subheading between paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 65, 70, 71, 72, 73, 74, 78, 82, 85, 95, 96, 97, and the heading between paragraphs 17 and 18 from the Complaint, based upon the arguments presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motions to Strike are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

13. As to Defendants’ motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Port O’Call Owners Association, Inc., Island Links Owners Association, Inc., Reba Management, Inc., K. Michael Barfield, B. Dean Pierce, Sheldon Stanhope, and John Beard, 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 an Amended Complaint so as to make a more definite statement as to the acts of an 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 Amended Complaint within 30 days of receipt of notice of this Order.

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 on the basis of expiration of the statute of limitations are **DENIED** without prejudice pending further discovery.
- C. Defendant’s motions to dismiss Plaintiffs’ causes of action for fraud/intentional misrepresentation, negligent misrepresentation, declaratory judgment, and alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the Consumer Protection

Code, and alleged violation of the South Carolina Unfair Trade Practices Act are **DENIED** at this time.

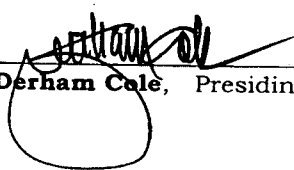
D. Defendants' motions to dismiss Plaintiffs' causes of action for breach of contract, fiduciary duty, and civil conspiracy are **GRANTED** and these three causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.

E. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Port O'Call Owners Association, Inc., Island Links Owners Association, Inc., Reba Management, Inc., K. Michael Barfield, B. Dean Pierce, Sheldon Stanhope, and John Beard are **DENIED** at this time pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement concerning these parties within 30 days of receipt of this Order.

F. Defendants' motions to strike paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 65, 70, 71, 72, 73, 74, 78, 82, 85, 95, 96, 97, and subheading between paragraphs 17 and 18 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

Dale Tratnack and Suzanne Tratnack,)

Plaintiffs,)

v.)

Coral Resorts, LLC, Sunrise Vacation
Properties, Ltd., Reba Management, Inc.,
Island Links Owners Association, Inc.,
B. Dean Pierce, K. Michael Barfield, Sherri
J. Smith, and Spencer Fulkert,)

Defendants.)

IN THE COURT OF COMMON PLEAS

ORDER

Civil Action Number **2014-CP-07-02632**

2016 SEP -6 PM 4:26
JERRI ANN ROSENEAU
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 FACTS

On November 21, 2011, Dale Tratnack and Suzanne Tratnack purchased a vacation timeshare property at the Island Links Resort, executing an Island Links Resort Horizontal Property Regime Tri-Ennial Purchase Contract (Contract) in conjunction therewith.

On October 21, 2014, Plaintiffs filed a verified Complaint, alleging eleven causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, alleged violation of the South Carolina Consumer Protection Code, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, declaratory judgment, alleged violation of the South Carolina Code Section 27-23-20, and negligent hiring, selection, contracting, training, supervision, and retention. The parties filed the following motions¹ which are the subject of this Order:

1. Defendant K. Michael Barfield's Motion to Dismiss (filed December 15, 2014)

RECEIVED

JUN 14 2017

SC Court of Appeals

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

2. Defendant Island Links Owners Association, Inc.'s Motions to Dismiss Complaint; to Strike Certain Allegations and Parties from Complaint; and for a More Definite Statement (filed December 19, 2014);
3. Defendants Coral Resorts, LLC, Reba Management, Inc., and B. Dean Pierce's Motions to Dismiss Complaint; to Strike Certain Allegations and Parties from Complaint; and for Sanctions (filed December 22, 2014);
4. Defendants Sunrise Vacation Properties, Ltd., Sherri J. Smith and Spencer Fulkert's Motion to Dismiss Complaint, to Strike Certain Allegations and Parties from Complaint; and for a More Definite Statement (filed December 22, 2014).

STANDARDS 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 pleadings 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 in 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 of 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' claim 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC, 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 Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
4. As to Defendants' motions 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 as to 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 negligent/grossly negligent hiring, selection, contracting, training, supervision, and retention, such motions are denied at this time.
8. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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).

As

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 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants’ motions to dismiss Plaintiffs’ cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs’ cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). “A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Id.* (quoting *O’Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot

be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action the Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another (Compl. ¶¶ 12 and 13). 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 have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

12. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of South Carolina Code Section 27-23-20, such motions are **GRANTED** because this code section has no relevance to Plaintiffs' claims. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

13. As to Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Spencer Fulkert, Island Links Owners Association, Inc., K. Michael Barfield, B. Dean Pierce, 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 an Amended Complaint so as to make a more definite statement as to the acts of an 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 Amended Complaint within 30 days of receipt of notice of this Order.

14. As to Defendants' Motion to Strike paragraphs 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 33, 35, 36, 40, 41, 42, 43, 44, 49, 51, 56, 57, 58, 59, 60, 61, 71, 72, 81, 136, and 137 and the heading between paragraphs 15 and 16 from the Complaint, based upon the

argument presented in Defendants' motions, supporting memoranda, and oral argument before this Court, Defendants' motion to Strike is **GRANTED**. Plaintiffs shall file an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

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. Defendant's motions to dismiss Plaintiffs' causes of action for fraud/intentional misrepresentation, negligent misrepresentation, declaratory judgment, negligent/grossly negligent hiring, selection, contracting, training, supervision, and retention, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, and, alleged violation of the South Carolina Consumer Protection Code are **DENIED** at this time.

C. Defendants' motions to dismiss Plaintiffs' causes of actions for alleged breach of contract, fiduciary duty, civil conspiracy, and alleged breach of South Carolina Code Section 27-23-20 are **GRANTED** and these four causes of action are dismissed without prejudice. Plaintiffs shall file and serve an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.

D. Defendant's motions to strike paragraphs 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 28, 29, 33, 35, 36, 40, 41, 42, 43, 44, 49, 51, 56, 57, 58, 59, 60, 61, 71, 72, 81, 136, and 137 and the heading between paragraphs 15 and 16 from the Complaint are **GRANTED**. Plaintiffs shall file an Amended Complaint removing these paragraphs within 30 days of receipt of notice of this Order.

E. Defendants' Motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Spencer Fulkert, Island Links Owners Association, Inc., K. Michael Barfield, B Dean Pierce, and Reba Management, Inc. are **DENIED** at this time, pending Plaintiffs' amendment of the Complaint to make a more definite and certain statement with 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED


J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Duane Wellman and Sharifa Wellman,

Plaintiffs,

v.

Coral Resorts, LLC, Reba Management,

Inc., Dustin Finnell, Spencer Fulkert,

SherriJ. Smith, Dean Pierce,

Sunrise Vacation Properties, Ltd.,

Coral Holdings, LLC, K. Michael Barfield,

Hilton Head Island Development Company,

LLC, and Coral Sands Owners

Association, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER

Civil Action Number **2014-CP-07-02772**

2016 SEP -6 PM 4:26
JERRI ANN ROSENEAU
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 FACTS

On April 3, 2012, Duane and Sharifa Wellman purchased a vacation timeshare property at the Coral Sands Resort, executing a Coral Sands Horizontal Property Regime Tri-Ennial Purchase Contract (Contract) in conjunction therewith. On September 29, 2014, Plaintiffs filed a lawsuit in the Beaufort County Magistrate's Court alleging eleven causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, alleged violation of the South Carolina Consumer Protection Code, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, declaratory judgment, alleged violation of South Carolina Code Section 27-23-20, and negligent hiring, selection, contracting, training, supervision, and retention.

The parties¹ filed the following motions² which are the subject of this Order:

1. Defendant K. Michael Barfield's Motion to Dismiss (filed December 16, 2014);

¹ Dustin Finnell has not been served with the Summons and Complaint.

² This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which or are subject of Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

#1

JUN 14 2017

SC Court of Appeals

2. Defendant Coral Sands Owners Association, Inc.'s Motions to Dismiss Complaint; to Strike Certain Allegations and Parties from Complaint; and for a More Definite Statement (filed December 19, 2014);
3. Defendants Coral Resorts, LLC, Reba Management, Inc., Dean Pierce, Coral Holdings, LLC, and Hilton Head Island Development Company, LLC's Motions to Dismiss Complaint; to Strike Certain Allegations and Parties from Complaint; and for a More Definite Statement (filed December 22, 2014); and
4. Defendants Sunrise Vacation Properties, Ltd., Sherri Smith, and Spencer Fulkert's Motion to Dismiss Complaint, to Strike Certain Allegations and Parties from Complaint, and for a More Definite Statement (filed December 22, 2014).

STANDARDS 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 pleadings 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 in 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 of 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-svt, 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCP, is 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 Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
4. As to Defendants' motions 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 as to Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
6. As to Defendants' motions to dismiss as to Plaintiffs' cause of action for declaratory judgment, such motions are denied at this time.
7. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.
8. As to Defendants' motions to dismiss Plaintiffs' cause of action for negligent/grossly negligent hiring, selection, contracting, training, supervision, and retention, such motions are denied at this time.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

10. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs' cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in him. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action the Defendants should or could have taken to protect the Plaintiffs. Finally, Plaintiffs have not pled any act or

4

omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED**. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

11. 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another (Compl. ¶¶ 15 and 16). 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 have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint with such pleading if removed within 30 days of receipt of notice of this Order. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

12. As to Defendants’ motions to dismiss Plaintiffs’ cause of action for alleged violation of South Carolina Code Section 27-30-20, based upon Defendants’ motions, memoranda in support and oral arguments, Defendants’ motion to dismiss is **GRANTED** because the Statute of Elizabeth has no relevance to Plaintiffs’ claims. Plaintiffs shall file and serve an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

13. As to Defendants’ motions to dismiss K. Michael Barfield, Coral Sands Owners Association, Inc., Coral Resorts, LLC, Reba Management, Inc., B. Dean Pierce, Coral Holdings, LLC 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 an 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 Amended Complaint within 30 days of receipt of notice of this Order.

14. As to Defendants’ motion to strike the paragraphs 15, 16, 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 35, 36, 37, 41, 42, 43, 44, 45, 46, 51, 53, 58, 59, 61, 62, 63, 64, 74, 75, 76, 84, 139, 140, 141, and the heading between paragraphs 18 and 19 and from the Complaint, based upon the argument presented in Defendants’ motions, supporting memoranda, and oral argument before this Court, Defendants’ motion to strike is **GRANTED**.

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), SCRPC are **DENIED**.
- B. Defendants’ motions to dismiss on the basis of expiration of the statute of limitations are **DENIED** without prejudice pending further discovery.

- C. Defendants' motions to dismiss Plaintiffs' causes of action for fraud/intentional misrepresentation; negligent misrepresentation; declaratory judgment; negligent/grossly negligent hiring, selection, contracting, training, supervision, and retention; alleged violation of the South Carolina Vacation Timesharing Act; alleged violation of the South Carolina Unfair Trade Practices Act; and, alleged violation of the South Carolina Consumer Protection Code are **DENIED** at this time.
- D. Defendants' motions to dismiss Plaintiffs' causes of actions for alleged breach of contract, fiduciary duty, civil conspiracy, and alleged violation of South Carolina Code Section 27-23-20 are **GRANTED** and these four causes of action are dismissed without prejudice. Plaintiffs are ordered to file and serve an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.
- E. Defendant's motions to strike the heading between paragraphs 18 and 19 and paragraphs 15, 16, 18, 19; 20, 21, 22, 23, 24, 25, 26, 27, 31, 32, 35, 36, 37, 41, 42, 43, 44, 45, 46, 51, 53, 58, 59, 61, 62, 63, 64, 74, 75, 76, 139, 140, 141, and the heading between paragraphs 18 and 19 from the Complaint are **GRANTED**. Plaintiffs shall file such Amended Complaint within 30 days of receipt of notice of this Order.
- F. Defendants shall file and serve their answers, motions, or other responses too Plaintiffs' Amended Complaint 30 days after receipt of Plaintiffs' Amended Complaint.

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
Richard Smoose and Nancy Jo Smoose,

Plaintiffs,

v.

Coral Resorts, LLC, Reba Management,
Inc., Wayne Heath, Sheldon Stanhope,
Sherri J. Smith, Dean Pierce, Sunrise
Vacation Properties, Ltd., K. Michael
Barfield, Hilton Head Island Development
Company, LLC, Island Links Owners
Association, Inc., Coral Sands Owners
Association, Inc., and Timeshare
Guarantee, Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

ORDER

Civil Action Number **2014-CP-07-02839**

2016 SEP -6 PM 4:26
JERRI ANN ROSENEAU
BEAUFORT COUNTY S.C.
CLERK OF COURT

RECEIVED

JUN 14 2017

SC Court of Appeals

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 FACTS

On November 4, 2011, Richard Smoose and Nancy Jo Smoose purchased a vacation timeshare property at the Coral Sands Resort, executing a Coral Sands Horizontal Property Regime Bi-Ennial Purchase Contract (Contract) in conjunction therewith. On October 30, 2014, they filed a lawsuit in Beaufort County Magistrate's Court alleging eleven causes of action: fraud/intentional misrepresentation, alleged violation of the South Carolina Vacation Timesharing Act, alleged violation of the South Carolina Unfair Trade Practices Act, alleged violation of the South Carolina Consumer Protection Code, breach of contract, negligent misrepresentation, breach of fiduciary duty, civil conspiracy, declaratory judgment, alleged violation of South Carolina Code Section 27-23-20, and negligent hiring, selection, contracting, training, supervision, and retention.

The parties¹ filed the following motions² which are the subject of this Order:

¹ Wayne Heath has not been served with the Summons and Complaint.

AT

1. Defendant K. Michael Barfield's Motion to Dismiss (filed December 15, 2014);
2. Defendants Coral Resorts, LLC, Reba Management, Inc., B. Dean Pierce, Hilton Head Island Development Company, LLC, and Timeshare Guarantee, Inc.'s Motions to Dismiss Complaint, to Strike Certain Allegations and Parties from Complaint, and for a More Definite Statement (filed December 22, 2014);
3. Defendants Sunrise Vacation Properties, Ltd., Sherri Smith, and Sheldon Stanhope's Motions to Dismiss Complaint, to Strike Certain Allegations and Parties from Complaint, and for a More Definite Statement (filed December 22, 2014); and
4. Defendants Coral Sands Owners Association, Inc. and Island Links Owners Association, Inc.'s Motions to Dismiss Complaint; to Strike Certain Allegations; and Parties from the Complaint; and for a More Definite Statement (filed December 18, 2014).

STANDARDS 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." *Fleateau 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 pleadings 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 in 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

² This Court's March 7, 2016 Form 4 Order addresses or fails to address several other discovery motions, which are the subject of Defendants' Joint Motion to Alter or Amend Order, filed on March 21, 2016.

Procedure, regularly rely of 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' Complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRPC, is 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 Plaintiffs' cause of action for alleged violation of the South Carolina Vacation Timesharing Act, such motions are denied at this time.
4. As to Defendants' motions 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' motion to dismiss as to Plaintiffs' cause of action for alleged violation of the South Carolina Consumer Protection Code, such motions are denied at this time.
6. As to Defendants' motions to dismiss as to Plaintiffs' cause of action for declaratory judgment, such motions are denied at this time.
7. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged negligent misrepresentation, such motions are denied at this time.
8. Defendants' motions to dismiss Plaintiffs' cause of action for negligent/grossly negligent hiring, selection, contracting, training, supervision and retention are **DENIED** pending Plaintiffs' amendment of the Complaint so as to make a more definite statement as to the person and acts complained of.
9. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of contract, this Court grants the motion to dismiss and dismisses Plaintiffs' breach of contract claim. 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 any of the Contract. A plain reading of the 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** and Plaintiffs shall file and serve an Amended Complaint within 30 days of receipt of notice of this Order removing this cause of action.

10. As to Defendants' motions to dismiss Plaintiffs' cause of action for alleged breach of fiduciary duty, this Court grants the motions to dismiss and dismisses Plaintiffs' cause of action for breach of fiduciary duty. To establish a claim for breach of fiduciary duty, Plaintiffs must plead and prove (1) the existence of a fiduciary duty; (2) a breach of that duty; and (3) damages proximately resulting from the wrongful conduct of the defendant. *Turpin v.*

Lowther, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). The existence of a fiduciary duty is a question of law for this Court. *Id.*

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (quoting *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992)). A relationship must be more than casual to equal a fiduciary relationship. *Id.* As a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. *Id.* The other party must have actually accepted or induced the confidence placed in them. *Id.* at 671, 582 S.E.2d at 444.

The Court finds that Plaintiffs have failed to plead sufficient facts to establish any of the three elements of this cause of action. First, Plaintiffs have not identified in their Complaint any particular duty owed to them by any Defendant. Second, Plaintiffs have not pled what action Defendants should or could have taken to protect Plaintiffs. Finally, Plaintiffs have not pled any act or omission of Defendants that could have been the proximate cause of any damages to Plaintiffs. Consequently, Defendants' motions to dismiss Plaintiffs' breach of fiduciary duty claim are **GRANTED** and Plaintiffs shall file and serve an Amended Complaint within 30 days of receipt of notice of this Order removing this cause of action.

11. 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 plaintiff; and (3) causing plaintiff 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 here have failed to state a claim of civil conspiracy for several reasons. First, Plaintiffs plead that Defendants are agents of one another (Compl. ¶¶ 16 and 17). 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 have alleged they are entitled to special damages, none of the facts in their 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 an Amended Complaint removing this cause of action within 30 days of receipt of notice of this Order.

12. Defendants' motions to dismiss Plaintiffs' cause of action for alleged violation of South Carolina Code Section 27-23-20 is **GRANTED** because the Statute of Elizabeth is not relevant to Plaintiffs' claims.

13. As to Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Sheldon Stanhope, Coral Sands Owners Association, Inc., Island Links Owners Association, Inc., Coral Resorts, LLC, Reba Management, Inc., B. Dean Pierce, K. Michael Barfield, and Timeshare Guarantee, 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 an 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 Amended Complaint within 30 days of receipt of notice of this Order.

14. As to Defendants' motion to strike paragraphs 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 40, 41, 42, 43, 44, 49, 51, 56, 57, 58, 59, 60, 61, 71, 72, 84, 139, and 140 and the heading between paragraphs 19 and 20 from the Complaint, based upon the argument presented in Defendants' motions, supporting memoranda, and oral argument before this Court, Defendants' motion to Strike is **GRANTED**, and Plaintiffs are ordered to file and serve an Amended Complaint with these paragraphs removed within 30 days of receipt of notice of this Order.

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), SCRPC 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, alleged violation of the South Carolina Unfair Trade Practices Act, alleged violation of the South Carolina Consumer Protection Code, and negligent/grossly negligent hiring, selection, contracting, training, supervision and retention are **DENIED** at this time.

C. Defendants' motions to dismiss Plaintiffs' causes of actions for breach of contract, fiduciary duty, civil conspiracy, and alleged violation of South Carolina Code Section 27-23-20 are **GRANTED** and these four causes of action are dismissed without prejudice. Plaintiffs are ordered to file an Amended Complaint removing these causes of action within 30 days of receipt of notice of this Order.

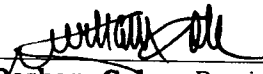
D. Defendant's motions to strike paragraphs 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 34, 35, 40, 41, 42, 43, 44, 49, 51, 56, 57, 58, 59, 60, 61, 71, 72, 84, 139, and 140 and the heading between paragraphs 19 and 20 from the Complaint are **GRANTED**, and Plaintiffs are ordered to file and serve an Amended Complaint with such paragraphs and heading removed within 30 days of receipt of notice of this Order.

E. Defendants' motions to dismiss Sunrise Vacation Properties, Ltd., Sherri J. Smith, Sheldon Stanhope, Coral Sands Owners Association, Inc., Island Links Owners Association, Inc., Coral Resorts, LLC, Reba Management, Inc., B. Dean Pierce, K. Michael Barfield, and Timeshare Guarantee, Inc. are **DENIED** at this time pending

Plaintiffs' amendment of the Complaint to make a more definite and certain statement within 30 days of receipt of notice of this Order.

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

AND IT IS SO ORDERED.



J. Derham Cole, Presiding Judge

August 31, 2016

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-07 – 03746 and consolidated cases

Albert R. LAFLEUR and Eileen LAFLEUR and consolidated cases,

CORAL RESORTS, LLC, HILTON HEAD ISLAND DEVELOPMENT COMPANY, ISLAND LINKS Owners Association, Inc., PORT O' CALL Owners Association, Inc. SUNRISE Vacation Properties, Ltd., REBA Management, Inc., K. Michael BARFIELD, B. Dean PIERCE, Sherri J. SMITH, Sheldon STANHOPE, Phil LUCCHESSE, and John BEARD,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: the Court

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 3 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

These matters are before this Court on motions of the plaintiffs and the defendants pursuant to Rule 59(e), SCRPC, to alter and amend this Court's Order filed 09/06/2016. Having considered the motion this Court finds that the motions to alter and amend should be and are therefore denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

RECEIVED

JUN 14 2017

SC Court of Appeals

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$

		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

J. Derham Cole
Circuit Court Judge

2053
Judge Code

05/19/2017
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 2017 and a copy mailed first class or placed in the appropriate attorney's box on this day of _____, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Joseph DuBois, Esq.

Zach S. Naert, Esq.

Post Office Box 7228

Hilton Head Island, South Carolina 29938

ATTORNEY(S) FOR THE PLAINTIFF(S)

James E. Smith, Jr., Esq.

1422 Laurel Street

Columbia, South Carolina 29201

Nekki Shutt, Esq.

Post Office Box 1390

Columbia, South Carolina 29202

Thornwell F. Sowell, Esq.

Bess J. Durant, Esq.

Post Office Box 11449

Columbia, South Carolina 29211

H. Cooper Wilson, III, Esq.

Post Office Box 1508

Charleston, South Carolina 29402

Drew A. Laughlin, Esq.

Post Office Drawer 21119

Hilton Head Island, South Carolina 29925

David W. Overstreet, Esq.

Post Office Box 22528

Charleston, South Carolina 29413

Angus H. Macaulay, Esq.

Post Office Drawer 2426

Columbia, South Carolina 29202

Mark Goddard, Esq.

Post Office Box 2126

Myrtle Beach, South Carolina 29578

Richard S. Dukes, Jr., Esq.

Post Office Box 22129

Charleston, South Carolina 29413

T. William McGee, Esq.

1320 Main Street

Columbia, South Carolina 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter:

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

ELECTRONICALLY FILED - 2017 May 19 3:20 PM - BEAUFORT - COMMON PLEAS - CASE#2012CP0703746



Beaufort Common Pleas

Case Caption: Albert R Lafleur , plaintiff, et al VS Coral Resorts Llc , defendant, et al
Case Number: 2012CP0703746
Type: Order/Form 4

IT IS SO ORDERED !

s/ J. Derham Cole