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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively on Behalf of The I'On Assembly, Inc.; and I'On Assembly, Inc.,

Petitioners,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC,

Respondents.

RESPONDENTS-PETITIONERS' RESPONSE BRIEF

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II. Did the Court of Appeals properly find that the I'On Defendants had no fiduciary duty to convey the disputed property to the Assembly where South Carolina courts have never recognized such a duty, where recognizing such a duty is not necessary to protect homeowners, and where recognizing such a duty would have far-reaching, negative consequences?

III. Did the Court of Appeals err in stating that South Carolina law would now embrace a novel, all-encompassing fiduciary duty for developers pursuant to *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) where covenants might provide theoretical control of a homeowners association?[1]

IV. Did the Court of Appeals properly find that Plaintiffs failed to allege facts indicating either an adequate demand by Plaintiffs or the futility of making such a demand as required by Rule 23(b)(1)?

V. Did the Court of Appeals properly find that the single business enterprise theory does not support amalgamating the I'On Defendants where there is no evidence in the Record of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions?

INTRODUCTION

Pursuant to South Carolina Appellate Court Rule 242(i), Respondents-Petitioners The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC (collectively, the "I'On Defendants") submit this

[1] The Supreme Court granted the I'On Defendants' petition for certiorari with respect to this issue. Because this issue is intertwined with Plaintiffs' challenge to the Court of Appeals' holding relating to fiduciary duty, and because it would be inefficient to address the Court of Appeals' fiduciary duty holding in two separate sets of briefs, the I'On Defendants are addressing their challenge and Plaintiffs' challenge to the Court of Appeals' holding on fiduciary duty in this Brief.

Brief responding to the Brief filed by the plaintiffs, Brad J. Walbeck and Lea Ann Adkins, both individually and derivatively on behalf of The I'On Assembly, Inc. (collectively, the "Plaintiffs").

Although this case has a long and complicated procedural history, and although Plaintiffs attempt to persuade the Court that there are many factual disputes that could only be resolved by a jury, the facts relevant to this appeal are straightforward. Plaintiffs allege that a 1998 Property Report obligated the I'On Defendants to convey certain amenities to the Assembly upon completion of their construction. Construction of the amenities was completed by early 2001, but Plaintiffs did not file suit until nearly ten years later, on December 22, 2010. Plaintiffs received notice, repeatedly and in writing, that the Assembly did not own the amenities at issue and that the I'On Defendants would not convey the amenities to the Assembly for free, and Plaintiffs even considered purchasing the amenities for $700,000 more than three years before filing suit. Thus, Plaintiffs' claims (aside from their breach of contract claims) are barred by the three-year statute of limitations, and the Court of Appeals correctly held that the trial court erred in denying the I'On Defendants' JNOV motion on this issue.

Further, the Court of Appeals correctly held that the trial court erred in denying the I'On Defendants' JNOV motion on Plaintiffs' breach of fiduciary duty claim. South Carolina law limits the situations in which a developer owes an HOA a fiduciary duty to narrow circumstances not present here, and even in those narrow circumstances, the duty that exists is a limited one that does not require the developer to convey its assets to its homeowners association. Recognizing an all-encompassing duty requiring developers to make only decisions that are in the best interest of their homeowners

associations would be a drastic change to the law, would eliminate developers' business judgment, and would expose developers to liability for virtually any decision.

Plaintiffs' derivative claims fail for an additional reason—they do not comply with the pleading requirements of Rule 23(b), SCRCP. Before asserting derivative claims on behalf of the Assembly, Rule 23(b) required Plaintiffs to demand that the Assembly pursue the claims or, in the alternative, allege facts demonstrating that such a demand would be futile. Despite filing five complaints, Plaintiffs never complied with this requirement. Plaintiffs now ask the Court to excuse their failure to comply with Rule 23(b) because the Assembly was realigned as a plaintiff as part of a settlement. But the law does not support Plaintiffs' "mootness" argument, particularly where the individual Plaintiffs controlled (and continue to control) all claims and presented them to the jury as derivative, not direct claims brought by the Assembly.

Finally, the Court of Appeals correctly held that the trial court erred in amalgamating the I'On Defendants and thereby relieving the Plaintiffs of their burden of proving liability for each of them separately. As this Court recently held, amalgamation pursuant to the single business enterprise theory "should be reserved for drastic situations and is the rare exception, not the rule." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 126, 866 S.E.2d 542, 551 (2021). Here, Plaintiffs did not demonstrate bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the I'On Defendants' legal distinctions.

In their Brief, Plaintiffs attempt to confuse the issues in this appeal by, among other things, citing irrelevant facts, ignoring dispositive facts and dispositive legal arguments, attempting to construe the Court of Appeal's application of legal principles

as the Court of Appeals construing inferences in the I'On Defendants' favor, and—tellingly—quoting extensively from a withdrawn and superseded Court of Appeals opinion. None of Plaintiffs' arguments supports reversing the Court of Appeals. Because the Court of Appeals' substituted opinion is well-reasoned and supported by the law and the Record, this Court should affirm it.[2]

STATEMENT OF THE CASE

This case involves a dispute between property owners and a developer regarding a promise made in 1998 to convey a community dock and a park to the homeowners association. The I'On Defendants contend that the developer fulfilled this promise in 2001 upon completion of construction and conveyance of those amenities. Plaintiffs contend that the developer should have conveyed different property. In any event, the construction of the amenities on the property Plaintiffs target was completed by April of 2001. No plaintiff brought suit until December 22, 2010.

Two property owners, Brad Walbeck and Lea Ann Adkins, asserted claims in their individual capacities as well as derivatively on behalf of the homeowners association, the I'On Assembly (the "Assembly"). The defendants included the developer, The I'On Company, LLC, and several related entities and individuals: The I'On Club, LLC, The I'On Group, LLC, I'On Realty, LLC, Vince Graham, and Tom Graham. Plaintiffs also sued the purchaser of the property they contend had been promised to them, 148 Civitas, LLC, and its principal, Mike Russo.

[2] As discussed below, the Court should clarify that certain dicta relating to fiduciary duty in the Court of Appeals' opinion is not consistent with South Carolina law. Further, the Court should reverse the portion of the Court of Appeals' opinion relating to the 2000 Recreational Easement for the reasons explained in the I'On Defendants' Briefs filed on April 14, 2022, and May 23, 2022. Otherwise, the opinion should be affirmed.

Walbeck alone filed suit on December 22, 2010, but never served the summons and complaint. (R. pp. 116-128.)[3] Walbeck filed an amended summons and complaint on March 8, 2011, alleging claims for violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. (R. pp. 129-140.) The I'On Defendants filed a motion to dismiss, answered, and counterclaimed for abuse of process. (R. pp. 1763-1764; R. pp. 141-150.) The I'On Defendants challenged the pleading based on, *inter alia*, the expiration of the statute of limitations, the absence of the alleged fiduciary duty, and the failure to properly bring the derivative claims. (*Id*.)

On the day before the hearing on the motion to dismiss, February 7, 2012, Adkins joined Walbeck in a second amended complaint purporting to assert claims individually and derivatively on behalf of the Assembly. (R. pp. 151-67.) Walbeck and Adkins each verified the facts and allegations and sought to bolster the claims as to the derivative procedure. (R. pp. 166-67.) They added the Assembly as a defendant to the action. (*Id.)* The trial court denied the motion to dismiss. (R. pp. 9-10.) The I'On Defendants later moved for summary judgment based, in part, on expiration of the statute of limitations and the plaintiffs' failure to bring a proper derivative claim. (R. pp. 1765-67.) The court also denied that motion. (R. pp. 11-12.)

On January 2, 2014, Walbeck and Adkins filed a third amended summons and complaint. (R. pp. 183.) Plaintiffs later verified this complaint. (R. pp. 184-85.) The I'On Defendants answered and counterclaimed. (R. pp. 186-98.)

[3] All citations to the Record ("R.") and the Appendix ("App.") are to the Record and Appendix filed by the I'On Defendants on June 21, 2019.

On the eve of what proved to be a mistrial, January 13, 2014, Plaintiffs reached a settlement with defendants Mike Russo and 148 Civitas, LLC. (R. pp. 13-15.) In that settlement agreement—in which the Assembly acquired more than anyone had ever contended was promised it—the Assembly agreed to support Plaintiffs' claims against the I'On Defendants. (R. pp. 2968-71; R. p. 415, line 24-p. 416, line 16; R. p. 1375, lines 7-16, R. p. 1379, lines 4-6.) The case proceeded to trial the following day, but the court declared a mistrial on January 17, 2014. On February 26, 2014, in light of the settlement agreement, the trial court realigned the Assembly as a nominal plaintiff. (R. pp. 16-17.) The Assembly never filed pleadings alleging any causes of action against the I'On Defendants. At trial, Walbeck and Adkins prosecuted the Assembly's claims, and only in a derivative capacity.

On May 12, 2014, The I'On Company and The I'On Club filed a separate suit against Walbeck, Adkins, and the Assembly seeking a declaration that an agreement which included two easements executed in 2000 was valid, and that the easement for use of the boating facilities contained therein was perpetual. (R. pp. 199-312.) The trial court consolidated the declaratory judgment action with the present action. (R. p. 18.)

The case was tried to verdict from July 28 to August 1, 2014. At the close of Plaintiffs' case, the trial court denied the I'On Defendants' motion for directed verdict. (R. p. 1019, line 11-p. 1066, line 15; R. pp. 1820-1854.) At the close of the I'On Defendants' case, the court directed a verdict in favor of Plaintiffs as to the I'On Defendants' counterclaim for abuse of process. (R. p. 1465, line 15-p. 1469, line 16.) The court denied the I'On Defendants' renewed motion for directed verdict at the close of evidence. (R. p. 1445, line 23-p. 1473, line 12.)

The jury returned a verdict in favor of the I'On Defendants as to all claims for fraud and violation of the South Carolina Unfair Trade Practices Act, and as to all claims brought by Adkins, including breach of contract, violation of ILSA, fraud, and negligent misrepresentation. (R. pp. 1855-62.) The jury returned a verdict in favor of Walbeck in the amount of $1.00 for his claim for violation of ILSA; $10,000.00 for breach of contract; and $20,000.00 for negligent misrepresentation. (*Id*.) The jury returned a verdict in favor of Plaintiffs' derivative claims brought on behalf of the Assembly in the amount of $1,000,000.00 for breach of contract; $1,750,000.00 for breach of fiduciary duty; and $1,000,000.00 for negligent misrepresentation. (*Id*.) The jury also found that each of the Plaintiffs knew or reasonably should have known that a claim existed against the I'On Defendants on August 5, 2009. (*Id*.) The court entered judgment on August 11, 2014. (R. pp. 19-20.)

The I'On Defendants moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. (R. pp. 1863-68.) Walbeck petitioned for attorney's fees and costs, Adkins petitioned for unjust enrichment, and Plaintiffs moved for judgment as to the validity of the 2000 Recreational Easement. (R. pp. 1869-98; R. pp. 1899-1902; R. pp. 1903-09.) The I'On Company petitioned for attorneys' fees and costs as the prevailing party in Adkins' breach of contract action. (R. pp. 1910-14.)

On July 16, 2015, the trial court filed orders denying Adkins' petition for unjust enrichment; denying the I'On Defendants' motion for JNOV and a new trial; denying The I'On Company's petition for attorneys' fees; declaring the 2000 Recreational Easement void and invalid; and awarding Walbeck $225,000.00 in attorneys' fees and

costs. (R. pp. 21-63; R. pp. 84-100; R. pp. 70-78; R. pp. 79-83; R. pp. 64-69.) On July 20, 2015, the I'On Defendants timely served a notice of appeal.

On August 8, 2018, the Court of Appeals issued an opinion affirming in part and reversing in part. Plaintiffs and the I'On Defendants filed petitions for rehearing, and on February 27, 2019, the Court of Appeals withdrew its initial opinion and issued a substituted and re-filed opinion. (App. pp. 1-28.) In the substituted opinion, the Court of Appeals held that the trial court erred in denying the I'On Defendants' JNOV motion with respect to Plaintiffs' breach of fiduciary duty claim and Plaintiffs' derivative claims. (*Id.* pp. 10-17.) The Court of Appeals also held that the trial court erred in denying the I'On Defendants' JNOV motion with respect to all claims other than Walbeck's breach of contract claim because the remaining claims are barred by the three-year statute of limitations. (*Id.* pp. 17-23.) The Court of Appeals also reversed the trial court's holding that the I'On Defendants were amalgamated and remanded for a new trial on Walbeck's breach of contract claim. (*Id.* pp. 25-26.) Finally, the Court of Appeals affirmed the trial court's ruling that the 2000 Recreational Easement was invalid under the two-issue rule,[4] reversed the trial court's ruling granting Walbeck his attorneys' fees,[5] and affirmed the trial court's ruling denying an award of attorneys'

[4] The Court of Appeals' ruling as to the validity of 2000 Recreational Easement is the subject of the I'On Defendants' separate petition for certiorari, which this Court granted, and which is discussed in briefing filed by the I'On Defendants on April 14, 2022, and May 23, 2022.

[5] In their Brief, Plaintiffs briefly argue that the Court should reverse the Court of Appeals' reversal of the trial court's award of Walbeck's attorneys' fees under ILSA because, even if Walbeck is not entitled to recover attorneys' fees based on his ILSA claim, he should be permitted to recover attorneys' fees under his breach of contract claim. (Pls. Br. p. 23.) Plaintiffs, however, did not make this argument to the Court of Appeals, nor did Plaintiffs petition this Court for certiorari regarding the Court of Appeals' ruling on this issue. Thus, Plaintiffs' argument is not preserved. *See, e.g.*, *Camp v. Springs Mortg. Corp.*, 310 S.C.

fees against Adkins. (*Id.* pp. 23-25, 26-27.) Plaintiffs and the I'On Defendants each filed petitions for certiorari, and on March 15, 2022, this Court granted both petitions.

STATEMENT OF THE FACTS

A few disgruntled residents of the I'On development manufactured this lawsuit to frustrate The I'On Company's latest development efforts, to quash the sale of I'On Club property, and to obtain that property for free. This group knew the property was not rightfully theirs, and they never claimed any right to it for the near decade they now contend the homeowners were supposed to have had ownership.[6] Ultimately, the group decided to redirect its failed efforts to court and recruited Walbeck to assert claims they manufactured. (R. p. 1795, lines 5-19.)

Walbeck's initial complaint claimed that the developer's promise to convey a "Creekside Park" and a "Community Dock" included in a 1998 ILSA Property Report actually referred to (1) Lot CV-6, an entire waterfront lot designated for civic use;[7] (2) multiple docks; (3) a boat ramp; (4) a parking lot; and (5) the 2,967 square-foot Creek Club. At trial, after having acquired rights to receive another parking lot down the street, Lot CV-5, as part of the 2014 settlement with 148 Civitas, LLC, Plaintiffs

514, 516, 426 S.E.2d 304, 305 (1993) (holding that this Court will not hear an issue that the Court of Appeals did not address and that was not raised in a petition for rehearing).

[6] The group of disgruntled residents included Respondent Lea Ann Adkins, Steve Brock, Assembly Board member Ward Mundy, and, for a short period of time, attorney Catherine Templeton. (R. pp. 3401-3402.) Respondent Brad Walbeck was recruited to join the group for the purpose of filing this action. (R. p. 1795, lines 5-19.)

[7] The "civic use" designation in I'On is distinct from residential, commercial, and other parcels designated for common homeowners' ownership. Civic properties in I'On, for example, are owned and operated by churches, a school, and The I'On Club. (R. p. 2995; R. pp. 2996-98; R p. 892, lines 20-24; R. p. 1176, line 23 – p. 1178, line 17.) In fact, many civic lots were donated to those civic organizations. (R. p. 1143, line 25 – p. 1144, line 7; R. p. 1171, lines 2-21.) Walbeck and Adkins concede that the lot they seek here, Lot CV-6, was always designated for a civic use and that they knew as much when they purchased. (R. p. 977, lines 3-10; R. p. 892, line 12-p. 893, line 9.)

grabbed for even more. (R. pp. 2968-71; R. p. 1313, line 13-p. 1314, line 11; R. p. 1315, line 10-p. 1316, line 5.) At trial, Plaintiffs swore under oath—directly contradicting their prior testimony—that this additional lot, at least ten parcels and 750 feet away from Lot CV-6, was also part of the simple 1998 promise to convey a "Creekside Park" and a "Community Dock."[8] (*Compare* R. p. 861, line 15-p. 862, line 13; R. p. 890, line 3-p. 891, line 1; R. p. 894, line 11-p. 895, line 5; R. p. 896, lines 1-7 *with* R. p. 415, line 24-p. 416, line 16; R. p. 402, line 1-p. 403, line 7; R. p. 1307, lines 19-24.)

I. The Developer's Vision of I'On and Efforts to Realize It

The I'On community is an award-winning, early example of a "new urbanism" development located off of Mathis Ferry Road in Mount Pleasant, South Carolina. (R. p. 2993.) I'On founders Vince Graham and his father, Tom Graham, planned a mixed-use development with designated residential, commercial, and civic spaces. The Grahams sought to recapture the charm of traditional walking neighborhoods such as downtown Charleston and the Old Village of Mount Pleasant. (R. pp. 2128-31.) From its inception, I'On "was going to be a community, not just a subdivision," designed "so that neighbors would have more interaction with each other." (R. p. 594, lines 18-22; R. p. 1164, lines 5-24.) Every residential lot is within a three-minute walk of a playground or park. (R. p. 1170, lines 4-23.) The Grahams envisioned many amenities including multiple parks and trails, docks and boating facilities, commercial spaces, churches, schools, and swim and tennis facilities. (R. p. 1124, line 20-p. 1125, line 4;

[8] Prior to trial, Plaintiffs informed the trial court that "under no theory of this present case would [the Assembly] have any claim . . . at all" to Lot CV-5. (R. p. 415, line 24-p. 416, line 16.)

R. p. 1125, line 16-p. 1126, line 2; R. p. 1169, line 21-p. 1171, line 7.) By design, these amenities would promote this sense of community spirit, and most of these amenities, including the civic spaces, were not intended to be owned by the Assembly. (R. p. 1126, lines 3-17; R. p. 1171, lines 2-13; R. p. 3024.)

The Grahams' relatively radical promotion of higher density development had detractors from the outset. Respondent Adkins and her domestic partner Steve Brock were chief among them. (R. pp. 3403-3404; R. p. 900, lines 5-22; R. p. 1188, line 11-p. 1189, line 1; R. p. 1191, lines 21-p. 1193, line 4; R. p. 1194, lines 15-22; R. p. 1195, lines 12-p 1196, line 4). Despite ironically becoming residents of the project they sought to stifle, Adkins and Brock have consistently continued to oppose The I'On Company's development efforts. (R. pp. 3403-3428; R. pp. 3582-3583; R. p. 1191, line 23-p. 1193, line 4; R. p. 1194, lines 15-22; R. p. 1197, line 14-p. 1198, line 25.)

After years of zoning and legal battles beginning in 1995, the family business where Tom Graham supported his son's commitment to the vision for I'On has been a resounding success.[9] The development has been featured in the *Wall Street Journal* and *Southern Living* magazine, recognized by the Department of Natural Resources, and has attracted tours by the National Mayors Institute of Design, colleges, and developers from all over the world. (R. p. 1179, line 16-p. 1180, line 22.) The residents even bestowed upon Vince Graham the singular honor of dedicating a public garden to him with a fitting monument. (R. p. 1174, line 8-p. 1175, line 10; R. p. 3588.) Even the disgruntled residents recognize the achievement it represents: neither Plaintiffs nor a witness who received the 1998 Property Report could testify that the "Creekside Park"

[9] *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (rejecting effort by citizens to block development pursuant to voter referendum on zoning).

and "Community Dock" issues central to this lawsuit were material to their decision to purchase in I'On. (R. p. 605, lines 8-18; R. p. 610, line 25-p. 611, line 15; R. p. 898, lines 9-13; R. p. 973, line 21-p. 974, line 4; R. p. 1078, lines 17-25.) It's no wonder—their property values have increased dramatically. (R. p. 1181, lines 11-22.)

II. The 1998 Property Report

On November 3, 1998, The I'On Company prepared a property report pursuant to ILSA ("Property Report") which addressed expectations for Phase II of the development. (R. pp. 2999-3034.) I'On Realty distributed this Property Report to prospective purchasers of property in Phase II. It included this table:

RECREATIONAL FACILITIES

Facility	% of Construction Now Complete	Estimated Date of Start of Construction (Month/Year)	Estimated Date Available for Use (Month/Year)	Financial Assurance of Completion	Buyer's Annual Cost or Assessments
PHASE 2					
Creekside Park	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Community Dock	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Sidewalks, paths and trails	0%	1/1999	10/1999	None	Part of annual HOA Assessment
Parks and Open Space	0%	1/1999	10/1999	None	Part of annual HOA Assessment

(R. p. 3022.) The I'On Defendants' only obligation to convey any amenity arose from the following statement below this chart: "The recreational facilities in the chart above shall, upon completion of construction, be conveyed to the I'On Assembly, Inc. by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the

I'On Assembly or its members." (R. p. 3023.) The Property Report also prominently disclosed that recreational facilities may be owned by persons other than the Assembly. (R. p. 3024.)

The Property Report's promises were intentionally conservative and generic because much of the plan for I'On was still a vision at the time the report was prepared. (R. p. 806, lines 1-13; R. p. 811, lines 1-8; R. p. 1110, lines 6-15; R. p. 1111, line 20-p. 1112, line 18.) The Property Report does not provide any further description of the planned amenities, does not indicate any proposed locations for the amenities, and does not contain maps or photographs. (R. pp. 2999-3034; R. p. 813, line 16-p. 816, line 6.) Adkins even conceded that the terms "Creekside Park" and "Community Dock" are "vague" and that determining what they mean "requires" review of other documents. (R. p. 878, lines 12-23; R. pp. 3152-3153.) Walbeck also had to refer to other documents to define these terms. (R. p. 974, line 22-p. 975, line 7.) The I'On Company did not purchase the Phase II parcel of land until March of 1999 after the Town of Mount Pleasant rezoned the property—several months after the Property Report was issued. (R. pp. 2986-2990; R. p. 1109, line 18-p. 1110, line 5.) It therefore could not obtain a dock permit until December of 1999. (*Compare* R. p. 2991 *with* R. pp. 2132-2150.)

The I'On Company amended the Property Report in April and December of 2000. (R. pp. 2999-3034; R. pp. 3035-73; R. p. 1126, line 18-p. 1127, line 5.) Potential purchasers after those dates were provided with an amended report—not the 1998 Property Report. (R. p. 1140, line 21-p. 1141, line 21.) The three reports applied only to Phases I through IV of the ten phases of the development. (R. p. 3070; R. p. 3109.)

Ultimately, The I'On Company determined that ILSA's reporting requirement did not apply to I'On and stopped distributing the reports altogether. It even changed the form of the lot purchase agreement—which form was used for Adkins' agreement—to make clear that ILSA did not apply. (R. p. 3117.) All purchase agreements, however, contained a merger clause and a disclaimer of reliance on oral representations as to amenities. (R. pp. 3113-30; R. pp. 3162-72.)

III. The I'On Company Delivers; Plaintiffs Later Invent Claims for More.

The I'On Company over-delivered on the promises made in the Property Report. (R. p. 1127, lines 6-11.) The "Creekside Park" is a 2.86 acre linear park, the Marshwalk, which runs along Shelmore Creek and other areas. (R. p. 810, lines 10-20; R. p. 811, line 16-p. 813, line 13; R. p. 1128, lines 12-13; R. p. 3565; R. pp. 3571-3578.) The concept of a linear park, and this park in particular, had long been part of the vision of I'On, and The I'On Company advertisements confirm that. (R. pp. 3399-3400; R. p. 1011, line 16-p. 1013, line 13.) The I'On Company conveyed this "Creekside Park" to the Assembly on November 21, 2000. (R. p. 1122, lines 0-12; R. p. 811, line 9-p. 812, line 12; R. p. 3569; R. pp. 3571-3578.)

Plaintiffs contend that the promise to convey a "Creekside Park" is a reference not to the Marshwalk, but to Lot CV-6. The primary improvement to Lot CV-6 is the Creek Club, a 2,967 square-foot event facility built at a cost of more than $600,000.00. (R. pp. 3614-15.) The I'On Club received the certificate of occupancy for the Creek Club on April 10, 2001, and immediately began operating the facility as a private event venue. (R. p. 3190; R. p. 615, lines 8-25.) Lot CV-6 also has two docks, a boat ramp,

and a parking lot. These improvements were all complete by April of 2001. (R. p. 3190; R. p. 3604; R. p. 3605; R. p. 1132, lines 4-22.)

Plaintiffs conveniently took their position only *after* they began looking for ways to use the legal process to disrupt the I'On Defendants. When she read the promise to convey a "Creekside Park" many years after her purchase, Adkins unwittingly conceded that she had to go check other documents—besides the Property Report—to determine what these two words mean. (R. pp. 3152-53.) Tellingly, Adkins did not see these other documents, which she declares are crucial to her position, before she bought her lot in I'On. (R. p. 878, line 24-p. 879, line 3.) Walbeck followed the same path—reviewing documents ten years after his purchase to determine what he thinks the 1998 Report means. (R. p. 974, line 22-p. 976, line 7.)

In 2007, Adkins did not openly support the Assembly's consideration of a potential purchase of Lot CV-6, but her opinion on the matter revealed a truth she cannot escape. She never believed that The I'On Company was legally obligated to convey Lot CV-6 to the Assembly for free:

> *I heard someone jokingly say once that they should give it to us; I laughed thinking that wasn't a serious consideration*. After thinking about it, it began to sink in that perhaps they should – in lieu of other mega-donations to various causes. There is, I believe, big opposition to the churches receiving such large donations, and these comments come from church-going individuals. Also, the school has its own fundraising. The I'On Trust ……c'mon…….and I'm a member! But I realize Vince gets a tax deduction for all these huge donations, as well. And probably takes a loss on the "sale" of the Creek Club. A proposal more people could get behind would involve nixing the donations to the organizations. And *no $$ exchanged for the club*….

(R. p. 3606 (emphasis added); *see also* R. pp. 3612-13.)[10]

Plaintiffs could not testify that the Creek Club facility, a boat ramp, a staging dock, or a parking lot were promised to the Assembly. (R. p. 891, lines 16-19; R. p. 976, line 22-p. 977, line 2; R. p. 977, line 20-p. 978, line 17.) In fact, before the Assembly promised to cooperate with Plaintiffs' case, its President, Deborah Bedell, told the Assembly membership that The I'On Company "did not promise the Creek Club or a particular dock or a deep water dock." (R. p. 1318, line 13-p. 1320, line 17; R. p. 1323, lines 4-15.) After the Assembly directed its attorneys to support Plaintiffs' case, Bedell attempted to reverse her position but was impeached at trial. (*Id.*; R. p. 1334, lines 13-18.) The group of disgruntled residents manufactured a claim that the two words "Creekside Park" meant the Assembly was entitled to the free acquisition of Lot CV-6, the Creek Club event facility, multiple docks, a boat ramp, and Lot CV-5. (R. p. 861, line 15-p. 862, line 13; R. p. 890, line 3-p. 891, line 1; R. p. 894, line 11-p. 895, line 5; R. p. 896, lines 1-7.)

As to the "Community Dock" promise in the 1998 Property Report, The I'On Company built and conveyed to the Assembly not one, but two, community docks as part of Phase II. (R. p. 814, lines 3-13; R. p. 816, lines 7-9; R. p. 831, lines 8-20; R. p. 1140, lines 17-20; R. p. 2897; R. p. 3579; R. p. 3604; R. p. 2992.) The Creek Club dock, the largest dock in the community, was owned and operated by The I'On Club,

[10] The proposed Lot CV-6 transaction in 2007 coincided with a proposal for the Assembly's cooperation regarding an amendment to the planned development zoning that would allow development of "Phase 11." (R. pp. 3511, 3565-68.) As part of the Phase 11 lot sales, The I'On Company proposed donating $60,000.00 per lot and up to $2.88 million among the Assembly, the I'On Trust (a charity created to provide cultural events for the community and promote volunteerism), church organizations, and the community's Montessori school. (*Id*.)

the entity created to build and manage the boating facilities, the Creek Club, and the swim and tennis facilities. (R. p. 1124, line 9-p. 1125, line 4; R. p. 1125, line 16-p.1126, line 2; R. p. 2994.) Plaintiffs insist that the Creek Club docks are the "Community Dock" promised to the Assembly.

IV. The 2000 Recreational Easement

On February 9, 2000, The I'On Club, The I'On Company, and the Assembly executed the Recreational Easement and Agreement to Share Costs. (R. pp. 3131-3145.) The Recreational Easement provided the Assembly members rights to access the Creek Club docks, boating facilities, and parking lot located at Lot CV-6.[11] (*Id*.) At this early stage of the development, the manager of The I'On Company also served as the manager of The I'On Club and as the President of the Assembly's board of directors. He executed the document on behalf of each entity. (*Id*.) The Recreational Easement was recorded and indexed to I'On's Declaration of Covenants, Conditions and Restrictions, rendering it a matter of public record contained in all subsequent lot purchasers' chains of title. (*Id*.)

The Recreational Easement unequivocally "grants to Assembly . . . a perpetual, nonexclusive easement" to access the amenities at Lot CV-6. (R. p. 677, lines 2-8; R. pp. 3132-3133.) The "Agreement to Share Costs" portion sets forth a division of costs between The I'On Club and the Assembly for the maintenance of the boating facilities. (R. p. 3138.) A 30-year limit on the term of the cost-sharing agreement gave Plaintiffs a wedge which they used to galvanize support for their lawsuit by instilling fear in the Assembly's membership that it would also lose easement access after 30 years. The

[11] The Recreational Easement sets forth rights and obligations among the parties to considerable property besides the Creek Club dock and boating facilities. (*Id*.)

parties operated pursuant to the terms of this document for nearly a decade before the current dispute arose. (R. p. 1300, lines 9-21; R. p. 1329, lines 16-24.)

V. Walbeck and Adkins.

Brad Walbeck entered into his lot purchase agreement on November 27, 1999, and in doing so, acknowledged that he entered into the contract "without reliance on any warranties, statements or representations, either written or oral, express or implied, by Seller, or by any agent of the Seller . . . ." (R. pp. 3164-3165.) Walbeck received a copy of the 1998 Property Report, the amenity portion of which was incorporated into his contract. (R. pp. 3162-3172; R. p. 958, line 18-p. 959, line 2.) Walbeck built a home in I'On and has lived there and been a member of the Assembly for the decade before he filed suit. (R. p. 959, line 21-p. 960, line 4.) Each year, he received written notice of the Assembly's budget and attended the annual meetings, both of which put him on notice that the Assembly was paying for use of the Creek Club and the Creek Club Dock. (R. p. 979, line 14-p. 981, line 12; R. pp. 3281-3292; R. p. 3294; R. pp. 3295-3305; R. p. 3324; R. pp. 3334-3395.) In sum, Walbeck knew for years that the construction was complete and that those amenities had not been transferred to the Assembly, but he did not bring a claim until he was recruited to do so nearly a decade later. (R. pp. 1795, lines 5-19.) In fact, when he learned of the proposed sale of Lot CV-6 to 148 Civitas, LLC, Walbeck raised questions, not about rights to ownership, but about whether the zoning of the lot was proper. (R. p. 985, line 19-p. 986, line 3; R. pp. 3553-57.)

On February 1, 2003, Lea Ann Adkins executed a purchase contract to buy a lot in Phase V of I'On—several years after Walbeck and several years after the 1998

Property Report had been amended. (R. pp. 3113-30; R. p. 906, lines 1-2.) Adkins conceded that the Creek Club and the Creek Club dock were constructed when she purchased her lot. (R. p. 879, lines 15-21.) She testified that she received the 1998 Property Report prior to her purchase but could not testify as to when she actually read the very document on which she based her claims. (R. p. 846, line 25-p. 847, line 14; 912, line 24-p. 914, line 25; R. pp. 64-69.) The 1998 Property Report had been amended twice and was no longer provided to prospective purchasers by the time Adkins purchased her lot. There is no receipt of delivery of the Property Report to Adkins, as there are for the early purchasers. (R. p. 908, lines 4-12; R. p. 926, line 9-p. 927, line 8; R. p. 1140, line 21-p. 1141, line 21.) Adkins' transaction was expressly and prominently "exempt[ed] from the Interstate Land Sales Full Disclosure Act." (R. p. 3117; R. p. 904, line 18-p. 905, line 4.)

VI. The I'On Assembly.

The I'On Company organized and formed the I'On homeowners association, the I'On Assembly, as a South Carolina nonprofit corporation on June 4, 1998. (R. p. 3028.) All lot owners in I'On are members of the Assembly. (*Id*.) The Assembly's responsibilities include managing the organization's annual budget, operating and maintaining the common areas, and administering and enforcing the Declaration of Covenants. (R. p. 3029.)

As I'On continued to develop, the I'On Defendants accelerated transfer of control of the Assembly to the I'On homeowners. (R. p 1184, lines 13-25.) By December of 2003, a majority of the Assembly's board of directors (the "Board") were

I'On homeowners with no association with the I'On Defendants.[12] (R. p. 791, lines 20-21; R. pp. 3429-31.) After December of 2005, no developer representatives served on the Board. (R. p. 791, line 22-p. 792, line 8; R. pp. 3475-3477.) The Assembly's Finance Committee, which had primary responsibility for reviewing and preparing the Assembly's budget each year, contained no developer representatives from 2003 on, if ever.[13] (R. p. 1185, lines 6-17; R. pp. 3429-3431.) Further, the I'On Defendants never exercised any of the limited veto rights the developer retained pursuant to I'On's Declarations. (R. p. 641, lines 9-15; R. p. 792, lines 18-23; R. p. 1425, line 14-p. 1427, line 3; R. pp. 3472-74.) Deborah Bedell, the Board President, spoke with many former Board members and did not believe that the I'On Defendants controlled the Board. Bedell conceded that she is aware of *no* decision of the Board that the I'On Defendants veto power impacted. (R. p. 1303, lines 9-25; R. p. 1304, lines 5-9; R. p. 1346, line 17-p. 1347, line 5; R. p. 1426, line 23-p. 1427, line 3.)

The Assembly knew that the construction of the amenities at issue was complete in 2001 and knew that it did not own the subject property. In fact, it paid for use of the property annually: for more than six years before this suit was filed, the Assembly paid The I'On Club to rent and maintain use of the very property Plaintiffs claim the Assembly was supposed to own. (R. p. 615, lines 8-25.) The Assembly's Finance Committee allocated $1,800.00 for "Creek Club Rental Fee" and $4,044.00 for "Creek

[12] The I'On homeowners serving on the Assembly Board at this time included Andy Gowder, Gaye Joyner, and Libby Eble. Each received the 1998 Property Report as part of their lot purchase. (R. pp. 3270-3279; R. pp. 3429-3431; R. pp. 2720-2841; R. p. 1183, line 17-p. 1184, line 12.)

[13] Members of the Finance Committee included Libby Eble, Annie Bonk, Ed Clem, and Andy Gowder. (R. pp. 3429-3431.) Each received a copy of the 1998 Property Report. (R. p. 1077, lines 1-5; R. p. 2753; R. p. 3280; R. p. 2741; R. pp. 3602-3603; R. p. 2729.)

Club Dock usage fee" to be included in the Assembly's 2005 budget. (R. pp. 3175-76.) The Assembly's later budgets contained similar allocations for the Assembly's "Creek Club Rental Fee" as well as for "Creek Club Dock usage fee." (R. pp. 3177-86.)

I'On resident Ed Clem was an active member of the Assembly's leadership for many years, serving on the Finance Committee and eventually on the Board. (R. p. 1069, line 20-p. 1070, line 9.) Clem purchased a lot in I'On in March of 1999 and received the 1998 Property Report. (R. p. 1069, lines 4-11; R. p. 3269; R. p. 2753). In 2004, Clem identified concerns with the Recreational Easement—a document that makes plain that the Assembly would not own the subject property. (R. p. 1072, lines 8-24.) The Assembly Board asked Clem to work with an attorney on the Assembly's behalf to review the Recreational Easement. (R. p. 1073, line 22-p. 1074, line 12; R. p. 1074, lines 8-24; R. pp. 3436-40.) By May 6, 2004, that attorney, Rick Brownyard, had reviewed the Recreational Easement "from the point of view of the Assembly" and shared his initial thoughts. (R. p. 1075, lines 5-9; R. pp. 3436-3440; R. pp. 3600-01.) Brownyard offered to meet with Clem and the Assembly Board to further discuss proposed changes. (*Id*.)

Several months later, at the February 9, 2005 meeting, the Assembly Board again reviewed and discussed the terms of the Recreational Easement. (R. pp. 3451-53.) The April 27, 2005 Assembly Board Minutes note that "the boat ramp agreement still holds" even if the Creek Club was sold. (R. pp. 3459-61.) The Assembly knew that the Recreational Easement provided access—as opposed to ownership—to the amenities at Lot CV-6, but it took no legal action.

Any lingering question as to whether the Assembly knew it did not own the property at issue and would not receive it for free may be answered by the Assembly's considering purchasing the property as early as 2005. (R. pp. 3451-53; R. pp. 3464-67; R. pp. 3482-3502; R. pp. 3511-16; R. pp. 3565-68.) On April 25, 2007, the Assembly again discussed a potential purchase of the Creek Club, noting that it would "include the building, boat dock, ramp, parking lot," and a separate, overflow parking lot down the street. (R. pp. 3490-97.) The Assembly decided not to purchase Lot CV-6 at that time because of potential liability. (R. p. 1081, lines 4-25.) On August 22, 2007, the Assembly entertained a proposal to purchase Lot CV-6, the Creek Club, and the boating facilities for $700,000.00. (R. p. 3567; R. pp. 3612-13.) The Assembly received and considered the disparate views of more than one hundred members as to whether it should own the property. (R. pp. 3396-97; R. pp. 3612-13.) Throughout these discussions—occurring more than three years before any action was brought—there was no claim that the Assembly was entitled to receive Lot CV-6 for free.

On October 30, 2008, the Assembly met and discussed the potential sale of Lot CV-6, this time to actual purchaser 148 Civitas, LLC. (R. pp. 3553-57.) Neither the derivative plaintiffs nor anyone else protested that the Assembly was supposed to receive Lot CV-6 pursuant to the 1998 Property Report or any resident's contract. (*Id.*) Instead, the homeowners expressed concerns regarding the use of Lot CV-6 by the purchaser and what impact that may have on the nearby residents. (*Id.*) On August 5, 2009, The I'On Company sold Lot CV-6 to 148 Civitas, LLC. (R. p. 653, lines 2-12.)

VII. Disgruntled Residents Fail in Zoning Challenge and Search for Alternative.

With the prospect of more events at the Creek Club exciting some interest in the community, this group of residents took advantage of the opportunity to push its opposition to The I'On Company and the proposed sale of Lot CV-6 to 148 Civitas, LLC. (R. pp. 3154-61.; R. p. 793, line 6-p. 794, line 22; R. p. 794, lines 10-16.) It did not initially seek ownership of the property. Rather, it challenged the zoning. The group's immediate goal was to block the sale. One of the early members articulated where a successful effort to block the sale would lead. At the January 15, 2009 Assembly Board meeting, this member explained that "should the zoning appeal find that the use of the Creek Club is commercial rather than civic then that would lessen the value of the Creek Club for the Graham family [and . . .] the Homeowners Association could then purchase the Creek Club for a dollar since it would be of no value to the Graham family and they would not be able to sell it." (R. pp. 3558-59.) This ambition dovetailed with Adkins' professed belief that The I'On Company should give Lot CV-6 to the Assembly instead of selling it and making charitable contributions. (R. p. 3606.) The group's goal was to scuttle the sale and obtain Lot CV-6 for free.

On the heels of hosting community meetings, the Assembly refused the pleas to join this effort or to fund it and instead spoke in support of the intended uses of the Creek Club as properly civic, a benefit to the community, and not overly commercial. (R. pp. 3162-72; R. pp. 3562-64.) At the February 23, 2009 meeting of the Board of Zoning Appeals, two members of the group, including Adkins, spoke in opposition. (R. pp. 3154-61; R. p. 909, line 10-p. 910, line 8.) The challenge failed on April 7, 2009,

when the Board of Zoning Appeals determined that use of Lot CV-6 was in compliance with the zoning code. (R. p. 795, lines 2-6; R. pp. 3154-3161; R. pp. 3589-97.)

The few residents regrouped the day after this defeat. They did not bemoan some injustice of another party selling property that rightfully belonged to the Assembly. They did not decry the promises relied on in purchasing I'On property. Instead, they evaluated other ways to foil The I'On Company's sale, considering: "So . . . where do we go from here?" (R. pp. 3401-02.) Ward Mundy, an attorney, suggested finding someone who received the 1998 Property Report on the theory that "I'On residents that purchased a lot directly from The I'On Company might have a civil claim for damages" pursuant to ILSA. (*Id*.) Not incidentally, Mundy identified a statute of limitations problem. Also telling, at that time, Adkins did not profess that *she* had received the 1998 Property Report when she purchased her lot in 2003—as she would later swear she had. (*Id*.) Enter Brad Walbeck, a recipient of the 1998 Property Report whom the group knew because he too raised concerns about zoning. He had never before insisted that the very same property at issue was supposed to be given to the Assembly or that he relied on that promise as part of his purchase—until Adkins recruited him for the effort. (R. p. 1795, lines 5-19.)

The group sought counsel to bring its claims. Walbeck initiated the lawsuit. After years of paying to use the property, contemplating purchase of the property, and challenging zoning after learning of the potential sale of the property, the lawsuit asserted that the 1998 Property Report's promise to convey a "Creekside Park" and "Community Dock" meant The I'On Company would convey all of Lot CV-6 as well as its improvements to the Assembly. Later, after an eleventh-hour settlement with 148

Civitas, LLC also gave rights to Lot CV-5 to the Assembly, Plaintiffs threw in Lot CV-5 as something else that those four words in the Property Report purportedly entitled the Assembly to for free. (*Compare* R. p. 861, line 15-p. 862, line 13; R. p. 890, line 3-p. 891, line 1; R. p. 894, line 11-p. 895, line 5; R. p. 896, lines 1-7 *with* R. p. 415, line 24-p. 416, line 16; R. p. 443, line 1-p. 444, line 7; R. p. 1307, lines 19-24.)

STANDARD OF REVIEW

At the directed verdict and JNOV stages of trial, the trial court views the evidence and inferences that can be drawn therefrom in the light most favorable to the party opposing the motions. *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 175-76, 648 S.E.2d 585, 588 (2007). When the trial court's ruling lacks evidentiary support or is controlled by an error of law, the appellate court will reverse. *Id*. As to questions of law, the appellate court's standard of review is *de novo*. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008).

ARGUMENT

I. PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF LAW.

Aside from their breach of contract claims,[14] Plaintiffs' claims are subject to a three-year statute of limitations period. *See* S.C. Code Ann. § 15-3-530(1), (2), and (5); 15 U.S.C. § 1711(a)(2). The Court of Appeals correctly held that the trial court erred in denying the I'On Defendants' JNOV motion as to Plaintiffs' negligent misrepresentation and ILSA claims because, "[e]ven viewing the evidence in the light

[14] The trial court determined that Walbeck's purchase contract was executed under seal and that Plaintiffs' breach of contract claims were subject to a twenty-year limitations period pursuant to section 15-3-520(2) of the South Carolina Code.

most favorable to [Plaintiffs,] those claims "accrued well before December 22, 2007" and therefore are barred by the statute of limitations as a matter of law.

Further, although the Court of Appeals did not reach this issue, Plaintiffs' derivative claims brought on behalf of the Assembly, including their breach of fiduciary duty claim and negligent misrepresentation claim, are barred by the statute of limitations for the same reasons. Thus, the statute of limitations provides an alternative sustaining ground for the Court of Appeals' ruling that the I'On Defendants were entitled to JNOV on Plaintiffs' derivative claims.

A. Plaintiffs' claims are based on the I'On Defendants' alleged failure to convey amenities nearly a decade before Plaintiffs filed suit.

All of Plaintiffs' claims are based on the theory that, in 1998, the I'On Defendants promised to convey to the Assembly a "Creekside Park" and a "Community Dock" upon completion of construction but failed to do so. (*See generally* Pls. Fourth Am. Compl. ¶¶ 15-56, R. pp. 315-320); *see also* Pls. Br. p. 2 ("In 2014, a Charleston County jury returned a verdict on special interrogatories and awarded [Plaintiffs] damages for common areas the Developer refused to convey to the HOA."); *id.* p. 45 (Plaintiffs arguing that the sale of the amenities to a third party is "the very crux of this case"); R. pp. 2999-3034; R. p. 848, line 21-p. 849, line 4; R. p. 853, lines 5-11; R. p. 890, lines 3-21; R. p. 896, lines 1-7; R. p. 956, lines 15-24; R. p. 968, lines 7-11; R. p. 1323, lines 20-22.) It is undisputed that construction of the "Creekside Park" and "Community Dock" that Plaintiffs allege should have been conveyed to the Assembly was completed by April of 2001. (R. p. 3190; R. p. 615, lines 8-25; R. p. 3190; R. p. 3604; R. p. 3605; R. p. 1132, lines 4-22.) Yet, Plaintiffs did not file suit until nearly ten years later, on December 22, 2010.

B. Under the discovery rule, the statute of limitations begins to run when a reasonable person would have been on notice that a claim against another party "might" exist.

"South Carolina's statute of limitations requires 'very little to start the clock.'" *Maher v. Tietex Corp.*, 331 S.C. 371, 380, 500 S.E.2d 204, 208 (Ct. App. 1998) (quoting *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994) (applying South Carolina law)). A cause of action should have been discovered through exercise of reasonable diligence "when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party *might* exist." *Id.* at 377, 500 S.E.2d 207 (emphasis added). "The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to 'act with some promptness.'" *Id.* (quoting *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981)).

When only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he had a claim becomes a matter of law and should not be submitted to the jury. *See Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding trial court properly directed a verdict when there was no conflicting testimony regarding time of discovery such that the notice issue was one for the trial court to decide); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009) (reversing trial court's denial of JNOV motion when account statements put plaintiff on notice of claim more than three years before suit was filed).

C. The only reasonable inference is that Plaintiffs knew or should have known prior to December 22, 2007, that a claim against the I'On Defendants might exist.

The only reasonable inference from the Record is that Plaintiffs knew well over three years before filing suit that Lot CV-6 and the adjacent Creek Club dock had been completed but had not been transferred to the Assembly. Indeed, Plaintiffs were paying to use these amenities, and they hired a lawyer to analyze the easement that granted Plaintiffs access to the amenities and made abundantly clear that the Assembly did not own the amenities. Likewise, Plaintiffs knew there was no intent to transfer the property to the Assembly for free at some point in the future: they actively considered purchasing the property for $700,000.00 more than three years before filing suit. In sum, Plaintiffs knew and repeatedly received notice that the Assembly did not own Lot CV-6 and that the I'On Defendants did not intend to convey Lot CV-6 to the Assembly for free. For example:

- Upon completion of construction of amenities in Phase II in 2001, the I'On Defendants conveyed two community docks and the Marshwalk to the Assembly. (R. p. 3571.) If Plaintiffs contended that these amenities were not the amenities promised to them by the I'On Defendants, this conveyance put them on notice that they might have a claim against the I'On Defendants for failing to convey the correct amenities.

- When the Creek Club opened for business on April 10, 2001, Plaintiffs knew that this facility was operated as a private event rental space that was not owned and operated by the Assembly. (R. p. 3190; R. p. 615, lines 8-25; R. p. 1132, lines 12-14.)

- The Recreational Easement was properly recorded on February 15, 2000, and made clear that the Assembly did not own Lot CV-6 or its amenities and would not own them. (R. pp. 3131-45.)

- The Assembly engaged counsel in 2004 to study its rights under the 2000 Recreational Easement which provides rights of *access*, clearly *not ownership*. (R. pp. 3436-40.)

- The Assembly Board was told in 2004 that the easement shows that the Assembly would not own the Creek Club dock. (R. pp. 3432-3535.)

- The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks. (R. pp. 3175-89.) The Assembly mailed the budget to every homeowner every year and approved it at annual meetings. (R. pp. 3325-41; R. pp. 3343-52; R. pp. 3355-73.) Walbeck and Adkins received the budgets and attended annual meetings. (R. p. 979 line 14-p. 980, line 20; R p. 3342; R. pp 3353-54; R. pp. 3355-73.)

- In 2007, the Assembly entertained proposals that the Assembly purchase Lot CV-6 and solicited feedback from I'On homeowners. (R. pp. 3451-53; R. pp. 3464-67; R. pp. 3482-02; R. pp. 3511-16; R. pp. 3565-68.)

- In 2007, Adkins served on the Assembly's Boating Committee, whose purpose was to advise the Assembly Board on the community boat ramp, community dock, and to interpret the 2000 Recreational Easement. (R. pp. 3517-24; R. p. 3542; R. p. 902, line 12-p. 903, line 4.)

The only reasonable inference that can be drawn from the Record is that, more than three years before any suit was filed (that is, before December 22, 2007), Plaintiffs knew or should have known that they might have a claim that the I'On Defendants had not conveyed the subject property to the Assembly for free and did not intend to do so.

i. The Assembly hired a lawyer to analyze the Recreational Easement, which makes clear that the Assembly does not and will not own the property in dispute and provided record notice of this fact to all subsequent purchasers on I'On.

By May of 2004, a lawyer retained by the Assembly had completed a review of the Recreational Easement—a document that makes clear that the Assembly did not and would not own the Creek Club or the Creek Club docks. (R. pp. 3131-45; R. pp. 3146-51; R. pp. 3436-40; R. pp. 3600-01, R. p. 1073, line 22-p. 1074, line 12; R. p.

1074, lines 8-24; R. p. 1075, lines 5-9.) Despite receiving legal advice on the terms of the Recreational Easement, the Assembly made no claim that it was supposed to own Lot CV-6.

In November of 2004, the Assembly discussed a request that The I'On Company convert the Creek Club into a private residence but maintain the Assembly's rights to access the boating facilities. (R. pp. 3444-47.) In 2005, the Assembly discussed frustrations over the terms of the cost sharing provisions of the Recreational Easement as well as the Assembly's rights to continue to access the boating facilities if The I'On Company ever sold the Creek Club. (R. pp. 3456-61; R. pp. 3475-77.) Again, neither the Assembly nor Walbeck or Adkins filed suit alleging that the Assembly should own the Creek Club.

Moreover, the 2000 Recreational Easement was properly recorded within all subsequent I'On purchasers' respective chains of title and cross-referenced to the I'On Declaration. (R. p. 3131.) The I'On Declaration was also included in all I'On purchasers' chains of title. Property owners are charged with constructive notice of any restriction properly recorded within the chain of title. *See Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) (finding a recorded declaration of covenants, restrictions, and easements that is noted in a deed is within chain of title and provides constructive notice to property owner); *see also Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) ("Property owners are charged with constructive notice of instruments recorded in their chain of title."). The 2000 Recreational

Easement was properly indexed, and as such "supplies inquiry notice of an instrument." *Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985).

ii. The Assembly paid to use the Creek Club and the Creek Club dock and provided written notice of its budget to its members, including Adkins and Walbeck, annually.

The Assembly budgeted funds to rent the Creek Club and use the docks and boating facilities at Lot CV-6. Beginning no later than 2004, the Assembly proposed an annual budget that included an allocation for "Creek Club Rental Fee" as well as an allocation for "Creek Club Dock usage Fee." (R. pp. 3175-3180; R. p. 615, lines 8-21.) The proposed budget was prepared by the Assembly's Finance Committee and sent to all members of the Assembly prior to the annual meeting.[15] (R. p. 979, line 20-p. 980, line 20; R. pp. 3325-3375.) Walbeck and Adkins, along with every other Assembly member, received a notice of the Assembly's annual meeting along with a proposed budget each year. Walbeck and Adkins reviewed these written documents and attended the Assembly's annual meetings. (R. pp. 3281-3375; R. p. 979, line 14-p. 981, line 12.) When a party is provided with written notice of a potential claim, his duty to investigate the claim is triggered. *See Gibson*, 383 S.C. at 403-04, 680 S.E.2d at 780-81 (holding that, if the plaintiff would have reviewed the bank statements provided to her, she would have been prompted to investigate her potential claims that there had been wrongful withdrawals from her accounts).

[15] As discussed above, many members of the Finance Committee also were recipients of the 1998 Property Report. (R. p. 2753; R. p. 3280; R. p. 2741; R. p. 2729.)

iii. The Assembly repeatedly discussed and considered purchasing Lot CV-6.

Perhaps the most inescapable evidence that Plaintiffs knew the I'On Defendants did not intend to convey Lot CV-6 to the Assembly for free—and, thus, that Plaintiffs had a claim against the I'On Defendants to the extent they contended the I'On Defendants were required to do so—is the extensive discussion about the Assembly purchasing the subject property. This is a discussion that persisted for several years and culminated in proposal that the Assembly purchase the property in 2007, more than three years before Plaintiffs filed suit.

As described above, discussions regarding the Assembly's potential purchase of the property began as early as 2005. (R. pp. 3451-53; R. pp. 3464-67.) After the Assembly was initially approached with the 2007 proposal to purchase the property, the parties negotiated the potential sale of the amenities throughout the spring and into the fall of 2007—more than three years before this suit was filed. (R. pp. 3482-3516; R. pp. 3565-67.) On August 22, 2007, the Assembly entertained a proposal to purchase Lot CV-6, the Creek Club, and the boating facilities for $700,000.00. (R. p. 3567; R. pp. 3612-13.) In response to this proposal, the Assembly held a meeting to gather input, and approximately 200 people attended. (R. p. 1081, lines 4-17.) Each of these Assembly members (including Adkins who had responded to the email survey) knew that Lot CV-6 had not been conveyed as a "Creekside Park" upon completion of construction and that the adjacent Creek Club docks had not been conveyed to the Assembly for free, and they also knew or should have known that the I'On Defendants did not intend to convey the property for free. Otherwise, they would not have considered buying the property for $700,000.

iv. The Assembly Board was comprised of several recipients of the 1998 Property Report.

From December 3, 2003, through January 6, 2008, there was at least one I'On homeowner who received the 1998 Property Report in attendance at the vast majority of Assembly Board meetings. (R. pp. 3429-43; R. pp. 3448-3552; R. pp. 3607-11.) Each time—over the course of five years—the Assembly reviewed the Recreational Easement, prepared a budget that allocated funds to rent the Creek Club and the Creek Club docks, or considered purchasing the property, and none of these individuals ever claimed or suggested that the Assembly was entitled to own any of the property that is the subject of this lawsuit. To the contrary, Ed Clem testified: "It was my belief that [Lot CV-6] wouldn't become the property of the homeowners." (R. p. 1078, lines 22-25.)

Viewed in any light, including that most favorable to Plaintiffs, the only reasonable inference is that Plaintiffs received repeated and express notice for *nearly a decade* that Lot CV-6 would not be conveyed to the Assembly at no cost. Quite clearly, Plaintiffs did not need to "f[ind] a needle in a haystack" to appreciate there may have been a dispute over what they contend constituted the "Creekside Park" and "Community Dock." (Pls. Br. p. 55.) Thus, Plaintiffs' claims are time-barred as a matter of law, and the Court of Appeals ruling should be affirmed.

D. Plaintiffs' arguments relating to the statute of limitations are unavailing.

In their Brief, Plaintiffs mostly ignore the above-referenced evidence. (*See* Pls. Br. pp. 54-59.) Instead, Plaintiffs focus on more recent events, such as the sale in 2009, that also would have provided Plaintiffs with notice of their claim if earlier events had not already done so. (*Id.*) But the most recent event or the most obvious event providing

notice that a claim might exist is irrelevant to the discovery rule analysis; instead, the discovery rule is concerned only with the *earliest* event providing notice that a claim *might* exist.

Further, in arguing that the statute of limitations does not bar their claims as a matter of law, Plaintiffs cite to evidence that is irrelevant to the question of when they knew or should have known of their claims and—fatally—offer no explanation as to how the litany of evidence in the Record is insufficient to have provided notice of a potential claim prior to December 22, 2007. Plaintiffs argue that: (a) more than one reasonable inference exists as to when Plaintiffs discovered their claims; (b) equitable tolling applies because the I'On Defendants controlled the Assembly just as the developer controlled the homeowners association in *Magnolia North*; and (c) equitable estoppel applies based on the I'On Defendants' supposed failure to disclose certain information to Plaintiffs. None of these arguments has merit.

i. Plaintiffs' discovery rule arguments ignore the evidence in the Record demonstrating that Plaintiffs knew or should have known that they might have a claim more than three years before filing suit.

First, Plaintiffs argue that the phrase "upon completion of construction" in the below sentence of the 1998 Property Report is ambiguous:

> The recreational facilities listed in the chart above shall, upon completion of construction, be conveyed to the I'On Assembly, Inc. by quitclaim deed free and clear of all monetary liens and encumbrances at no cost to the I'On Assembly or its members.

(Pls. Br. pp. 15-17.) According to Plaintiffs, "upon completion of construction" could refer to, among other things, the completion of construction of "I'On itself," or the completion of construction of amenities other than those in the chart. The only support

Plaintiffs cite for these alternative interpretations is testimony from Plaintiffs Walbeck and Adkins. (*Id.* at 16.)

This argument fails for several reasons. First, the phrase "upon completion of construction" is not ambiguous in the context of the above-quoted sentence, and the individual Plaintiffs' self-serving testimony does not prove otherwise. The phrase modifies "[t]he recreational facilities in the chart above" and therefore cannot reasonably be interpreted to refer to I'On itself or other amenities, neither of which are mentioned in the sentence. Moreover, even if Plaintiffs were confused about what that phrase meant, they certainly should have known that they "might" have a claim, which is all that is required to start the statute of limitations. *See, e.g.*, *Maher*, 331 S.C. at 380, 500 S.E.2d at 208 (reversing the trial court's denial of defendant's JNOV motion where plaintiff should have known that he "might" have a claim against defendant, even though he had "questions" about whether he had a claim for bonus money from his employer and, after confronting his employer, "'walked away' without 'really getting' a satisfactory response to his concerns").[16] Finally, even if the Court were to accept Plaintiffs' argument regarding the ambiguity of "upon completion of construction," Plaintiffs simply ignore all of the Record evidence discussed above that demonstrates Plaintiffs knew or should have known that they might have a claim. For example, it is undisputed that Plaintiffs considered purchasing the subject property for $700,000 more than three years before filing suit. Thus, more than three years before filing suit,

[16] Plaintiffs also argue that the statute of limitations did not begin to run for some unspecified period of time because the I'On Defendants supposedly "vacillated" as to what amenities would be conveyed to the Assembly. (Pls. Br. at 54.) But even if this were true, the I'On Defendants' vacillation would only provide an additional basis for Plaintiffs to investigate and pursue their claims.

Plaintiffs must have known that the I'On Defendants were not planning to convey the property to the Assembly for free.

Next, Plaintiffs argue that the "Creek Club Dock usage fee" included in the Assembly budget also was ambiguous and therefore not sufficient to alert Plaintiffs that the Assembly did not already own the property at issue. (Pls. Br. pp. 56-57.) This argument also fails for several reasons. First, there is nothing ambiguous about "Creek Club Dock usage fee"—this phrase unambiguously refers to a fee paid to use the Creek Club Dock. Further, the Assembly would not pay to use the Creek Club Dock if it already owned it. Second, if Plaintiffs were confused by that phrase (or ignored it every time they received the Assembly budget) and believed that the Assembly already owned the Creek Club Dock, Plaintiffs unquestionably learned prior to 2007 that the Assembly did not own the subject property. Otherwise, the Assembly would not have considered buying the property for $700,000. Finally, even if the Court ignores the "Creek Club Dock usage fee" in the budgets, Plaintiffs simply ignore the numerous other examples of facts in the Record demonstrating that Plaintiffs knew or should have known that they might have a claim more than three years before filing suit.[17]

[17] Plaintiffs discuss the holding of *Turner v. Milliman*, 381 S.C. 101, 105, 671 S.E.2d 636, 638 (Ct. App. 2009), in which the Court of Appeals held that more than one reasonable inference existed with respect to the statute of limitations. (Pls. Br. pp. 55-57.) In *Turner*, the plaintiff alleged that the defendant misrepresented to him that "the future [health insurance] premiums would not increase dramatically or as dramatically as the premiums with individual insurance plans." *Id.* The premiums gradually increased over time, and the Court of Appeals held that "reasonable minds could differ" as to when the increases became sufficiently dramatic to alert plaintiff that he may have a claim. *Id.* at 111, 671 S.E.2d at 641. These facts are not remotely analogous to the facts of this case.

ii. Equitable tolling does not apply.

Equitable tolling is to be applied sparingly and "typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009) (internal quotation omitted); *see also Hughes v. Bank of Am., N.A.*, No. CV 7:15-5083-MGL, 2017 WL 569847, at *2 (D.S.C. Feb. 13, 2017) ("The fact equitable tolling is to be employed sparingly is so established as [to] make citation to authority unnecessary."). Plaintiffs argue that, because "the Developer controlled the HOA from its inception until at least 2009," (Pls. Br. p. 31), the facts here are analogous to those of *Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) ("*Magnolia North*"). In *Magnolia North*, the Court held that the statute of limitations was tolled during the period when the homeowners association board was comprised of the developer's officers, reasoning that the developer's officers would not have sued themselves, and finding that the homeowners association showed diligence by filing suit only eight months after the property owners received control from the developer. *See id.*, 397 S.C. at 372, 725 S.E.2d at 125.

Here, the I'On Defendants did not control the HOA after, at latest, 2005—five years before Plaintiffs filed suit. By the end of 2003, the majority of the Assembly Board was comprised of I'On homeowners unaffiliated with the I'On Defendants. (R. p. 791:20-21; 3429-31.) Moreover, *Plaintiffs conceded* in their Brief to the Court of Appeals—and the trial court found—that control of the Assembly was turned over to the homeowners by December of 2005. (*See* App. p. 199 (Plaintiffs arguing: "The Assembly Board was not 'turned over' to the I'On property owners until December

2005."); R. pp. 33; 791:20-792:8; 3429-31, 3475-77.) There is no evidence that the I'On Defendants exercised control over the Assembly Board after it was completely turned over to the homeowners in 2005. (R. pp. 79:201-21; 3429-31.)

After December of 2005, no developer representatives served on the Board. (R. p. 791, line 22-p. 792, line 8; R. pp. 3475-77.) The Assembly's Finance Committee, which had primary responsibility for reviewing and preparing the Assembly's budget each year, contained no developer representatives from 2003 on, if ever. (R. p. 1185, lines 6-17; R. pp. 3429-31.) Further, the I'On Defendants never exercised any of the limited veto rights the developer retained pursuant to I'On's Declarations. (R. p. 641, lines 9-15; R. p. 792, lines 18-23; R. p. 1425, line 14-p. 1427, line 3; R. pp. 3472-74.) Deborah Bedell, the Board President, spoke with many former Board members and did not believe that the I'On Defendants controlled the Board. Bedell conceded that she is aware of *no* decision of the Board that the I'On Defendants' veto power impacted. (R. p. 1303, lines 9-25; R. p. 1304, lines 5-9; R. p. 1346, line 17-p. 1347, line 5; R. p. 1426, line 23-p. 1427, line 3.) As the Court of Appeals acknowledged, when the I'On Company placed Chad Besenfelder on the Board in 2014, the Assembly excluded him from participating in decisions involving the developer—the very opposite of developer control. (App. p. 15, n. 7.) The I'On Company not only exercised no control over the Assembly; it was patently impotent. The Assembly Board refused to allow a developer representative to participate in Board discussions and votes when the Assembly decided against it. (R. p. 1345:2-15.) Thus, this case is easily distinguishable from *Magnolia North* where the homeowners association's board was comprised entirely of the developer's officers.

iii. Equitable estoppel does not apply.

The Court of Appeals correctly concluded that the doctrine of equitable estoppel does not excuse Plaintiffs' failure to exercise diligence in investigating and pursuing potential claims within the statute of limitations period. (App. pp. 21-22.)

As the party claiming estoppel, Plaintiffs "must prove that [they] (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Here, Plaintiffs have not demonstrated that they lacked the means to obtain the truth regarding ownership of the disputed property, and the I'On Defendants never concealed this information. To the contrary, Plaintiffs were explicitly told the Assembly did not own the property, Plaintiffs paid to use it, and they considered buying it. *See Rushing v. McKinney*, 370 S.C. 280, 294, 633 S.E.2d 917, 925 (Ct. App. 2006) ("One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mislead (sic).").

Plaintiffs argue that, from 1998 to 2000, and again from 2004 to 2007, the I'On Defendants failed to disclose to Plaintiffs that they no longer intended to convey the subject property to Plaintiffs for free. (Pls. Br. 58-59.) But, by 2007, Plaintiffs unquestionably knew that the I'On Defendants did not intend to convey the subject property to Plaintiffs for free because Plaintiffs considered purchasing the property for $700,000 (R. p. 3567; R. pp. 3612-13), and Plaintiffs received and considered the views of more than one hundred members as to whether it should purchase the property. (R. pp. 3396-97; R. pp. 3612-13.) Plaintiffs also argue that equitable estoppel applies

because the I'On Defendants did not disclose to Plaintiffs that the Recreational Easement was supposedly defective and void *ab initio*. (Pls. Br. p. 59.) But even if Plaintiffs were correct that the Recreational Easement was defective and void *ab initio*,[18] Plaintiffs' claims are based on the theory that the I'On Defendants were required to convey title to the subject property to the Assembly—not that they were required to provide a valid easement for access to the property. Moreover, any title defects affecting the Recreational Easement were matters of public record and could have been discovered by Plaintiffs, especially since Plaintiffs hired counsel to review the easement.[19]

II. THE FIDUCIARY DUTIES OWED BY A DEVELOPER TO A HOMEOWNERS ASSOCIATION ARE VERY LIMITED AND DO NOT INCLUDE A DUTY TO CONVEY AMENITIES.

South Carolina views the relationship between a developer and a homeowners association as fiduciary in nature in very limited circumstances and only at very specific times. A developer has a fiduciary duty to bring about a viable homeowners association, and any further fiduciary obligation is triggered only if the developer conveys common areas to the association. Outside these narrow parameters, South Carolina law has never held that a developer must act, not on its own behalf, but on behalf of property owners.

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[18] The Recreational Easement was, in fact, valid for the reasons explained in the I'On Defendants' Briefs filed with this Court on April 14, 2022, and May 23, 2022.

[19] Plaintiffs also ask the Court to grant them an adverse inference based on the I'On Defendants' failure to preserve 117 electronic files, and to rely on such adverse inference to reverse the Court of Appeals' statute of limitation ruling and perhaps other unspecified rulings. (*See* Pls. Br. pp. 18-19.) But Plaintiffs did not ask the trial court to grant an adverse inference based on the I'On Defendants' failure to preserve these files, nor did Plaintiffs move to reconsider or appeal the trial court's order that sanctioned the I'On Defendants with only a requirement that they pay approximately $23,000 in costs and fees. Plaintiffs cannot request this additional sanction now, nor would such a sanction be warranted based on the facts.

Moreover, South Carolina courts are cautious about recognizing new fiduciary duties. *See, e.g.*, *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (declining to recognize a broader fiduciary duty owed by developers to homeowners associations); *Hendricks v. Clemson Univ.,* 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.").

Here, Plaintiffs do not allege that the I'On Defendants breached the narrow fiduciary duties previously recognized by South Carolina courts in the context of developers and homeowners associations. Instead, Plaintiffs argue that "[a] fiduciary is a fiduciary," (Pls. Br. p. 42), and ask the Court to recognize an all-encompassing fiduciary duty that generally requires developers "to act in the best interest" of homeowners associations, apparently in all circumstances and without qualification. (*Id.* p. 32.) Plaintiffs argue that this all-encompassing fiduciary duty required the I'On Defendants to convey the amenities at issue to the Assembly. (*Id.* p. 42.)

Adopting the expansive new rule urged by Plaintiffs—a rule which has not been adopted by any other jurisdiction in the United States—would eliminate developers' business judgment and, instead, subject developers who contemplate building common areas to an unrealistic and impractical standard. If endorsed by this Court, the new rule will stifle development generally and discourage developers' considerations of providing amenities. Even if a developer decided to build certain amenities but, instead of conveying them for free, opted to fund or operate the amenities through a small club,

the developer would be subject to liability. Or, if a developer decided to save money by building a clubhouse for the homeowners association out of wood instead of brick, the decision could expose the developer to liability for failing to act in the best interests of the homeowners association. Indeed, if taken to its logical conclusion, the new rule urged by Plaintiffs would expose developers to liability if they did not convey all of their property and assets to their homeowners associations.

The Court of Appeals reversed the trial court's denial of the I'On Defendants' JNOV motion as to Plaintiffs' claim for breach of fiduciary duty, reasoning that South Carolina law does not "impose upon developers a generic fiduciary duty to convey . . . common areas to the homeowners association," and holding that the trial court committed legal error "in concluding [the I'On Defendants] had a fiduciary duty to convey title to the Creekside Park and Community Dock on lot CV-6 to the HOA." (App. p. 12.) The Court of Appeals' decision is consistent with South Carolina law and should be affirmed.

A. South Carolina has recognized a fiduciary duty owed by a developer to a homeowners association in very limited circumstances and at very specific times.

South Carolina courts have recognized a limited fiduciary relationship between a developer and a homeowners association in three cases: *Goddard*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993), *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251 562 S.E.2d 633 (2002), and *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012).

In *Goddard*, a limited developer fiduciary duty was recognized to thwart decisions by a developer to saddle a homeowners association with the financial burden

associated with ownership of common areas. After building and selling only five of the ninety units planned, the *Goddard* developer "unload[ed]" common areas to a newly created homeowners association that consisted of only five homeowners and did not have adequate financial resources to operate. 310 S.C. at 410-11, 426 S.E.2d at 830. The Court determined that "[i]t seem[ed] unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that require an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id*. at 415, 426 S.E.2d at 832-33.

Similarly, in *Concerned Dunes West*, the developer conveyed the common areas to the homeowners association within a week of discovering that the common areas were in need of "significant" repair at the time of conveyance. 349 S.C. at 255, 562 S.E.2d at 635-36. Citing *Goddard*, this Court held that a developer's fiduciary duty is triggered at the time the developer conveys common areas to a homeowners association: "the developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (citing *Goddard*, 310 S.C. 408, 426 S.E.2d 828).[20]

In *Goddard*, the Court of Appeals also recognized a limited duty owed by developers to create a functional homeowners association. *See Goddard*, 310 S.C. at 415, 426 S.E.2d at 832 (identifying a "corollary between the promoters of a corporation

[20] The Court of Appeals recognized the same limited duty in *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). There, the developer turned over control of a homeowners association to the homeowners at a time when the common areas needed significant repairs, and it did so without providing the association adequate funds to make those repairs. *Id.* at 358, 725 S.E.2d at 118.

and the developers of a PUD" and holding that "[b]oth are entrusted by interested investors to bring about a viable organization to serve a specific function," and "[b]oth should be expected to use good faith and act in utmost good faith to complete the formation of their organizations"); *see also Bivens v. Watkins*, 313 S.C. 228, 233, 437 S.E.2d 132, 135 n.5 (1993) (recognizing that promoters are persons or entities "who plan or organize a corporation," and that the relationship between a promoter and a corporation is fiduciary in nature only during "the formation and start-up of the corporation").

B. It is undisputed that the I'On Defendants fulfilled the limited fiduciary duties previously recognized by South Carolina law.

It is undisputed that the I'On Defendants organized and created a functional homeowners association. The I'On Defendants incorporated the Assembly on June 4, 1998, and ceded control of the Assembly Board well in advance of the scheduled transition set forth in the governing documents. (R. p. 1184, lines 13-25.) By 2014, the self-governing homeowners association had reserves on hand totaling $1.3 million and had long-made its own decisions on development issues. (R. pp. 3616-74; R. p. 1308:3-8; R. p. 1303:9-25; R. p. 1304:5-9; R. p. 1346:17-1347:5; R. p. 1426:23-1427:3.) Further, Plaintiffs do not bring claims alleging that the I'On Defendants conveyed amenities to the Assembly that were in need of repair or created a financial burden.[21]

[21] At the time the Assembly acquired Lot CV-6, the Creek Club, the Creek Club docks, the boating facilities, and Lot CV-5 in its settlement with 148 Civitas, LLC, the acquisition did not require the Assembly to increase I'On homeowners' annual dues. (R. p. 1307, line 25-p. 1309, line 18.)

C. South Carolina has refused to impose a broad fiduciary duty on developers.

In the same two cases that announced a limited developer fiduciary duty, South Carolina courts declined to recognize a broad fiduciary duty. The *Goddard* plaintiffs contended that the developer had a fiduciary obligation based on its superior voting strength on the homeowners association's board of directors. 310 S.C. at 413, 426 S.E.2d at 832. But the Court of Appeals rejected this argument because, even "assuming a fiduciary relationship exists" on that basis: (1) the evidence was clear that the developer had refrained from exercising its superior voting strength; and (2) in its role as a director, a developer's conduct should be judged by the business judgment rule. *Id*. at 413-14, 426 S.E.2d at 832.

In *Concerned Dunes West*, the Supreme Court answered a certified question regarding a developer's obligation to maintain common areas during the period in which the developer exercises control of the homeowners association. 349 S.C. at 260, 562 S.E.2d at 638. In its analysis, the Court looked only to the obligations the developer undertook in the PUD's covenants to resolve the question. *Id*. at 260-61, 562 S.E.2d at 638-39. Given the opportunity to recognize a broader developer fiduciary duty, the Court declined.

If South Carolina courts had been inclined to recognize a broader fiduciary duty owed by developers to homeowners associations, they would done so in *Goddard* or *Concerned Dunes West*. The specific fiduciary duty recognized in these cases strikes an appropriate balance between a developer's ability to operate its business and a homeowner's desire to protect his investment. In any event, recognizing the new all-encompassing fiduciary duty urged by Plaintiffs finds no support in the law of South

Carolina, the law of other states, or public policy. Indeed, endorsing Plaintiffs' and the trial court's view of fiduciary duty would have disastrous consequences for developers in South Carolina, eliminating their business judgment and exposing them to liability for any business decision arguably not in the best interests of the homeowners association.

D. The trial court erroneously held that an alleged promise to convey property created a fiduciary duty to convey property.

The trial court held "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which should have been conveyed and properties which were actually conveyed in a substandard condition is a distinction without a difference." (R. p. 49.) The trial court also found: "by failing to convey the community properties as promised to the Assembly, [the I'On Defendants] failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly." (R. p. 49.)

If the 1998 Property Report did not include a promise to convey amenities to the Assembly, Plaintiffs would have no basis for the claims pursued in this action. (R. p. 848, line 21-p. 849, line 4; R. p. 853, lines 5-11; R. p. 890, lines 3-21; R. p. 896, lines 1-7; R. p. 956, lines 15-24; R. p. 968, lines 7-11; R. p. 1323, lines 20-22.) At best, this evidence supports a claim under ILSA, for negligent misrepresentation, or for breach of contract; it does not support a claim for breach of fiduciary duty. In *Goddard* and *Concerned Dunes West*, the Court was focused on fashioning a remedy because no existing legal theory fit the allegations made by the property owners, who had no contract requiring that amenities be conveyed in a certain condition. *See Goddard*, 349

S.C. at 257, 562 S.E.2d at 637; *Concerned Dunes West*, 349 S.C. at 255, 562 S.E.2d at 635-36. The question of whether amenities are promised at all, on the other hand, is one which can be expected to be covered by an agreement among parties—which was alleged here. No sweeping new fiduciary duty is needed to redress Plaintiffs' allegations in this case.

E. This Court should clarify that the dicta in the portion of the Court of Appeals' opinion discussing fiduciary duty is not an accurate statement of South Carolina law.

The Court of Appeals' decision to reverse the trial court's denial of the I'On Defendants' JNOV motion as to Plaintiffs' breach of fiduciary duty claim was correct and should be affirmed. However, the Court of Appeals' opinion includes an additional discussion that is both erroneous and unnecessary to the resolution of the issue. (*See* App. pp. 14-16.)

After addressing the trial court's basis for denying JNOV, the Court of Appeals separately states: "[The I'On Defendants] retained continuing control of the HOA up to and including the date they conveyed lot CV-6 to Russo [in 2009]." (App. p. 14.) The Court of Appeals relies exclusively on two provisions in the Covenants to reach the factual conclusion that the I'On Defendants continued to control the Assembly: 1) the retained right to "appoint, remove[,] and replace members of [the HOA's] Board of Trustees" for a limited period of time not to exceed twenty years after the Covenants' recording; and 2) the retained right to disapprove actions, policies, or programs of the Assembly that would impair the rights of The I'On Company, interfere with the development of I'On or diminish the services of the Assembly. (App. pp. 14-15.) Despite these provisions in the Covenants, the Record is clear that the I'On Defendants

did not exercise "continuing control" after the undisputed turnover of control no later than December 2005. *See* Section I.D.ii, *supra* (discussing the I'On Defendants' lack of control over the Assembly after, at latest, 2005).

The Court of Appeals builds on this factual error and concludes that the I'On Defendants' "continuing control" creates a fiduciary duty as set forth in *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). This discussion arguably suggests that the mere existence of retained rights in the Covenants is sufficient for the law to recognize an unlimited, unqualified fiduciary duty. The implication is that because the rights exist, the duty exists; because the duty exists, the developer can make no decision that places its own interests above the interests of the homeowners association.

The Court of Appeals' discussion does not comport with South Carolina law; the existence of retained rights alone does not equate to control and does not create an all-encompassing fiduciary duty. South Carolina has only recognized a fiduciary duty owed by a developer in the narrow circumstances discussed in *Goddard* and *Concerned Dunes West*. Moreover, other jurisdictions to address the fiduciary duties owed by developers have held that any fiduciary duty arising from the developer's control over the homeowners association exists only when and to the extent that the developer is actually exercising such control.[22]

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[22] *See, e.g.*, *Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co.*, 1171 Cal. Rptr. 334, 334 (Cal. Ct. App. 1981) ("[P]rinciples of fiduciary duty . . . may exist for holding those *exercising actual control* over the [homeowners association]'s affairs to a duty not to use their power in such a way as to harm unnecessarily a substantial interest of a dominated faction.") (emphasis added); *Cohen v. S & S Constr. Co.*, 201 Cal. Rptr. 173, 175 (Cal. Ct. App. 1983) (same); *Chesus v. Watts*, 967 S.W.2d 97, 108 (Mo. Ct. App. 1998) (same); *Laurel Rd. Homeowners Ass'n, Inc. v. Freas*, 191 A.3d 938, 951 (Pa. Commw. Ct. 2018) (recognizing a fiduciary relationship where a developer "exercise[s] . . . control" over the

Significantly, none of the analysis of the I'On Defendants' theoretical control was necessary to the Court of Appeals' decision on the issue. After including this extraneous discussion, the Court of Appeals acknowledges that the discussion was *not* the basis of the trial court's denial of the I'On Defendants' JNOV motion. (App. p. 16.) Because it does not matter to the Court of Appeals' resolution of the issue, this entire discussion is dicta. The I'On Defendants respectfully request that this Court clarify that the Court of Appeals' discussion of an all-encompassing fiduciary duty in dicta is not an accurate statement of the law.

F. Even if the Court were to recognize a new fiduciary duty that exists when and to the extent a developer exercises control over a homeowners association, such a duty would have no application here.

Plaintiffs allege that the I'On Defendants breached a fiduciary duty by conveying different amenities than the ones promised. (*See, e.g.*, Pls. Br. p. 2 ("In 2014, a Charleston County jury returned a verdict on special interrogatories and awarded [Plaintiffs] damages for common areas the Developer refused to convey to the HOA."); *see also* Section I.A, *supra*.) But the I'On Defendants' alleged promise to convey amenities to the Assembly has nothing to do with the I'On Defendants' theoretical ability to exercise control over the Assembly's board decision under the Covenants. Indeed, even if the I'On Defendants had been exercising actual control over the

homeowners association); *Gables at Sterling Vill. Homeowners Ass'n, Inc. v. Castlewood-Sterling Vill. I, LLC*, 417 P.3d 95, 110 (Utah 2018) (recognizing a fiduciary relationship while the developer "establishes and initially controls a homeowners association"). Further, even when the developer is exercising control over the homeowners association, any fiduciary duty is limited in scope. *See, e.g.*, *Gables at Sterling Vill. Homeowners Assn, Inc.*, 417 P.3d at 109 ("Given the developer's self-interest, '[t]he developer cannot be expected to act solely in the interests for the association and the homeowners. Conflicts of interest are inherent in the developer's role while it retains control of the association.'") (internal citations omitted).

Assembly's decisions up through trial—which it plainly was not—this control would have nothing to do with the I'On Defendants' alleged failure to convey amenities previously promised to the Assembly.

Moreover, because the statute of limitations for a breach of fiduciary duty claim is three years, Plaintiffs' breach of fiduciary duty claim must be based on the existence of a duty and alleged breaches of that duty which occurred no earlier than December 22, 2007, three years before any suit was filed. But by the end of 2003, I'On homeowners held a majority of the seats on the Assembly Board (R. pp. 1184:13-25; 791:20-21), and Plaintiffs concede and the trial court found that the I'On Defendants relinquished control of the Assembly to the I'On homeowners by December 2005. (App. p. 199; R. pp. 33; 791:20-792:8; 3429-31, 3475-77.).[23] Thus, the relationship between the I'On Defendants and the Assembly was not fiduciary in nature with respect to any timely allegations of breaches of fiduciary duty, and this Court should affirm the decision of the Court of Appeals.

III. PLAINTIFFS FAILED TO FILE AND MAINTAIN A PROPER DERIVATIVE ACTION.

The Court of Appeals correctly determined that Plaintiffs' "pleadings fall short of alleging facts indicating either an adequate demand by Walbeck or Adkins directed to the Board or the futility of making such a demand." (App. p. 11.)

[23] Plaintiffs argue that the I'On Defendants breached their fiduciary duties by selling "usage rights" to Olde Park in 1999 and by granting an allegedly invalid recreational easement to the Assembly in 2000. (Pls. Br. pp. 33–35). But these alleged breaches cannot support Plaintiffs' claims because they are far outside the statute of limitations and, in any event, do not concern the Assembly's organization or viability or the condition of common areas when conveyed to the Assembly.

The pleading requirements of Rule 23(b)(1) are designed to prevent a minority of shareholders from dictating a corporation's actions except in carefully prescribed circumstances, such as where the directors cannot evaluate whether to file suit because they are the very defendants accused of wrongdoing. These circumstances do not even arguably exist here. The derivative Plaintiffs did not sue the Assembly's Board members. Instead, the derivative Plaintiffs sued and alleged wrongdoing by third parties—the I'On Defendants. These are claims that the derivative Plaintiffs could only bring on the Assembly's behalf if they demanded that the Assembly assert them and the Assembly ignored the demand. Rather than demanding that the Assembly pursue claims against the I'On Defendants, the individual Plaintiffs filed suit without making a demand and then sought to control the litigation, consistently eschewing the Assembly's authority to determine whether and how to pursue the claims. Over a period of four years, Plaintiffs filed five complaints but never came close to alleging demand or futility with particularity under Rule 23(b)(1).

Plaintiffs ask this Court to reverse the Court of Appeals ruling based on two arguments: (1) the Assembly's realignment as a plaintiff as part of a settlement on the eve of the first trial supposedly "mooted" the Rule 23 issues; and (2) the individual plaintiffs properly pleaded demand or futility as required by Rule 23(b)(1), SCRCP. Both arguments fail.

A. <u>The derivative Plaintiffs may not ignore Rule 23's pleading requirements after presenting derivative claims to the jury and controlling the derivative claims throughout trial and on appeal.</u>

Plaintiffs argue that they were not required to comply with the Rule 23(b) pleading requirements because the claims presented to the jury on behalf of the

Assembly were not derivative claims, but rather were direct claims asserted by the Assembly itself. (Pls. Br. pp. 23-27.) Notwithstanding Plaintiffs' contention, Plaintiffs' claims in fact were presented and argued to the jury as derivative. Likewise, the derivative Plaintiffs and their counsel—not the Assembly and its separate counsel—controlled all claims asserted by the Plaintiffs at trial, and they continue to do so on appeal.

In their Brief, Plaintiffs cite examples of the I'On Defendants' counsel arguing to the trial court that Plaintiffs' derivative claims *should be* dismissed and that any claims asserted on behalf of the Assembly *should be* controlled by the Assembly itself, not by the individual Plaintiffs. (*See id.*) What the derivative Plaintiffs ignore, however, is that the trial court *rejected* the I'On Defendants' arguments, resulting in the claims on behalf of the Assembly being presented to the jury as derivative, and resulting in the derivative Plaintiffs and their counsel controlling all of Plaintiffs' claims. The Assembly's counsel never filed a complaint in this case, and Plaintiffs never dismissed their derivative claims. Further, the trial court denied the I'On Defendants' motion to dismiss, motion for summary judgment, motion for directed verdict, and JNOV motion, each of which sought dismissal of the derivative claims. Indeed, when convenient, Plaintiffs have conceded that the claims presented to the jury were derivative, not direct. (*See, e.g.*, Pls. Opp. to JNOV Motion, R. pp. 1988-89 ("Given Plaintiffs' satisfaction of Rule 23(b)'s requirements, Plaintiffs' derivative claims are supported by South Carolina law, derivative claims which the jury found were supported by the evidence and derivative claims which resulted in an award of $1,750,000 to the Assembly.") In fact, Plaintiffs have presented arguments in court and obtained rulings

based on the claims having been tried as derivative claims. (*See, e.g.*, App. p. 218; App. pp. 252-252.) (individual Plaintiffs' counsel arguing that the trial court properly denied the I'On Defendants' petition for attorneys' fees in defending against Adkins claims because "Adkins did in fact prevail at trial as a derivative plaintiff on behalf of the I'On Assembly")).

While Plaintiffs have flip-flopped on whether the claims asserted on behalf of the Assembly were derivative or direct, the facts in the Record demonstrate that they were, in fact, derivative, and were controlled by the derivative Plaintiffs, not the Assembly. Indeed, the derivative Plaintiffs' counsel argued in his opening statement:

> The homeowners have brought a number of claims related to this transaction, for lack of a better word, the series of transactions. They brought them to court and they're bringing them to you to resolve. And when I say "the homeowners", *it's my two clients and then derivatively on behalf of the Assembly*, a homeowner membership [sic].

(R. pp. 542-43 (emphasis added); *see also* R. p. 1034, lines 8-16 (individual Plaintiffs' counsel arguing to the trial court that the breach of fiduciary duty claim is "a derivative claim only").) In closing arguments, the individual Plaintiffs' counsel likewise argued:

> All three plaintiffs -- I'm going to speak of three, even though there's only two people. You know that Brad and Lea Ann are representing the Assembly in what's called a derivative action, and we explained that in the opening statement. When an entity and association or corporation doesn't do something its members or shareholders thinks it should do, a member or shareholder may sometimes bring what's called a derivative action. They bring that suit on behalf of the entity that's not acting. And Brad and Lee Ann have done that on behalf of the Assembly, because after the Assembly -- after the transaction with Russo took place, it appears as though the Assembly figured the horse was out of

> the barn, and there was nothing that could be done about it. And Brad originally, and later Lea Ann joined him, Brad took it upon himself -- he wasn't going to stand for that, he took it upon himself to bring the claim individually and derivatively.

(R. p. 1583, line 8-p. 1584, line 1.) Notably, the Assembly was represented at trial by Timothy Bouch, Esq., but Mr. Bouch did not make an opening statement or a closing argument, nor did he otherwise take an active role at trial.[24]

Moreover, when it charged the jury, the trial court made clear that the claims presented on behalf of the Assembly were derivative in nature:

> The Court: On behalf of the I'On Assembly, plaintiffs Adkins and [Walbeck] have asserted derivative claims for breach of contract; fraud; negligent misrepresentation and breach of fiduciary duty. A derivative action is a lawsuit that is brought on behalf of a corporation or association by one or more of its shareholders or members to enforce a right of the corporation or association. . . . [A] plaintiff who brings derivative claims on behalf of a corporation may also bring individual claims in one action.
>
> * * * * * * * * * * * * * * * * * *
>
> The next cause of action listed on the form is breach of contract. And it has a few more questions. And that also covers the derivative claim that the individual plaintiffs have asserted on behalf of the Assembly.

(R. p. 1681, lines 6-17; R. p. 1711, line 22-p.1712, line 1.)

The individual Plaintiffs also ignore the facts that prompted the Assembly to settle and agree to support the individual Plaintiffs' position in the litigation. The

[24] Shortly before trial, the derivative Plaintiffs entered into a settlement agreement with the individual Defendants. Although the Assembly had been realigned as a plaintiff months earlier, the Assembly's counsel informed the trial court that he did not believe there was any need for the Assembly to consent to the settlement because the Assembly was obligated under the previous settlement to cooperate with the derivative plaintiffs. (R. p. 482:3 – 485:5.) The trial court agreed. (*Id.*) The Assembly plainly was not exercising control over any claims even after it was realigned as a plaintiff.

individual Plaintiffs had secured a settlement with a different defendant, raising the specter for the Assembly that it would be responsible for the substantial legal fees of derivative Plaintiffs' counsel, which were claimed to have been more than $1,000,000 in post-trial motions. *See* S.C. Code Ann. § 33-7-400 cmt. ("The right of successful plaintiffs in derivative suits to [attorneys' fees from the entity] is so universally recognized . . . that specific reference was thought to be unnecessary."); *see also Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (2010) (citing official comment to section 33-7-400 as the source of a successful derivative plaintiff's right to recover fees from the entity).

Rule 23(b) is designed to afford boards of directors the opportunity to weigh competing interests. Here, the trial court's repeated failures to enforce the derivative demand requirements of Rule 23(b) resulted in coercion of the Assembly Board on the eve of the first trial, when a settlement was reached among the other parties. (R. pp. 2968-71.) That settlement dictated that the Assembly Board support the individual Plaintiffs and limited what the derivative Plaintiffs could seek from the Assembly for fees. (*Id.*) Thus, the trial court's realignment of the Assembly as a plaintiff was not done as the result of some determination that the Assembly desired to pursue Plaintiffs' derivative claims; rather, it was a purely procedural action that did not affect the composition or adequacy of the pleadings. Plaintiffs cannot point to this realignment now as a cure for their defective derivative pleadings.

Further, the case law Plaintiffs cite in support of their "mootness" argument is inapposite. In *Pikor v. Cinerama Prods. Corp*, 25 F.R.D. 92, 96 (S.D.N.Y. 1960), on which Plaintiffs rely, the court did not excuse a failure to comply with Rule 23; to the

contrary, the district court dismissed claims because they failed to comply with Rule 23(b) pleading requirements. The other cases Plaintiffs cite are factually distinguishable.[25] Plaintiffs cite no case law that authorizes the derivative Plaintiffs to do what they are seeking to do here—namely, pursue derivative claims for years without complying with the Rule 23 pleading requirements, pressure the company to enter into a settlement agreement that requires the company to support the derivative claims, present the claims to the jury as derivative and control those claims throughout the trial and on appeal, and then have the claims somehow transformed from derivative to direct claims such that the failure to comply with Rule 23(b) is excused. Permitting such a result would be a perversion of Rule 23(b) and its goal of ensuring companies have the opportunity to control any claims asserted on their behalf.

B. The Court of Appeals correctly held that Plaintiffs failed to comply with the Rule 23(b) pleading requirements.

Plaintiffs' claims are based on the theory that the I'On Defendants promised to convey certain amenities to the Assembly but, instead, sold them to a third party on August 5, 2009. (*See* Section I.A, *supra*.) The individual Plaintiffs filed suit on December 22, 2010, more than a year after the I'On Defendants sold the amenities to the third party. Thus, at the time Plaintiffs commenced this lawsuit, the I'On

[25] *See United Canso Oil & Gas Ltd. v. Catawba Corp.*, 566 F. Supp. 232, 241–42 (D. Conn. 1983) (dismissing the individual plaintiffs' claims where "counsel for the individual plaintiffs has ceased in any practical sense to participate in this case"); *Berman v. Thomson*, 403 F. Supp. 695, 698 (N.D. Ill. 1975) (dismissing the derivative claims where the individual plaintiffs were failing to prosecute the case); *Ross v. Patrusky, Mintz & Semel*, No. 90 CIV. 1356 (SWK), 1997 WL 214957, at *10 (S.D.N.Y. Apr. 29, 1997) (granting a motion to dismiss derivative claims even though the direct claims were vulnerable to dismissal on statute of limitations grounds); *In re Penn Cent. Sec. Litig.*, 335 F. Supp. 1026, 1041 (E.D. Pa. 1971) (granting the company's motion to dismiss the derivative claims and to grant exclusive control of the case to the company, over the objection of the derivative plaintiffs).

Defendants no longer owned the amenities at issue and therefore could not convey them to the Assembly. Accordingly, at the time Plaintiffs commenced this lawsuit, the Assembly's only remedy was to sue the I'On Defendants for damages resulting from their allegedly wrongful conveyance of the amenities.

Rule 23(b)(1) requires derivative plaintiffs to "allege with particularity the efforts, if any, made by the plaintiff to obtain *the action he desires* from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort." Rule 23(b)(1), SCRCP (emphasis added). Importantly, "futility is gauged by the circumstances existing at the commencement of the derivative suit." *In re World Acceptance Corp. Derivative Litig.*, No. 6:15-CV-02796-MGL, 2017 WL 770539, at *6–7 (D.S.C. Feb. 28, 2017). Here, the action the derivative Plaintiffs desired from the Assembly Board—indeed, the only action the Assembly Board could take with respect to Plaintiffs' derivative claims at the time Plaintiffs commenced this lawsuit—was to sue the I'On Defendants for damages. Because the derivative Plaintiffs did not make a demand on the Assembly Board to sue the I'On Defendants, and because the derivative Plaintiffs have not alleged facts demonstrating that such a demand would have been futile, Plaintiffs' derivative claims fail to comply with Rule 23(b)(1).

i. The I'On Defendants properly challenged the sufficiency of Plaintiffs' pleadings, and the Court of Appeals properly analyzed whether Plaintiffs' pleadings complied with Rule 23(b).

As an initial matter, Plaintiffs argue that, because the I'On Defendants did not appeal the trial court's order denying their motion to dismiss Plaintiffs' derivative claims, the Court of Appeals should have considered matters outside the pleadings

when deciding whether Plaintiffs complied with the Rule 23(b)(1) pleading requirements. (Pls. Br. pp. 60-65; pp. 72-73.) Regardless of whether the Court considers materials beyond the pleadings, Plaintiffs cannot show that they made an adequate demand on the Assembly because they did not, in fact, make one. Likewise, regardless of what materials the Court considers, Plaintiffs cannot show that a demand would have been futile; the Assembly Board was not "interested" for purposes of a futility analysis. In any event, Plaintiffs are incorrect that the Court should have considered materials beyond the pleadings in its Rule 23(b) analysis.

As an interlocutory order, the denial of a motion to dismiss is not directly appealable, even after trial. To challenge the trial court's denial of a motion to dismiss, the moving party must raise the same issue at a later stage of the proceeding by subsequent motion, such as through a JNOV motion:

> Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. Therefore, the denial of a motion to dismiss is not directly appealable.

Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 381–82, 762 S.E.2d 44, 48–49 (Ct. App. 2014) (quoting *McLendon v. S.C. Dep't of Highways & Pub. Transp.,* 313 S.C. 525, 526 n. 2, 443 S.E.2d 539, 540 n. 2 (1994)). *Cf. Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) (holding that "the denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits").[26]

[26] Plaintiffs rely on *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535 (2014), for the proposition that the I'On Defendants should have appealed the order denying their motion to dismiss. But *Davis* involved a challenge to a discovery order, which requires the challenging party to follow a procedure that does not apply in the context of a motion to dismiss. *See id.* at 280, 762 S.E.2d at 543 (holding that, "to challenge the specific rulings

Here, the I'On Defendants raised Plaintiffs' failure to comply with Rule 23(b)'s pleading requirements at every stage of the litigation. (*See, e.g.*, R. pp. 1028-39; 1763; 1831-36; 1863-68; 1924-29.) Further, the Court of Appeals correctly held that "the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the complaint." *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 511–12, 827 S.E.2d 348, 357 (Ct. App. 2019) (citing *McCormick v. England*, 328 S.C. 627, 632–33, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also Carolina First Corp. v. Whittle*, 343 S.C. 176, 188–89, 539 S.E.2d 402, 409 (Ct. App. 2000) (holding that "the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it"). Indeed, the demand requirement "would be rendered meaningless if a plaintiff who cannot establish demand futility when he files suit is nonetheless permitted to amend his pleading using materials later obtained during discovery to justify his failure to make a pre-suit demand." *In re Merck & Co., Inc. Sec., Derivative & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007); *see also Smilovits v. First Solar Inc.*, No. CV-12-00555-PHX-DGC, 2016 WL 5682723, at *5 (D. Ariz. Sept. 30, 2016) (rejecting plaintiff's "attempt to maneuver around the well-accepted rule that 'discovery may not be used to supplement demand futility allegations'") (internal citations omitted).

Plaintiffs argue that *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018) requires this Court to consider materials beyond the pleadings in deciding whether Plaintiffs complied with the Rule 23(b) pleading requirements. Plaintiffs are incorrect. In fact, *Patterson* demonstrates that, when deciding a challenge to the sufficiency of a

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of the discovery orders, the normal course is to refuse to comply, suffer contempt, and appeal from the contempt finding").

pleading under Rule 23(b), the Court should apply a Rule 12(b)(6) standard. In *Patterson*, although the trial court considered documents outside the pleadings in deciding the defendants' motion to dismiss and thereby converted the motion to one for summary judgment, the Supreme Court cited the Rule 12(b)(6) standard in discussing which materials should be considered on appeal when deciding defendants' challenge under Rule 23(b). *See id.* at 235, 821 S.E.2d at 689 (holding that "a complaint may be 'deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint'") (quoting *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d. Cir. 2011)).[27]

ii. The Complaints' allegations fail to satisfy the demand requirement of Rule 23(b), SCRCP.

The "demand" requirement "that the shareholder seek action from the corporation itself before bringing a derivative suit is premised on the 'cardinal precept . . . that directors, rather than shareholders, manage the business and affairs of the corporation.'" *Hazelton v. Kuttner*, No. C/A/NO. 08:06CV02063, 2007 WL 1120405,

[27] Contrary to the implication of Plaintiffs' argument in their Brief, the letter that the *Patterson* court found satisfied the Rule 23(b) demand requirement *was* expressly discussed in the complaint. *See id.* at 234, 821 S.E.2d at 688 (referring to the "discussion of the letter in paragraph 8 of [plaintiffs'] complaint"). Plaintiffs are also incorrect in arguing that *Grant v. Gosnell*, 266 S.C. 372, 223 S.E.2d 413 (1976) requires the Court to consider matters outside the pleadings. *Grant* did not involve an application of Rule 23 to evaluate the allegations of derivative plaintiffs. In fact, *Grant* was decided prior to the adoption of the South Carolina Rules of Civil Procedure in 1985. *See* Rule 86, SCRCP (providing that the new Rules of Civil Procedure took effect on July 1, 1985). Moreover, the "other evidence" discussed in the opinion includes affidavits and exhibits filed by the *defendants* to support their motion. *Id.*

at *3 (D.S.C. Apr. 13, 2007) (internal citation omitted) (applying Delaware law).[28] Here, it is undisputed that the derivative Plaintiffs never demanded that the Assembly sue the I'On Defendants. (*See generally* Pls. Fourth Am. Compl., R. pp. 313-329 (never alleging that Plaintiffs demanded that the Assembly file suit); Pls. Br. pp. 65-73 (same).) Because suing the I'On Defendants was "the action [Plaintiffs] desire[d]" from the Assembly after the I'On Defendants sold the amenities to a third party, Plaintiffs have not alleged demand under Rule 23(b)(1).

In arguing that they made an adequate demand, Plaintiffs rely on the "Templeton Demand" and the "Adkins Demand." (Pls. Br. pp. 65-73.)[29] Neither of these demands satisfies Rule 23(b)(1). First, these "demands" occurred in early 2009, months before the I'On Defendants sold the amenities to a third party on August 5, 2009. (Pls. Br. p. 66 (alleging that the Templeton Demand occurred on February 26, 2009, and that the Adkins Demand occurred on March 5 and 11, 2009). Notably, the derivative Plaintiffs contend that they did not even have notice of their claims against the I'On Defendants until the I'On Defendants sold the amenities on August 5, 2009. (Pls. Br. p. 55; *see also id.* p. 45 (arguing that the sale of property on August 5, 2009, is "the transaction which is the very crux of this case").

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[28] *See In re World Acceptance Corp. Derivative Litig.*, No. 6:15-CV-02796-MGL, 2017 WL 770539, at *6–7 (D.S.C. Feb. 28, 2017) ("Due to the voluminous body of Delaware corporate law, the South Carolina Supreme Court and Court of Appeals have indicated Delaware law is persuasive in assessing demand futility."); *In re SCANA Corp. Derivative Litig.*, No. CV 3:17-3166-MBS, 2018 WL 3141813, at *3 (D.S.C. June 27, 2018) (same).

[29] At trial, Walbeck confirmed what the pleadings indicate—he never claimed to have made a demand on the Assembly Board for ownership of any property. (R. pp. 985:19-986:3.) He is concededly not a proper derivative plaintiff. Rule 23(b)(1), SCRCP.

Further, the Templeton demand does not satisfy Rule 23(b)(1) because Catherine Templeton is not a named plaintiff. *See* Rule 23(b)(1), SCRCP (requiring plaintiffs to plead demands "made *by the plaintiff*") (emphasis added). Moreover, the trial court correctly held that Templeton's February 26, 2009 letter is not a derivative demand, and Plaintiffs did not challenge this ruling. (R. pp. 1031:4-24; 2229-30.) Templeton settled her zoning claims against the I'On Defendants, which were separate from this litigation. (R. pp. 725:10-726:15.)

Finally, the "Adkins Demand" also does not comply with Rule 23(b) because Adkins merely demanded that the Assembly's attorney "investigate the allegations that The I'On Company was contractually obligated to convey Creekside Park and Community Dock to The Assembly."[30] (R. pp. 156, ¶ 47; 173, ¶ 47; 318, ¶ 46.) But a request to "investigate" is a far cry from a demand to initiate litigation, which is the action the individual Plaintiffs desired for the Assembly to take.[31] Moreover, the Assembly's attorney in fact did what Adkins requested. He investigated and responded. (R. p. 2231.) Adkins pushed for nothing else from the Assembly. As correctly recognized by the Court of Appeals, the purported "Adkins demand" simply "fall[s] short[,]" as the court of appeals concluded. (App. p. 11.)

Plaintiffs argue that their demand allegations "are more extensive than those in" *Patterson v. Witter*, 425 S.C. 213, 821 S.E.2d 677 (2018). (Pls. Br. p. 71.) Plaintiffs are incorrect. In *Patterson*, members of the South Carolina Home Builders Self Insurers

[30] As Adkins confirmed at trial, her alleged demands do not include ownership of the "Commons," as Plaintiffs now contend. (R. p. 1307:11-24.)

[31] Plaintiffs also discuss "demands" made on *the I'On Company* to convey amenities to the Assembly. (Pls. Br. pp. 65, 69-70.) But a demand that one of the *defendants* convey property has no relevance to the determination of whether Plaintiffs made an adequate demand on *the Assembly* to initiate litigation against that defendant.

Fund (the Fund) sued the Fund's board based on its decision to "wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company." *Id.* at 218, 821 S.E.2d at 680. The plaintiffs sent the board's counsel a letter demanding that the board, among other things, distribute the Fund's assets to the members rather than using it to establish the new mutual insurance company. *Id.* at 222-23, 821 S.E.2d at 682-83. When the board members did not respond to the letter, the plaintiffs sued them for breach of fiduciary duty and breach of contract for using the assets to create the new mutual insurance company rather than distributing the assets to its members. *Id.* Thus, *Patterson* presents a straightforward example of plaintiffs demanding that board members take a specific action, and then suing those board members for failing to take that action. Accordingly, *Patterson* is inapposite.

iii. *The Complaints' allegations fail to satisfy the futility requirement of Rule 23(b), SCRCP.*

South Carolina appellate courts have a limited number of decisions addressing demand futility and therefore find Delaware futility law to be persuasive. *See* footnote 28, *supra*. Delaware applies what is referred to as the *Rales* test where, as here, the plaintiff alleges that a board failed to act.[32] Under the *Rales* test, the court must determine whether the plaintiff's allegations "create a reasonable doubt that, as of the time the complaint is filed, [a majority of] the board of directors could have properly exercised its independent and disinterested business judgment in responding to the demand." *World Acceptance*, 2017 WL 770539, at *6 (quoting *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993)). A director is considered "interested" where "he or she will

[32] Delaware applies what is referred to as the *Aronson* test when the plaintiff challenges a specific board decision. *Id.*

receive a personal financial benefit from a transaction that is not equally shared by the stockholders," or where the plaintiff alleges conduct "so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of [personal] director liability therefore exists[.]" *Id.* at *7 (internal citations omitted).

Here, Plaintiffs have not alleged—and had no basis to allege—that the Assembly's Board members received a personal financial benefit from the I'On Defendants' sale of amenities to a third party, or that the Assembly's board faced a substantial likelihood of personal director liability. Thus, Plaintiffs have not come close to showing the "extraordinary" conditions required to establish demand futility. *See Smilovits v. First Solar Inc.*, No. CV-12-00555-PHX-DGC, 2016 WL 5682723, at *4 (D. Ariz. Sept. 30, 2016) ("The [United States] Supreme Court has stated that conditions supporting a finding of demand futility must be 'extraordinary.'") (quoting *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 95-96 (1991); *see also* Rule 23, SCRCP, Reporter's Comments ("[SCRCP 23(b)(1) is the language of present Federal Rule 23.1.").[33] Instead, Plaintiffs merely allege that additional demands on The Assembly "would now be futile as The Assembly has failed to act to protect the rights of The Assembly and its members . . . ." (R. pp. 174, ¶55; 319, ¶52.) Plaintiffs'

[33] Plaintiffs argue that the Court should apply a "lenient standard" in determining whether Plaintiffs have adequately pleaded futility under Rule 23(b). (*See* Pls. Br. p. 62 (citing *Grant v. Gosnell*, 266 S.C.372, 375-77, 223 S.E.2d 413, 414-15 (1976)). But, as clarified in *Whittle*: When the Court stated that it would apply a "lenient standard," "[t]his does not mean a court will be lenient in finding there are sufficient facts pled to establish futility. Rather, it means that if the court finds sufficient facts are pled, then it will be lenient in excusing demand—a matter within its discretion." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000) (quoting *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1578 (D. Kan. 1986)).

allegations do not come close to establishing futility.

Moreover, Plaintiffs' reliance on *Grant v. Gosnell*, 266 S.C. 372, 223 S.E.2d 413 (1976) and *Stahn v. Catawba Mills*, 53 S.C. 519, 31 S.E. 498 (1898) is misplaced. First, neither case involved an application of Rule 23(b) to evaluate the allegations of derivative plaintiffs; both cases were decided prior to the adoption of the South Carolina Rules of Civil Procedure in 1985. *See* Rule 86, SCRCP (providing that the Rules of Civil Procedure took effect on July 1, 1985). Further, these cases focus on the question of demand futility when "the directors or managing board are *themselves* the wrongdoers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action." *Grant*, 266 S.C. at 374, 223 S.E.2d at 414 (quoting *Stahn*, 53 S.C. 519, 31 S.E. 498) (emphasis added). Those are not the facts before the Court here: the I'On Defendants were not on the Assembly Board. In keeping with these cases, the Court of Appeals properly determined that there are no allegations that the non-developer members of the Assembly Board were guilty of some wrongdoing that would have made demand on them futile. (App. p. 12.)[34]

iv. The I'On Defendants' Answer is immaterial to the Court's Rule 23 analysis.

Plaintiffs contend that the Court of Appeals ignored a binding admission by the I'On Defendants that Plaintiffs made a demand. (Pls. Br. p. 60) But Rule 23(b) requires an analysis of the sufficiency of allegations contained in a *complaint*—statements in an

[34] Plaintiffs briefly argue that the Court's decision to toll the statute of limitations in *Magnolia North* suggests that futility is automatically established when a homeowners association is controlled by its developers. (Pls. Br. p. 71.) Plaintiffs cite no law for this proposition and, in any event, the facts of this case are easily distinguishable from those in *Magnolia North*. *See* Section I.D.ii, *supra*.

answer are not considered. Rule 23(b)(1), SCRCP. As discussed above, the I'On Defendants have contested—at every turn—the adequacy of Plaintiffs' alleged demands and their compliance with Rule 23(b)'s requirements. (R. pp. 1028-39; 1763; 1831-36; 1863-68; 1924-29.) Moreover, the paragraph in the I'On Defendants' answer cited by Plaintiffs does not admit that the Plaintiffs in this action made any demand, much less one that complies with Rule 23(b).

IV. THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S RULING THAT THE I'ON DEFENDANTS WERE AMALGAMATED.

The Court of Appeals correctly applied the single business enterprise theory as set forth in *Pertuis v. Front Roe Restaurants, Inc*., 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018), and held that the trial court erred in holding that the I'On Defendants were amalgamated. Plaintiffs argue that the Court of Appeals' amalgamation ruling should be reversed because (1) the I'On Defendants did not preserve their challenge to the trial court's amalgamation ruling for appellate review; (2) the trial court's ruling was correct; and (3) the I'On Defendants were not prejudiced by the trial court's ruling. Each of these arguments fails.

A. The I'On Defendants did not waive their challenge to the trial court's amalgamation ruling.

Plaintiffs argue that the I'On Defendants waived any challenge to the amalgamation ruling because they supposedly induced the trial court to rule on the issue before the case was submitted to the jury. (Pls. Br. 51-52.) But, on appeal, the I'On Defendants challenged the *substance* of the trial court's ruling on amalgamation, not the *timing* of that ruling. (*See* I'On Defs. App. Br., R. pp. 176-179) By agreeing

that the trial judge should rule on amalgamation, the I'On Defendants did not somehow waive the right to challenge the substance of the trial court's ruling.

B. The Court of Appeals correctly held that the trial court erred in amalgamating the I'On Defendants.

As this Court recently held, "invocation of the single business enterprise theory should be reserved for drastic situations and is the rare exception, not the rule." *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 126, 866 S.E.2d 542, 551 (2021). This case does not present the "drastic situation" or "rare exception" warranting amalgamation pursuant to the single business enterprise theory, and the Court of Appeals properly reversed the trial court's ruling on this issue.

In *Pertuis v. Front Roe Restaurants, Inc*., 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018), this Court thoroughly examined the amalgamation of interests theory, officially recognized the theory, and aptly rebranded it the "Single Business Enterprise" theory. 423 S.C. at 655, 817 S.E.2d at 280.[35] This theory requires a showing "of more than the various entities' operations are intertwined." *Id.* Instead, it requires a demonstration of bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of entities' legal distinctions. *Id.*, 817 S.E.2d at 281 (emphasis added). In elaborating on what constitutes "bad faith, abuse, fraud, wrongdoing, or injustice" for purposes of this doctrine, this Court held:

> By "injustice" and "inequity" we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used ... as shorthand references for

[35] Confusingly, Plaintiffs argue that *Pertuis* should be given prospective effect only because "[p]rospective application is required when liability is created where none formally [sic] existed." (Pls. Br. p. 49.) But *Pertuis* did not create liability where none formerly existed. Where, as here, a decision neither establishes a novel cause of action nor dissolves a then-existing immunity, the decision is to be applied retroactively. *See Osborne v. Adams*, 346 S.C. 4, 12, 550 S.E.2d 319, 323 (2001).

> the kinds of abuse, specifically identified, that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like. Such abuse is necessary before disregarding the existence of a corporation as a separate entity.

Id., 423 S.C. at 654–55, 817 S.E.2d at 280 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)).

Here, Plaintiffs have not alleged "fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, [or] the like" that is "resulting from" the blurring of distinctions between the I'On Defendants. The claims Plaintiffs presented to the jury were ILSA, breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act. These claims were based on the theory that The I'On Company failed to convey amenities to the Assembly that were promised. (*See generally* Pls. Fourth Am. Compl., R. pp. 313-29; *see also* Section I.A, *supra*.) None of these claims were based on the theory that the I'On Defendants' alleged wrongdoing, fraud, or abuse resulted from any blurring of the distinctions in the I'On entities (*See generally id.*)

Plaintiffs argue that "[t]he sale [of amenities] which substantively wronged the homeowners—the sale to Civitas—was only accomplished by virtue of the Developer's collective control of all entities . . . ." (Pls. Br. p. 45.) But amalgamation requires a showing of bad faith, abuse, fraud, wrongdoing, or injustice resulting from *the blurring of entities' legal distinctions*—not *collective control* of the entities. Plaintiffs' sale of amenities to a third party has nothing to do with any alleged blurring of distinctions between the I'On Defendants.

Plaintiffs also argue that amalgamation is proper because the alleged invalidity of the 2000 Recreational Easement resulted from the blurring of distinctions between the I'On Defendants. (Pls. Br. pp. 46-47.) Plaintiffs are incorrect for several reasons. First, the 2000 Recreational Easement is not invalid. (*See* I'On Defs. Briefs filed April 14, 2022, and May 23, 2022.) Second, the alleged invalidity of the 2000 Recreational Easement is not an example of "fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, [or] the like." Plaintiffs do not allege that the I'On Defendants had an obligation to provide an easement to the amenities. Third, the alleged invalidity of the 2000 Recreational Easement is not based on a *blurring* of distinctions between the I'On Defendants, but rather is based on the *highlighting of and reliance on* the distinctions between the I'On Defendants by the Plaintiffs. Plaintiffs allege that the 2000 Recreational Easement was invalid because The I'On Company, not The I'On Club, owned the servient property at the time the 2000 Recreational Easement was executed.[36]

Moreover, incorporating several companies to accomplish different components of a planned development is not evidence of nefarious conduct, just as involving several companies in a transaction is not evidence of wrongdoing. Sharing employees and managers amongst companies, by itself, is not evidence of an illegitimate purpose. This is especially true where, as here, each I'On entity had unique responsibilities.

[36] Plaintiffs' arguments implicitly assume that amalgamation requires only evidence of bad faith, abuse, fraud, wrongdoing, or injustice *and* a blurring of distinctions between the entities. (*See generally* Pls. Br. pp. 44-49.) But the law requires a causal relationship between the bad faith, abuse, fraud, wrongdoing, or injustice and the blurring of distinctions between entities.

C. The I'On Defendants were prejudiced by the trial court's amalgamation holding.

Plaintiffs argue that the trial court's amalgamation ruling did not prejudice the I'On Defendants because the jury was not specifically charged on amalgamation. (Pls. Br. pp. 50-51.) But the Court of Appeals correctly held that the I'On Defendants were prejudiced because "the circuit court's [amalgamation] ruling relieved [Plaintiffs] of the burden of establishing liability as to each individual [I'On Defendant] and likewise relieved the jury members from their responsibility to evaluate the liability of each individual [I'On Defendant]." (App. p. 26.)

Moreover, the legal distinction among the defendants was presented as an issue throughout the trial, and the circuit court's incorrect amalgamation ruling improperly indicated to the jury that the I'On Defendants had committed some wrongdoing. Indeed, Plaintiffs' counsel presented this contention to the jury in his opening statement: "[T]he entities are essentially inseparable. They act as one. They don't maintain legal distinctions and they should be treated by you as one." (R. p. 537; *see also* R. pp. 544-45 (stating to the jury that defendant entities "should be amalgamated" and "the jury should treat [the I'On Defendants] as one"). The I'On Defendants refuted this point during trial, including presenting evidence about the distinct operation of each company. (*See, e.g.*, R. pp. 765-75.) Yet the trial court's ruling indicated to the jury that the Plaintiffs were correct and that the I'On Defendants were guilty of improper actions. From there, Plaintiffs' counsel sought to reinforce the ruling in closing argument and take advantage of the impact on the jury. (*See* R. p. 1647, line 3-p. 1664, line 1 (Plaintiffs' counsel repeatedly lumping the I'On Defendants together in closing argument).) If the trial court had correctly held that the I'On Defendants were

not amalgamated, the I'On Defendants' counsel could have relied on that ruling in closing and refuted Plaintiffs' counsel's argument that all of the I'On Defendants should be treated as one.

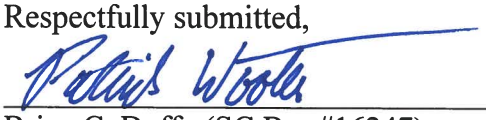
Further, as the Court of Appeals determined, Plaintiffs' counsel would not have been permitted to lump all of the I'On Defendants together and, instead, would have been required to argue that each defendant was separately liable. The I'On Defendants then could have argued about Plaintiffs' failure to establish elements of their claims as to each separate defendant.

The I'On Defendants were prejudiced by the trial court's erroneous ruling, and this Court should affirm the Court of Appeals' decision to remand Walbeck's breach of contract claim for a new trial.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the I'On Defendants' briefing relating to the 2000 Recreational Easement, the Court should (a) reverse the Court of Appeals' holding that the two-issue rule applies to the I'On Defendants' challenge to the trial court's ruling as to the 2000 Recreational Easement and hold that the 2000 Recreational Easement was valid and perpetual; (b) clarify that the Court of Appeals' extraneous discussion of the law on fiduciary duty is not an accurate statement of the law; and (c) otherwise affirm the decision of the Court of Appeals.

Respectfully submitted,



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