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Department of Business and Professional Regulation
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PETITION FOR DECLARATORY STATEMENT BEFORE
STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF CONDOMINIUMS, TIMESHARES AND MOBILE HOMES

January 11, 2018

DS 2018-003

In re:

Petition for Declaratory Statement
by PSVC, LLC for Pink Shell Resort Club

RE: Non-Applicability of Timeshare Act
§ 721.05(39) and §721.52(4),
Florida Statutes.

PETITION FOR DECLARATORY STATEMENT

PSVC, LLC (“**Petitioner**”), by and through Petitioner’s counsel, Foley & Lardner LLP, hereby petitions the Division of Florida Condominiums, Timeshares, and Mobile Homes (the “**Division**”) to issue a formal written position determining the effect of the above-referenced section of Chapter 721, *Florida Statutes*, known as the Florida Vacation Plan and Timesharing Act (the “**Timeshare Act**”), as it applies to Petitioner’s proposed product, and hereby files this Petition for Declaratory Statement, as permitted by Rule 28-105.001, *Florida Administrative Code*.

I. NAME AND ADDRESS OF PETITIONER AND PETITIONER’S ATTORNEY

The Petitioner’s name and address is PSVC, LLC, c/o William C. Guthrie, Esq., Foley & Lardner LLP, 111 North Orange Avenue, Suite 1800, Orlando, Florida 32801-2386, and William C. Guthrie is Petitioner’s attorney.

II. SPECIFIC PROVISION TO BE CONSIDERED

The specific provisions to be considered in this Petition for Declaratory Statement are §721.05(39), *Florida Statutes* and §721.52(4), *Florida Statutes*.

III. REASON FOR THE DECLARATORY STATEMENT

Petitioner intends to offer a vacation product that will have a term limited to less than a three (3) year period. Petitioner would like to request an opinion from the Division to clarify that this vacation product is not considered to be a “Timeshare Plan” or a “Multisite Timeshare Plan” within the meaning of the Timeshare Act, and that Petitioner is not required to file this vacation product with the Division prior to offering the vacation product because the structure of the

vacation product does not fall under the definition of a timeshare plan or multisite timeshare plan under Chapter 721, *Florida Statutes*.

IV. RELEVANT FACTS

1. The Timeshare Act defines a "Timeshare Plan" as:

(A)ny arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, for consideration, receives ownership rights in or a right to use accommodations, and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years. The term "timeshare plan" includes:

(a) A "personal property timeshare plan," which means a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and

(b) A "real property timeshare plan," which means a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property.

§721.05(39), *Florida Statutes*.

2. The Timeshare Act provides certain exceptions to the definition of a "Timeshare Plan," as follows:

a. Part I of Chapter 721, *Florida Statutes*, provides that the Timeshare Act applies to all timeshare plans consisting of more than seven (7) timeshare periods over a period of at least three (3) years in which the accommodations and facilities, if any, are located within Florida or are offered within Florida. §721.03(1), *Florida Statutes*. (Emphasis added.)

b. Under Part II of the Timeshare Act, a multisite timeshare plan does not include a plan where the term is "for a period of 3 years or less." §721.52(4)(b), *Florida Statutes*. Specifically, Section 721.52(4), *Florida Statutes*, provides that a multisite timeshare plan does not include a plan in which:

(b) The term is for a period of 3 years or less, regardless of the purchaser's contractually specified maximum total financial obligation, if any. For purposes of determining the term of such use and occupancy rights, the period of any option renewals which a purchaser, in his or her sole discretion, may elect to exercise, whether or not for additional consideration, shall not be included. For purposes of determining the term of such use and occupancy

rights, the period of any automatic renewals shall be included unless a purchaser has the right to terminate the membership at any time and receive a pro rata refund or the purchaser receives a notice no less than 30 days and no more than 60 days prior to the date of renewal informing the purchaser of the right to terminate at any time prior to the date of automatic renewal. (Emphasis added.)

3. The Petitioner intends to develop a vacation plan called Pink Shell Resort Club (“**Trust Plan**”). The Trust Plan will be established in accordance with the Pink Shell Resort Club Trust Agreement (“**Trust Agreement**”) creating the Pink Shell Resort Club Trust (“**Trust**”).
4. The Petitioner will transfer a lease or title to certain condominium units or other real property interests that are subject to exclusive ownership or use by one or more persons (collectively “**Units**”) to an independent trustee (“**Trustee**”) to be committed to the Trust in accordance with the Trust Agreement (collectively the “**Trust Property**”). Title to the Trust Property will be free and clear of any claims of any interestholders (other than the interests held by the Members), or the Trust Property shall be the subject of a recorded nondisturbance and notice to creditors instrument.
5. The Trustee will hold legal and equitable title to the Trust Property for the use and benefit of the “Members” of the Trust Plan in accordance with the Trust Agreement. The Trust Property may consist of Units located in a specific geographic location under common management, which constitute in whole or in part, any portion of the Trust Property, and related amenities and recreational facilities (each location, a “**Site**”).
6. To be a “Member” of the Trust Plan, a person must enter into an agreement (“**Membership Agreement**”) through which a Member contracts to purchase a Membership in the Trust Plan from Petitioner, as the “Developer” of the Trust Plan, and therefore acquire a Membership from Developer or acquire a Membership from a prior Member. A Membership is evidenced by a deed and the term “Member” includes all parties named as grantee on such deed and, with respect to an entity, those persons designated as such in accordance with the “Trust Plan Documents.” “Trust Plan Documents” include the Trust Agreement, the Articles of Incorporation of the Trust Association (defined below), the Bylaws of the Trust Association, the Pink Shell Resort Club Member’s Manual (“**Member’s Manual**”), a Member’s Membership Agreement, and any rules and regulations promulgated by the Trust Association.) It is estimated that the initial purchase price to become a Member will be between \$12,200 and \$33,150.
7. A Membership consists of a beneficial interest in the Trust and is a real property interest consisting of an estate of a term for years. At closing, a Member will receive a special warranty deed from Developer evidencing Member’s Membership in the Trust Plan and the number of ShellPoints (defined below) associated with such Membership. Other than a Member’s beneficial interest in the Trust, a Member’s Membership(s) and any other interests or rights appurtenant thereto do not create any ownership interest or partial ownership interest in any Trust Property or Developer. Members of the Trust Plan are not, and shall not be deemed to be, tenants-in-common and except for each Member’s

beneficial interest in the Trust, are not in any other form of joint or cooperative ownership of any of the Trust Property or Developer. Petitioner will also be a Member of the Trust Plan with respect to any unsold or reacquired Memberships in the Trust Plan. Each Membership will grant to the owner thereof the right to reserve, use, and occupy the Trust Property in accordance with and subject to the terms, conditions, and restrictions of the Member's Manual and other Trust Plan Documents.

8. "ShellPoints" are the symbolic units of use comparison initially assigned to a Member's Membership which signify the use rights in the Trust Property that the Member holds. "ShellPoints for Use" mean the number of ShellPoints that are required to reserve a particular Unit at a particular time in accordance with the Member's Manual. "ShellPoints for Sale or Sold" are the number of ShellPoints that Petitioner ascribes to the Units or other real property that may be submitted to the Trust in accordance with the Trust Agreement ("**Potential Trust Property**") on the deed upon conveyance of such Potential Trust Property to the Trustee. The total ShellPoints for Sale or Sold in the Trust at any given time will never exceed the total ShellPoints for Use at such time thereby maintaining at least a one-to-one use night to use right ratio.
9. A Membership "In Good Standing" means a Member who is current with all payments to the Management Company (defined below), relating to the Member's Membership including, as applicable, Annual Fees (defined below) and purchase money payments, and entitles the Member holding such Membership to reserve and use the Units in accordance with the Trust Plan Documents. With respect to Memberships that are not In Good Standing or have not been transferred by Developer, Developer will be considered as the Member with respect to rights to use the ShellPoints associated with such Memberships to reserve Use Nights.
10. The Trustee's ownership of the Trust Property is subject to the rights and benefits granted to the Petitioner and Members pursuant to the Trust Agreement and the powers, obligations, and duties of Developer, the Pink Shell Resort Club Association, Inc., a Florida corporation not-for-profit, formed for the purpose of maintaining and operating the Trust Plan and the Trust Property ("**Trust Association**"), and the person or entity engaged by the Trust Association, with responsibility for the management and operation of the Trust, Trust Plan and the Trust Property ("**Management Company**") pertaining to the operation, maintenance, repair, and replacement of the Trust Plan and the Trust Property. The duties of the Trustee pursuant to the Trust Agreement include, without limitation, and in accordance with the specific terms and conditions of the Trust Agreement: the execution of documents with respect to the Trust and Trust Property; to convey, hypothecate, mortgage, assign, lease, or otherwise transfer or encumber any interests in or portion of the Trust Property as directed by the board of directors of the Trust Association ("**Board**") or in the event of the termination of the Trust; vote on behalf of the Trust as the legal and equitable title owner of the Trust Property at any meeting or other proceeding of any owners' association or similar organization governing the use, operation, repair, replacement, or maintenance of a portion of the Trust Property for a specific Site, but excluding the Trust Association ("**Site Association**") or similar organization (excluding the Trust Association) governing the Trust Property; maintain a

registry of the Members of the Trust Plan; and hold legal and equitable title to the Trust Property.

11. Throughout the term of a Member's Membership in the Trust Plan, a Member shall be obligated to pay annual "Annual Fees" for the expenses properly incurred in the ownership, maintenance, management, operation, repair, and replacement of the Trust Property, the Trust Association property, in the operation of the Trust Plan, and by the Trust Association in the performance of its duties and includes any fees, expenses, taxes, or claims payable by the Trust Association from time to time, including such other expenses defined in the Trust Agreement. The Annual Fees for the first year of operation for the Trust Plan are estimated to be as set forth below, with all Memberships charged the Tier 1 per ShellPoint amount for the first 1385 ShellPoints purchased, followed by Tier 2 for the next 390 ShellPoints purchased, followed by Tier 3 for the next 270 ShellPoints purchased, and then followed by Tier 4 for all additional ShellPoints purchased.

ShellPoints Purchased		Per ShellPoint
Tier 1	0-1385 ShellPoints	\$0.51
Tier 2	1386-1775	\$0.25
Tier 3	1776-2045	\$0.20
Tier 4	2046 and above	\$0.15

12. The Trust Plan shall have the one (1) class of membership; however, the Petitioner reserves the right to amend the Trust Plan Documents and to create and define such additional classes of Membership as Developer, in its sole discretion, may elect.
13. The initial term of each Membership is thirty-five (35) months (the "**Initial Term**") and commences on the first (1st) day of the month immediately following the date on Member's special warranty deed for the Membership.
14. The Member will be under no obligation to renew Member's Membership in the Trust Plan after the Initial Term, and will receive notice (the "**Renewal Notice**") no less than thirty (30) days and no more than sixty (60) days prior to the date of renewal, informing the Member of the right to terminate at any time prior to the date of automatic renewal ("**Automatic Renewal Date**").
15. Unless a Member terminates the Member's Membership prior to the expiration of the Initial Term or any Renewal Term (as defined below), each constituting an Automatic Renewal Date, the Member's Membership will automatically renew on the Automatic Renewal Date for an additional thirty-five (35) months (a "**Renewal Term**"). After payment in full of the Purchase Price, Member shall pay the Petitioner upon the commencement of each Renewal Term, twenty-five dollars (U.S. \$25.00) ("**Agreement**

Renewal Fees") in consideration for renewing the Membership, unless otherwise waived or terminated.¹

16. In order for a Member to terminate that Member's Membership, Developer must receive Member's written notice of termination ("**Member's Notice of Termination**") prior to the Automatic Renewal Date.
17. The term of the Trust may be perpetual unless sooner terminated in accordance with the provisions of the Trust Agreement. The term of the Trust at any given time shall be dependent on the term of the leasehold condominiums or other condominium property submitted by the Developer to the Trustee.
18. The Association provides for the methods and means by which Members reserve the use of any Units committed to the Trust and is responsible for instituting the Member's Manual and operating the reservation system; however, the Association will delegate these duties to the Management Company by agreement as permitted by the Trust Plan Documents.
19. Because the Trust Plan is structured so that the Initial Term and any Renewal Term of a Membership is less than three (3) years and Members have the right to terminate their Membership at the end of each applicable term, the Petitioner believes that the Trust Plan is not a timeshare plan as defined under the Timeshare Act.
20. Although not a timeshare plan as defined under the Timeshare Act, the Trust Plan Documents contain consumer protections which closely mirror those required for timeshare plans under the Timeshare Act, including:
 - All accommodations committed to the Trust shall be free and clear or non-disturbed.
 - Ten (10) day rescission period is available to purchasers.
 - All funds received from a Member shall be placed in an escrow account held by an escrow agent independent from the Developer ("**Escrow Agent**") until the end of the rescission period described above.
 - Full, fair, meaningful and effective disclosure of all aspects of the Trust Plan. A copy of the disclosure statement and its exhibits are provided with this Petition.

¹ In addition to the Agreement Renewal Fee, in determining whether to renew, Members of the Trust Plan must also take into consideration the Annual Fees which will have to be paid by the Member over the course of the Renewal Term.

- A one-to-one member to accommodation ratio, as the total ShellPoints for Sale or Sold in the Trust at any given time will never exceed the total ShellPoints for Use at such time.
 - An independent Trustee and escrow agent.
21. Because the Initial Term of each Membership of the Trust Plan is only thirty-five (35) months, Renewal Notices are received by Member's no less than thirty (30) days and no more than sixty (60) days prior to the date of renewal, and the subsequent Renewal Terms are for thirty-five (35) months, Petitioner believes the Trust Plan fits under the exception to a multisite timeshare plan set forth in Section 721.52(4), *Florida Statutes*.

V. ISSUES TO BE RESOLVED

As applied to Petitioner's particular set of circumstances presented in Article IV of this Petition for Declaratory Statement, Petitioner hereby requests an opinion from the Division confirming the Trust Plan, which will offer a vacation product for a thirty-five (35) month Initial Term with terminable thirty-five (35) month Renewal Terms that include a right to use accommodations that are part of the Trust Property, is not considered to be a "timeshare plan" under the Timeshare Act, and thus is not subject to the registration requirements of the Timeshare Act.

VI. NO REQUEST FOR HEARING.

The Petitioner requests a declaratory statement at this time and does not formally request a hearing at this time; however, Petitioner understands that the Division may, in its discretion, hold a hearing to dispose of the petition.

Respectfully submitted this 11th day of January, 2018 by:



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January 11, 2018

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VIA FEDERAL EXPRESS

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Re: • Petition for Declaratory Statement
PSVC, LLC
Pink Shell Resort Club

To Whom it May Concern:

Enclosed please find for your review and consideration a petition for declaratory statement submitted on behalf of PSVC, LLC -- the developer of Pink Shell Resort Club, which is the program described in the petition for declaratory statement. Also enclosed is a CD-ROM containing the Disclosure Document and all of its exhibits that describe the Plan. For your convenience, the Petition is also included as a document on the disk.

Should you have any questions or concerns regarding this petition for declaratory statement or the documents included with this letter, please do not hesitate to contact me at (407) 244-3260 or via email at bguthrie@foley.com.

Respectfully,



Bill Guthrie

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