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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

Opinion No. 5588 (S.C. Ct. App. withdrawn, substituted, and refiled February 27, 2019)

Case No. 2010-CP-10-10490

Appellate Case No.: 2019-000968

I'On Assembly, Inc., Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of 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.

PETITIONERS-RESPONDENTS' REPLY BRIEF

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INTRODUCTION

Developers’¹ predominant factual response theme – that this case is nothing more than a manufactured claim prosecuted by the **“Free Lot Gang,”** was the backbone of their failed counterclaim. Developers expend much of their Response rehashing the counterclaim allegations;² ignoring that the counterclaim was directed out for lack of evidence and is not on appeal. The law of the case is that there is no “manufactured” claim by a “few disgruntled residents” to “obtain that property for free.”

Similarly, the Developers’ double down on other factual arguments that have now been rejected four times: by the jury, by the trial judge, and by both Court of Appeals (“COA”) Opinions. For example, Developers continue to argue that the **crabbing docks** are the “Community Dock” and that the “Creekside Park” is the **Marshwalk Path** that was *not* on the only deep water; they still defend their waffling on the identification of the Commons with their **“still a vision”** defense;³ and they still claim the Easement and its Agreement to Share Costs are two, different agreements. (Resp. Br., pp. 14, 17).

¹ “Developers” refers collectively to all Respondents, including the “Developer”, The I’On Company, LLC or “TIC”; and its Affiliates, the I’On Group, LLC n/k/a Civitas, LLC, I’On Realty, LLC, and the I’On Club, LLC. The I’On Group was the manager of the I’On Company and the I’On Club.

² (Resp. Br., pp. 9-25). Notably, while Developers disparage the Petitioners personally, they wax poetically regarding their altruistic activities, (Resp. Br., pp. 10-11), and fail to explain why they needed to make \$1.5 million more by selling the homeowners’ waterfront.

³ This, paraphrasing, “we didn’t know what the amenities would be because it was still a vision, a work in process...hadn’t even bought Phase II yet...”, (App. pp. 1252:1-13; 1257:1-8; 1566:6-15; 1567:20 – 1568:18), defense was rejected by the jury as Petitioners showed Phase II was under contract, lots were already being sold, the promise of the Community Dock and the Creekside Park in the Property Report was clear, and that similar, clear representations had been previously made to permitting authorities. Adkins only resorted to other documents to collaborate her proof of the identity and location of the Creekside Park and Community Dock to refute the Developers’ linear park and crabbing dock defense. (App. pp. 1292:12-1293:20; 1294:10-1295-12; 1301:11-1302:18; 1323:19-1324:11).

Developers deliberately miscite sources and evidence. For example, Developers attribute a detrimental statement to “Plaintiff’s counsel” that was made by the HOA’s counsel when the HOA was a Defendant.⁴ Yet another example is Developers’ false assertion that the Trial Court *held* that “Templeton’s February 26, 2009 letter is not a derivative demand.” (Resp. Br., p. 62).⁵

Developers perfect their mythology by deliberately interchanging their references to the **Creek Club** on the one hand, and the **Creekside Park**, the **Community Dock**, and **CV-6** on the other hand, often generically referring to any of these as “the property,” to take the evidence out of context. As already briefed, Petitioners never claimed they were promised the Creek Club; Petitioners claimed they were promised the Creekside Park and Community Dock (and associated boat ramp, staging dock, and parking). As it turned out, the Creek Club and the Creekside Park were on the same parcel of land, known as CV-6; and the Community Dock, although over the adjacent, Hobcaw Creek, was accessed from the same parcel. Time and time again, Developers refer to the *Creek Club* as “the Property” to confuse representations as to the Park and Dock with that as to the *Creek Club*.⁶

For example, Developers make much of the 2007 offer to sell the *Creek Club* to the HOA. But rather than refer to it for what it was, the offer to sell to the HOA an amenity which had not been promised, Developers represent it to be an offer to sell the Commons to the HOA. The HOA

⁴ See Developers’ Footnote 8 for this statement that they wrongfully attributed to “Plaintiffs” (Resp. Br., p. 10, n. 8).

⁵ This is false. After noting the difference between the Templeton zoning appeal settlement and the Templeton Demand, the Court stated “I am not relying on the Templeton. I just found it interesting. . . .” (App. p. 1487:22-24). Similarly, the Developers’ assertion that “Assembly’s counsel never filed a complaint in this case,” (Resp. Br., p. 52), is false; the Order realigning the Assembly ordered that the pending claims be deemed as filed by the Assembly. (App. pp. 452-53).

⁶ The initial zoning response to the sale of the Creek Club that Developers harp on (Resp. Br., p. 18), was as to the use of the Creek Club by a commercial business; Petitioners never claimed a right to the Creek Club building.

was not looking to purchase the Commons – it supposedly had unimpeded use of the same, even if it was by a then unknown, defective easement rather than a deed – a distinction admittedly lost on most homeowners.

Developers consistently try to manipulate conceded facts. For example, Developers assert there is no evidence of control, (Resp. Br., p. 38), while conceding the Developer’s control provisions in the Covenants, including the infamous, “Supreme Court” like veto power, and the Developer’s forced appointment of a Board member in 2014. (2018 Op., p. 26; 2019 Op., p. 15). Another example is the Developers’ assertion that Deborah Bedell, the then Board President, did not believe that Developer “controlled the Board.” (Resp. Br., p. 20).⁷

Developers can disparage their homeowner-buyers until they are blue in the face; that won’t change the **facts** highlighted below that are collectively the death knell for Developers:

- 1) Developers represented that the HOA would own the Commons, to the exclusion of all others; and concurrently, surreptitiously contracted to sell portions of those rights to third parties for Developers’ benefit;
- 2) Developer accommodated the conflicting rights by substituting a defective easement for a deed;
- 3) Developer never disclosed the reason for the substitution; and never overtly disclosed that the substitution had even occurred;
- 4) Developer engaged in an amenity transfer process between 2005 and the time of trial which was believed to have included (and was referenced as including) the Commons;
- 5) Developer again surreptitiously sought to capitalize further on the Commons for their own personal benefit repeatedly throughout 2006-2009, without disclosure;

⁷ Bedell actually testified: “[w]ell, we were aware of the veto power, so even if it had come up, we would not have thought about filing a suit, because it would be so clear that it would be vetoed.” (App. p. 1882:10-13).

- 6) The HOA learned of the first defect in the easement, the 30-year term, upon the Developers' attempted transfer of the Creek Club to Russo in 2008;⁸
- 7) Developer refused the HOA's 2008-2009 attempts to correct the 30-year term;
- 8) Developer purported to resume the transfer process in March of 2009, while again surreptitiously contracting with Russo to sell the Creek Club;
- 9) In August of 2009, Developer sold the Creek Club – and the Commons – without correcting the 30-year term;
- 10) It was not until after this suit was filed in 2012 that Petitioners learned that the Easement was invalid *ab initio* for lack of grantee title;
- 11) The HOA is an intended, third-party beneficiary of the residents' purchase contracts that mandated the transfer of the Commons and have a 20-year statute of limitations (“SOL”);
- 12) Developer admitted that Petitioners' satisfied Rule 23's demand requirement prior to the HOA's realignment and did not appeal the Trial Court's order finding that Petitioner's derivative claims were proper; and,
- 13) Developer asked for, and acknowledged, the HOA's direct claims and did not appeal the Trial Court's Order realigning the HOA as a party plaintiff.

ARGUMENT

I. THE HOA WAS REALIGNED AS A PLAINTIFF PURSUANT TO THE DEVELOPER'S REQUEST; ADOPTED ALL DERIVATIVE CLAIMS; AND THIS MOOTS ANY RULE 23 ISSUES

The HOA's direct claims are not subject to Rule 23, SCRCP, and Developer is substantively and procedurally barred from arguing that these claims were not properly presented to the jury. In Developer's own words, mid-trial:

If the derivative claims are dismissed, the Assembly's only remaining claims are those it has brought a[s] a Plaintiff in its own right.

⁸ It is **undisputed** this case was still evolving in 2008-2013 as no one knew of the Easement's 30-year defect until 2008 and no one knew of the Easement's title defect until after litigation commenced.

(App. p. 2288) (emphasis added). The same is true today – if this Court does not reinstate the derivative verdicts, the HOA’s direct claims and verdict(s) stand.

A. Any Error During Realignment Was Induced By the Developer Who Asked for the HOA’s Realignment Instead of a Substitution

Developer appears to argue that the jury’s verdicts on the realigned HOA’s direct claims don’t exist because Petitioners did not dismiss their derivative claims? The law of the case is otherwise; that the HOA was made a Plaintiff; was deemed to have adopted the existing claims without the necessity of filing a pleading by an un-appealed order; remained in the case at trial; and was named as a direct plaintiff and claimant on the jury’s verdict form. (App. pp. 2323-24).

1. The Existence of Petitioners’ Derivative Claims Does Not Affect the Validity of the HOA’s Direct Claims

Developer does not present any authority that Petitioners were obligated to dismiss their derivative claims for the HOA’s direct claims to be valid. In contrast, the insignificance of the purported Rule 23 defect after the HOA’s realignment is perhaps best illustrated by the New York District Court in *Pikor v. Cinerama Productions Corp.*, 25 F.R.D. 92 (1960). In *Pikor*, two stockholders objected to the sale of one corporation’s assets (Cinerama) to another corporation, and exercised minority rights by tendering their stock for a valuation; and filed a derivative suit against Cinerama. *Id.* at 93. Cinerama moved to dismiss the suit for lack of jurisdiction because stockholders “having invoked the statutory appraisal procedures . . . lost their status as stockholders” for purposes of bringing a derivative action. *Id.* Pending at the same time was a Motion to Intervene that was filed by other stockholders. *Id.*

The issue before the Court was whether the other stockholders could intervene if original plaintiffs lacked standing to bring a derivative claim *ab initio*. *Id.* at 94. The *Pikor* Court found that the other stockholders were not precluded from intervening as the lack of standing of the

original plaintiffs “does not impair the right of the corporation, or others whose status as stockholders has not been terminated, to prosecute [a derivative] action on its behalf.” *Id.* In reaching this conclusion, the *Pikor* Court cited another New York case, *Kantor*, which found that:

The real plaintiff is the corporation; the cause of action is that of the corporation, which it is prosecuting for its benefit. The extinction of the status of plaintiffs as preferred stockholders, in no way impaired or affected the corporation's cause of action or its right to continue and prosecute the action. In legal effect, it is as if the preferred stockholders had never appeared or instituted the action but as if the corporation alone was the plaintiff and alone had brought the suit.

Id. citing *Kantor v. Stendig*, 190 Misc. 861, 76 N.Y.S.2d 284, 286 (1947).⁹ Other courts have reached the same conclusion.¹⁰

2. The Remaining Rule 23 Cases Cited by Developer Are Simply Minor Variations of the Derivative Practice Set Forth in Petitioners' Cases

Most of the cases addressing this issue do so in the context of a fight for control of the claim as between the original derivative plaintiffs on the one hand and the current board or successor (*e.g.*, creditors' committee) on the other hand. A corporation which originally refused to bring the claim may have a subsequent change in circumstances that cause it to want to control and prosecute the claim itself. Typically, unless the corporation/board suffers from some sort of disability, *i.e.*, conflict of interest or inability to properly prosecute its own claim, the corporation is entitled to take over its own claim, and the derivative plaintiffs are dismissed.

This typical scenario is inapplicable to this case for many reasons, including:

- (1) there was not a fight for control of the case; in contrast, there was an agreement for cooperation, and there was no duplicity that needed to be addressed by the Court;

⁹ The intervenor's intervention was ultimately rejected by the Court in *Pikor*, without prejudice, because the intervenors failed to attach a proposed complaint to the motion. *Id.* at 95-96. The Court expressly granted the intervenors leave to correct this omission and refile. *Id.*

¹⁰ See, *e.g.*, *Berman v. Thomson*, 403 F. Supp. 695, 698 (N.D. Ill. 1975); *In re Penn Cent. Sec. Litig.*, 335 F. Supp. 1026, 1041 (E.D. Pa. 1971) (“[B]ecause a . . . derivative suit asserts a [claim] on behalf of the corporation, the corporation can take over the litigation of its own claim.”).

- (2) the HOA wanted and needed the derivative plaintiffs to continue to prosecute the case as the HOA suffered from two disabilities: it was still under developer control; and, its decision to support the case, on the eve of the first trial, came too late for the HOA to conduct a competent trial; and,
- (3) as addressed elsewhere herein, the Developer never moved to dismiss the HOA's direct claims as invalid after the HOA was realigned as a plaintiff.

B. The COA Missed the Absence of a Directed Verdict Motion as to Existence of the HOA's Direct Claims

Here, the HOA was realigned as the new Plaintiff at Developer's request;¹¹ and Developer never asked the Trial Court to dismiss the HOA's direct claims as invalid due to the remaining presence of the derivative claims. The only Directed Verdict Motion the Developer made as to the HOA's direct claims was that they were time-barred. (App. pp. 2287-88). Besides, any error resulting from the HOA's direct claims and Petitioners' derivative claims being prosecuted in tandem is harmless as it is the same claims, the HOA's claims, being prosecuted.¹² See (Verdict Form, App. 2321). As rightfully found by the COA in its 2018 Opinion, "the HOA's realignment as plaintiff allowed the jury to award to damages to HOA as if Walbeck and Adkins had never brought a derivative action." (2018 Op., App. p. 22).

C. The HOA Was Not "Coerced" Into Asserting Its Own Claims; and This Fantastic Theory Would Have No Bearing on The Outcome Anyway

¹¹ On February 26, 2014, the Trial Court granted the Developer's Motion and issued this "Order Realigning I'On Assembly, Inc. as a Party Plaintiff" and further ordered: "**[HOA] should be deemed to have adopted [Respondents'] claims. . .**" (App. pp. 452-53). Developer did not seek any clarification as to this Order, and this Order is not on appeal. In light of the Order that the operative complaint would stand for the HOA, there was no need for the HOA's in-house Counsel to file a separate Complaint contrary to Developer's arguments. (Resp. Br., p. 52). Further, although Petitioners' counsel and the Trial Court may have occasionally referred to "derivative" claims out of habit during trial (given the case had always been spearheaded by Walbeck and Adkins, before and after realignment), (Resp. Br. pp. 52-54), these references are not determinative in the face of the Court's Realignment Order.

¹² Indeed, how can Developer assert otherwise when it sued both the derivative Plaintiffs and the HOA corporate plaintiff in the subsequent Easement suit that was consolidated into Walbeck's suit! See, e.g., (App. p. 2381 *et. seq.*).

Developer next fantasizes that the HOA was “coerced” by Petitioners to agree to a settlement that “dictated” that the HOA was to cooperate with Petitioners and that this would have never happened but for the “Trial Court’s derivative failures.” (Resp. Br., p. 55). It was the strength of Petitioners’ case that caused Defendants Russo/148 Civitas to enter a settlement with Petitioners after the jury was struck for the first trial. (App. p. 862). A settlement was reached between these Defendants, the HOA, and Petitioners that “worked for everyone” and without objection from Developer:

The Court: Anything else anybody needs to add?

Ms. Beddell: We would just like to thank the other parties for their hard work in coming to an agreement that *works for everyone*. . .

The Court: . . .Anything you need to put on the record, Mr. Duffy?

Mr. Duffy: No, ma’am.

(App. pp. 865:6-866:8) (emphasis added).¹³ Further, Developer later used this settlement to assist in garnering a mistrial, so any purported “failure,” (Resp. Br. p. 55), that could have remotely contributed to this settlement is a moot point. Developer got the new trial it wanted with, per Developer’s request, the HOA realigned as a plaintiff.

II. THE TRIAL COURT’S 2012 RULING THAT PETITIONERS’ PROPERLY FILED DERIVATIVE CLAIMS STANDS BECAUSE DEVELOPER DID NOT APPEAL THIS RULING

This Court cannot reverse the Trial Court’s 2012 Denial of Developer’s Motion to Dismiss (“2012 Ruling”) which found that Petitioners’ derivative claims were proper because Developer

¹³ There is not a shred of evidence supporting the Developer’s ridiculous claim that the HOA was forced to agree to this settlement. To the contrary, the HOA’s voluntary commitment to spend \$500,000.00 to repurchase the property from Russo indicates it was involved in the settlement and approved it with its checkbook. (App. pp. 849:19-850:11).

failed to appeal this Ruling. All orders, interlocutory or not, must be appealed for the Court to consider them. *See, e.g., Davis v. Parkview Apartments*, 409 S.C. 266, 280-81, 762 S.E.2d 535, 541-42 (2014) (finding that this Court could not reevaluate the denial of an interlocutory order that was not appealed, even on a *de novo* review); *Edge v. State Farm*, 366 S.C. 511, 520, n. 6, 523 S.E.2d 387, 392, n. 6 (2005) (finding that this Court was precluded from reviewing a ruling that granted a motion to dismiss because, although immediately appealable, the ruling was not appealed).¹⁴

Developer's attempt to distinguish *Davis* because it involved a "discovery" order as opposed to a "dismissal" order is unavailing as *Edge*, which Developer ignores, expressly noted that appellate courts cannot consider dismissals (or denials) that are not appealed.

The trial judge dismissed the 3rd and 4th causes of action against the Facility and the plaintiffs did not appeal the dismissal.

Id. at 520, n. 6, 523 S.E.2d at 392, n. 6 (emphasis added).¹⁵

III. DEVELOPER RELIES UPON THE VACATED WHITTLE DECISION INSTEAD OF THE PATTERSON DECISION THAT CONTROLS

Developer's citation(s) to *Whittle* is misleading as it does not acknowledge that *Whittle* has been *vacated*. (Resp. Br., p. 59). Developer's *Whittle* based/type arguments were expressly rejected in *Patterson*.

A. Developer Concedes Patterson Permits Courts to Consider More Than Just the Complaint

¹⁴ *See also Manley v. Maple Grove Nursing Home*, 267 N.C. App. 37, 831 S.E.2d 902 (2019) (a party's failure to list interlocutory orders in its Notice of Appeal precludes appellate courts from considering any such orders).

¹⁵ At the very least, the Developer's failure to appeal the 2012 Ruling finding the derivative claims as properly pled illustrates why reconsideration of this issue in the context of a JNOV or this appeal requires consideration of the entire record, not just the complaint(s).

Developer's footnoted attempt to distinguish the demands made by "several homeowners" including "Walbeck and Adkins" (both named Plaintiffs) referenced in Petitioners' Complaint from the demand referenced in *Patterson's* Complaint is unpersuasive. Petitioners' demands were "sent and received," and as explained by Petitioners in their Brief, the *Patterson* Court expressly "reject[ed] an approach that approves of a trial court's consideration of everything *except* [a] demand letter that was actually *sent and received*." *Id.* at 235, 821 S.E.2d at 689 (emphasis added).

B. Delaware Law is Not Controlling and There is No Requirement to Demand the Initiation of Litigation

Developer's other arguments relate to the COA's insertion of its own demand requirement from the vacated *Whittle* decision, *i.e.*, that a derivative demand must have the magic words "initiate litigation" for it to be proper.¹⁶ Developer now also relies on the Delaware law referenced in *Whittle* for the same proposition. Rule 23 and this Court's decision in *Patterson* is the controlling authority, and neither require that a demand say "initiate litigation" for it to be a proper demand. In fact, the *Patterson* Court found that a Complaint referencing requests for action, **which did not include a request to sue**, and was sent to the corporation's attorney (not directly to the corporation), satisfied Rule 23's derivative requirements. *Patterson*, 425 S.C. at 688-89, 821 S.E.2d at 233-35.

Seemingly realizing this, Developer takes another stab at trying to distinguish *Patterson* by discussing the facts – as opposed to the pled allegations – of that case. Developer claims that *Patterson* is a "straightforward example" of a "demand for specific action." (Resp. Br., p. 63).

¹⁶ Developer states this same argument in multiple ways but obfuscates that this is what it is doing. For example, Developer states "the COA found the Adkins demand 'fell short'" but does not state that the reason the COA found this was because the demand did not contain the words "initiate litigation." (2019 Op., p. 10).

However, the actual Complaint allegations quoted by this Court in the *Patterson* decision which this Court found were “appreciably more detailed than those in *Whittle*”¹⁷ do not request the corporation to take “specific” action. Rather, they simply state that derivative Plaintiffs made efforts “to obtain the action they desire”:

Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire. . .including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

Patterson, 425 S.C. at 224, 821 S.E.2d at 683 (emphasis added).

Walbeck and Adkins alleged they demanded the HOA to secure the HOA’s rights to the Commons, and the demands, emails, meetings, and other communications that were pled and exchanged show that Walbeck and Adkins did demand the HOA to take this action.¹⁸ Petitioners’ derivative claims are therefore proper under *Patterson*.

IV. PETITIONERS SATISFY RULE 23’S FUTILITY REQUIREMENT

First and foremost, demand futility should be presumed here because both the HOA and the Commons were under Developer’s control. The COA twice recognized that Developer controlled this HOA through at least 2009 when Developers sold the Commons. (2018 Op., p. 26; 2019 Op., p. 14).¹⁹ Any demand made upon the HOA during the Developer’s control period would have been futile for the same reason that the HOA’s SOL was tolled during the Developer’s control period – a Developer is not going to initiate litigation against itself. *Magnolia N. Prop Owners’ Ass’n, Inc. v. Heritage Cmty., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012). Further, if a “pleading only” standard applies, then the only allegations needed to satisfy “futility” in this

¹⁷ *Patterson*, 425 S.C. at 234, 821 S.E.2d at 688.

¹⁸ These many efforts and demands are detailed in full in Petitioners’ Brief.

¹⁹ Perhaps just as important, it is undisputed that the Developer controlled the Commons, and the HOA’s interests therein, until the third-party sale.

context would be an allegation that the Developer “controlled” the HOA, such as the allegation Petitioners pled in this case. (Pet. Br., Sec. III).

A. Petitioners’ Also Satisfy Grant’s Futility Test

Petitioners also satisfy *Grant* which establishes South Carolina’s futility test. As explained at length in their brief, Petitioners alleged – and proved – Developer’s control and breach of fiduciary duty²⁰ which are the two factors that our Courts have historically considered as dispositive in making futility determinations.²¹ Petitioners also alleged Board wrongdoing (failure to secure the Commons) which, coupled with developer control, is more than enough to satisfy futility even under a review limited to the pleadings. *See, e.g.*, (App. pp. 592-93).

B. Adopting the Developer’s Position Would Contravene the Fundamental Purpose Behind Rule 23 and Public Policy

The Developer’s approach eviscerates the purpose for why there are *two* avenues for a derivative plaintiff to assert claims on a corporation’s behalf. The way Developer would have it is that for Petitioners to prove futility then they would have had to make a futile demand to “initiate litigation” and have it rejected before suit was filed, eviscerating the futility doctrine. A derivative plaintiff does not need to show that a demand was made and refused to establish futility – the entire reason for the futility distinction is to address situations, such as here, where it’s obvious that a demand would serve no useful purpose.

C. This Court Should Not Adopt Delaware’s Rales Test

²⁰ The COA agreed that Petitioners proved futility in its 2018 Opinion when it applied the correct standard and considered the evidence. (2018 Op., pp. 18-22).

²¹ *Grant v. Gosnell*, 266 S.C. 372, 374-77, 223 S.E.2d 413, 414-16 (1976) (“The [*Stahn*] Court attach[ed] importance to allegations of majority [control] and breach of trust, both of which factors are alleged in the present suit. . .”) *citing Stahn v. Mills*, 53 S.C. 519, 31 S.E. 48 (1898).

Developer asks this Court to apply Delaware’s *Rales* Test for demand futility which excuses demands where there is reasonable doubt as to (1) whether the majority of the corporation’s board was disinterested, or (2) whether the challenged transaction was a valid exercise of business judgment. *Rales v. Blasband*, 634 A.2d 927, 934 (Del. 1993), *modified or limited by*, *Hamilton Partners, L.P. v. Englard*, 11 A.3d 1180, 1207 (Del. Ch. 2010). Developer’s claim that South Carolina finds Delaware’s derivative law persuasive is incorrect where there is contrary South Carolina precedent. Here, we have *Patterson* and *Grant* which are controlling, and contrary Delaware precedent is not applicable.

Additionally, the vacated *Whittle* decision is the only South Carolina state case that has referenced Delaware’s derivative law, and it did not address the *Rales*’ Test for demand futility. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 192, 539 S.E.2d 402, 411 (Ct. App. 2000), certiorari granted August 23, 2001, remains viable in result only by Order dated January 10, 2003.²² In fact, *Whittle* “decline[d] to adopt the Delaware rule” outlined in *Spiegel* which prevents a derivative plaintiff from arguing both demand and futility because it was “too restrictive.” *Id. citing Spiegel v. Buntrock*, 571 A.2d 767, 775-76 (Del. 1990) (emphasis added).

D. The Rales Test That Developer Advocates May No Longer Exist

Developer omits that whatever was left of *Rales* after *Hamilton Partners* was recently modified in *United Food and Comm’l Workers Union and Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034 (2021). The new test asks whether at least half of the board members obtained a material benefit from the challenged transaction, faced a

²² Notably, the two, unreported South Carolina District Court decisions that Developer cites in its support of this proposition both rely on *Whittle*. *In re World Acceptance Corp. Derivative Litig.*, 2017 WL 77039, at *5-7 (D.S.C. Feb. 28, 2017) (unreported); *In re SCANA Corp. Derivative Litig.*, 2018 WL 3141813, at *2-4 (D.S.C. June 27, 2018) (unreported).

substantial likelihood of liability, **or** lacked independence from someone who did. *Zuckerberg*, 250 A.3d at 891-92. Petitioners have already met Delaware’s new test – that the members of the HOA’s Board lacked independence from Developer because the entire Board served at the pleasure of the Developer while it retained “continuing control over the HOA.” (2018 Op., p. 26; 2019 Op, p. 14). Developer’s retained control disqualifies the entire Board from being disinterested.

V. DEVELOPER’S ANSWER, WHICH CONCEDES THE HOA MET RULE 23’S DEMAND REQUIREMENT, CAN BE CONSIDERED BY THIS COURT

Defendant’s Answer admits this is a proper derivative action:

35. Responding to Paragraph 35, [t]he I’On Defendants admit upon information and belief that a certain member or members of the Assembly has **made demands upon the Assembly to bring suit regarding the issue raised in the Amended Complaint and that the Assembly refused to do so.**

(Answer to Am. Compl., App. p. 580, para. 35) (emphasis added). *Patterson* acknowledges that a defendant’s Answer may be considered in derivative determinations. *Patterson*, 425 S.C. at 235, 821 S.E.2d at 685. This is an admission as to the existence of demands, the HOA’s refusal, *and*, this admission concedes that the subject matter of the demand, *i.e.*, the relief requested, is the same relief that is requested in this suit. Further, it evidences that further demands would be futile.²³

²³ *Patterson* relies on the 2nd Circuit’s decision in *L-7 Designs* which found that court can consider “the complaint, **the answer**, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case” in deciding Rule 12 Motions. *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2nd Cir. 2011) (emphasis added). In *L-7 Designs*, the 2nd Circuit found that the District Court could consider all pleadings, and anything attached to them in deciding Rule 12(c) Motions. *Id.* The same analysis applies here even though Developer’s Motion was captioned as a 12(b)(6) Motion. *See United States v. Beltecno Inc. & Subsidiaries*, 2009 WL 2568232, at *2 (W.D. Wash. Aug. 12, 2009) (A 12(b)(6) Motion must be filed before an Answer or else it is untimely; however, when this happens, courts will construe the 12(b)(6) Motion as a 12(c) Motion); *see also Kottmyer v. Maas*, 436 F.3d 684, 689 (6th Cir. 2006) (finding the standard of review for 12(b)(6) and 12(c) Motions are the same).

This Court need look no further than Developer’s Answer to affirm the properness of Petitioners’ derivative claims.

VI. SOUTH CAROLINA LAW RECOGNIZES A FIDUCIARY’S DUTY TO ACT IN ITS WARD’S BEST INTEREST; THE JURY WAS PROPERLY CHARGED ON THIS LAW; AND, THE JURY FOUND THAT DEVELOPER BREACHED THIS DUTY

South Carolina law is clear – “[a] fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) (emphasis added).²⁴ The jury was properly charged on this law;²⁵ and the jury and the COA both found that:

1. The HOA “reposed a special confidence” in Developer because of (a) its “continuing control” and (b) its many “representations” to the HOA;²⁶
2. This triggered Developer’s fiduciary duty to act in the best interest of the HOA;²⁷
3. The Developer repeatedly breached this duty by self-dealing and profiting at the HOA’s expense;²⁸ and,
4. The HOA’s breach of fiduciary claim is not time-barred.²⁹

This Court should affirm the Trial Court’s principal fiduciary duty holding, regardless of whether a developer has a duty to convey promised amenities.

²⁴ *Island Car Wash* was overturned on other grounds in *Paradis v. Charleston County School Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021) (plaintiffs no longer need to plead special damages for civil conspiracy claims).

²⁵ The fiduciary duty charge given to the jury, quoted in Petitioners’ Brief, references only *Island Car Wash*, *Goddard*, and *Dunes West’s* precedent and does not reference any “developer duty to convey title”.

²⁶ (2018 Op., p. 26; 2019 Op., p. 14).

²⁷ (2018 Op., p. 27; 2019 Op., p. 14).

²⁸ (2018 Op., p. 16); *see also* Section IV(B) of Petitioners’ Brief outlining the evidence showing that Developer benefited by diluting the HOA’s rights to the Commons on at least four occasions.

²⁹ (2018 Op., pp. 10-12).

A. The Facts of This Case Evidenced a Fiduciary Relationship Between the Developer and the HOA

Developer argues that *different* fiduciary rules apply to developers and that these rules do not require developers “to act in the best interest of homeowners’ associations.” (Resp. Br., p. 41). This is incorrect. Regardless of the context – whether attorney/client, doctor/patient, or developer/HOA – anyone who qualifies as a fiduciary violates South Carolina law if they take advantage of their fiduciary relationship for their own personal gain:

[I]t is a well-settled equitable rule that **anyone** acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests.

Island Car Wash, 292 S.C. at 599, 358 S.E.2d at 152 (emphasis added).³⁰ The COA therefore did not err in either its 2018 or 2019 Opinions when it found that as a matter of South Carolina law:

...[A] developer in control of a homeowners’ association may not make decisions that benefit the developer’s own interest at the expense of the association and its members.

(2019 Op., pp. 15-16); (2018 Op., p. 27: “[W]e view Appellant’s fiduciary duty as a duty to ‘act in good faith and with due regard to the interest of the’ HOA’s members”).

B. Goddard and Dunes West Do Not Limit the Island Car Wash Rule

Developer’s argument that *Goddard* and *Dunes West* illustrate the outer limits of a *developer’s* fiduciary obligations is unsupported. (Resp. Br., pp. 41-45, 48). Neither *Goddard* nor *Dunes West* contain any language narrowing or limiting *Island Car Wash’s* rule to fiduciary relationships that exist in or outside the developer-HOA context.³¹

³⁰ This “well-established rule” is clearly not a “new, sweeping, all-encompassing, and never before adopted” rule as characterized by Developer in their Response Brief. (Resp. Br., pp. 41-48).

³¹ Further, *Dunes West* relies on *Goddard* and cites to Illinois and California decisions which also quote the *Island Car Wash* rule. *Dunes West*, 349 S.C. at 258-59, 562 S.E.2d at 637-38 citing, e.g., *Orange Grove Terrace Owners Assn. v. Bryant Prop., Inc.*, 176 Cal. App. 3d 1217, 1223, 222 Cal. Rptr. 523, 526, (Ct. App. 1986) (“[A] developer. . .may not make decisions for the Association that benefit [its] own interest at the expense of the association and its members. . .”); *Seven Bridges Courts Assoc. v. Seven Bridges Dev’t, Inc.*, 306 Ill.App.3d 697, 701, 239 Ill.Dec. 682, 684, 714

There is simply nothing in either of these decisions that says or even suggests that the duty that developers owe homeowner associations are more circumscribed or different than those that are owed by “anyone” else acting as fiduciary in South Carolina. These cases also confirm that the “business judgment rule” does not negate fiduciary obligations between a developer and HOA as the COA correctly found in both its 2018 and 2019 Opinions.³²

C. Developer “Actually” Controlled and Misled the HOA; and, Regardless of Whether It Used Its Veto Power, Developer Still Owed and Breached its Fiduciary Duty to Act in the HOA’s Best Interest

Developer’s argument that any duty to act in the HOA’s best interest is limited to the time frame when Developer exercised “actual” control of the HOA, is unpersuasive for three reasons.

1. “Control” Is Not the Only Factor That Triggered Developer’s Duty to Act in the HOA’s Best Interest

The COA found that Developer’s fiduciary duty was triggered by two activities:

Because of Appellants’ retention of continuing control over the HOA and their representations in 2008 and 2009 that they would convey the disputed property to the HOA, they are governed by standards set forth in *Island Car Wash*. . .

(2018 Op., p. 27) (emphasis added). Developer does not dispute either (1) that it made these representations or (2) that these representations led the HOA “to repose special confidence in”

N.E.2d 601, 604 (1999) (“A fiduciary or confidential relationship exists where. . .trust and confidence are reposed by one person in another who, as a result, gains an influence and superiority over him. . .Once such a relationship exists. . .a fiduciary has the duty ‘to act with utmost good faith and loyalty in managing the corporation’ and is prohibited from enhancing his or her ‘own personal interests at the expense of corporate interests.’”) (emphasis added). As shown by these cases, Developer is incorrect that “no other jurisdiction in the United States” has adopted a rule like *Island Car Wash* in the developer-HOA context. (Resp. Br., p. 41).

³² See, e.g., (2019 Op., p. 13) (“We reject Appellants’ argument that the business judgment rule precludes the existence of a fiduciary relationship between a developer in control of homeowners’ association and the associations’ members”).

Developer.³³ This Court should rely on these *undisputed* representations to affirm the Trial Court’s denial of JNOV.

2. Developer Did Actually Control the Commons

While disputed facts may exist as to whether Developer exercised actual control over the HOA until 2009, the exercise of the Developer’s control of the Commons is indisputable.

3. Restraint in the Exercise of Retained Rights Does NOT Preclude the Existence of a Fiduciary Relationship

The COA also correctly found in its 2018 and 2019 Opinions that Developer’s restraint from using its self-described, “Supreme Court-like veto power”³⁴ did not convert the relationship between Developer and the HOA from a fiduciary to non-fiduciary one:

Appellants contend there were no developer-appointed directors serving on the HOA’s Board after December 2005 and Appellants have never exercised any of the I’On Company’s veto rights. However, as in *Goddard*, **Appellants’ asserted restraint does not speak to the existence of a fiduciary relationship and the duty to act in good faith arising from their veto power but rather to the manner in which they carried out such a duty.** . . . Therefore, we reject Appellants’ argument that their restraint from exercising the veto power precludes the existence of a fiduciary relationship. Rather, we define Appellants’ fiduciary duty arising from its retention of control over the HOA by the standards set forth in *Island Car Wash*. . . .

³³ The record is replete with evidence showing that Developer assured the HOA for over a decade that it was “going to honor its promise” to convey the Commons. *Island Car Wash* does not have any timing restrictions as to when a fiduciary relationship starts or ends – so long as there is “confidence” – there is a fiduciary relationship. Here, it’s clear that such a relationship extended until at least August 5, 2009 based solely on Developer’s representations. In the 2005-2009 timeframe that Developer focuses on, for example, there are the December 5, 2005 Meeting Minutes indicating that “Phases 1-7 will be turned over in 2006”; the July 18, 2006 Bensenfelder email indicating the turnover of these phases and the boat ramp was still in process; the September 2007 Meeting Minutes in which Bensenfelder indicated that the “he would like to turn over the community docks”; the August 2008 emails in which Developer told Petitioners that it “not sold or initiated the sale of the Creek Club”; and, the March 2009 email in which Developer told the HOA and property management that the Community Dock would be transferred to the HOA. Each of these representations, and more, are detailed in full in Petitioners’ brief.

³⁴ (2018 Op., pp. 26-27; 2019 Op., p. 14).

(2018 Op., p. 26; 2019 Op., p. 15) (emphasis added and in original).

Developer ignores this crucial point – *i.e.*, that the “manner” in which it carried out its fiduciary duties is a question of fact for the jury so long as Developer is a fiduciary. Here, Developer is a fiduciary under *Island Car Wash* for the two reasons stated above.

Regardless of whether Developer “exercised” this control and veto power, Developer had the ability to exercise it all the way up to 2014 when this case was tried. This retained ability equates to control as correctly recognized by the COA. (2018 Op., pp. 25-27) (“[T]he [Developer] *retained* continuing control of the HOA up to and including the day they conveyed lot CV-6 to Russo”); (2018 Op. p. 26; 2019 Op., p. 14) (“[The Developer’s] *retention* of control over the HOA throughout the years preceding [the sale] created a continuing fiduciary relationship between [the Developer] and the HOA”) (emphasis added).

The Second Circuit reached the same conclusion in *Darnet Realty Assocs., LLC v. 137 East 56th St. Owners, Inc.*, 214 F.3d 79 (2nd Cir. 2000). The Second Circuit found that Darnet’s “special control period” did not end “with the election of an independent board. *Id.*³⁵ The Second Circuit pointed to Darnet’s *retained veto powers* that “**even after the 1998 election of an independent board. . .allowed [Darnet] to exercise** such control”:

Here it is plain that **Darnet drafted Owners’ governing documents in such a way as to retain significant clout over Owners’ affairs independent of Darnet’s direct voting influence over [the Owners’] Board. . . .Darnet had the right to veto any change to [the governing documents] as long as Darnet held even one share in Owners. That assured Darnet’s ability to block any amendments to the supermajority voting or quorum requirements that affected numerous business matters of Owners, including . . .changing Board’s composition. . . . Those supermajority provisions enabled Darnet to control Owners’ decisions on those issues.**

³⁵ While Developer cites to five cases in Footnote 22 of its Response Brief to suggest that a developer is no longer “in control” once there is a “turnover,” none of these cases decided the question that is presented here and in *Darnet* - *i.e.*, whether a developer’s ability to dominate a HOA’s decision making after turnover is effective control.

Id. (emphasis added). Here, like *Darnet*, it is *undisputed* that Developer had the ability *to exercise* its “Supreme Court-like veto power” to disapprove *any action* taken by this HOA’s Board that was averse to Developer and Developer retained this veto power until the jury rendered its verdict. The COA thus did not err in finding that Developer “retained continuing control” over the HOA.

VII. THE DEVELOPER HAD A DUTY TO ENFORCE THE HOA’S RIGHTS, WHICH INCLUDED THE DEVELOPER’S OBLIGATION TO CONVEY

As the COA also found in its 2018 Opinion, the Developer owed a fiduciary duty to “enforce the HOA’s rights.” (2018 Op., p. 16). Whether one calls it a duty to act in the HOA’s best interest, a duty to protect the HOA’s “unfettered access” or its third-party beneficiary rights,³⁶ or a *duty to enforce* the Developer’s obligation to convey pursuant to its representations,³⁷ there is evidence in the record that supports the verdict and the Trial Court’s denial of JNOV. In fact, the Trial Court principally operated under *Island Car Wash*, before considering, and ruling upon, what most would consider the very, very, obvious duty to convey.³⁸

**VIII. EVEN IF THE HOA’S CLAIMS WERE NOT TOLLED UNTILL 2009,³⁹
THEY ARE TIMELY BECAUSE THEY WERE TOLLED FOR PORTIONS
OF THE 2006-2009 PERIOD**

³⁶ The HOA was a third-party beneficiary of many member’s purchase contracts providing for the transfer of the Commons. (App. p. 3661).

³⁷ Notably, Developer does not mention *Cedar Cove*, the decision the COA relied upon in reaching its erroneous conclusion that Developer did not have a duty to convey the Commons to the HOA. (2019 Op., p. 15). Petitioners stand on their original briefing as to the irrelevance that *Cedar Cove* has to this case, even given the COA’s oversight of the provision in the Covenants that indicate this HOA is to hold “title” to “the Commons.” (Covenants, Art. VI, App. p. 4140).

³⁸ See also Restatement (Third) of Property, § 6.19 Servitudes, para. (2) which recognizes a developer’s duty to convey, as does Section 4-119(a) of the UCA (Uniform Condominium Act). Both the Restatement (Third) of Property and the UCA have been cited favorably in this state on other matters. See, e.g., *Murphy v. Yacht Cove Homeowners Ass’n*, 289 S.C. 367, 345 S.E.2d 709 (1986) (member of a condominium association may bring an action against the association per the Model Condominium Code and the UCA.)

³⁹ Developer admitted to again appointing a HOA Board Member nine years later in 2014. (App. pp. 26, 101; 2018 Op., p. 26; 2019 Op. p. 15). The Covenants show that Developer’s “Founder Control Period” spanned through February 9, 2018, but also contained language that arguably

As implicitly conceded by the Developer, the SOL could not have begun to run on the HOA's claims until at least January 1, 2006, when the HOA's Board was no longer run by an employee of the Developer. (App. pp. 3981-83) (12/7/05 meeting minutes in which the "2006 Board of Directors" were elected); *see also* (Resp. Br., p. 38) (Developer admitting that 2006 Board was not elected until "December 2005").

Assuming the SOL began to run on January 1, 2006:

- The SOL was paused six months and 17 days later on July 18, 2006 when Developer's employee, Besenfelder, emailed the HOA's Board about the "HOA Turnover Project" and a list of items he has "been working on to complete the HOA turnover project...Once completed I will be ready to handover Phases 1, 2, 3, 4, 5 and 8." Under "Phase 2" work items remaining are listed "Boat ramp and boat dock as-builds...dock and ramp construction documents."⁴⁰

Even if the SOL started again on August 22, 2007 when the HOA discussed purchasing the Creek Club, (Resp. Br. p, 32):

- The SOL was paused again 1 month and 4 days later on September 26, 2007 when Besenfelder told the HOA that "he would like to turn over the community docks" after looking into "needed repairs." (App. p. 4025).
- The SOL remained paused through September 9, 2008, when a few HOA Board members emailed Developer about a "rumored" sale of Creek Club and Developer assured the members this same day that "I'On Company has **not** sold the Creek Club to Mike Russo." (App. p. 3420) (emphasis in original).

Even if the SOL started again when the HOA resumed discussions about the sale of "the Creek Club" on October 30, 2008, (App. p. 4060):

- The SOL clock was paused again 4 months and 25 days later on March 25, 2009 with the Developer reiterating its intention to transfer the Commons to the HOA, (App. pp. 3438-39), and it continued to be tolled with the Developer's lie to the then-Board president on

allowed Developer's "Founder's Rights and Obligations" to extend beyond the Developer's "Founder Control Period" (App. pp. 4130, 4143).

⁴⁰ (App. pp. 3408-09) (emphasis added); *see also* (App. p. 1144:16-20; 3408-10) (Developer admitting this email indicated that the boat ramp was still in the process of being turned over to the HOA).

July 27, 2009 that the Commons were merely undergoing a ‘management change.’” (App. p. 3402).

Therefore, only one year and sixteen days of the SOL would have run before the sale on August 5, 2009, leaving nearly two years remaining on the SOL. The SOL started running again on August 5, 2009. Petitioners’ Initial Complaint was filed one year, four months, and 16 days after this date, and Petitioners’ Amended Complaint was filed one year, seven months, and three days after this date (and served by March 29, 2011, within 120 days of the filing of the Initial Complaint).⁴¹ As a result, the case was timely filed regardless, even if the COA’s finding of Developer control through August 5, 2009 (and the jury’s discovery finding) is ignored.⁴²

IX. THIS SAME EVIDENCE OF DEVELOPER’S ASSURANCES, COUPLED WITH ITS OMISSIONS, ESTOP IT FROM RELYING ON THE SOL

Developer’s argument that equitable estoppel does not apply to preclude Developer from relying on the SOL as a defense is also unavailing. First, Petitioners do not have to prove that they relied on Developer’s “conduct” for estoppel to apply. (Resp. Br., p. 39). Although Petitioners could satisfy this burden for the reasons stated in Section X above, “[s]ilence which amounts to misrepresentation or concealment of facts can satisfy the ‘conduct’ element of the test for equitable estoppel.” *Maher v. Tietex Corp.*, 331 S.C. 371, 382, 500 S.E.2d 204, 210 (1998) *citing Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992).⁴³

⁴¹ (App. p. 541: “This case commenced on December 22, 2010, upon the filing of Plaintiffs’ Initial Complaint. Plaintiffs amended the Complaint on March 8, 2011, and the Amended Complaint was served on the I’On Defendants between March 28 and 29, 2011.”)

⁴² As explained in Petitioner’s Brief, the HOA’s direct claims “relate back” to when Petitioners’ derivative claims were first asserted since the HOA adopted these claims. (Pet. Br., Sec. III(5)) *citing* Rule 15, SCRCF and *Whitfield Const. Co. v. Bank of Tokyo Tr. Co.*, 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999).

⁴³ *See also Lukenas v. Bryce’s Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976) (Under federal law, a defendant who conceals material facts is estopped from relying upon the statute of limitations as a defense and this concealment excuses a plaintiff’s lack of due diligence.).

Second, Developer’s claim that it “never concealed this information” is blatantly false. (Resp. Br., p. 39). Petitioners detailed Developer’s decade-long concealment of material information related to the Commons in their Brief. (Pet. Br., Sec. III(E)(4), VI(C)(2)). These omissions closed off any means the HOA (or Walbeck as an HOA member) had in discovering the truth of the Developer’s intent and that their representations were, in fact, misrepresentations.

Third, the fact that the HOA Board discussed purchasing the Creek Club in 2007 does not affect the estoppel analysis. (Resp. Br., pp. 39-40). The evidence shows that throughout 2007 Developer was exploring how to “capitalize” on the “potential value” of the Commons and outlining their options in “selling community facilities,” while keeping its ideas “quiet for now.” *See, e.g.*, (App. p. 3341) (emphasis added). This evidence infers that the Board entertained these 2007 discussions because the Creek Club itself had never been promised to the homeowners. Notably, the Developer had not disclosed to the HOA that the property on which the Creek Club and its adjacent docks were located was, in fact, “the” Commons that Developer had obligated itself to convey to the HOA. Rather, the Developer continued to misrepresent that the “Creekside Park” was the “Marshwalk,” and the “Community Dock” was the “Crabbing Docks,” both of which had been conveyed to the HOA. (App. p. 1016). And when discussions of the sale of the Commons occurred in 2008-2009, Developer denied that the sale was occurring while concealing the contracts it had negotiated for the sale. (App. pp. 2710-11, 2717-18).

X. DEVELOPERS HAVE NOT SHOWN THAT THEY SUFFERED ACTUAL PREJUDICE DUE TO THE TRIAL COURT’S AMALGAMATION RULING THAT DEVELOPERS ASKED FOR PRE-VERDICT

Developers oppose amalgamation without forthrightly addressing the most basic question(s) briefed by Petitioners – whether the principal Developer, The I’On Company, LLC, can show any material prejudice – even if the Trial Court and the 2018 Opinion were in error. TIC

was the named Developer and seller, the issuer of the Property Report, the entity that deeded the Commons to the I'On Club in August of 2000 instead of the HOA, a party to the Handover Agreement, a participant in the handover process, the steward of the Commons until sold, the entity that informed the homeowners that the Commons were being transferred to the HOA when the first sale of the Creek Club collapsed; and, a participant in the multi-parcel sale in August of 2009, and was shown to be directly liable on Petitioners' claims. How can TIC show prejudice if, *e.g.*, I'On Realty is amalgamated with it? It cannot.⁴⁴

In fact, the Developers are so unable to show any prejudice resulting from the amalgamation ruling that they resorted to quoting from Petitioners' counsel's opening statement, where counsel explained the grouping concept to the jury (Resp. Br., p. 70);⁴⁵ and again refer to the "trial court's ruling indicated to the jury" (*Id.*), when the jury was never informed of the trial court's ruling.

Of course, the forgoing assumes that the amalgamation ruling was in error. As shown in Petitioners' Brief, it was not. (Pet. Br. Sec. V). Moreover, Developers clarify for the first time that

⁴⁴ Similarly, the I'On Club cannot show any material prejudice. The Club was the entity that granted the invalid Easement to the HOA in early 2000 when it did not own the property; the Club later received the Commons – to which it was not entitled – in lieu of the HOA in August of 2000. The Club was also a steward of the Commons until sold. The Club's manager also managed TIC, the entity that informed the homeowners that the Commons were being transferred to the HOA when the first sale of the Creek Club collapsed; and the Club sold the Commons to a third-party in August of 2009 without correcting the Easement's 30-year term. How can the Club show prejudice if, *e.g.*, I'On Realty is amalgamated with it? It cannot. Frankly, TIC, the Club, and their shared manager, The I'On Group, were so directly involved in so many of these activities, and the entire course of conduct, that only I'On Realty might be able to show any prejudice as its principal role, the distribution of the Property Report and the sales of the lots, while important, might be slightly more limited in duration. However, the verdict should stand as to the remaining principal tortfeasors.

⁴⁵ The lack of contemporaneous objection to this amalgamation reference in the opening negates any attempt to bootstrap a prejudice claim on this reference.

they have only appealed the merits of the amalgamation ruling, not the timing of it.⁴⁶ If Developers have not appealed the ruling's timing, then they can't claim it was prejudicial to the jury's verdict.

CONCLUSION⁴⁷

This Court should vacate the COA's 2019 Opinion based on the evidence, law, and equity, all of which support the verdicts reached by the jury and the Trial Court's decision to sustain these verdicts. Alternatively, this Court should at least reinstate the contract verdicts and the HOA's direct verdicts, as elected or to be re-elected on remand, and any other verdict or award to which Petitioners have shown themselves entitled. The public policy supporting Rule 23 has been well served by this action; and it is the public policy of this great State to protect homeowners.

Respectfully submitted,

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⁴⁶ "But, on appeal, the Developers challenge the *substance* of the Trial Court's ruling on amalgamation, not the *timing* of that ruling." (Resp. Br., p. 66).

⁴⁷ Given page limitations, Petitioners stand on their Brief for matters not expressly rebutted herein.