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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 withdrawn, substituted, and refiled February 27, 2019)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-Respondents,

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.

**PETITIONERS-RESPONDENTS' RETURN TO SECTION IV OF RESPONDENTS-
PETITIONERS' PETITION FOR REHEARING**

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Pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules (“SCACR”), Petitioners-Respondents’, Brad J. Walbeck (“Walbeck”) and Lea Ann Adkins (“Adkins”), individually and derivatively on behalf of I’On Assembly, and the I’On Assembly, Inc. (“Assembly”) (collectively referred to as “Respondents”), respectfully file this Return to Section IV of the 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 referred to as “TIC”), Petition for Rehearing.¹

SUMMARY OF ARGUMENT

Section IV of TIC’s Petition for Rehearing sets forth a single ground in opposition to the reinstatement of the Trial Court’s award of attorney fees: that the award was “unreasonable” given the nominal damage verdict on Walbeck’s Interstate Land Sales Full Disclosure Act (“ILSA”) claim; and that the Trial Court “improperly borrowed the success of the Assembly’s claim...and projected that success onto Walbeck’s ILSA claim.” (Pet. for Reh’g, pp. 20-21). TIC relies upon a single precedent, the *Farrar*² case.

The Trial Court aptly and expressly addressed and dispensed with this argument in its Order Awarding Fees, addressing the *Mercer* and *Jama* clarification to *Farrar* at length and applying Justice O’Connor’s guidelines. As the application of these guidelines require the evaluation of factual issues, and there is substantial evidence to support Judge McDonald’s decision, there is no basis for this Court to overturn her decision awarding Walbeck attorneys’ fees.

¹ Rule 221(a), SCACR, provides that Returns shall not be filed on Petitions for Rehearing unless solicited by the Court. By email dated February 27, 2023, the Court instructed the undersigned to submit a Return addressing Section IV of TIC’s Petition for Rehearing relating to the issue of attorneys’ fees and “that issue only”.

² (Pet. for Reh’g, p. 21) *citing Farrar v. Hobby*, 506 U.S. 103, 115 (1992).

Lastly, while Respondents will first brief why the Trial Court provided the proper fee treatment based upon TIC's contention that Walbeck only achieved nominal damages, Respondents will also show that Walbeck achieved a recovery that was not nominal. This recovery included procuring a pretrial recovery from TIC's Co-Defendants on the ILSA claim (which the Trial Court was aware of, but this Court may not have been).

WHAT IS NOT AT ISSUE

For clarity, and for the avoidance of any doubt, it is worth confirming what Section IV does not challenge. It does not challenge Walbeck's right to a statutory, attorneys' fee award in addition to a common law verdict; it does not contest the success of the Assembly's claims; and it does not contest Walbeck's success on his other claims (\$20,000.00 awarded on the negligent misrepresentation claim and \$10,000 awarded on the breach of contract claim). (Pet. for Reh'g, pp. 20-21). It does not contest the reasonableness of Respondents' counsels' fees; and it does not contest the Trial Court's application of the O'Connor factors. *Id.* It does not even contest the determination of the amount of fees awarded; it purely challenges the Trial Court's **discretionary** decision to award **any** fees given the jury's award of nominal damages on Walbeck's ILSA claim. *Id.*

STANDARD OF REVIEW

The standard of review for this Court is whether the Trial Court's award of attorneys' fees was an abuse of discretion. *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434-45 (Ct. App. 2005) (noting a trial court's decision to award attorneys' fees is subject to the abuse of discretion standard of review) (emphasis added); *see also* (TIC's COA Br., pp. 20-21) (conceding that the abuse of discretion standard applies to directed verdict, new trial and JNOV motions as well as attorneys' fees awards).

Given the applicability of the abuse of discretion standard, this Court’s review is limited to whether the Trial Court’s fee ruling contains an error of law or is without evidentiary support. *Swinton Creek Nursery v. Edisto Farm Credit. ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999) (noting the appellate court can only reverse the trial court when there is no evidence to support the trial court’s rulings or the rulings are controlled by an error of law); *see also Gilbert LLP v. Tire Eng’g & Distribution, Ltd. Liab. Co.*, 689 F. App’x 197 (4th Cir. 2017) (holding that a trial judge has discretion in awarding attorney’s fees because they have a close knowledge of the efforts expended and value of services rendered. This should only be reversed when the court is “clearly wrong”); *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 S.E.2d 272, 274 (2003) (noting the appellate court does not have authority to resolve conflicts in the evidence).

Where no errors of law exist and the Trial Court’s ruling is supported by at least one piece of evidence, this Court must affirm the Trial Court. *Id.*; *see also Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004) (noting the appellate court must affirm the trial court’s ruling if there is any evidence that supports it).

ARGUMENT

A. The Trial Court Correctly Concluded That Walbeck is Entitled to Recover Attorneys’ Fees on his ILSA Claim Under South Carolina Law

The Trial Court did not err in finding that Walbeck was entitled to an award of attorneys’ fees under ILSA³ in addition to the actual damages Walbeck elected to receive under his common

³ The purpose of ILSA is to ensure that an individual is informed of certain facts prior to purchasing a piece of property which would enable a prudent buyer to make an informed decision as to the purchase, and ILSA provides recourse to the buyer when a “developer” or “agent” fails to make the proper disclosures. 15 U.S.C. § 1703(a); *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327, 1333 (D.S.C. 1992). When it is proven, like here, that “any part of the statement of record or the property report contained an untrue statement of material fact or omitted to state a material fact required to stated therein,” then the acts complained of violate ILSA. 15 U.S.C. § 1703(a)(2)(B). ILSA defines a “developer” as “any person who, directly or indirectly, sells, or offers to sell, or advertises for sale any lots in a subdivision.” 15 U.S.C. § 1701(5); *Gibbes*, 794 at

law, negligent misrepresentation claim. *See* 15 U.S.C. § 1709(a)-(c) (2012) (allowing statutory recovery of attorneys’ fees, interest, and costs). A Plaintiff may recover attorneys’ fees under a statutory claim, such as ILSA, in addition to actual damages under a common law claim, such as negligent misrepresentation. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) *citing Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) (“[A] plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney fees to which he is entitled under a separate verdict.”). “[T]he rationale for this position is that an award for [damages] does not amount to double recovery for a single wrong given attorneys’ fees are intended to make such claims economically viable for private citizens . . .” *Id.*

B. The Trial Court’s Decision to Award Walbeck Attorneys’ Fees on His “Nominal” ILSA Verdict Damage Contains No Error and is Supported by the Evidence

The issue of nominal damages was one of three issues addressed by the Trial Court in her award of attorneys’ fees. (Order, p. 2) (“The I’On Defendants oppose Walbeck’s Petition on three grounds: (1) the I’On Defendants maintain Walbeck’s nominal recovery under his ILSA claim precludes an award of attorneys’ fees and costs...”). The Trial Court considered this issue at length as illustrated by the following section in her Order:

B.) Walbeck is Entitled an Award of Reasonable Attorneys’ Fees Under His ILSA Claim Despite His Award of Nominal Damages

The United States Supreme Court’s decision in *Farrar* does not serve to automatically preclude attorneys’ fees awards in nominal damages case. *See Mercer v. Duke University (Mercer III)*, 401 F.3d 199, 206-09 (4th Cir. 2005) *citing Mercer v. Duke University (Mercer II)*, 50 Fed. Appx. 643, 646 (4th Cir. 2002) (“[w]e have never interpreted *Farrar* as automatically precluding attorney’s fee

1333. The Act also provides for agents of developers to be subject to liability under the statute, defining an agent as “a person who represents, or acts for or on behalf of a developer in selling, or offering to sell, any lot or lots in a subdivision.” *Id.* at § 1701 (6).

awards in all nominal-damage cases.”) (unpublished); *Clark v. Sims*, 28 F.3d 420, 425 (4th Cir. 1994) (remanding fee award in nominal-damage case for reconsideration in light of plaintiff’s limited success).

Rather, in *Farrar*, the Supreme Court held where a prevailing party⁴ recovers nominal damages, “the only reasonable fee is *usually* no fee at all.” *Farrar*, 506 U.S. at 115 (emphasis added); *Id.* at 121 (O’Connor, J., concurring) (“[n]ominal relief does not necessarily a nominal victory make.”); *Id.* at 124 (White, J., dissenting) (noting that the majority did not hold “that recovery of nominal damages *never* can support the award of attorneys’ fees”).

Because the *Farrar* Court “provides little guidance for courts considering whether an award of attorneys’ fees is warranted” in nominal damage cases, the Fourth Circuit follows Justice O’Connor’s concurring opinion in *Farrar* wherein she identified three factors to be considered in determining how to assess attorneys’ fees to a nominally prevailing party:

- (1) The difference between the amount of damages sought and recovered;
- (2) The significance of the legal issue on which the plaintiff has prevailed; and
- (3) Whether the litigation has accomplished some public goal other than occupying the time and energy of counsel, court and client.

Mercer III, 401 F.3d at 203; *Farrar*, 506 U.S. at 121, 113 S.Ct. 566 (O’Connor, J., concurring).

Relying on the “O’Connor factors,” several courts of appeals, including the Fourth Circuit, permit attorneys’ fees awards despite the award of only nominal damages. In *Mercer*, for example, the plaintiff was awarded only nominal damages; however, the Fourth Circuit upheld an award of \$350,000 in attorneys’ fees despite the de minimis compensatory relief.⁵ *Mercer III*, 401 F.3d 199 at 206-09. As noted by the *Mercer III* Court:

⁴ “[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar*, 506 U.S. at 111–12. This standard is satisfied by a “judgment for damages in *any amount*, whether compensatory or *nominal*.” *Id.* at 113 (emphasis added). Accordingly, the award of nominal damages in favor of Walbeck on his ILSA claim suffices to qualify Walbeck as a prevailing party.

⁵The Fourth Circuit’s decision in *Mercer versus Duke University* resolved a number of issues originating from a Title IX action brought by Heather Mercer, a former kicker on Duke University’s Division I-A football team. Mercer, who enrolled at Duke University in 1994 as a full-time student, was an all-state place kicker on her high school football team and wanted to

Because the Court in *Farrar* held that plaintiffs recovering only nominal damages *usually* or *often* will not be entitled to an award of attorney's fees, it is clear that such plaintiffs will at least *sometimes* be entitled to a fee award. Our cases have recognized as much.

Although the majority opinion in *Farrar* provides little guidance for courts considering whether an award of attorney's fees is warranted, Justice O'Connor in a separate concurring opinion addressed the question in more detail. . .She

continue playing football at the collegiate level. Following several attempts by Mercer to join Duke's football team, Duke's head football coach, Mr. Goldsmith, made Mercer a playing member of the team in April of 1995. After Mercer officially became part of the team, an onslaught of media attention and publicity ensued; some of which cast Mercer's membership in a negative light. Goldsmith appeared to begin to regret making Mercer a member, fearing the attention would negatively impact the rest of the team. Subsequently, in the fall of 1996, Goldsmith officially dismissed Mercer from the team, citing "performance reasons" for Mercer's dismissal. Mercer filed suit against Duke University and Goldsmith, seeking declaratory, injunctive, and monetary relief, alleging they violated Title IX by discriminating against her on the basis of sex. The United States District Court for the Middle District of North Carolina dismissed Mercer's complaint based on an interpretation of the statutory "contact-sport exception." The Fourth Circuit reversed, holding that the contact-sport exception was inapplicable, and remanded the issue to the district court for further proceedings. On remand to the district court, a federal jury found that Goldsmith had discriminated against Mercer in violation of Title IX, awarding Mercer two million dollars in punitive damages and one dollar in compensatory damages. She was then awarded approximately \$389,000 in attorneys' fees and costs. On appeal, however, the Fourth Circuit in *Mercer II* vacated the punitive damages award, finding private litigants may not recover punitive damages under Title IX based upon the United States Supreme Court decision in *Barnes v. Gorman*, 536 U.S. 181 (2002). Despite vacating Mercer's award of punitive damages, leaving her with only one dollar in compensatory damages, the *Mercer II* Court rejected Duke's claim that Mercer was no longer entitled to attorneys' fees as a matter of law. Instead, the court remanded the issue to the district court to decide "in light of Mercer's now limited success at trial" whether she should recover attorney's fees and, if so, what amount. In remanding the case, the *Mercer II* Court suggested that the Supreme Court's holding in *Farrar versus Hobby* should guide the district court in deciding attorneys' fees and costs. In particular, the *Mercer II* Court referred to Justice O'Connor's concurring opinion, in which she articulated additional grounds for a court to award attorneys' fees to a nominally-recovering plaintiff. On remand, the district court held that Mercer should still recover the attorneys' fees from her Title IX claim. Notably, the district court utilized Justice O'Connor's three factor test from her concurring opinion in *Farrar*, and in applying these three factors, the court concluded that Mercer's victory was neither pyrrhic nor de minimis, and thus, she should recover reasonable attorneys' fees. The district court then calculated the amount that it deemed reasonable for recovery, resulting in a total award to Mercer of \$349,243.96 for attorneys' fees. Following the district court's decision, Duke appealed to the Fourth Circuit again in *Mercer III*, arguing that the district court erred in awarding attorneys' fees and that the appropriate award "is an award of no fees at all." The *Mercer III* Court affirmed the district court's holding, concluding Mercer was entitled to attorneys' fees as a prevailing party, and upholding the amount of fees awarded by the district court.

suggested that when determining whether attorney’s fees are warranted in a nominal-damages case, courts should consider “the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served” by the litigation . . .

We believe that the factors set forth by Justice O’Connor help separate the usual nominal-damage case, which warrants no fee award, *from the unusual case that does warrant an award of attorney’s fees*. Accordingly, we will consider the district court’s decision to award attorney’s fees by way of the factors identified by Justice O’Connor.

Mercer III, 401 F.3d 199 at 203-04 (emphasis in original and added); *see also Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996) (referring to the O’Connor factors when analyzing the question of attorneys’ fees in nominal damages cases).

(Order, pp. 4-6) (emphasis in original).

The Trial Court went on to apply Justice O’Connor’s factors as follows:

C.) The Balance of the O’Connor Factors Weighs in Favor of Walbeck, and thus, Walbeck is Entitled an Award of Attorneys’ Fees

The Fourth Circuit recently followed the majority of circuit courts in utilizing the O’Connor factors to determine whether a “nominally-recovering” plaintiff should recover attorneys’ fees. The Fourth Circuit’s interpretation of the O’Connor factors supports awarding attorneys’ fees to Walbeck. Decided after *Farrar*, the Fourth Circuit in *Mercer* opined attorneys’ fees are warranted in cases “which [serve] a significant public purpose” and where a plaintiff “succeed[s] on a significant legal issue,” regardless of the monetary degree of such success. *Mercer III*, 401 F.3d 199 at 207-08; *see also Diaz-Rivera*, 377 F.3d at 125) (“[T]he Supreme Court has explicitly rejected the proposition that fee awards . . . should necessarily be proportionate to the amount of damages . . . plaintiff actually recovers.”) (internal quotations omitted); *Cabrera*, 24 F.3d at 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose); *Jama*, 577 F.3d at 176 (finding the degree of a plaintiff’s success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose); *Morales*, 96 F.3d at 361 (overruling district court’s calculation of attorneys’ fees because of failure to consider second and third O’Connor factors). In other words, it is the balancing of all O’Connor factors that proves dispositive of whether a plaintiff is entitled a fee award. Here, the balance weighs in favor of Walbeck, and thus, an award of attorneys’ fees is warranted.

1.) Walbeck Succeeded on a Significant Legal Issue

First, Walbeck succeeded on an important legal issue – ILSA’s anti-fraud provisions. Walbeck’s reliance on these provisions, as opposed to the I’On Defendants’ reliance on ILSA’s anti-disclosure provisions, emphasizes this point. Walbeck’s case confirmed that wronged purchasers may proceed under ILSA’s anti-fraud provisions based upon a developer’s material misrepresentations, whether made orally, in writing, or otherwise. Additionally, Walbeck’s case resulted in a first of its kind liability determination – the facts as found by the jury determined the I’On Defendants were legally responsible for violating Walbeck’s rights under ILSA’s anti-fraud provisions. Consequently, Walbeck succeeded on a significant legal issue, and thus, the second O’Connor factor weighs in favor of an award of fees to Walbeck.

2.) Walbeck’s ILSA Claim Served an Important Public Purpose

Second, ILSA’s purpose of limiting unfair and deceptive acts in the sale of land to the public is an important public purpose. *Kemp v. Peterson*, 940 F.2d 110, 112 (4th Cir. 1991) (noting the purpose of ILSA is to “prevent fraud and deception in the sale of undeveloped land.”). Irrespective of the monetary recovery Walbeck received under his ILSA claim, Walbeck’s victory signaled to developers, including the I’On Defendants, the importance of ensuring that their property-related advertisements and representations do not mislead innocent purchasers or otherwise violate ILSA’s anti-fraud provisions. *See, e.g., Lippoldt v. Cole*, 468 F.3d 1204, 1224 (10th Cir. 2006) (holding that a fee award was justified because the ruling against the defendants would encourage the defendants to comply with the First Amendment going forward).

Not only does Walbeck’s ILSA claim serve a public purpose, the public interest is best served by shifting the burden of the expense of litigation onto the shoulders of those whose unfair and deceptive acts are responsible for the litigation in the first place. Ultimately, the I’On Defendants were the cause of the litigation at issue, and thus, it is “reasonable” that the I’On Defendants should bear the burden of the attorneys’ fees necessarily expended in vindicating wronged purchasers’ rights. Allowing a plaintiff who successfully pursues an action under ILSA to recover his attorneys’ fees encourages individuals to pursue litigation to protect the public interest. Similarly, requiring unsuccessful defendants to pay the plaintiff’s attorneys’ fees discourages developers from engaging in deceptive and unfair practices, such as promulgating false advertisements and material misrepresentations, thereby enforcing the purpose of ILSA. *See Farrar*, 506 U.S. at 121–22. . . (O’Connor, J., concurring) (explaining that a plaintiff’s “success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client”).

Moreover, if this Court focused on the dollar value and the result of the case when awarding attorneys’ fees, the remedial purpose of ILSA would be frustrated. If

attorneys' fees awards in ILSA cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. In other words, the courthouse doors will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would defy legislative intent – it is precisely those individuals with ILSA complaints who cannot afford attorneys' fees whom ILSA's remedial provisions are intended to protect.

Simply stated, the primary purpose of ILSA is to prevent developers from deceiving purchasers when promoting and selling property, and to require developers who deceive purchasers to pay for all costs stemming from their misconduct. Imposing a purchaser's attorneys' fees upon deceitful developers promotes ILSA's public purpose, and thus, the third O'Connor factor also weighs in favor of Walbeck.

3.) Walbeck's Total Recovery is Not Nominal

Finally, although similar to *Mercer* in that Walbeck recovered on an important statutory claim, Walbeck's recovery on his common law claims, in addition to his ILSA claim, distinguishes him from the plaintiffs in *Farrar* and *Mercer* who received only nominal damages *in total*. While the impact of this specific scenario has not been squarely addressed by South Carolina courts, the Third Circuit addressed a similar scenario and concluded a plaintiff's recovery on related, common-law claims may affirmatively demonstrate the "successfulness" of plaintiff's statutory claim.

In *Jama versus Esmor Correctional Services, Incorporated*, the Third Circuit was faced with the question of whether a plaintiff's success on her negligence claim (\$100,000 award) could "independently inform the degree of her success" on her Religious Freedom Restoration Act ("RFRA") claim (\$1 award). Following a lengthy analysis which involved defining what constitutes a "related" claim under the United States Supreme Court's decision in *Hensley versus Eckerhardt*, the *Jama* Court held as follows:

Applying this reasoning here, we conclude that the *Hensley* standard should guide a district court's consideration of pendent state claims in a litigation where a plaintiff has prevailed on a fee-eligible federal claim. We will vacate the award and remand the matter for the District Court to make this discretionary determination in the first instance. The District Court should determine whether Jama's RFRA and pendent state negligence claims involved a "common core of facts" or were based on "related legal theories." *If the claims are related under this standard, the results on Jama's tort claims may inform the degree of Jama's overall success . . .* Whether or not the state and federal claims are related, the District Court should also consider the extent to which Jama's RFRA claim might, *even independently, justify a fee award under the factors articulated by Justice O'Connor in Farrar*. Thus,

while the jury’s nominal award must undoubtedly color the degree of Jama’s success on her RFRA claim, the District Court *should also consider the significance of the legal issue on which she prevailed and determine whether her victory served a public purpose.*

Jama v. Esmor Correctional Services, Inc., 577 F.3d 169, 179-80 (3rd Cir. 2009) (emphasis added) (citations omitted).⁶ *See also Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903 (8th Cir. 2012)(holding quarry was a “prevailing party” under 42 U.S.C. § 1988 even though constitutional claim went unaddressed where non-constitutional claim upon which it prevailed arose from same common nucleus of operative fact as constitutional claim).⁷

Here, Walbeck’s individual and derivative claims all involved a “common core of facts” based upon the I’On Defendants’ repeated promises to convey certain amenities to the I’On community. Thus, the overall success of Walbeck is not measured solely by the amount of monetary recovery he was awarded under his ILSA claim;⁸ rather, Walbeck’s success is measured by: (a) the results Walbeck achieved on his negligent misrepresentation claim; and (b) the results Walbeck achieved on behalf of the I’On Assembly on its breach of fiduciary duty claim. Walbeck’s success is further measured by the fact that he prevailed on his ILSA claim, and in so prevailing, he succeeded on a significant legal issue and served a public purpose. Simply stated, the crux of Walbeck’s ILSA claim, and the nucleus from which it stemmed, resulted in both a substantial success for the Assembly, of which he is a member, as well as significant success for the public at large. Based upon the foregoing, the balance of the O’Connor factors weighs in favor of Walbeck, and thus, Walbeck is entitled an award of reasonable attorneys’ fees.

The I’On Defendants’ failure to provide promised amenity property to the I’On Assembly and its members was the catalyst for both Walbeck’s ILSA claim as well as Walbeck’s and the Assembly’s common law claims. Because all of these claims were based upon a common core of facts, and involved interrelated theories, it is

⁶ *See also Farrar v. Hobby*, 506 U.S. at 111–12 (“[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”); *Stevenson v. Branch Banking and Trust Co.*, 159 Md. App. 620, 662-663 (2004) (“[F]ederal courts characterize a plaintiff as the prevailing party when she *succeeds on any significant issue that achieves some of the benefit sought in bringing the action*; he or she *does not* have to win it all to be regarded as prevailing . . . this Court held that plaintiffs may be considered the prevailing parties *if a significant issue is resolved* so as to achieve some of the benefit *through litigation.*”) (emphasis added).

⁷ This is distinct from the “common fund” doctrine. *See e.g., Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329-330 (2008) (as discussed in Defendants’ Opposition Memorandum).

⁸ It is worth noting that, but for the I’On Defendants’ destruction of ILSA-related evidence such, as the “Letter to JoAnn.doc” and the HUD subdirectory, Walbeck’s ILSA verdict may well have been more than one dollar. *See Order Finding the I’On Defendants in Contempt for Destruction of Evidence.*

impractical, if not impossible, to ascertain how many of the hours spent by Walbeck's counsel were devoted solely to Walbeck's ILSA claim.⁹ See *Austin*, 406 S.C. at 192-93, 750 S.E.2d at 80-81 citing *Austin*, 387 S.C. at 64, 691 S.E.2d at 153 (noting plaintiff "was entitled to the entire amount of his request as it would have been difficult to dissect [plaintiff's] counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud." (internal citations omitted); *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim ...").

(Order, pp. 7-12) (emphasis in original).

As shown above, the Trial Court followed prevailing authorities in balancing the O'Connor factors¹⁰ and determined this balance weighed in favor of Walbeck. Each balancing point made by

⁹ The interrelation of these claims is further supported by the jury's findings – not only did the jury find that the I'On Defendants wronged the I'On Assembly, into whose shoes Walbeck stepped, the jury found the I'On Defendants also wronged Walbeck, individually.

¹⁰ Notably, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits all employ the O'Connor factors in determining whether a prevailing plaintiff, who recovers only nominal damages, will receive attorneys' fees. See, e.g., *Díaz-Rivera v. Rivera-Rodríguez*, 377 F.3d 119, 125 (1st Cir. 2004) (upholding district court's award of attorneys' fees to plaintiff based on three O'Connor factors); *Buss v. Quigg*, 91 F. App'x 759, 761 (3rd Cir. 2004) (citing O'Connor factors for assessing whether plaintiff with nominal damage award should recover attorneys' fees); *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1052-53 (5th Cir. 1998) (applying O'Connor factors in assessing whether plaintiff entitled fee award); *Cartwright v. Stamper*, 7 F.3d 106, 109-10 (7th Cir. 1993) (holding that three O'Connor factors should guide court in prevailing party inquiry); *Jones v. Lockhart*, 29 F.3d 422, 423-24 (8th Cir. 1994) (applying O'Connor factors to assess reasonableness of attorneys' fees award to partially successful plaintiff); *Morales v. City of San Rafael*, 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors); *Phelps v. Hamilton*, 120 F.3d 1126, 1131-32 (10th Cir. 1997) (applying three O'Connor factors to evaluate plaintiff's success and reversing district court's holding that plaintiff should not recover any fee award). Further, the Second Circuit applies the O'Connor factors implicitly. See *Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose). Several of these courts have also employed or otherwise acknowledged the O'Connor factors since the Trial Court's Order awarding Walbeck attorneys' fees. See, e.g., *Velius v. Township of Hamilton*, 466 F. App'x 133 (3^d Cir. 2012) ("Our 'adopt[ion]' of Justice O'Connor's factors must be understood only as an endorsement of the use of those considerations by trial judges who believe the case before them may present

the Trial Court is also supported by at least one piece of evidence and therefore this Court should affirm Walbeck’s fee award.¹¹

C. The Trial Court Did Not Err in Considering the Entire Beneficial Result

The Trial Court did not err in considering the larger impact that stemmed from Walbeck’s individual efforts; and TIC points to no South Carolina case that says a Trial Court must wear blinders when awarding attorneys’ fees. (Pet. for Reh’g, p. 21). This is because our case law says the opposite, *i.e.*, that it’s up to the Trial Court’s discretion to award attorneys’ fees based on all the evidence. *See, e.g., Seabrook Island* and *Swinton Creek Nursey, supra*.

Farrar does not change this. The *Farrar* majority reasoned that where a plaintiff’s recovery was nominal, the deciding court can “lawfully award low fees or no fees” without having to first calculate the lodestar amount or apply the twelve factors bearing on reasonableness. Thus, the *Farrar* majority created a limited exception for calculating attorney’s fees: where a prevailing plaintiff recovers only nominal damages and the victory was merely technical or de minimis, the

the rare situation in which success on the claim justifies attorneys’ fees despite the technical victory manifested by an award of nominal damages. Our opinion in *Jama*, like Justice O’Connor’s concurrence in *Farrar*, did not and could not circumscribe the broad discretion *Farrar* conferred upon district judges.”); *Kane v. Lewis*, 675 F. App’x 254 (4th Cir. 2017) (“To determine when fees are warranted... in nominal-damage cases versus the unusual case that does warrant an award for attorney’s fees... three factors to consider are: (1) the extent of the relief obtained in comparison to the relief sought, (2) the significance of legal issue on which the plaintiff has prevailed, and (3) the public purpose served by the litigation.”); *Parada v. Anoka Cnty.*, 54 F.4th 1016 (8th Cir. 2022) (finding that, although Plaintiff received nominal damages, the trial court did not abuse its discretion in awarding attorneys’ fees because Plaintiff’s claims arose out of the “same nucleus of operative fact” and Plaintiff’s victory was more than “technical” or “insignificant”).

¹¹ As an additional sustaining ground, Respondents note TIC’s argument (both to the Trial Court, and again, on appeal) addresses only the first O’Connor factor, and only in the sense of a limited monetary recovery. Because TIC failed to effectively challenge the other two O’Connor factors, it necessarily follows TIC cannot challenge the Trial Court’s ruling finding the balance of all three factors weigh in favor of Walbeck on appeal. Moreover, the fact Walbeck received a limited monetary recovery does not warrant the reversal of the Trial Court’s fee award – the Trial Court still retained its discretion to award what it deemed a “reasonable” attorneys’ fees based upon Walbeck’s prevailing party status alone. (R. p. 97, n. 14) (citations omitted).

lower court can determine the amount of fees within its discretion, dispensing with the lodestar calculation. The majority (a) did not create a bright-line rule precluding fee awards in nominal damages; (b) did not define what constitutes “nominal” damages; (c) did not define what constitutes a “technical” victory; and (d) did not provide insight as to whether a fee award is warranted in a given case. The *Farrar* majority indicates the decision to award attorneys’ fees, as well as the amount of fees awarded, remains within the trial’s courts discretion.

There is simply no error of law that the Trial Court committed in considering multiple factors in awarding Walbeck fees at her discretion.

D. The Trial Court Did Not Improperly Base Walbeck’s Fee Award on the Assembly’s Claims

TIC also ignores the fact that the Trial Court did not award the \$1,015,000 that Respondents requested in attorneys’ fees and only awarded \$225,000 in fees to reflect the amount she believed was reasonably attributed solely to Walbeck’s ILSA claim. (Order, p. 12). As explained by the Trial Court:

As noted above, the Lucey Law Firm was able to procure for Walbeck substantial results, not only in terms of monetary compensation, but also in terms of promoting public interest and advancing a significant legal issue.

Having weighed the complexity of the issues involved in this case, the time and service necessary to fully prosecute this matter, the competency of counsel, the contingencies of compensation, the appropriateness of fees incurred, and the beneficial results obtained, this Court finds an award of \$225,000.00 in attorneys’ fees to be reasonable. In awarding a fee in an amount significantly less than that sought in the Petition, the court attempts to reflect proportionality in the award as to both the degree of success obtained and the hours *devoted to the ILSA claim*, while recognizing the impracticality articulated by our supreme court in *Austin*.

(Order pp. 14-15) (emphasis added).

Therefore, even if there is a “link” required between a plaintiff’s claim and attorneys’ fees as TIC suggests, there is still no error here. The Trial Court, in her discretion, awarded fees she

“linked” to Walbeck’s individual claim based on the fee affidavits and *en camera* evidence provided to her.

E. Walbeck’s ILSA “Success” is Not Limited to \$1.00

Walbeck’s ILSA “success” if measured individually and monetarily as TIC would like this Court to do is much bigger than \$1.00. There are two prior settlements achieved by Walbeck prior to the final trial that TIC continues to ignore in its briefings.¹²

In addition to the settlement with the third-party buyer of the amenities on the eve of the first trial referenced by this Court in its recent opinion, there was a second settlement on the eve of the second trial. The second settlement included a settlement on the ILSA claim. The owners of the I’On Defendant entities, Tom Graham, and his son Vince Graham, were defendants in this case until the second trial. *See, e.g.*, Fourth Amended Complaint (App. p. 749). Tom and Vince Graham were defendants on the ILSA claim (Count I, App. p. 756) and every other claim.¹³ As seen above in Footnote 3, ILSA makes “agents” of Developers potentially liable for material misstatements and omissions.

On the eve of the second trial, the derivative Plaintiffs and the Grahams entered a valuable and complex settlement. (App. p. 918). Besides the amounts paid by the Grahams, which was to remain confidential, at least through trial, (App. pp. 925-27), the Grahams personally guaranteed the corporate payment of a substantial portion of any resulting verdict. (App. p. 929). The Grahams

¹² As we know, this Court can affirm for any reason appearing in the record. And prior settlements with former co-defendants is a legitimate consideration for an award of attorney fees. *See, e.g., Bravo v. City of Santa Maria*, 810 F.3d 659 (9th Cir. 2016) (“We affirm the attorney fees award because the district court’s finding that the Bravos achieved an excellent result is supported by the public benefit generated by the litigation as well as the \$150,000 in damages the Bravos obtained in the Santa Barbara settlement.”) (emphasis added).

¹³ The reference in several cause of action to “the I’On Defendants” appears to be a left-over distinction from when the third-party buyer, Civitas/Russo, were part of the case.

were also required to provide corporate financial statements to Plaintiffs' counsel. *Id.* As can be seen by the dialogue with the Trial Court in the record, the settlement was achieved by the derivative Plaintiffs, not the realigned Plaintiff Assembly. (App. p. 930) (Assembly counsel still trying to get his board of directors' consent to the settlement). After the Court individually polled the Grahams for their consent, (App. pp. 933-34), the *voir dire* was altered to change the Grahams from parties to witnesses. (App. p. 932). Assembly counsel eventually announced to the Court that he had the Assembly Board's approval of the individual settlements. (App. p. 947).

Posttrial, TIC's Motion for Setoff as to the Russo-Civitas settlement was denied as those value adjustments had been argued to and submitted to the jury. TIC's Motion for Setoff as to the sums paid by the individual defendants was granted, and a reduced judgment was entered on the verdict in favor of the Assembly in the amount of \$1,350,000.¹⁴

Plaintiffs' ILSA claims were always set forth as Count One and were always the bedrock of the entire suit. It was the existence of ILSA that made the Property Report so significant. And, it was the Property Report that eventually created the base line for evaluating the Defendants' conduct for the ensuing ten (10) years. It is evident that the sums paid, and considerations granted, by the individual defendants on the ILSA and other claims, pretrial, was quite substantial. For these same parties to now argue that Walbeck only achieved a nominal recovery on ILSA must be a bit tongue in cheek; and at any rate, must be overruled.

¹⁴ To the extent it's not in the record on appeal, the entered judgment granting set-off for the substantial sums paid by the individual Defendants can be judicially noticed as it is part of our South Carolina court records. *See, e.g.*, for a copy of the order:

<https://www.courtplus.org/DocHandler.ashx?id=020000009D321FC371524E7B5FDC03917B2A2F996505A7E3EF014B8F2F21C257F38C7CBF1FF65ADBC9AAE5E03594B3A79D138FD8009D1CBB3A3963E7D499EDDBF1FC2770&casenum=2010CP1010490>

This point serves also to emphasize the common nexus of the claims. While Plaintiffs attempted to buttress the clear representation of future amenities in the Property Report with many other materials, in part to defeat the “waffling” by the Developers as to what constituted the “community dock(s)” and “Creekside Park,” it was solely the property report representation that came with the additionally statutory enforcement mechanism and attorney fee recovery provision. Its no accident that the ILSA claim was Count I, Plaintiffs built their entire case around it. Arguably, it was the attorney fee recovery provision in ILSA that brought the individual Defendants to the table on the eve of the second trial. It was the pendulum of financial leverage which had the capacity to double the value of Plaintiffs’ claims and create individual liability for the Developers’ owners.

F. **Alternatively, “Borrowing” is Permissible Here Given The Nucleus of Facts Intricate to All Claims, The Complexity of This Case in General, and Walbeck’s Derivative Efforts Prior to the Assembly’s Realignment as a Direct Plaintiff**

TIC’s argument that the Trial Court “improperly borrowed the success of the Assembly’s claim” is unavailing for three other reasons.

1. Courts Have Measured the “Success” of One Claim Based on Other Claims

TIC offers no authority rebutting either *Mercer* or *Jama*, the latter of which concluded that a Plaintiff’s success on related claims may be considered as evidence of the overall success of the statutory claim. *See* Section B, *supra* (discussing both *Mercer* and *Jama* at length). The circumstances here are precisely on par with these cases that involve the same core set of facts underlying all claims. As explained by the Trial Court (and as this Court acknowledged in its Opinion):

Here, Walbeck’s individual and derivative claims **all involved a “common core of facts” which was based upon the I’On Defendants’ repeated promises to convey certain amenities to the I’On community.** . . .Simply stated, the crux of Walbeck’s ILSA claim, **and the nucleus from which it stemmed,** resulted in both

a substantial success for the Assembly, of which he is a member, as well as significant success for the public at large. . . The I'On Defendants' failure to provide promised amenity property to the I'On Assembly and its members **was the catalyst for both Walbeck's ILSA claim as well as Walbeck's and the Assembly's common law claims. [A]ll of these claims were based upon a common core of facts, and involved interrelated theories.** . . .

(Order, p. 12) (emphasis added);¹⁵ *Walbeck, et. al. v. I'On Co., et. al.*, 2023 WL 1809318, *1 (2023) (“This case involves promises made and broken to homeowners by a developer and its affiliated entities. Following a lengthy trial, a jury returned verdicts on several causes of action in favor of the homeowners, and the developer appealed... We granted certiorari and now affirm in part and reverse in part, thus reinstating the jury’s verdicts.”) (emphasis added).

It is therefore proper to consider and measure Walbeck’s overall success (both monetarily and generally) as opposed to only considering Walbeck’s \$1.00 ILSA award. Properly viewed in this light Walbeck monetarily succeeded on his negligent misrepresentation claim (\$20,000), his breach of contract claim (\$10,000)¹⁶, the Assembly’s breach of fiduciary duty claim (\$1,7500,00), and through pretrial settlements founded on these claims. *See* Section E, *supra*. Walbeck also generally succeeded in promoting public policy and protecting South Carolina homeowners from developer deception. These are all far more than “nominal” victories.

2. This Case is the Unusual Case That Warrants Attorneys’ Fees

Also important in the Trial Court’s fee analysis is this quote from *Mercer III*:

We believe that the factors set forth by Justice O’Connor help separate the usual nominal-damage case, which warrants no fee award, *from the unusual case that*

¹⁵ Notably, the Trial Court also found “...but for the [Appellants’] destruction of ILSA evidence . . . Walbeck’s ILSA verdict may well have been more than one dollar.”) (R. p. 96, n. 10) *citing* (Order Finding the [Appellants] in Contempt for the Destruction of Evidence).

¹⁶ Walbeck’s entitlement to attorney fees as the prevailing party in his contract is an additional, sustaining ground to reinstate the prior fee award. (App. pp. 3658-68). Paragraph 12(c) of the Walbeck purchase contract provides that “the prevailing party shall be entitled to collect its reasonable attorney’s fees and paralegal’s fees actually incurred in the action from the non-prevailing party.” (Walbeck Contract, App. p. 3662).

does warrant an award of attorney's fees. Accordingly, we will consider the district court's decision to award attorney's fees by way of the factors identified by Justice O'Connor.

Mercer III, 401 F.3d 199 at 203-04 (emphasis in original and added).

No one who reads this Court's recent decision can deny that this was an unusual case with facts that "are not for the weary". *Walbeck, et. al. v. I'On Co., et. al.*, 2023 WL 1809318, *1 (2023), quoting Justice George C. James, *Stoneledge at Lake Keowee Owner's Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 114, 866 S.E. 2d 542, 545 (2021). This Court should find that this case qualifies for different treatment under any analysis given the complexity of this marathon case that has spanned close to 13 years in litigation (and 24 years from the representation in the Property Report) and now serves to send an important message to developers to keep the promises they make to South Carolina homeowners. This case has put flesh on the bones of the public policies enunciated in many cases, including *Goddard*, *Concerned Citizens of Dunes West*, and *Island Car Wash*.¹⁷

3. The Assembly's Significant Recovery is Directly Linked to Walbeck's Derivative Efforts

Lastly, TIC cannot complain about any alleged "borrowing" of the Assembly's success when it was TIC who caused Walbeck to prosecute all claims for years until TIC moved to realign the Assembly as a Plaintiff in 2014. Prior to this time, and still thereafter, Walbeck prosecuted the Assembly's claims because the Assembly could not do so on its own behalf given TIC's veto power that was like the "Supreme Court". The Assembly's \$1,750,00 verdict is directly linked to Walbeck's derivative efforts and therefore there no "borrowing" occurred. If anything, this Court

¹⁷ *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 562 S.E.2d 633, (2002), *Goddard v. Fairways Dev. Gen. P'Ship*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (same), *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987).

should acknowledge Walbeck’s “contributing” efforts to the Assembly’s ultimate success in holding TIC accountable for its failed promises – the same failed promises that were “the crux” of Walbeck’s ILSA claim. (Order, p. 12). As each Assembly member owns the Assembly property in part as a tenant in common, the Assembly’s success personally benefited Walbeck.

CONCLUSION

This Court was correct in “agree[ing] with the trial court’s [fee] analysis” and should find that the Trial Court did not err in awarding Walbeck attorneys’ fees for his ILSA claim. *Walbeck, et. al. v. I’On Co., et. al.*, 2023 WL 1809318, *13 (2023). The Trial Court’s Order is supported by the O’Connor factors (only one of which TIC challenges) and the evidence showing that the balance of these factors weighed in Walbeck’s favor.

TIC’s argument is unsupported because the only case TIC relies on, *Farrar*, affirms a Trial Court’s discretion to award fees; the Trial Court directly linked the attorneys’ fees awarded to Walbeck’s individual ILSA claim; Walbeck’s recovery was not nominal when the prior settlements and awards on other claims are properly considered. Walbeck contributed to, and caused, the Assembly’s success and promoted public good; and, Walbeck’s contract contains a prevailing party provision that entitles him to fees as well.

This Court should affirm the Trial Court’s fee award for any or all these reasons.

(Signature on Following Page)

Respectfully submitted,

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