

**DIRK KEMPTHORNE**  
GOVERNOR



**GAVIN M. GEE**  
DIRECTOR

**STATE OF IDAHO**  
**DEPARTMENT OF FINANCE**  
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P.O. BOX 83720  
BOISE, IDAHO 83720-0031  
Website: [finance.state.id.us](http://finance.state.id.us)

July 13, 2001

Re:

Dear

This is in response to your letter dated June 18, 2001. You have asked that the Department concur with your opinion that the business plan of \_\_\_\_\_ does not involve the offer and sale of a security under the Idaho securities laws.

Our Department has reviewed your original request, dated April 22, 1997 ("Original Request") and our response issued on July 15, 1997. Based on the facts presented in your June 2001 letter, we are willing to recommend to the Director that no enforcement action be taken if the \_\_\_\_\_ offers and sells contractual rights ("Residence Agreements") for the use and occupancy of shipboard luxury apartments ("Residences") as described without registration under the Idaho Securities Act.

In reaching this position, we note particularly your representation that the factual change identified in your letter is the only material difference from the facts set forth in your Original Request. Specifically, the Original Request has been modified relating to the provision of rental services on a non-exclusive, unsolicited basis. It is our understanding that the rental services program will operate within the following parameters:

1. The service provider will make no representations with regard to the economic or tax benefits of ownership or rental of residences.
2. The service provider will not advertise its rental services.
3. Availability of rental services will be indicated to potential purchasers only in response to direct questions regarding rental activities.
4. The service provider will not contract with any resident for the provisions of rental services prior to the execution of the resident agreement, nor will any such arrangement be offered in connection with the sale of Residences.
5. The rental program will not involve a pooling arrangement and will not involve any limitations on resident occupancy.

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Credit Unions (208) 332-8003  
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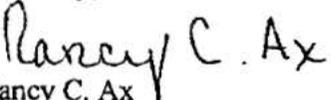
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**EQUAL OPPORTUNITY EMPLOYER**

In connection with your representations and the position expressed above, the remaining limitations outlined in the Original Request continue to apply. Please be advised, that this no-action position is based solely on your representation of the facts, and should the facts change or prove to be untrue, this no-action position may no longer be available.

Sincerely,

  
Nancy C. Ax  
Securities Analyst

June 18, 2001

063649.0101

BY UPS

Mr. Gavin M. Gee  
Director  
Department of Finance Securities Bureau  
Joe R. Williams Building  
700 West State Street  
Boise, Idaho 83720-0031

Re: Luxury Passenger Vessel and Marketing of Residence  
Apartments

Dear Mr. Gee:

On behalf of \_\_\_\_\_, a corporation formed and existing under the laws of the Bahamas, we request that the staff (the "Staff") of the Idaho Department of Finance (the "Department") provide interpretive advice confirming our opinion that \_\_\_\_\_ ("Ship Owner"), a wholly owned subsidiary of \_\_\_\_\_, may enter into contractual arrangements with purchasers (the "Residents") of the exclusive right to occupy and use a luxury apartment ("Residence") aboard the luxury passenger vessel \_\_\_\_\_ the "Ship"), in the manner described below, without such contractual arrangements being deemed to render such arrangements or the previous purchase of rights to occupy a Residence to involve the offer or sale of a security, as such term is defined under the Idaho securities laws.

On March 27, 1997, a formal No-Action request on behalf of \_\_\_\_\_ was made of the staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC").<sup>1</sup> A response from the Division of Corporation Finance (the

Luxury Passenger Vessel and Marketing of Residence Apartments" (March 27, 1997) attached as part of Appendix A. In seeking no-action relief, \_\_\_\_\_ represented to the SEC that: (1) the Residences are not being offered and sold with emphasis on economic benefits to the purchaser to be derived from the managerial efforts of \_\_\_\_\_ the Ship Owner or others; (2) no rental pool or time-sharing is required of Residents or authorized or offered to them by \_\_\_\_\_ or its affiliates; (3) the Resident is not required to hold or make available the Residence to Ship Owner for any part of a year; (4) no rental agency services or unsolicited referrals will be offered by \_\_\_\_\_ or its affiliates to Residents; and (5) although the Residents may independently enter into a non-pooled rental arrangement with an agent, for purposes of assigning or subletting a Residence, any such agent will not be designated or required to be used as a condition to the

"Division") was received on March 28, 1997 ("March 1997 No-Action Letter")<sup>2</sup> stating that, based on the facts presented, the Division would not recommend enforcement action to the Commission and that registration would not be required under the Securities Act. The Division noted, in granting its no-action relief, that the Residences should be offered and sold to Residents without any emphasis on economic benefits to Residents to be derived either from the ownership of the Residences, the managerial efforts of others, or from the rental of the Residences. The SEC also outlined the following limitations on the offer and sale of the Residences:

1. payments will be placed in an escrow account in a United States bank, and payments will be returned to Residents with interest in the event the Ship is not delivered;
2. Residents will be required to meet suitability standards, including a minimum net worth of \$5 million;
3. neither \_\_\_\_\_ nor any of its affiliates will offer the opportunity for Residents to participate in rental pool arrangements, nor will any such arrangements be authorized;
4. \_\_\_\_\_ and its affiliates will not provide Residents with rental brokerage services; and
5. \_\_\_\_\_ and its affiliates will offer referrals to rental agents on a solicited basis only.

Since the issuance of the March 1997 No-Action Letter, 65% of the Residences have been sold, and many of the current Residents have requested that \_\_\_\_\_ provide rental services.<sup>3</sup> \_\_\_\_\_ desires, either itself or through an affiliate, to provide such rental services, on a non-exclusive, unsolicited basis as requested by the Residents, and has requested and received on June 12, 2001, a no-action letter (the "Modified Letter") from the Division modifying the conditions referenced above from the March 1997 No-Action Letter, which request letter (the "Modified Request") and Modified Letter are attached hereto as part of Appendix A.

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acquisition of the Residence. Additionally it was represented that Residents will not receive rental brokerage services from \_\_\_\_\_ or its affiliates or be offered referrals to other rental agents from \_\_\_\_\_ or its affiliates on an unsolicited basis.

<sup>2</sup> \_\_\_\_\_, No-Action Letter (March 28, 1997), attached as part of Appendix A.

<sup>3</sup> Approximately 20 or more existing Residents have inquired into whether \_\_\_\_\_ intends to offer rental services and expressed an interest in utilizing such services, if offered. Members of the Residents Committee have also asked \_\_\_\_\_ to provide rental services. The primary reason Residents have given for desiring a rental program offered by \_\_\_\_\_ is convenience.

Part I of this letter, the Background, contains a detailed, updated presentation of facts relating to the Ship and the offers and sales of the Residences and draws upon our recent SEC no-action request. Part II sets forth a summary of rental program. Part III sets forth a summary of the federal securities law analysis relating to the proposed rental services. Part IV sets forth the Idaho securities law analysis relating to the rental services. Parts V and VI summarize and conclude this letter.

Because \_\_\_\_\_ determined that it would be more helpful to you for us to be able to include the Modified Letter, timelines of your review is of great importance. We would greatly appreciate an initial review from you within the next three to four weeks. Please also note that existing and prospective Residents are required to have a minimum financial net worth of \$5,000,000.

I. Background

A. The Ship, Ship Owner and \_\_\_\_\_ <sup>4</sup>

The Ship is currently under construction in Risa, Norway and the hull was launched in February 2001. The Ship is expected to be completed and delivered to Ship Owner on or about December 28, 2001. The first sailing is scheduled for mid to late January 2002. The Ship is a 644-foot long, 40,000-ton luxury liner elevated 12 decks high, with a crew of 343 and a cruising speed of 19 knots.<sup>5</sup> The Ship is being configured with spacious, luxurious, and fully-serviced Residences, and smaller, less numerous hotel suites ("Guest Suites").

\_\_\_\_\_ a preminent operator of luxury cruises, will manage the Ship's deck, engine and hotel operations. The Ship's make-up consists of approximately 110 Residences, ranging in size from 102.8 to 301.3 square meters (1,114 to 3,242 square feet), and featuring two to three bedrooms. The Residences have sold or are selling at purchase prices between \$2,000,000 and \$6,840,000.<sup>6</sup> All purchasers have been individuals or entities with net-worths exceeding \$5,000,000. At present, 73 of the 110 Residences have been sold.<sup>7</sup> The end-users of the Residences are Residents (who may be year-round occupants of their Residences), their families and friends, business associates, guests and approved assignees. In addition to the Residences,

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<sup>4</sup> For further information regarding the Ship, Ship Owner and \_\_\_\_\_, please see Appendix A.

<sup>5</sup> Original plans called for a 1,000-foot long, 80,000-ton ship with 283 Residences and 186 Guest Suites.

<sup>6</sup> Two under-sized Residences with obstructed views and certain other drawbacks have sold for approximately \$500,000 each.

<sup>7</sup> This number does not include 15 Residences which have been reserved, but not yet sold. The number of Residences in reserve changes on a weekly basis.

the Ship will maintain 88 Guest Suites, renting at prices expected to be approximately \$1,000 per person per day, double occupancy, offering accommodations for individual segments of the ongoing annual itinerary lasting approximately 5 to 15 days.

Ship Owner was incorporated on May 16, 1997, under the laws of the Bahamas, for the purpose of constructing, owning and operating the Ship.<sup>8</sup> The officers and directors of and Ship Owner are experienced and well-known members of the shipping, resort and business community.<sup>9</sup>

and Ship Owner have entered into a management agreement pursuant to which, for a management fee plus reimbursement of expenses, has assumed responsibility for (i) the management of the Guest Suites; and (ii) the fulfillment of the Shipowner's obligations to the Residents pursuant to the Residence Agreements.<sup>10</sup> and Ship Owner have, in turn, engaged to manage the operations and affairs of the Ship, including technical maritime operations and resort, travel and hospitality services.

#### B. Organization and Capitalization of Ship Owner

The Ship Owner has contracted for the construction of the Ship as a luxury passenger ship. owns one hundred percent (100%) of the common stock of the Ship Owner, and operates it as a separate subsidiary. The authorized share capital of Ship Owner is \$60 million. contributed initial capital of \$100,000 upon incorporation of the Ship

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<sup>8</sup> was incorporated in December, 1995, for the purpose of organizing, promoting and developing Ship Owner and other similar ship-owning entities.

<sup>9</sup> The backgrounds and profiles of the board of directors, management and consultants of and Ship Owner can be found at shareholders include various Norwegian entities as well as , an indirect affiliate of as also engaged recognized operators as concessionaires to manage and operate the Ship's facilities including the spa, casino and jewelry shop.

<sup>10</sup> Under the management agreement, Ship Owner appointed as the manager of the Ship. In such capacity, will direct and supervise administration of the daily operations and maintenance of the Ship, as hereinafter described, and shall develop and oversee plans and strategies for the Ship's deployment (including services and activities concerning, the Guest Suites, the common areas, and the Residences). Among other matters, will act on behalf of and represent Ship Owner in any and all respects with regard to the Residences and the exercise of Ship Owner's rights with respect to the Residences. will also manage the daily operations of Ship Owner including, among other matters, forecasting, budgeting, creditor-relations and correspondence with Ship Owner's board.

Owner and increased its capital contribution to \$60 million when the contract for construction of the Ship was confirmed in September 1999.<sup>11</sup> Payment for the construction of the Ship, including without limitation, the obligations of \_\_\_\_\_ and Ship Owner under the Ship construction contract, has been fully secured by pre-delivery and post-delivery debt facilities arranged by Westdeutsche Landesbank Girozentrale, the fourth largest bank in Germany, and Centre Solutions (Bermuda) Limited, a member of the Zurich Financial Services Group. Economic benefits from the day-to-day operations of the Ship, including revenues from the sale of Guest Suite accommodations, and revenues from retail and other on-board commercial services, will inure to the benefit of Ship Owner. Earnings will be passed from Ship Owner to \_\_\_\_\_, rather than retained by Ship Owner, through the payment of dividends or other distributions by Ship Owner to \_\_\_\_\_.

### C. Residence Agreements

Ship Owner has entered into and will continue to enter into Residence Agreements granting each Resident a contractual right to exclusive occupation and use, for permitted, residential or similar recreational purposes, of a particular Residence, and certain rights to use the public areas aboard the Ship, for a term of 50 years (subject to renewal and extension options). The consideration paid by each Resident, for the rights granted by the Residence Agreement, vary according to the location, size, amenities and appointments of any Residence, and are payable in two installments (formerly three installments).

In addition, commencing with the Ship's first sailing, Residents will incur a quarterly maintenance obligation to fund the Ship's then current operations, calculated as that proportional amount of the Ship's cash requirements which the square footage of the particular Residence bears to the total square footage of all Residences and Guest Suites on the Ship.<sup>12</sup> Each Resident will also pay a security deposit on the Residence in an amount equal to one quarterly installment of the estimated annual maintenance obligation for the particular Residence. During the period prior to the delivery of the Ship, \_\_\_\_\_ has taken precautions to protect the payments made by Residents from the risks associated with construction and other contingencies. Such payments are placed in an escrow account with The Chase Manhattan Bank, and in the event the Ship is not delivered, payments will be returned to the payors with interest. Notwithstanding that the Residence Agreements do not involve securities, in view of the

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<sup>11</sup> In \_\_\_\_\_ March 1997 No-Action Letter \_\_\_\_\_ indicated it would capitalize Ship Owner with \$10 million, but has subsequently raised its capital contribution to the \$60 million noted here.

<sup>12</sup> The first payment will include an additional sum to cover costs related to the commissioning and start-up operations of the Ship. The annual maintenance is estimated to be about 5 percent of the purchase price, or \$100,000 on a \$2 million Residence.

substantial cost of acquiring and maintaining a Residence, prospective Residents are required to meet standards of suitability, including, a minimum financial net worth of \$5 million.

D. Assignments and Subleases: No Rental Pool or Exclusive Rental Arrangements

Residents have the right, subject to restrictions consistent with the residential nature of the Ship, to assign their exclusive right to occupy and use a Residence for all or part of the term of the Residence Agreement, pursuant to the rules set forth in the Residence Agreement and the Ship Rules (the latter document being similar to the house rules of a condominium or cooperative apartment). Neither \_\_\_\_\_ nor its affiliates will offer the opportunity for Residents to participate in rental pool arrangements, nor will any such arrangements be authorized by \_\_\_\_\_.<sup>13</sup> Nor does, or will the Residence Agreement require use of an exclusive rental agent, designated by \_\_\_\_\_, or place limitations on the time the Resident may occupy and use the Residence.

E. Absence of Expectation of Profit to Resident

As described in the March 1997 No-Action Letter, Residences have not and will not be marketed as investment opportunities. In marketing the Residences, no representations have been made with regard to the economic or tax benefits of rental of the Residences. Moreover, no rental projections concerning the Residences are provided to prospective purchasers. Sales representatives are advised that, under no circumstances, are they allowed to make statements concerning the economic benefits relating to the rental of the Residences and emphasis is placed only on the value of the Residences as luxury residential accommodations for personal use by the Residents. \_\_\_\_\_ will continue to operate under these same guidelines irrespective of whether the Staff agrees that rental services can be provided to Residents.

II. Rental Program

In the March 1997 No-Action Letter, it was represented to the SEC, in seeking no-action relief, that Residents would not receive rental brokerage services from \_\_\_\_\_ or its affiliates. Furthermore it was represented that \_\_\_\_\_ would only offer rental agent referrals to Residents upon request. In response to demands by current Residents for rental

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<sup>13</sup> A rental pool has been defined as "a device whereby the promoter or a third party undertakes to rent the unit on behalf of the actual owner during that period of time when the unit is not in use by the owner. The rents received and the expenses attributable to rental of all the units in the project are combined and the individual owner receives a ratable share of the rental proceeds regardless of whether his individual unit was actually rented." See Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347 (January 4, 1973).

services by the Ship Owner, now desires to offer rental services, provided by itself or an affiliate, on a non-exclusive and unsolicited basis.

The rental program will be voluntary, separate and distinct from the Residence sales program. Under no circumstances will a rental agency agreement be executed by a prospective Resident until after the execution of a Residence Agreement.<sup>14</sup> The rental agency agreement will be a separate agreement from the Residence Agreement and only the rental agency agreement will cover those services to be rendered under the rental program.

or its affiliate will not advertise its rental services<sup>15</sup> and the availability of such rental services will be indicated to potential purchasers only in response to direct questions regarding rental activities. The rental program will not be the exclusive avenue for the rental of Residences, and Residents will have the option of renting their Residences directly or going through an independent rental agent.

anticipates that there will be an abundant supply of independent rental agents interested in the rental market for Residences.<sup>16</sup> Those Residents or prospective Residents requesting information concerning rental alternatives will be advised of the three choices available to them for rental of their Residences: (i) rent the Residence directly themselves; (ii) use the rental services of an independent company; or (iii) use the rental services of or its affiliate.

For those Residents who chose to participate in rental service program ("participating Residents"), a rental agreement will be established between or an affiliate (the "Service Provider") and each participating Resident, under which the Residence, once placed with the Service Provider, must remain in the rental program for a term of 3 years. There are significant business reasons why a 3-year term duration is required for the

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<sup>14</sup> When duly executed and delivered by a Resident, the Residence Agreements constitute legal, valid and binding obligations of such Resident enforceable in accordance with the terms thereof. Execution of a rental agency agreement will not change any of the Resident's obligations regarding purchasing a Residence or otherwise under the Residence Agreement, other than relating to the subsequent renting of such Residence through the Service Provider. In no event will entering into a rental agency agreement impose any additional financial obligations on a Resident. Moreover, the rental agency agreement will provide that in the event that a Residence Agreement is effectively terminated, the rental agency agreement will also terminate with no additional penalty to the Resident.

<sup>15</sup> Although the rental services offered by Service Provider will not be advertised, the availability of Residence rentals onboard the Ship will be advertised in order to identify persons interested in renting such Residences.

<sup>16</sup> For a comprehensive discussion on the reasons why believes there will be an abundant supply of independent rental agents interested in the rental market for Residences, please see Appendix B to the Modified Request.

rental program. Typical of the luxury cruise industry, there will be a long lead time in filling vacancies on board the Ship.<sup>17</sup> In order to ensure the quality of the rental program and that adequate resources are allocated as necessary, the Service Provider needs to be assured of a stable number of units in the Service Provider rental program, especially when specific itineraries are likely to be booked far in advance. The only way the Service Provider can be assured of adequate Residence availability for itineraries scheduled with long lead times is to have the length of term proposed for those Residences going into the Service Provider rental program.

The ongoing monitoring and administration of the rental agreement will be performed on behalf of the individual participating Residents by the Residents Committee.<sup>18</sup> The rental of participating Residents' Residences will be handled by the Service Provider. Under the agreement, participating Residents will agree not to use other entities to rent their Residences nor to undertake such activities on their own.

Other terms in the agreement will contain appropriate provisions for indemnification, insurance requirements, the maintenance of proper books and records by the Service Provider, the content and frequency of reports to be provided by the Service Provider to individual participating Residents and to the Residents Committee, and other obligations and

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<sup>17</sup> The anticipated long lead times in filling vacancies on board the Ship will not serve as a barrier to independent rental agencies seeking to enter the Residence rental market. Long lead times are a general market phenomenon in the cruise industry which impact cruise operators and travel agents alike. Currently 98% of cruise bookings are made through independent travel agents and lead times have not given cruise operators any advantage over travel agents. does not believe a different result would arise in the rental of Residences.

<sup>18</sup> A "Residents Committee" is comprised of actual Residents and acts as the representative body of all Residents in liasing with Ship Owner and on matters relating to the operations of the Ship, the services and amenities available on the Ship and other matters pertaining to the experiences of the Residents in relation to the Ship. See , No-Action Letter (March 28, 1997). The first Residents Committee was appointed by February 2000. Subsequent to the delivery of the Ship, the Residents Committee will be elected by the Residents. As stated in the March 1997 No-Action Letter, the Residents Committee serves exclusively in an advisory role to "liase with Ship Owner and on matters relating to the services and amenities available on the Ship and other matters pertaining to the lifestyle of the Residents." As such, the Residents Committee will serve in an advisory capacity to the Service Provider rental program.

responsibilities of the Service Provider and the participating Residents. Rights to terminate the agreement will be specified for both the participating Residents and the Service Provider.<sup>19</sup>

Approximately once a year, the participating Resident will specify to the Service Provider the specific time periods in which such Resident's Residence will be available for rental.<sup>20</sup> The Service Provider will then have the right to rent such Residence out during the designated rental period. If a Residence has not been rented out within a certain span of time, anticipated to be approximately 60 days, prior to the date upon which the designated rental period is to commence, the right to occupy and use such Residence during such designated rental period will, if the Resident so chooses, revert back to the Resident. The rental agreement will also provide for minimum duration of rentals (i.e. at least one scheduled voyage), restrictions on occupancy by infants and children or people with special medical conditions and requirements, and the payment of security deposits, among other matters.

The Service Provider will establish daily rental rates for each Residence reflecting prevailing market factors and conditions and will market Residence rentals in an effort to promote their appeal to prospective tenants.<sup>21</sup> The rental rates may at some point in time include a bundled array of amenities and services, i.e. food, beverages, and gratuities as provided to occupants of Guest Suites as well as comparable housekeeping, linen laundry, bathroom

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<sup>19</sup> The specific rights of termination under the Service Provider rental agreement have not been determined yet but will likely include reciprocal rights of termination for non-performance/default. Additional rights of termination may include the right of the Service Provider to terminate without cause upon a given period of notice, possibly 90 to 180 days. The purpose of such a right of termination would be to give the Service Provider an avenue of relief if the rental program were to become financially or commercially burdensome. A similar right of termination for the benefit of Residents might be considered in exchange for liquidated damages.

<sup>20</sup> Remaining time periods will be allocated to the Resident for such Resident's personal occupancy and use of the Residence. Participating Residents will not be obligated to commit to a minimum period of time in which their Residences must be available for rental. The amount of lead time that the Resident will be required to give Service Provider in order for Service Provider to rent a Residence has not yet been determined, but will be determined based on industry standards. The following year's itinerary will be available to the participating Resident with ample time before the Resident specifies the designated rental period.

<sup>21</sup> For a discussion on the establishment of daily rental rates and procedures by \_\_\_\_\_ to assure neutrality in the rental of Residences, please see Appendix C to the Modified Request.

amenities, etc.<sup>22</sup> Rental rates will reflect incentives for extended periods of rental (e.g. seasonal or annual) and off-season rentals. Holiday and other peak season rates will reflect premiums.

Rents received with respect to a Residence will be distributed to the Resident owning such Residence, reduced for certain fees and expenses payable to the Service Provider, and others.<sup>23</sup> Amounts to be deducted from the rental revenue disbursed to the Resident will likely include allocations for items such as:<sup>24</sup> (i) an amount equal to the daily maintenance charge for such Residence;<sup>25</sup> (ii) sales commissions paid to the various channels of

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<sup>22</sup> It is currently contemplated that added value services and amenities will be offered separately from rental accommodations under the Service Provider rental program and will not be bundled together with rentals. However, the bundling of added value services and amenities into an all-inclusive rental package may arise if, based on a market analysis, such packaging is deemed preferable. Regardless, will make added value services and amenities available for both Service Provider rentals and independent rentals. Specific procedures have not yet been established on how the bundled array of amenities and services will be made available to those renting outside the Service Provider rental program. It is contemplated, however, that will offer for sale added value services for rentals such as ones to be offered to the Residents themselves during their periods of occupancy and/or which may be offered under the Service Provider rental program. Added value services such as food, beverages, air transportation, ground transfers and spa treatments will possibly be sold on a per service "a la carte" basis or as bundled packages for set intervals of time, possibly weekly, daily or on a per voyage basis. Pricing of such bundled services will be determined on a retail basis which will include an element of profit as with the added value services offered to Residents and/or sublessees under the Service Provider rental program. will not implement pricing decisions discriminating against independent rentals.

<sup>23</sup> Ship Owner has engaged the real estate and hospitality business advisory group of to advise Ship Owner and the Residents Committee on prevailing standards and customs for rental programs in the luxury mixed use resort and real estate industries.

<sup>24</sup> The structure described represents the Service Provider's intended plan for the distribution of revenue under the rental program. The revenue distribution plan and the terms within it have not been negotiated with the Residents as of the date of the submission of this letter, because the Service Provider and the Residents Committee felt that it was premature to approach the Residents with the proposed rental program prior to obtaining the necessary SEC interpretive advice. The revenue distribution plan may change in negotiations with the Residents, however, in all cases, the Residents will only receive revenue from the rental of their own Residences and in no way will the structure of the revenue distribution plan be modified or changed so as to "pool" rental income among the Residents.

<sup>25</sup> As a matter of cash-flow control and convenience to the participating Residents, intends to have the Service Provider credit part of the gross rental income for a rented Residence

distribution used to rent the Residences;<sup>26</sup> (iii) sales and marketing expenses; (iv) audit fees related to the yearly independent audit report contemplated for the rental program;<sup>27</sup> (v) a management fee to be paid to Service Provider; (vi) services and amenities bundled with the rental of the Residence; (vii) a reserve charge for items such as charges made by credit card companies, credit card charge-backs, uncollected telephone charges, uncollected guest accounts, bad check and credit and collection charges.<sup>28</sup>

### III. Status Under the Federal Securities Laws

received the Modified Letter from the SEC regarding offers and sales of the Residence Agreements as modified relating to the rental program on June 12, 2001. The federal analysis is set forth below.

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against the daily maintenance charge for such Residence due to \_\_\_\_\_ from such participating Resident for the days the Residence was rented. The Resident will receive a credit against its maintenance fees for such period and the actual net revenue payable to the participating Resident for such rental will be reduced accordingly.

<sup>26</sup> The various channels of distribution used to rent the Residences will likely include retail travel agents, general sales agents, real estate and travel networks and yacht brokers. Commissions payable to the various channels of distribution are being deducted from the rental revenue because payments to the channels of distribution represent expenses incurred for the purpose of generating rental revenue and thus the allocation of this expense between participating Residents and the Service Provider seems reasonable and appropriate. Commission deductions against rental income will be on an actual basis for each individual Residence.

<sup>27</sup> Audit fees will be paid to a certified public accounting firm for the performance of an independent audit report with respect to the rental program. \_\_\_\_\_ is including this deduction because it anticipates that renters will want an independent third party to audit the Service Provider's books rather than rely on an audit provided by Service Provider.

<sup>28</sup> Residents will be solely responsible for the expenses and reserve charges which accumulate for their individual specific apartments. An annual reserve will be established once a year based on a percentage of estimated total gross rental revenue. Each Residence will contribute to the reserve fund a pro rata portion of the total reserve based on an estimate of that proportion of the total gross rental revenue to be generated by such Residence. In practice, the Service Provider may elect to deduct a portion of the net rental revenue payment due to the Resident to cover the reserve charge. Charges against the reserve will be allocated and charged against each participating Residence on an actual basis. It is likely that the unspent balance of the reserve will be carried forward to the next year with appropriate adjustments made on an individual Residence basis to account for prior charges against the reserve allocated to applicable individual Residences. Reserve amounts attributed to different Residences will not be pooled.

A. Offer and Sale of Residences

views the rights being offered to Residents, for exclusive occupation and use of a Residence, as lacking the essential attributes of an investment contract or any other type of security. Indeed, the SEC has previously agreed with this view when it stated in the March 1997 No-Action Letter that such rights would not be deemed to involve the offer or sale of a security. The only material difference between the business plan of as presented to the SEC in the March 1997 No-Action Letter, and the business plan now as presented, is that desires to offer, itself or through an affiliate, rental services to the Residents on a non-solicited and non-exclusive basis.

In both the March 1997 No-Action Letter and in the Modified Request for no-action relief, the business plan of and the sale of the rights to occupy and use the Residences under the Residence Agreements, fit comfortably within the limits of prior SEC provisions on condominiums and similar residential properties and lodgings, where no security was deemed to exist:

1. The Residences are not being offered and sold with emphasis on economic benefits to the purchaser to be derived from the managerial efforts of , the Ship Owner or others in renting the Residences;
2. No rental pool or time-sharing is required of Residents or authorized or offered to them by or its affiliates;
3. The Resident is not required to hold or make available the Residence to Ship Owner for any part of a year;
4. No unsolicited referrals to rental agency services will be offered by or its affiliates to Residents; and
5. Although the Resident may independently enter into a non-pooled rental arrangement with an agent, for purposes of assigning or subletting a Residence, any such agent will not be designated or required to be used as a condition to the acquisition of the Residence.

These restrictions satisfy the conditions under which the SEC has permitted sales of condominium units to proceed without causing a sale of a security to be involved in the sale of the unit. See Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development, Securities Act Release No. 5347 (January 4, 1973) ("Condominium Release"), attached hereto as Appendix B.

## B. Rental Program

The rental program offered by the Service Provider will contain the relevant restrictions under the Condominium Release and the SEC's recent interpretive no-action letter "FC Beach Joint Venture" ("FC Beach No-Action Letter").<sup>29</sup> Therefore, the offer and sale of Residences, subject to the rental program, will not require registration under the Securities Act.

In the Condominium Release, the SEC stated that the offering of condominium units in conjunction with "the offering of a rental or similar arrangement whereby the purchaser must hold his unit available for rental for any part of the year, must use an exclusive rental agent or is otherwise materially restricted in his occupancy or rental of his unit" will cause the offering to be viewed as an offering of securities in the form of investment contracts.<sup>30</sup> In the FC Beach No-Action Letter, which involved an interpretation of the Condominium Release as it applied to a rental program offered by a seller of condominium units, the SEC specifically stated that it would not recommend enforcement action if FC Beach Joint Venture (the "Owner") were to offer and sell condominium units ("Units") in its condominium hotel without registration under the Securities Act. Under the Owner's plan, the condominium hotel consisted of residential and commercial Units. The residential Units were owned by private individuals (the "Residential Owners"), while the commercial Units were not available for private ownership. The residential and commercial Units were forms of real estate not unlike the Residences and Guest Suites which comprise the Ship. The Owner offered rental services to its Residential Owners under guidelines which are analogous to the guidelines proposed by (i) the Residential Owner could only receive rental income from his or her own Unit (i.e. no pooling of rental revenues was allowed); (ii) the Unit had to remain in the Owner's rental program for a term of either five or ten years;<sup>31</sup> and (iii) the Residential Owner retained the right to use and occupy the Unit for any length of time desired. The only restriction to the Residential Owner's use was in the event the Unit had already been rented by the Owner's management company.

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<sup>29</sup> FC Beach Joint Venture, SEC No-Action Letter (May 29, 1998), attached hereto as Appendix C for the convenience of the Staff.

<sup>30</sup> More specifically, the SEC stated that a condominium developer can offer and sell units and offer rental services through an agent affiliated with such offeror without causing a sale of a security to be involved in the sale of the unit as long as: (i) the condominiums are not offered and sold with emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of others; (ii) no plan to avoid the registration requirements of the Securities Act is involved; (iii) the rental arrangement is entered into after the sale of the unit; (iv) no rental pool arrangement is involved; and (v) the owner is not obligated to rent through the offering agent.

<sup>31</sup> will be offering a shorter three-year term under its rental program.

In granting no-action relief to the Owner, the SEC specifically looked at the applicability of the Condominium Release as it related to the Owner's rental program in the offer and sale of the Units, and stated that the Units should be offered and sold without any emphasis on the economic benefits to the purchaser to be derived from the managerial efforts of others or the rental of the Units. The Staff also placed the following limitations upon the offer and sale of the Units:

1. no representations should be made with regard to the economic or tax benefits of ownership of the Units;
2. the Owner should not advertise its rental management services;
3. the availability of such rental services should be indicated to potential purchasers only in response to direct questions regarding rental activities;
4. the Owner should not contract with any purchaser for the provision of rental management services prior to closing the sale of the Unit, nor should any such arrangement be offered in connection with the sale of Units; and
5. the Owner's rental management program should not involve a pooling arrangement, and should not involve any limitations on Owner occupancy, except for when the Unit had been previously rented by the Owner's rental management company.

The sale of Residences and rental services offered by the Service Provider will contain the same restrictions outlined by the SEC in the FC Beach No-Action Letter.

1. No Representations will be made by the Service Provider with Regard to the Economic or Tax Benefits of Ownership or Rental of Residences.

The Residence Agreements will be offered and sold to Residents without any emphasis on economic or tax benefits to Residents to be derived either from the ownership of the Residences, the managerial efforts of others, or from the rental of the Residences. No representations concerning the potential economic benefits from the ownership and rental of the Residences will be made to prospective purchasers.<sup>32</sup> The Residences will not be marketed as

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<sup>32</sup> Mr. \_\_\_\_\_ the CEO of \_\_\_\_\_, has been very careful to point out in featured articles and statements to the press that the Residences should not be considered as investment opportunities. See Terry Trucco, *198 New Apts. \$2 Million and Up. Views of All Oceans*, NY TIMES, Mar. '12, 2000 ("When they raise the question [concerning investment potential of Residences], we tell them they are buying a lifestyle experience, not an investment"); Lauren Foster, *Home, Home on the Waves*, FINANCIAL TIMES, August 26/27 2000 (weekend) (reported as representing that the Residences should not be considered investments); Johan Hedlund, *Making the Most of the World*, OFFSHORE FINANCE CANADA, November/December 2000, at 39 ("We're not selling an investment, we're selling a lifestyle").

investment opportunities and written brochures and oral representations made to potential purchasers by salespersons will not emphasize the potential economic benefits that could be derived from ownership and rental of the Residences. Instead, the Residences are and will be presented to prospective purchasers as real estate for personal use by the Residents.

is the sole entity having the right to receive dividends, and each Resident will have responsibility for its own Residence to the same extent that a condominium or cooperative owner would.

2. Service Provider will not Advertise its Rental Services.

Service Provider will refrain from advertising its rental services. In no event will sales representatives be permitted to mention the existence of the Service Provider rental program until and unless an inquiry is made by the prospective purchaser concerning the existence of a rental program.

3. Availability of Rental Services will be Indicated to Potential Purchasers only in Response to Direct Questions Regarding Rental Activities.

The availability of rental services provided by the Service Provider, or by third-party independent agents, will be conveyed to potential purchasers only in response to direct questions regarding rental activities. It is anticipated that some prospective Residents can be expected to inquire concerning the various alternatives available for rental of their Residences. However, in no event will sales representatives be permitted to mention the existence of any rental program until and unless an inquiry is made by the prospective purchaser concerning the existence of a rental program. Those prospective purchasers and Residents requesting information concerning rental alternatives will be advised of the three choices available to them for rental of their Residences (i.e., rent directly, rent through an independent company, or rent through the Service Provider rental program).

4. Service Provider will not Contract with any Resident for the Provision of Rental Services Prior to the Execution of the Residence Agreement, nor will any such Arrangement be Offered in Connection with the Sale of the Residences.

There will be no collateral arrangements associated with the sale of the Residences involving rental services. The Residences will not be sold in connection with any rental arrangements nor in connection with any agreement requiring the Resident (i) to use an exclusive rental agent, (ii) hold the Residence available for rental for any part of the year, or (iii) materially restricting the occupancy or rental of the Residence. The only restriction in use will occur if, and only if, after purchasing a Residence, the Resident voluntarily chooses to enter into a rental agency agreement with the Service Provider as described above.<sup>33</sup> or its

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<sup>33</sup> If a Resident does choose, after purchasing a Residence, to participate in the rental program, the Resident will be subject to the term of the rental agreement, but the Resident will still not be

affiliate will not contract with any prospective purchaser of a Residence for the provision of rental management services prior to the execution of the Residence Agreement nor will such arrangement be offered in conjunction with the sale of the Residence.

Although the Service Provider will provide rental services as one of its many services to Residents, Residents will not be obligated to contract with the Service Provider for such rental services. The rental program offered by the Service Provider will be voluntary and non-exclusive. Residents will be able to act on their own behalf in the rental of their Residences or employ the services of an independent rental agent. Residents will not be materially restricted in their occupancy of their Residences and will not be required to hold their Residences available for rental for any part of the year.

5. The Rental Program will not Involve a Pooling Arrangement, and will not Involve any Limitations on Resident Occupancy.

The Residences will not be sold in conjunction with any mandatory or optional rental pooling arrangement or similar economic arrangement. A Resident will only receive rental income derived from renting its own Residence at such times as Resident chooses to do so. The rent received and expenses attributable to the rental of a Resident's own Residence will not be combined in a pool with other rents received from the rental of other Residences.

As discussed above, the Residences will not be sold in conjunction with a rental or similar arrangement pursuant to which the Resident must hold the Residence available for rental for any part of the year, or in which the Resident will be materially restricted in the occupancy of the Residence. In the FC Beach No-Action Letter, it was noted that the only restriction in use could occur when, and only when, the Unit holder voluntarily chose to enter into a rental agency agreement with the condominium owner. The same is true in case. The only restriction in use of a Residence will occur if, and only if, the Resident voluntarily chooses both (i) to enter into a rental services agreement with the Service Provider and (ii) to inform the Service provider that such Resident wishes to have the Residence rented out for a specific period of time. Any restriction in use will be limited to the terms of the rental services agreement (as described above) and the decision to enter into such agreement will be purely voluntary on the part of the Resident.

IV. Status under Idaho Securities Laws

On April 22, 1997, a formal no-action request on behalf of \_\_\_\_\_ was made of the Department. On July 15, 1997, the Department issued a letter stating that, premised upon the facts presented, the Department would not recommend enforcement action for violation of

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obligated to hold the Residence available for rental for any part of any year and will only be subject to such restrictions as are required of Unit holders under the FC Beach No-Action Letter.

the Idaho Securities Act for the offer and sale of the Residences. Copies of our no-action request and the Idaho response letter are attached as Appendix D.

Based upon the proposed change of facts relating to the provision of rental services on a non-exclusive, unsolicited basis, we hereby request the issuance of a no-action letter modifying the July, 1997 letter to reflect the change in facts.

views the offer and sale of Residences with the proposed rental services program as lacking the attributes of a security. As stated above under the federal securities law analysis, no representations with regard to economic or tax benefits of ownership or rental of the Residences will be made by Service Provider, Service Provider will not advertise its rental services, the availability of rental services will be indicated to potential purchasers only in response to direct questions regarding rental activities, Service Provider will not contract with any Resident for the provision of rental services prior to the execution of the Residence Agreement, the rental services program will not involve a pooling arrangement and will not involve any limitations on a Resident's occupancy. The structure of the rental services program does not meet any of the parameters set forth in the Condominium Release as denoting an investment contract:

1. There is no emphasis on the economic benefits to the purchaser from the managerial efforts of Service Provider from rental of the Residences;
2. There is no rental pool arrangement; and
3. The rental services program does not require a Resident to hold his Residence available for rental for any part of the year.
4. Purchasing a Residence will not require use of an exclusive rental agent or otherwise materially restrict Resident's occupancy or rental of his unit.

The Staff has issued no-action letters in analogous situations. In Re: USAA Towers, a cooperative, 1986 Id. Sec. No-Act. LEXIS 74, June 19, 1986, the Department issued a no-action letter in connection with sales of interests in a residential real estate housing cooperative. As was the situation in USAA Towers, does not and will not attempt to attract prospective purchasers of Residences with the prospect of profits traditionally associated with securities and intends to market the Residences as property interests to be used for residential purposes with no emphasis on tax or economic benefits and no rental pool or time-sharing arrangement involved. See also Re: Lake Haven Owners Association, Inc., 1997 Id. Sec. No-Act. LEXIS 50, September 10, 1997, wherein the Department issued a no-action letter in connection with membership interests and related licenses in a non-profit corporation and resort wherein, as with , no rental pool would be provided.

Additionally, the Supreme Court of Idaho, in *State v. Resource Serv. Co.*, 950 P.2d 249 (1997), cited *The Dunbarton Condominium Association v. 3120 Street Associates Limited Partnership*, et. al., 1987 U.S. Dist. LEXIS 2760, (1987) ("Dunbarton") in determining whether a transaction relating to entry of names in a BLM lottery for oil and gas leases constitutes a security. In Dunbarton, the United States District Court for the District of Columbia cited the Condominium Release (as well as case law) in concluding that the sale of condominiums did not involve an investment contract.

With respect to the risk capital test for whether a security is involved, as stated under Part I, the hull of the Ship was launched in February, 2001, the Ship is currently under construction with a completion date anticipated to be on or about December 28, 2001, 73 of the 100 units have been sold and [redacted] has put in \$60,000,000 in capital contributions to the project. The Ship is no longer a concept, it is a reality.

Accordingly, we believe that the offer and sale of Residences in the manner described above relating to the provision of rental services does not involve the offer and sale of a security.

#### V. No Security Involved

[redacted] has come a long way since the March 1997 No-Action Letter. The business plan of [redacted] has evolved into reality and cannot be considered speculative. The Ship is fully financed and under construction with an expected delivery date of December 28, 2001. 73 of the 110 Residences have been sold to Residents, all meeting the \$5 million suitability requirement, which [redacted] has and will continue to enforce. The fruition of the [redacted] business plan has resulted in the Residents requesting that [redacted] provide rental services. [redacted] has been careful to propose a structure for the rental services which ensures compliance with SEC precedent relating to the offering of rental services in conjunction with the offer and sale of residential properties.

The interests in the rights to occupy and use the Residences do not resemble any interest known as a security, notwithstanding the offering of rental services by the Service Provider. Ownership of the right to use a Residence in actuality in every material respect mirrors that of ownership in a condominium. The coincidental circumstances that make condominium ownership impossible or impracticable for ocean-going residential vessels should not result in an anomalous application of the securities laws to a business plan which was not designed to be marketed on expectation of profits to purchasers of Residences. Accordingly, [redacted] should be given the same treatment, in terms of the application of the securities laws, as that given to land-based condominium projects. In this regard, the business plan of [redacted] conforms within the limits of prior Department provisions concerning condominiums and similar residential properties where no security was deemed to exist.

VI. Conclusion

For the foregoing reasons, we respectfully request that the Department indicate its concurrence with our opinion that the business plan of \_\_\_\_\_ described herein does not involve the offer and sale of a security under the Idaho securities laws.

Respectfully submitted,