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October 4, 2023

VIA EMAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *The Boathouse at Breach Inlet, LLC v. Richard S.W. Stoney*
Appellate Case No. 2020-001203

Dear Ms. Kitchings:

Appellant, The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., submits this letter in accordance with Rule 208(b)(7), SCACR. In the course of preparing for argument in this matter, Appellant has identified additional authority pertinent to the briefs submitted by the parties. The first of these is *Walbeck v. I'On Company, LLC*, 439 S.C. 568, 889 S.E.2d 537 (2023), which is submitted in the interest of completeness because this Court's decisions in this case were cited by both parties. Appellant further directs the Court's attention to *Gamache v. Hogue*, 338 F.R.D. 275, 290–91 (M.D. Ga. 2021), and particularly the discussion relating animosity and standing found in the section titled "Intra-Class Conflicts." This discussion relates to the standing arguments made by both parties.

These cases are attached for the Court's convenience.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/sac
Enclosure
Cc: Capers G. Barr, III (via email only cgb@barrungermcintosh.com)
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439 S.C. 568
Supreme Court of South Carolina.

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

Appellate Case No. 2019-000968
|
Opinion No. 28134
|
Heard December 14, 2022
|
Filed February 8, 2023
|
Rehearing Denied July 26, 2023

Synopsis

Background: Homeowner and homeowners' association brought action against property developer and its affiliated entities for violations of the Interstate Land Sales Full Disclosure Act (ILSA), breach of contract, negligent misrepresentation, and breach of fiduciary duty, alleging that defendants breached their promise to convey certain real property community amenities, upon their completion, to association. Following trial in the Circuit Court, Charleston County, Stephanie P. McDonald, J., jury returned verdicts in favor of association, which elected its $1.75 million verdict for breach of fiduciary duty, and homeowner, who elected his $20,000 negligent-misrepresentation verdict. Defendants moved for judgment notwithstanding the verdict. The Circuit Court, 2015 WL 10742888, denied motion. Parties appealed. The Court of Appeals initially affirmed, but on rehearing, 426 S.C. 494, 827 S.E.2d 348, affirmed in part, reversed in part, and remanded. Parties cross-petitioned for certiorari and petitions were granted.

Holdings: The Supreme Court, Hearn, J., held that:

[1] evidence was sufficient to support jury's finding that limitations periods for plaintiffs' claims began to run on date developer sold amenities to third party;

[2] evidence was sufficient to support jury's finding that developer breached its fiduciary duty;

[3] homeowner established that making demand that association pursue claims against defendants would have been futile, as required for homeowner to bring derivative action; and

[4] evidence was sufficient to amalgamate interests of developer and entities under single-business-enterprise theory.

Affirmed in part and reversed in part.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Judgment; Motion for Judgment Notwithstanding the Verdict (JNOV).

West Headnotes (21)

[1] **Limitation of Actions** Breach of contract in general
Limitation of Actions Consumer protection; unfair trade practices
Limitation of Actions Fraud as Ground for Relief

Evidence was sufficient to support jury's finding that limitations periods for homeowner's and homeowners' association's action against developer for breach of contract, breach of fiduciary duty, negligent misrepresentation, and violation of Interstate Land Sales Full Disclosure Act (ILSA), arising from developer's alleged failure to convey certain community amenities to association, began to run on date developer sold amenities to third party; developer initially planned, and promised, to convey amenities to association, but instead had associated entity retain title to amenities, and although developer

promised in "Handover Agreement" to inform association when amenities were ready to turn over to association control, developer instead surreptitiously sold amenities to third party. Interstate Land Sales Full Disclosure Act, § 1402 et seq., 15 U.S.C.A. § 1701 et seq.

More cases on this issue

[2] **Limitation of Actions** Questions for Jury

Ordinarily, the question of when a statute of limitations began to run is one left to the jury.

[3] **Limitation of Actions** Questions for Jury

The question of when a plaintiff discovered, or should have discovered the alleged harm, and thus when a statute of limitations began to run, is for the jury to decide because it is an objective question.

[4] **Limitation of Actions** Questions for Jury

The presence of conflicting testimony regarding when a plaintiff discovered or should have discovered the alleged harm, and thus when a statute of limitations began to run, necessarily requires the jury's resolution.

[5] **Common Interest Communities** Evidence

Evidence was sufficient to support jury's finding that property developer breached its fiduciary duty to homeowners' association's by failing to convey certain community amenities to association; developer initially promised to convey amenities to association and, in "Handover Agreement" between developer and association, to inform association when amenities were ready to turn over to association control, but developer instead surreptitiously sold amenities to third party while representing to association that amenities were merely undergoing a "management change."

More cases on this issue

[6] **Fraud** Fiduciary or confidential relations

Establishing a breach of fiduciary duty has three elements: (1) existence of the relationship, (2) breach of the duty owed to the plaintiff, (3) damages proximately resulting from that breach.

[7] **Common Interest Communities** Common Elements

Property developers owe fiduciary duties to homeowners and homeowners' associations regarding common areas.

[8] **Common Interest Communities** Declarant, developer, or sponsor in general

Generally, when a property developer turns over control of a homeowners' association to its members by relinquishing its superior voting power, the fiduciary relationship is extinguished; the developer no longer has control over that which the association has an interest.

[9] **Common Interest Communities** Common Elements

The fiduciary duties a property developer owes to homeowners and a homeowners' association regarding common areas stem from developer control of the entity, the ongoing nature of construction, and the transfer of common areas.

[10] **Common Interest Communities** Pre-turnover duties of declarant, developer, or sponsor

When creating a common-interest community, a property developer owes the homeowners' association and homeowners a fiduciary duty to convey common areas in good repair, and if they are not, sufficient maintenance funds must be provided in tandem with the property conveyance.

[11] **Covenants** Covenants as to Use of Property

In real-property subdivisions with common areas that are subject to covenants, the responsibilities outlined in the covenants control.

[12] **Fraud** Fiduciary or confidential relations

Those in a fiduciary relationship with another party must not act to make use of that relationship to benefit his own personal interests.

[13] **Fraud** Fiduciary or confidential relations

Conduct that violates a fiduciary duty includes self-dealing, fraud, unconscionable conduct, misrepresentations, etc.

[14] **Fraud** Fiduciary or confidential relations

A fiduciary relationship 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 reposing confidence.

[15] **Common Interest Communities** Derivative actions

Homeowners established that making demand that homeowners' association pursue claims against property developer for developer's alleged failure to convey certain community amenities to association would have been futile, as required for homeowners to bring derivative action on behalf of association, where developer had veto power on association's board. S.C. R. Civ. P. 23(b)(1).

More cases on this issue

[16] **Corporations and Business Organizations** Derivative or direct action

Shareholders of an organization may bring a derivative suit pursuant to the rule governing class actions, in order to compel an organization to represent its interest through litigation. S.C. R. Civ. P. 23(b)(1).

[17] **Corporations and Business Organizations** Pleading

The rule permitting shareholders of an organization to bring a derivative suit requires a plaintiff to set forth particularized allegations—a departure from the more liberal pleading requirements of the general rule of pleading. S.C. R. Civ. P. 8, 23(b)(1).

[18] **Corporations and Business Organizations** Necessity of demand

Corporations and Business Organizations Allegations of excuse for failure to demand; futility

A shareholder-plaintiff bringing a derivative suit must either make a demand on the entity that it pursue a claim or plead with particularity the exceptional

circumstances that demonstrate why making a demand would be futile. S.C. R. Civ. P. 23(b)(1).

[19] Corporations and Business Organizations Sufficiency of demand

A shareholder-plaintiff's demand that a corporation pursue a claim, which demand is a prerequisite to a derivative suit, must (1) identify the alleged wrongdoers, (2) describe the factual basis of the wrongful acts and the harm caused to the corporation, and (3) request remedial relief. S.C. R. Civ. P. 23(b)(1).

[20] Corporations and Business Organizations Sufficiency of demand

In reviewing whether a shareholder-plaintiff demanded that a corporation pursue a claim, as a prerequisite to a derivative suit, the trial court is neither limited to considering only the allegations put forth in the complaint nor precluded from considering a pre-suit demand letter that was not expressly incorporated by reference into the complaint. S.C. R. Civ. P. 23(b)(1).

[21] Corporations and Business Organizations Sale and transfer of property

In homeowner's and homeowners' association's action against developer and affiliated entities for breach of contract, breach of fiduciary duty, negligent misrepresentation, and violation of Interstate Land Sales Full Disclosure Act (ILSA), arising from developer's failure to convey community amenities to association, evidence was sufficient to amalgamate interests of developer and entities under single-business-enterprise theory, where developer and entities were all controlled, managed, and owned by same individuals and collectively functioned as one in day-to-day operations, and developer promised to convey amenities to association once development was completed, but then sold amenities to third party while representing that third party was simply taking over management of amenities. Interstate Land Sales Full Disclosure Act, § 1402 et seq., 15 U.S.C.A. § 1701 et seq.

More cases on this issue

****539 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from Charleston County, The Honorable Stephanie P. McDonald, Circuit Court Judge

Attorneys and Law Firms

Justin O'Toole Lucey, Joshua Fletcher Evans, and Dabny Lynn, all of Justin O'Toole Lucey, P.A., of Mt. Pleasant, for Petitioners-Respondents.

Brian Duffy, Julie Lauren Moore, and Patrick Coleman Wooten, all of Duffy & Young, L.L.C., of Charleston, for Respondents-Petitioners.

Opinion

JUSTICE HEARN:

***573** 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. The court of appeals initially upheld the jury's verdict for $1.75 million on the homeowners' breach of fiduciary claim and a verdict for $10,000 on a breach of contract claim by an individual homeowner. Thereafter, upon petitions for rehearing, the court of appeals completely reversed course, dismissing all of the homeowners' claims as a matter of law and reversing and remanding the breach of contract claim by the individual homeowner. We

granted certiorari and now affirm in part and reverse in part, thus reinstating the jury's verdicts.

FACTS/PROCEDURAL HISTORY

The facts of this case are complicated, and, in the words of Justice George C. James, are "not for the weary." ****540** *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 114, 866 S.E.2d 542, 545 (2021). I'On is a high-density residential development that comprises public squares, restaurants, shops, and homes designed to imitate historic urban housing, including a replica of downtown Charleston's Rainbow Row. After this Court rejected a referendum effort to restrict multi-use zoning, construction of I'On Phase II ***574** began around 2000. *See I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 409, 526 S.E.2d 716, 717 (2000).

In 2010, Plaintiffs, Brad Walbeck and Lea Ann Adkins (collectively, "Homeowners"), sued the I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, Thomas Graham, and Vince Graham, (collectively "Developers") for various causes of action related to the nonconveyance of certain real property and community amenities within the neighborhood. Thomas Graham, Vince Graham, and I'On Realty Company, LLC were dismissed from the case prior to trial, and a mistrial was ordered during the first trial in order to realign the HOA as a plaintiff. In the subsequent trial, the jury returned verdicts in favor of Walbeck and the HOA. The HOA elected its $1.75 million verdict for breach of fiduciary duty, and Walbeck elected his $20,000 negligent misrepresentation verdict.

At the heart of Homeowners' claims is the allegation that Developers breached their promise to convey certain real property community amenities, upon their completion, to the HOA. Specifically, Homeowners claim that Developers promised to convey an event facility (the Creek Club), a community dock, a boat ramp, and a parking lot. With the exception of a portion of the parking lot, all of these amenities are located on Lot CV-6, a civic-use zoned property along Hobcaw Creek.

In 1998, in order to comply with the Interstate Land Sales Full Disclosure Act ("ILSA"), Developers filed a Property Report with the U.S. Department of Housing and Urban Development which included the following language:

> THE RECREATIONAL FACILITIES LISTED IN THE CHART ABOVE SHALL, UPON COMPLETION OF CONSTRUCTION, BE CONVEYED TO THE [HOA] BY QUITCLAIM DEED FREE AND CLEAR OF ALL MONETARY LIENS AND ENCUMBRANCES AT NO COST TO THE [HOA] OR ITS MEMBERS. UPON CONVEYANCE OF THESE FACILITIES TO THE [HOA], IT SHALL ASSUME FULL RESPONSIBILITY FOR THE COSTS OF OWNERSHIP, OPERATION, AND MAINTENANCE OF THE FACILITIES CONVEYED TO IT.

***575** The chart that preceded this section of the 1998 Property Report [1] included nonspecific references to a "Community Dock" and a "Creekside Park." Lot CV-6 was not listed or specifically referred to by the 1998 Property Report. Thomas Graham, one of two primary developers of I'On along with his son, testified this was because Developers did not own the lot at that time. Additionally, the I'On Company submitted plans, applications, and letters to DHEC representing that the community docks were in lieu of private docks and were "for the use and enjoyment of the I'On community." DHEC, as well as the Army Corps of Engineers, subsequently approved these plans.

When Walbeck purchased his lot in November 1999, he received a copy of the 1998 Property Report and the relevant sections were included in his lot's purchase agreement. Development of I'On continued in the early

2000s, with multiple community docks, parks, and homes. On Lot CV-6, the Creek Club and adjacent docks were completed in 2001.[2] Perpendicular to that lot sat Creekside ****541** Park (later named "Marshwalk Park" to avoid confusion with a nearby neighborhood). The Community Dock is distinct from the other docks built in the neighborhood during this time due to its size, deep-water access to Hobcaw Creek, and its proximity to the Creek Club.

Shortly after the 1998 Property Report was drafted, Developers began a pattern of conduct altering their initial promise to convey ownership of the disputed properties to the HOA. Beginning in December of 1998, the I'On Company sent a ***576** letter to a neighboring development, Olde Park, offering to allow residents of that neighborhood access to the community dock and boat ramp for a fee of $350,000, which was accepted. In this same letter, the I'On Company stated the community dock and boat ramp would "belong to the [HOA,]" with negligible fees to be charged for dock keys. However, at trial Vince Graham acknowledged that the plan to deed the disputed amenities to the I'On Club rather than to the HOA changed sometime between November 1998 and March 1999.

In February of 2000, the I'On Club, I'On Company, and the HOA executed a "Recreational Easement and Agreement to Share Costs." This easement granted the HOA access to the Creek Club, boat ramp, parking lot, and boat slip on Lot CV-6. Notably, when the *I'On Club* conveyed the easement to the HOA, it lacked title to the servient estate, Lot CV-6, which instead was owned by the *I'On Company*. It was not until August of 2000 that the Club acquired title, despite the fact that the amenities belonged to the HOA according to the 1998 Property Report. Developers nonetheless recorded the easement in I'On's declaration of covenants, conditions and restrictions ("I'On's Covenants"). The easement apportioned certain costs to the HOA for a term of 30 years. The HOA began making these annual payments for usage and upkeep in 2004.[3]

In April of 2000, the I'On Company amended the 1998 Property Report, deleting the obligation to convey a "Creekside Park" and "Community Dock" to the HOA. Later in 2000, the I'On Company conveyed two docks and a 2.86-acre tract of land, which would become Marshwalk Park, to the HOA and again amended the property report.

This vacillation continued when, in 2005, Developers entered into a "Handover Agreement" with the HOA, which stated that "the I'On Company will notify the [HOA] Board when ***577** common area property and structures are ready to be handed over to the [HOA]." This document further outlined the importance of handing all properties over in good repair and provided assurances to the HOA that the process was prepared to go forward. Nevertheless, in an email discussing the Creek Club Boat Ramp and docks, Chad Besenfelder, Developers' manager, proposed a different plan to the Grahams in November of 2006, stating "[b]oth the HOA and the Club do not want responsibility for this area .... I think the area should stay in control of the Club so not to interfere with events."

Ultimately, Developers began to negotiate an outright sale of the two lots containing the amenities to a third party rather than convey them to the HOA. In 2007, Developers discussed several proposals concerning the Creek Club and the associated community dock and boat ramp. One of the proposals by Thomas Graham was to sell the HOA another lot for a community center at a cost of $650,000 rather than to convey the Creek Club to them. This would allow Developers to sell the Creek Club as a personal residence, providing there were not any zoning issues. However, Besenfelder tabled any plan for the time being, writing, "The docks are too controversial ****542** and taking away even part of this community amenity would cause trouble."

In 2008, Mike Russo proposed to Developers that his company, 148 Civitas, purchase Lots CV-5 and CV-6. However, Besenfelder emailed Russo in August of 2008 and acknowledged the HOA's right to the property in dispute, stating: "Subject to HOA approval, the I'On Company plans to convey the docks and boat ramp to the HOA, retaining continued easement for both I'On Club and Creek Club events." Hearing rumors about this possible sale, the HOA scheduled an October 2008 meeting to discuss Russo's attempts to purchase the lots. Following this meeting, Besenfelder emailed the Grahams requesting assurance that an upcoming meeting with the Town of Mount Pleasant

would lead to the continued designation of the lots as civic property. Besenfelder proposed that Developers "not separate the docks from the Creek Club at this time." He added that it was clear, based on the current use, that the lots were properly zoned as civic property and something could be worked out with Russo to ensure the ***578** HOA's continued use of the lots because Russo "want[ed] this deal to work[.]"

Notwithstanding this attempt to sell the property to Russo, in March of 2009, Besenfelder sent another email to Developers, now confirming that he was working with Thomas Graham to help prepare the "parcel for HOA dock and ramp turnover" by dividing these amenities from the Creek Club, thus contradicting his earlier recommendations. Also in March of 2009, Russo withdrew his offer to purchase the land due to pending litigation with I'On resident Catherine Templeton. [4]

After this initial sale to Russo fell through, Developers' plan for the Creek Club Dock and Boat Ramp changed again. Besenfelder emailed the I'On Club's property manager, copying all Board members, that the I'On Company "is preparing to deed the community dock to the [HOA] and discussed plans to subdivide the property to facilitate the transaction. Even Vince Graham conceded at trial that it was "entirely reasonable for the Assembly and the homeowners to rely on this representation." Yet within hours of the Besenfelder email being sent, secret negotiations resumed between Developers and Russo for the sale of the property.

Russo again made an offer to Developers, which they accepted in June of 2009. A month later, the President of the HOA, Bruce Kinney, called Thomas Graham to discuss a phone call Kinney had received about a pending sale of the amenities, but Graham informed Kinney that the Creek Club was merely undergoing a "management change." This conversation occurred during the same time that Kinney was in the midst of negotiations with Developers to correct the recreational easement and make it permanent, and Kinney knew nothing about the sale to Russo's company, 148 Civitas, until ***579** he was informed by Thomas Graham on August 11, 2009, that the sale had taken place on August 5, 2009.

Walbeck filed suit in December of 2010, and Adkins subsequently joined. With the parties unable to resolve their disputes, the case proceeded to trial. Following a mistrial, which was granted in order to realign the HOA as a plaintiff, a second trial ensued, and the jury awarded the following damages: breach of contract ($1,000,000 for the HOA and $10,000 for Walbeck), negligent misrepresentation ($1,000,000 for the HOA and $20,000 for Walbeck), breach of fiduciary duty ($1,750,000 for the HOA), and ILSA ($1 for Walbeck). [5, 6] Having to elect their remedies, ****543** Walbeck chose his negligent misrepresentation verdict, and the HOA elected its breach of fiduciary duty claim.

The parties appealed to the court of appeals, which initially unanimously upheld the jury's breach of fiduciary duty verdict, concluded Homeowners' derivative action on behalf of the HOA could proceed because a formal demand would have been futile, and affirmed the trial court's decision to amalgamate Developers. Thus, under the first opinion, the HOA's $1,750,000 verdict and Walbeck's $10,000 breach of contract verdict were upheld. Following both parties' petitions for rehearing, the court of appeals reversed course and unanimously substituted its opinion, this time practically nullifying the jury's verdicts. *See* *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2019). The court reversed the trial court's denial of Developers' JNOV motions on derivative claims and breach of fiduciary duty—meaning that the HOA could not collect on any of the verdicts—and reversed the trial court's finding that Developers were amalgamated. As to the only remaining claim—Walbeck's individual breach of contract cause of action—the court of appeals remanded that $10,000 verdict for a new trial because it was tainted by an erroneous amalgamation ruling. The court then affirmed the trial court's ***580** rulings that the recreational easement was invalid and that Developers were not entitled to attorney's fees. This Court granted the parties' cross-petitions for certiorari.

ISSUES

I. Were Homeowners' claims barred by the statute of limitations?

II. Did the court of appeals err in its ruling regarding Homeowners' claims for breach of fiduciary duty?

III. Did the court of appeals err in finding the homeowners failed to meet the requirements for filing a derivative suit?

IV. Did the court of appeals err in reversing the circuit court's amalgamation finding?

DISCUSSION

Because the myriad of evidence adduced during this lengthy trial presented quintessential jury issues, we disagree with the court of appeals' reversal of the jury verdicts. We find the trial court properly submitted Homeowners' claims and the issue of the statute of limitations to the jury, and we find its verdict was supported by the evidence. *See Burns v. Universal Health Serv., Inc.*, 361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) ("The verdict will be upheld if there is any evidence to sustain the factual findings implicit in the jury's verdict.") (citation omitted).

I. Timeliness

[1] Both the individual Homeowners and the HOA filed four claims and each is subject to an applicable statute of limitations. Based on the conflicting evidence presented as to when Homeowners should have discovered that the property was not going to be conveyed to them as promised, together with the repeated assurances that it would be conveyed, the trial court submitted the issue of the statute of limitations to the jury. Developers have consistently argued this was error, and, in its second, substituted opinion, the court of appeals agreed, holding that a budgetary provision in a 2005 usage agreement triggered *as a matter of law* the running of the ***581** limitations period for all the claims except Walbeck's individual breach of contract claim. This was error. [7]

[2] **[3]** **[4]** Ordinarily, the question of when a statute of limitations began to run is one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. ****544** *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide). The presence of conflicting testimony regarding the time discovery should have occurred necessarily requires the jury's resolution. *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it ... and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.") (internal citations omitted). In the case at bar, the jury was presented with a host of conflicting evidence as to when Homeowners should have, by the exercise of reasonable diligence, discovered the facts giving rise to their claims.

The jury found the operative notice date for each claim was August 5, 2009—the date Developers conveyed the properties at issue to Russo. [8] While the jury certainly could have accepted the 2005 date argued by Developers and ultimately embraced ***582** by the court of appeals, we believe the jury's contrary finding is supported by the evidence.

Beginning in 1998, Developers produced a property report that promised to convey the Creek Club and the Community Dock to the HOA, upon their completion. Subsequently, Developers amended that report at least twice, changing the operative language to more vague terminology, specifically changing "Community Dock" to community docks. In February of 2000, ostensibly to pacify the Homeowners, the I'On Club entered into a recreational easement with the HOA, whereby the HOA was permitted use of the amenities and agreed to share costs of their upkeep. [9]

Substantial evidence was presented that although the initial plan—and promise—by Developers was to convey the disputed property to the HOA, Developers jettisoned that plan. In a March 2009 email, Thomas Graham's attorney, Jo Ann Stubblefield, explained that the 2000 recreational easement was granted because "in early 2000 the decision was made" to change

course from the 1998 Property Report. [10] Rather than convey the properties at issue to the HOA, Developers decided they wanted the I'On Club to retain title, subject to an easement that provided for neighborhood use. Stubblefield then detailed the changes between the 1998 Property Report and subsequent iterations, including excepting the sidewalks and community dock from the properties to be conveyed to the HOA. However, rather than the I'On Club retaining title, in 2002 Lot CV-5 was conveyed to the Grahams for a nominal fee and that deed was recorded. At trial, Thomas Graham described the situation as "evolving." Another interpretation would be that Developers continued to change their position with regard to the disputed property in an apparent effort to pacify the HOA, thereby lulling the homeowners into believing that the property would eventually be theirs as promised.

***583** Following the 2005 Handover Agreement, wherein Developers promised to inform the HOA when common areas were ready to turn over to HOA control, Besenfelder instead discussed other options with the Grahams. In April of 2007, Besenfelder sent the Grahams proposals for what to do with the Creek Club and docks, including "selling the Creek Club to the HOA[.]" Besenfelder listed the pros and cons of doing so, one pro being "[t]he ****545** HOA gets the infamous boat ramp and docks" and one con being the loss of a potentially valuable financial asset. He closed the email by suggesting the group "keep [these options] quiet for now[.]" In July, Besenfelder emailed the Grahams asking what the value of the Creek Club would be if it was repurposed and sold as a residential property, to which Thomas Graham replied, "[o]ur Creek Club is a potentially valuable asset ... How can we capitalize this potential value?" Besenfelder then proposed limiting access, and Thomas Graham expressed concern that the homeowners had existing rights in the property.

Further evidence of this ever-shifting plan for the disputed properties surfaced in September of 2008 when Developers surreptitiously began the process of selling to a third party, Russo. Besenfelder, in an email titled "Creek Club, Please keep confidential[,]" informed Russo that the I'On Club had hired an accountant to perform the due diligence in advance of a sale. In this email to Russo, Besenfelder mentioned that I'On Club members get discounted use rates due to a preexisting agreement, but that he would "work with [other parties to] revise that agreement" and further informed Russo that, "the docks were promised to the homeowners and Vince [Graham] would like to honor that someday." In March of 2009 when Besenfelder seemed to express an intention not to turn over the docks, Russo inquired, "[d]oes this mean you're not going to turn over the docks???? Let me know ASAP[.]"

After the first deal with Russo fell through, an email from Besenfelder to the property manager, copying all Board members, again promised that the property would be conveyed, even mentioning that the property would be subdivided to accomplish this transfer. Nevertheless, as already noted, within hours of this email, secret negotiations began again with Russo, and the sale ultimately took place on August 5, 2009, ***584** the date on which the jury later found the statute of limitations was triggered.

As is clear from the recitation of the communications and events which transpired between the parties since the 1998 Property Report, when the HOA knew or should have known the Developers' promises were not going to be fulfilled was a question of fact for the jury, not one capable of being decided as a matter of law. We believe this case is similar in some respects to *Stoneledge at Lake Keowee Owners' Ass'n v. IMK Development Co., LLC*, 435 S.C. 176, 177, 866 S.E.2d 577, 578 (2021), where the Court implicitly acknowledged that although defendants in that case may have had a colorable argument as to the running of the statute of limitations, this Court nonetheless affirmed the jury's verdict. *See id.* ("Application of both the basic three-year limitations period and the discovery rule in any given case can present factual issues for a jury to resolve. ... [W]e are constrained by our standard of review and conclude that under the facts of this case, there was a jury issue as to whether the statute of limitations had expired by the time the action was commenced against [the defendant]"). In *Stoneledge*, the jury found in favor of the homeowners after the trial court denied defendants' motion for directed verdict based on the statute of limitations. As is the case here, there was a question of fact as to when Homeowners were put on notice.

Because ample evidence was presented supporting the jury's determination of when Homeowners were on notice, the jury's verdicts are reinstated. While there is an argument that the budgetary provision relied on by the court of appeals could have led to notice, the jury was cognizant of that argument but was convinced by the ample contrary evidence. That finding, because it was supported by sufficient evidence, should not have been overturned on appeal. Accordingly, we find that these claims are timely.

II. Merits of the HOA's Breach of Fiduciary Duty Claim

[5] Homeowners argue Developers owed fiduciary duties to the HOA and that they breached these duties by not conveying the property, as well as by granting various easements over the property to third parties and in self-dealing by ***585** surreptitiously selling the property to Russo in 2009. Developers counter that their fiduciary duties to the HOA did not include a responsibility to convey the disputed property and therefore their sale to ****546** Russo did not constitute a breach. We agree with Homeowners that the court of appeals focused too narrowly on the Developers' failure to convey the disputed properties, ignoring the plethora of other evidence presented of the Developers' bad faith, broken promises, and self-dealing, all of which support the jury's verdict on Homeowners' breach of fiduciary duty cause of action.

[6] **[7]** **[8]** **[9]** **[10]** **[11]** Establishing a breach of fiduciary duty has three elements: (1) existence of the relationship, (2) breach of the duty owed to the Plaintiff, (3) damages proximately resulting from that breach. *See* *Turpin v. Lowther*, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013). Developers owe fiduciary duties to homeowners and homeowners' associations regarding common areas. [11] *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Specifically, common areas must be conveyed in good repair and if they are not, sufficient maintenance funds must be provided in tandem with the property conveyance. *Id.* In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, this Court likened this duty to those present in a business relationship, holding ***586** developers owe homeowners a duty, "much like that owed by promoters of a corporation to investors." 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002). Importantly, in subdivisions with common areas that are subject to covenants, the responsibilities outlined in the covenants control. *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006).

[12] **[13]** **[14]** More broadly, "it is [ ] well settled" that those in a fiduciary relationship with another party must not act to "make use of that relationship to benefit his own personal interests." *Lesesne v. Lesesne*, 307 S.C. 67, 69, 413 S.E.2d 847, 848 (Ct. App. 1991). Conduct that violates this mandate includes self-dealing, fraud, unconscionable conduct, misrepresentations, etc. *See Bennett v. Estate of King*, 436 S.C. 614, 633, 875 S.E.2d 46, 55 (2022) (Kittredge, J. dissenting). This makes sense because the fiduciary relationship 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 reposing confidence." *Id.* at 633, 875 S.E.2d at 56.

The trial judge consistently questioned whether Developers' argument—that nonconveyance is only a contractual issue rather than a potential breach of fiduciary duty—was too narrow. This occurred at the directed verdict stage, as well as in the court's order denying JNOV, where she stated, "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which *should have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference." However, the court decided to send this cause of action to the jury based not only on the nonconveyance but also on the evidence of bad faith and self-dealing that was presented, and the court denied Developers' motion for JNOV on that additional ground as well. In its second opinion, which reversed the jury's verdict on breach of fiduciary duty, the court of appeals pivoted and embraced the Developers' narrow approach, focusing only on the Developers' act of nonconveyance. ****547** *See* ***587** *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 517, 827 S.E.2d 348, 360 (Ct. App. 2019) ("[T]he

circuit court's denial of Appellants' JNOV motion was based on its extrapolation of a specific fiduciary duty to *convey title* to common areas from the duty pronounced in *Goddard* and *Dunes West*, i.e., the fiduciary duty to ensure common areas are in good repair before turning them over to a homeowners association.") (emphasis in original).

Homeowners argue this holding was unnecessarily and erroneously constricted, as the two relationships between Developers and the HOA—contractual and fiduciary—are inextricably intertwined. Under this analysis, the contractual duty to convey was overlaid by a fiduciary relationship, which means that while the nonconveyance was certainly a breach of contract, the subsequent self-dealing by Developers through the secret sale of the property to a third party constituted a breach of the Developers' fiduciary duties to the HOA. Stated differently, if the only evidence in the record of a breach of fiduciary duty was that Developers did not convey the property, that claim might well be limited to a breach of contract. While Developers urge this Court to focus only on the nonconveyance, Homeowners have never taken such a limited approach, nor did the trial court. Instead, there was sufficient evidence of bad faith, promises made and broken, and self-dealing presented *in addition to* the breach of contract, to warrant submission of the fiduciary claim to the jury. This nefarious conduct includes, but is not limited to, the secretive sale to Russo, the false representation regarding the property's rightful ownership, and the easement granted to third parties when the property had been promised to the HOA. This kind of conduct, by those in a fiduciary relationship, has clearly led to breaches in other cases and, though springing from contract in this case, constitutes breaches of fiduciary duty. *See, e.g.*, *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct. App. 2004) ("Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.") (citation omitted). Accordingly, we reverse the court of appeals and reinstate the jury verdict as to this cause of action.

***588** *III. Derivative claims*

[15] The court of appeals dismissed Homeowners' derivative claims, finding the claims failed the requirements of Rule 23, SCRCP. There is a strong argument that the HOA's realignment as a plaintiff renders this issue moot. Nevertheless, because it seems the parties tried this case as derivative claims—as evidenced by Homeowners' opening and closing, arguments at the directed verdict stage, and the jury charge—we address the merits.

[16] **[17]** **[18]** **[19]** **[20]** Shareholders of an organization may bring a derivative suit pursuant to Rule 23, SCRCP, in order to compel an organization to represent its interest through litigation. *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018). Generally, this occurs when the organization's leaders and directors have chosen, for whatever reason, to not act on their own to protect the organization's legal rights. Rule 23(b)(1), SCRCP, mandates:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Id. Accordingly, Rule 23, SCRCP, requires a plaintiff to set forth particularized allegations—a departure from the more liberal pleading requirements of Rule 8, SCRCP. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000). Pursuant to Rule 23, a shareholder plaintiff ****548** must either make a demand on the entity that it pursue a claim or plead with particularity the exceptional circumstances that demonstrate why making a demand would be futile. *Id.* A demand made on a corporation must (1) identify the alleged ***589** wrongdoers, (2) describe the factual basis of the wrongful acts and the harm caused to the corporation, and (3) request remedial relief. *Patterson*, 425 S.C. at 233-34, 821 S.E.2d at 688. In reviewing these requirements, the trial court is neither limited to considering only the allegations put forth in the complaint nor precluded from considering a pre-suit demand letter that was not expressly incorporated by reference into the complaint. *Patterson*, 425 S.C. at 234-35, 821 S.E.2d at 688-89.

Here, in denying Developers' JNOV motion, the trial court stated, "by virtue of the verdict and monetary awards rendered in favor of the [HOA], it is clear that the representative [Homeowners] prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property." Further, the trial court specifically found that the homeowners made repeated demands, and even if they had not, a demand would have been futile since Developers had veto power on the HOA board. *Grant v. Gosnell*, 266 S.C. 372, 376, 223 S.E.2d 413, 415 (1976) ("In evaluating the 'excuse' allegations in a derivative suit, 'Courts have generally been lenient in excusing demand.' ") (quoting *DeHaas v. Empire Petroleum Co.*, 435 F.2d 1223 (10th Cir. 1970)). We find the trial court properly denied JNOV because even if no formal demand was made, any attempt to do so would have been futile in light of the Developers' remaining control of the HOA through its veto power. Indeed, Thomas Graham conceded he had previously stated in his deposition that this veto power was like being on the "Supreme Court."

Moreover, after the HOA was realigned as a plaintiff, utilizing a derivative action makes little sense. The HOA is a party to this litigation and acting on the same side as the purported interested members, regardless of their success or failure to compel suit through a derivative action. Thus, the only purpose of the derivative suit—compelling the HOA to join as a plaintiff—has been accomplished. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) ("A threshold inquiry for any court is a determination of justiciability, *i.e.* whether the litigation presents an active case or controversy."); *see generally Smith v. Sperling,* ***590** 354 U.S. 91, 95, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957) ***590** *Smith v. Sperling,* 354 U.S. 91, 95, 77 S.Ct. 1112, 1 L.Ed.2d 1205 (1957) (finding that realignment of a corporate plaintiff in a derivative action defeated subject matter jurisdiction). Accordingly, the court of appeals' dismissal of the HOA's claims is reversed.

IV. Amalgamation/Single-Business Enterprise Theory

[21] Homeowners contend the court of appeals erred in reversing its original opinion that the trial court did not err in amalgamating the interests of the various entities. Homeowners assert the court of appeals should not have applied the single-business entity test set forth by this Court in *Pertuis*, but even if *Pertuis* applies, amalgamation is appropriate because there is ample evidence of exploitative and evasive conduct resulting in unfairness. Additionally, Homeowners argue Developers waived the question of amalgamation by asking the trial court to decide the issue before sending the case to the jury. Homeowners also contend that even if the parties should not have been amalgamated, Developers cannot establish material prejudice, and therefore it was error for the court of appeals to remand for a new trial.

Conversely, Developers argue they did not waive any challenge to the amalgamation ruling since that is an issue for the trial court to answer in the first instance and may be appealed. As to the merits, Developers contend the court of appeals correctly recognized that amalgamation is the exception, not the rule. Accordingly, Developers argue Homeowners' failure to show a causal connection between any bad faith or improper conduct and the mixing of several different corporate entities precludes treating the various Developers as one. Developers assert the

court of appeals properly concluded the trial court's erroneous amalgamation ruling prejudiced them, and therefore, the new trial remedy was correct.

****549** In *Pertuis*, the Court formally adopted the single business enterprise theory as one method of piercing the corporate veil. *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 655, 817 S.E.2d 273, 280 (2018). There, a restaurant manager who was a minority shareholder filed suit against the majority shareholders for being "squeezed out" of the business, which actually ***591** consisted of three S-corporations. The trial court determined the three entities constituted a "de facto partnership" and amalgamated the interests. In formally adopting the single business enterprise theory, the Court acknowledged the practical reality that businesses often form different corporate structures as a means of shielding shareholders from liability—"there is nothing remotely nefarious in doing that." *Id.* at 655, 817 S.E.2d at 280-81. Accordingly, the Court required two elements before amalgamating different interests into one under the single business enterprise theory: 1) "the various entities' operations are intertwined" and 2) "further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.* The Court placed the burden on the party seeking to pierce the corporate veil and also cautioned that deciding whether to amalgamate various entities should only be done upon "substantial reflection." *Id.* ("As with other methods of piercing the corporate form that have previously been recognized in South Carolina, equitable principles govern the application of the single business enterprise remedy, and this doctrine 'is not to be applied without substantial reflection.' " (citation omitted)). After formally adopting this test, the Court concluded the trial court erred in amalgamating the three entities because there was no evidence of bad faith by the majority shareholders.

While *Pertuis* involved a claim of minority shareholder oppression, this Court applied *Pertuis* in a construction defect case where a homeowner's association sought to amalgamate various entities structured as limited liability companies. *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 435 S.C. 109, 866 S.E.2d 542 (2021). The Court reversed the trial court's "decision" to amalgamate the various LLCs that employed the investors, construction contractors, and sales team for a residential property development. [12] A principal of the construction contractor had knowledge of construction ***592** defects plaguing the project while working with another intertwined sales entity. The various LLCs shared members, and homeowners testified they were confused as to the different roles that each LLC and individual played. In declining to amalgamate the LLCs, the Court noted that it viewed the facts "with the requisite hesitancy to invade the LLC form...." *Id.* at 126, 866 S.E.2d at 551. The Court reviewed the record de novo and concluded that the only evidence of "bad faith, abuse fraud, wrongdoing, or injustice" was the fact that the profits of the developer, who had constructive notice of construction defects, were "entirely dependent" on the sales entity's ability to sell units. *Id.* at 119, 126, 866 S.E.2d at 548, 551 (2021). Accordingly, amalgamation was not appropriate.

In denying Developers' JNOV motion, the trial court concluded that any distinctions between the various entities were blurred, as all were "controlled, managed, and owned by the same individuals, and all collectively functioned as one in the day-to-day operations" of the I'On development, "including promulgating deceptive and misleading representations." Additionally, although the trial court did not have the benefit of the *Pertuis* decision at the time it denied Developers' JNOV motion, some of the court's findings still demonstrate more than that the various entities were simply intertwined. For example, the trial court noted that the recreational easement, which was entered into between the I'On Company, the I'On Club, and the HOA in 2000 was executed on behalf of all three entities by the general manager of the I'On Company. Nevertheless, a subsequent general manager of the I'On company informed the HOA in 2009 that the I'On Company was preparing to deed the property containing ****550** the community dock to the HOA despite the fact that the I'On Club, not the I'On Company, owned the property. The trial court also

recounted how lots CV-5 and CV-6 were transferred between the I'On Company to the I'On Club in 2000 for $5, CV-5 was transferred two years later to the owners of the I'On Company for $5, although there was no evidence that consideration was actually paid to the I'On Club. In its initial opinion, the court of appeals agreed with the trial court's amalgamation ruling but reversed in its substituted opinion, concluding there was no ***593** evidence of "bad faith, abuse, fraud, wrongdoing, or injustice *resulting from* the blurring of the entities' legal distinctions."

We find the court of appeals correctly analyzed this issue initially, and erred in its second opinion by adopting Developers' limited view of the test set forth in *Pertuis*. While it is true that courts should be hesitant to invade the corporate form, here there is more than enough evidence that the creation of various entities furthered Developers' abilities to refrain from doing that which they repeatedly told the HOA and the residents they would do—turn over the disputed amenities to the HOA. As this Court stated in *Pertuis*, "the corporate structure should not shield—fraud, *evasion of existing obligations*, circumvention of statutes, monopolization, criminal conduct, and the like." 423 S.C. 640, 654-55, 817 S.E.2d 273, 280 (quoting *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008)) (emphasis added).

The 1998 Property Report specifically provided that the HOA would own the dock and park once the development was completed. Then, within a year, the plan changed, as Developers decided not to convey the amenities, including the community dock, completely disregarding the 1998 Property Report. Next, Developers attempted to change from outright HOA ownership to mere HOA access by granting the HOA a recreational easement, despite not actually owning the property at the time. In an amended property report in 2000, the community dock was removed from the list of amenities owned by the HOA, thus purporting to accomplish the change from ownership to access without any input or consideration of the interests of the residents and the HOA. Between 2006 and 2007, Developers had yet to turn over the community dock or boat ramp, and openly acknowledged that "[t]he docks are too controversial and taking away even part of this community amenity would cause trouble." Shifting course again, in 2008, Besenfelder wrote, "We are ready to deed this community dock and ramp to the homeowners and wish to comply with regulations."

Ultimately, Developers reversed themselves yet again, and decided to sell the docks to Russo without informing the HOA ***594** because they wanted to "keep the transaction quiet because of all the brew ha hah (sic) and filings." Developers even went a step further when, instead of disclosing the outright sale of the properties to Russo, they told Kinney that Russo was simply taking over management of the lots and amenities. Thus, under our de novo review of this issue, the evidence shows that not only were the various entities intertwined and acting in concert with each other, their conduct demonstrates "bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 280-81. Although the jury elected not to award punitive damages in this case, its verdict did include a finding that the Developers' conduct was "willful and wanton." [13] Accordingly, we find the court of appeals erred in declining to apply the single-business enterprise theory. Because the trial court did not err in amalgamating the different entities, there is no need for a remand. [14]

***595 CONCLUSION**

Based on the forgoing, we: (1) reverse the court of appeals' ruling on the statute of ****551** limitations because the issue as to when Homeowners had adequate notice to begin the limitations clock was properly presented to the jury and resolved by it; (2) find any procedural issues related to the derivative claims either (a) moot as the HOA was realigned as a plaintiff and the trial court explicitly found it adopted its own claims against the Developers, or (b) demand was saved by futility due to the Developer's continuing veto power; (3) hold that Developers breached the fiduciary duties owed to Homeowners; (4) reverse the court of appeals' decision that Developers could not be amalgamated, as there is more than enough evidence of bad faith, abuse, fraud, wrongdoing, or

injustice resulting from the blurring of the entities' legal distinctions; and (5) affirm the court of appeals that the recreational easement was invalid. [15]

AFFIRMED IN PART; REVERSED IN PART.

KITTREDGE, Acting Chief Justice, FEW, JAMES, JJ., and Acting Justice Jan B. Bromell Holmes, concur.

All Citations

439 S.C. 568, 889 S.E.2d 537

Footnotes

1 The 1998 Property Report also warned prospective buyers that "VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED AND OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY SUCH FACILITIES WILL BE AVAILABLE FOR USE BY LOT OWNERS." (all caps in original).

2 Over the years, Developers have equivocated on whether the dock off Lot CV-6 is the "Community Dock" referenced in the 1998 Property Report. Even at trial, Thomas Graham vacillated, initially refusing to concede that the reference to a community dock in the report referred to the main dock at the Creek Club. When Homeowners' counsel reminded him that he had testified to the contrary in his deposition, Graham replied: "I don't remember what I said two years ago." Ultimately, after being impeached with his deposition testimony, Graham admitted that the dock at the Creek Club was intended to be conveyed to the HOA.

3 Around that time, the HOA's board, then chaired by Developers, authorized one board member, Edward Clem, to speak to a real estate attorney about the easement. Clem had concerns that "it was signed by the same person in three different roles, as the manager of the I'On Club; as the president of the I'On homeowners association; and as the general manager of the I'On Company. Sort of shaking hands with yourself, as I could describe it." The attorney drafted a new agreement, but the HOA Board was not satisfied with the changes and did not adopt it.

4 Though not a party to this litigation, Templeton was a homeowner at the time of Russo's offer and had sought legal action to halt the sale of the disputed lots and amenities. Templeton attended HOA meetings, wrote the HOA board president, and generally alleged that the HOA had ownership of the disputed properties pursuant to the 1998 Property Report. She formed an LLC with other homeowners, communicated with the Board of Zoning Appeals and the Town of Mount Pleasant, but eventually settled with Thomas Graham after he threatened a countersuit.

5 Walbeck and Adkins entered a settlement agreement with Russo prior to trial.

6 The jury found for Developers on all of Adkins's claims, on the HOA's and Walbeck's fraud claims, and on Walbeck's claim for a violation of the South Carolina Unfair Trade Practices Act. Although the jury determined Developers' conduct was reckless, willful, and/or wanton, it declined to award punitive damages.

7 We do not address the timeliness of Walbeck's breach of contract claim because Developers now concede that Walbeck's contract to purchase his lot was a sealed instrument and thus has a twenty-year statute of limitations. *See* S.C. Code Ann. § 15-3-520 (2005).

8 Interestingly, the trial judge specifically mentioned during an *in camera* colloquy with the attorneys that the date of the transfer to Russo was what triggered the statute of limitations. As she stated: "Because that's when it became very clear to the landowners in I'On that that parcel, CV-6, couldn't be given to them, regardless of any representations that the jury may find have been made, because it was gone then, and gone to a third-party."

9 However, as previously noted, the I'On Club did not have title to the properties when it executed the easement, instead receiving them from the I'On Company for the nominal fee of $5.00 in August of 2000. Additionally, while the easement was denominated "permanent[,]" subsequent language indicated that it would expire after thirty years.

10 Thomas Graham forwarded this email to Bruce Kinney (then-president of the HOA), Russo, and Besenfelder with the message, "I think this explains why the community dock was not deeded to the [HOA.]"

11 Generally, when a Developer turns over control of the HOA to its members by relinquishing its superior voting power, the fiduciary relationship is extinguished; the developer no longer has control over that which an HOA has an interest. *See* *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding that superior voting power by developers created a fiduciary relationship with condo-owners). However, those duties stem from developer control of the entity, the ongoing nature of construction, and the transfer of common areas. *See* *Concerned Dunes West Residents, Inc. v. Georgia–Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002) ("[T]he developer has a fiduciary duty to the POA to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, *at the time of transfer*, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair.") (emphasis added). Here, Developers maintained consistent veto authority over the board, continued construction in I'On until past the 2009 conveyance, and delayed the transfer of the disputed property, thereby continuing their fiduciary relationship with the HOA. These facts counteract any concerns that the fiduciary relationship was extinguished at the time of Developers' transfer to Russo.

12 As the Court noted, the trial court never reached the merits of the claim, instead simply denying a directed verdict motion on the issue but not revisiting it. Nevertheless, because the question of amalgamation lies in equity and the parties, as well as the court of appeals, all treated the issue as being decided on the merits, the Court reached the matter. *Stoneledge*, 435 S.C. at 120, 866 S.E.2d at 548.

13 Moreover, we note that following the verdict, the trial court issued an order—from which the Developers did not appeal—holding them in contempt for their destruction of evidence. The trial court pointed out specific examples of documents that were deleted, and noted that the forensic report revealed that "Besenfelder deleted approximately *51,527 files and folders*[.]" The trial court ultimately awarded over $23,000 in sanctions.

14 In Developers' cross-petition for certiorari, they assert the court of appeals erred in relying on the two-issue rule in upholding the trial court's finding that the 2000 recreational easement was invalid. As to the merits, Developers contend the after-acquired title doctrine applies and that the easement was perpetual rather than limited to 30 years. While we agree the two-issue rule applies and affirm the court of appeals on this issue, we do so for a different reason. Regardless of whether the lack of an arms-length transaction constituted a separate ground in the trial court's order, the court specifically noted, "Additionally, the Doctrine of Unclean Hands precludes Developers from

relying upon equitable principles such as the After-Acquired Title Doctrine because, in order to recover in equity, one must act equitably." Developers have not addressed this equitable basis supporting the trial court's decision, so it is the law of the case. *See* *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the [two-issue] rule, [when] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."). In any event, we agree with the trial court that because Developers acted inequitably, we do not need to reach whether the after-acquired title doctrine could apply in this case.

15 Before the circuit court, Walbeck claimed attorney's fees under his statutory ILSA claim. *See* 15 U.S.C.A. § 1709(a)-(c) (2012) ("The amount recoverable ... may include, in addition to matters specified [in this section] interest, court costs, and reasonable amounts for attorneys' fees ...."). The trial court found both that Walbeck could recover attorney's fees under ILSA and that his claim for more than $1 million was unreasonable, reducing the fee by over 75%. *See Farmers & Merchants Bank v. Fargnoli*, 274 S.C. 23, 26, 260 S.E.2d 185, 187 (1979) ("The law requires, however, that the award must be reasonable."). Though Developers challenged this claim before the court of appeals, its ultimate finding that the ILSA claim was barred was dispositive. Rather than remanding to the court of appeals, because we agree with the trial court's analysis on this issue and we reinstate the jury's verdict as to the timeliness of Walbeck's claims, the attorney's fees award of $225,500 to Walbeck is likewise reinstated.

338 F.R.D. 275
United States District Court,
M.D. Georgia, Albany Division.

Nelson GAMACHE, et al., Plaintiffs,
v.
John F. HOGUE, Jr., et al., Defendants.

CASE NO.: 1:19-CV-21 (LAG)
|
Signed March 2, 2021

Synopsis

Background: Former employees brought putative class action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging violations of Employee Retirement Income Security Act (ERISA) in connection with employee stock ownership plan (ESOP). Employees moved for class certification.

Holdings: The District Court, Leslie A. Gardner, J., held that:

[1] employee possessed statutory standing to bring action;

[2] employees possessed Article III standing to bring action;

[3] numerosity requirement was satisfied for certification of class;

[4] commonality requirement was satisfied for certification of class;

[5] typicality requirement was satisfied for certification of class;

[6] adequacy requirement was satisfied for certification of class;

[7] no substantial conflicts of interests existed between employees and class, as required for certification of class;

[8] risk of inconsistent or varying adjudications warranted certification of class.

Motion granted.

Procedural Posture(s): Request or Application for Class Certification.

West Headnotes (51)

[1] **Federal Civil Procedure** Evidence; pleadings and supplementary material

Plaintiffs seeking class certification bear burden of establishing that requirements for certification have been met. Fed. R. Civ. P. 23.

[2] **Federal Civil Procedure** Class Actions

Federal Civil Procedure In general; certification in general

Class actions are exceptions to usual rule that litigation is conducted by and on behalf of individual named parties only; therefore, the court must conduct a rigorous analysis to determine whether prerequisites for class certification have been satisfied under Federal Rules of Civil Procedure. Fed. R. Civ. P. 23.

[3] **Federal Civil Procedure** Consideration of merits

While courts may not conduct free-ranging merits inquiries at the class certification stage, such questions may be considered to the extent, but only to the extent, that they are relevant to the class certification analysis under Federal Rules of Civil Procedure. Fed. R. Civ. P. 23.

[4] **Federal Civil Procedure** Discretion of court

Once the elements for class certification are met under Federal Rules of Civil Procedure, a court does not have discretion to deny certification. Fed. R. Civ. P. 23.

[5] **Federal Civil Procedure** Representation of class; typicality; standing in general

An analysis of class certification must begin with issue of Article III standing. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 23.

[6] **Federal Civil Procedure** Representation of class; typicality; standing in general

In order to satisfy Article III standing and Federal Rules of Civil Procedure governing class certification, class representatives must be part of the class and possess the same interest and suffer the same injury as the class members. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 23.

[7] **Federal Civil Procedure** In general; injury or interest

Federal Civil Procedure Causation; redressability

For Article III standing, a plaintiff must show he or she: (1) suffered an injury in fact, that is, an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) causation, that is, a traceable connection between the alleged injury in fact and the purported misconduct; and (3) redressability. U.S. Const. art. 3, § 2, cl. 1.

[8] **Labor and Employment** Who Is an Employee or Participant

ERISA plan participant may include former employee with colorable, non-frivolous claim for benefits. Employee Retirement Income Security Act of 1974 §§ 3, 502, 29 U.S.C.A. §§ 1002(7), 1132(a)(2).

[9] **Federal Civil Procedure** Employees

Labor and Employment Who Is an Employee or Participant

Labor and Employment Parties in general; standing

Former employee possessed colorable claim for benefits arising from distribution of his benefits under employee stock ownership plan and, thus, was "plan participant" who possessed statutory standing to bring putative class action against his former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging employer engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); if he prevailed in action, ESOP would recover amount that would have been in ESOP absent employer's alleged ERISA violations and those amounts would be distributed among participants, including employee. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b).

More cases on this issue

[10] **Labor and Employment** Defined contribution plans

Labor and Employment Prudent person standard

A participant's benefits in a defined contribution plan, like an employee stock ownership plan (ESOP), include the value of his account unencumbered by any fiduciary impropriety; put differently, the benefit in a defined contribution pension plan is whatever would have been there had the plan honored the employee's entitlement, which includes an entitlement to prudent management.

[11] **Federal Civil Procedure** Employees

Labor and Employment Parties in general; standing

Former employees possessed requisite injuries in fact for Article III standing to bring putative class action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging employer engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); employees alleged the employee stock ownership plan's (ESOP) ownership stake declined as a result of stock grants to employer's executives in refinancing, which also diluted the value of the stock held by ESOP and value of participants' interests in the stock. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b).

More cases on this issue

[12] **Federal Civil Procedure** Representation of class; typicality; standing in general

A claim cannot be asserted on behalf of a class, in order to satisfy Article III's standing requirements, unless one named plaintiff has suffered the injury that gives rise to that claim. U.S. Const. art. 3, § 2, cl. 1; Fed. R. Civ. P. 23.

[13] **Labor and Employment** Parties in general; standing

An ERISA plaintiff is not required to allege his or her account balance declined or that he or she was not paid to satisfy the personal injury requirement for Article III standing. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 §§ 404, 405, 406, 29 U.S.C.A. §§ 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b).

[14] **Declaratory Judgment** Proper Parties

A plaintiff has Article III standing to seek declaratory or injunctive relief only when he or she alleges facts from which it appears there is a substantial likelihood he or she will suffer injury in the future. U.S. Const. art. 3, § 2, cl. 1.

[15] **Federal Courts** Case or Controversy Requirement

Injunction Persons entitled to apply; standing

Past exposure to illegal conduct does not in itself show a present case or controversy allowing Article III standing to seek injunctive relief if unaccompanied by any continuing, present adverse effects. U.S. Const. art. 3, § 2, cl. 1.

[16] **Labor and Employment** Parties in general; standing

ERISA participants may have Article III standing to obtain injunctive relief related to ERISA's fiduciary duty requirements without a showing of individual harm to the participant. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 §§ 404, 405, 406, 29 U.S.C.A. §§ 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b).

[17] **Federal Civil Procedure** Employees

Labor and Employment Parties in general; standing

Former employee, a participant in employee stock ownership plan (ESOP), possessed Article III standing to seek prospective injunctive relief in putative class action against former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging employer engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); employee alleged employer's executives, as fiduciaries, engaged in self-dealing and continued to be paid dividends that further harmed the ESOP since refinancing. U.S. Const. art. 3, § 2, cl. 1; Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b).

More cases on this issue

[18] **Federal Civil Procedure** Identification of class; subclasses

A plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable. Fed. R. Civ. P. 23.

[19] **Federal Civil Procedure** Identification of class; subclasses

A proposed class is "ascertainable" when its definition contains "objective criteria that allow for class members to be identified in an administratively feasible way." Fed. R. Civ. P. 23.

[20] **Federal Civil Procedure** Identification of class; subclasses

Identifying potential class members is administratively feasible when it is a manageable process that does not require much, if any, individual inquiry. Fed. R. Civ. P. 23.

[21] **Federal Civil Procedure** Identification of class; subclasses

A plaintiff may rely on business records to establish class membership if the records are in fact useful for identification purposes, and that identification will be administratively feasible. Fed. R. Civ. P. 23.

[22] **Federal Civil Procedure** Impracticability of joining all members of class; numerosity

Courts consider several factors in determining whether joinder of all class members is practicable, as required to satisfy numerosity requirement for class certification, including size of class, nature of action, size of each member's claim, and geographical dispersion. Fed. R. Civ. P. 23(a)(1).

More cases on this issue

[23] **Federal Civil Procedure** Impracticability of joining all members of class; numerosity

While there is no fixed numerosity requirement for class certification, generally, less than 21 persons is inadequate, but more than 40 is adequate, with numbers between varying according to the other factors. Fed. R. Civ. P. 23(a)(1).

More cases on this issue

[24] **Federal Civil Procedure** Employees

Numerosity requirement was satisfied for certification of class in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); employees alleged the ESOP had 327 participants throughout the proposed class period, including 166 active participants and 161 former employees entitled to future benefits. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b); Fed. R. Civ. P. 23(a)(1).

More cases on this issue

[25] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

To satisfy commonality requirement for class certification, the claims must depend on a common contention of such a nature that it is capable of classwide resolution, which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. Fed. R. Civ. P. 23(a)(2).

[26] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

For purposes of commonality requirement for class certification, even a single common question will do. Fed. R. Civ. P. 23(a)(2).

[27] **Federal Civil Procedure** Common interest in subject matter, questions and relief; damages issues

An alleged policy or practice of treating an entire class unlawfully satisfies the commonality requirement for class certification. Fed. R. Civ. P. 23(a)(2).

[28] **Federal Civil Procedure** Representation of class; typicality; standing in general

Federal Civil Procedure Common interest in subject matter, questions and relief; damages issues

The commonality and typicality requirements for class certification overlap in many ways; however, the requirements are separate inquiries, even though proof of each also tends to merge. Fed. R. Civ. P. 23(a)(2), (a)(3).

More cases on this issue

[29] **Federal Civil Procedure** Employees

Commonality requirement was satisfied for certification of class in former employees' action against their former

employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA), despite contention that some of employees' claims might be time-barred; issue of whether employees had actual knowledge of meetings and disclosures through which executives acquired stock through refinancing or transaction involving ESOP was capable of class-wide resolution, alleviating any need for individualized defenses. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 413, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b), 1113; Fed. R. Civ. P. 23(a)(2).

More cases on this issue

[30] Federal Civil Procedure Representation of class; typicality; standing in general

While related to commonality requirement for class certification, typicality focuses on individual characteristics of named plaintiff in relation to class. Fed. R. Civ. P. 23(a)(2), (a)(3).

More cases on this issue

[31] Federal Civil Procedure Representation of class; typicality; standing in general

Plaintiff's claim is "typical," as required for class certification, if there is nexus between class representative's claims or defenses and common questions of fact or law which unite class. Fed. R. Civ. P. 23(a)(3).

More cases on this issue

[32] Federal Civil Procedure Representation of class; typicality; standing in general

Plaintiff's claims or defenses need not be identical to proposed class in order to satisfy typicality requirement for class certification, and minor variations will not render plaintiff's claims atypical; instead, plaintiff satisfies typicality requirement by showing that claims or defenses arise from same event or pattern or practice and are based on same legal theory. Fed. R. Civ. P. 23(a)(3).

More cases on this issue

[33] Federal Civil Procedure Employees

Typicality requirement was satisfied for certification of class in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); claims were based on same events and legal theories, proof of alleged misconduct and alleged harm would be same for each class member, rather than turning on individual circumstances, and whether meetings and statements at issue were sufficient to have provided "actual knowledge" had potential of being resolved in manner that eliminated it as defense against class as a whole. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b); Fed. R. Civ. P. 23(a)(3).

More cases on this issue

[34] Federal Civil Procedure Representation of class; typicality; standing in general

The fairness and adequacy requirement for class certification ensures the legal rights of absent class members are protected. Fed. R. Civ. P. 23(a)(4).

[35] Federal Civil Procedure Representation of class; typicality; standing in general

In order to demonstrate plaintiffs will adequately protect class interests, as required for class certification, plaintiffs must show: (1) they and their counsel will adequately prosecute the action; and (2) no substantial conflicts of interest exist between the representatives and the class. Fed. R. Civ. P. 23(a)(4).

[36] Federal Civil Procedure Representation of class; typicality; standing in general

Whether the named plaintiffs will prosecute the action with sufficient vigor, as required to satisfy fairness and adequacy requirement for class certification, generally turns on whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation. Fed. R. Civ. P. 23(a)(4).

[37] Federal Civil Procedure Representation of class; typicality; standing in general

While potential class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives, adequacy, for class certification purposes, generally does not require that named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor legal claims of class. Fed. R. Civ. P. 23(a)(4).

[38] Federal Civil Procedure Representation of class; typicality; standing in general

Finding of inadequacy of representation, thereby precluding class certification, generally requires plaintiffs to have abdicated their role in case beyond that of furnishing their names as plaintiffs, such that attorneys, in essence, are class representatives. Fed. R. Civ. P. 23(a)(4).

[39] Federal Civil Procedure Representation of class; typicality; standing in general

Class certification will be denied, on basis that plaintiffs will not fairly or adequately represent class, when plaintiffs display so little knowledge of and involvement in class action that they would be unable or unwilling to protect interests of class against possibly competing interests of attorneys. Fed. R. Civ. P. 23(a)(4).

[40] Federal Civil Procedure Employees

Adequacy requirement was satisfied for certification of class in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); employees articulated the basis for their claims, submitted evidence

of adequacy and had not contradicted the core allegations in the complaint, and their sworn submissions, involvement in discovery and testimony indicating knowledge of claims showed they had not abdicated their role in case beyond that of furnishing their names as plaintiffs. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b); Fed. R. Civ. P. 23(a)(4).

More cases on this issue

[41] Federal Civil Procedure Representation of class; typicality; standing in general

Class representatives are required to possess the personal characteristics and integrity necessary to fulfill the fiduciary role of class representative. Fed. R. Civ. P. 23(a).

[42] Federal Civil Procedure Representation of class; typicality; standing in general

It is within court's sound discretion to deny class certification if there is strong indication that named plaintiff's testimony might not be credible. Fed. R. Civ. P. 23(a).

[43] Federal Civil Procedure Representation of class; typicality; standing in general

Court must be wary of defendant's efforts to defeat representation of class on grounds of inadequacy when effect may be to eliminate any class representation. Fed. R. Civ. P. 23(a)(4).

[44] Federal Civil Procedure Representation of class; typicality; standing in general

The existence of minor conflicts of interests alone will not defeat adequacy of representation, as required for class certification; adequacy is only defeated when there is a fundamental conflict going to the specific issues in controversy. Fed. R. Civ. P. 23(a)(4).

[45] Federal Civil Procedure Representation of class; typicality; standing in general

A "fundamental conflict of interest" exists, as would defeat class certification, where some party members claim to have been harmed by the same conduct that benefited other members of the class; conflict, however, is not fundamental when all class members share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants. Fed. R. Civ. P. 23(a)(4).

[46] Federal Civil Procedure Representation of class; typicality; standing in general

Adequacy of representation, as required for class certification, is not defeated by mere speculative or hypothetical conflicts of interests. Fed. R. Civ. P. 23(a)(4).

[47] Federal Civil Procedure Representation of class; typicality; standing in general

Courts may disqualify a class representative if he or she is so unduly antagonistic as to render him inadequate as a class representative. Fed. R. Civ. P. 23(a)(4).

[48] **Federal Civil Procedure** Employees

No substantial conflicts of interests existed between representatives and class, as required for certification of class in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA), despite contention that one of class representatives possessed animosity toward executives; proposed class explicitly excluded executives, committee and their family members, and parties enjoyed a good relationship until representative learned of executive's alleged breach of fiduciary duty. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b); Fed. R. Civ. P. 23(a)(4).

More cases on this issue

[49] **Federal Civil Procedure** Representation of class; typicality; standing in general

Antagonism only renders class representative inadequate when plaintiff has ulterior motives unrelated to instant litigation. Fed. R. Civ. P. 23(a)(4).

[50] **Federal Civil Procedure** Employees

Risk of inconsistent or varying adjudications warranted certification of class in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA); employees alleged executives and committee breached duties based on management of ESOP, alleged breach affected all class members, and adjudicating claims among 327 participants individually ran the risk of inconsistent results that could place incompatible standards of conduct on executives and committee. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)(D), 1106(b); Fed. R. Civ. P. 23(b)(1)(A).

More cases on this issue

[51] **Federal Civil Procedure** Employees

Certification of class was appropriate in former employees' action against their former employer's executives and administrative committee of employer's employee stock ownership plan (ESOP), alleging defendants engaged in prohibited transactions and breached fiduciary duties in violation of Employee Retirement Income Security Act (ERISA), as individual adjudications would be dispositive of other members' interests not parties to individual adjudications; individual differences among class members would not destroy certification, and employees had not rejected gravamen of class claims, as they sought recovery on behalf of entire ESOP to correct and prevent alleged breach of fiduciary duties. Employee Retirement Income Security Act of 1974 §§ 3, 201, 301, 404, 405, 406, 29 U.S.C.A. §§ 1002(7), 1051, 1081, 1104(a)(1), 1105, 1106(a)(1)

(D), 1106(b); Fed. R. Civ. P. 23(b)(1)(B).

More cases on this issue

Attorneys and Law Firms

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Joelle C. Sharman, Atlanta, GA, Robert E. Lesser, Covington, GA, for Defendants John F. Hogue, Jr., Graham Thompson, Technical Associates of Georgia Inc. Employee Stock Ownership Plan, John Does 1-20, Administrative Committee of the Technical Associates of Georgia, Inc. Employee Stock Ownership Plan.

Joelle C. Sharman, Atlanta, GA, for Defendants James Urbach, Glenn Kirbo, Randy Hall.

ORDER

LESLIE A. GARDNER, JUDGE

Before the Court is Plaintiffs' Motion for Class Certification (Doc. 51) against Defendants. For the reasons stated below, Plaintiffs' Motion is **GRANTED**.

BACKGROUND

On January 29, 2019, Plaintiffs Nelson Gamache and Edward Nofi filed this putative class action pursuant to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, against Defendants John F. Hogue, Jr., Graham Thompson, James Urbach, Glenn Kirbo, Randy Hall, and the Administrative Committee of the Technical Associates of Georgia, Inc. Employee Stock Ownership Plan. (Doc. 1). Plaintiffs amended their Complaint on April 19, 2019. (Doc. 30). Plaintiffs, former employees of the Technical Associates of Georgia., Inc. (TAG) and participants in the TAG Employee Stock Ownership Program (ESOP), allege that Defendants engaged in prohibited transactions and breached fiduciary duties in violation of ***282** 29 U.S.C. §§ 1104(a)(1), 1105, 1106(a)(1)(D), and 1106(b). (*Id.* at 26–33).

Plaintiffs seek to certify the following class:

> Participants in the Technical Associates ESOP on or after the date stock was issued to Defendants Hogue and Thompson in connection with the 2011 Refinancing who vested under the terms of the Plan (or ERISA) and those participants beneficiaries.
>
> Excluded from the Class are Defendants and their immediate families, any other fiduciary of the Plan and his or her immediate family; the officers and directors of Technical Associates and their immediate family, and legal representatives, successors, and assigns of any such excluded persons.

(Doc. 51 at 9). Defendants oppose class certification under two general arguments. First, Defendants argue that Plaintiffs lack standing to represent the proposed class. Second, Defendants assert that Plaintiffs have failed to meet the requirements of Rule 23, which provides the criteria for class certification.

On July 29, 2020, Plaintiffs filed the instant Motion for Class Certification. (*See generally id.*). Defendants filed an unopposed Motion for Extension of Time (Doc. 52) to respond, which the Court granted (Doc. 53), giving Defendants until September 11, 2020 to file their response. Defendants timely filed a Response on September 10, 2020. (Doc. 56). Plaintiffs requested an extension to file a reply (Doc. 58), which the Clerk of Court granted (*see* Docket), giving Plaintiffs until October 9, 2020 to file their reply. Plaintiffs timely filed a Reply on October 9, 2020. (Doc. 63). Plaintiffs' Motion is now ripe for review. *See* M.D. Ga. L.R. 7.3.1(A).

LEGAL STANDARD

[1] **[2]** **[3]** **[4]** A case may be certified as a class action only if it satisfies all four requirements of Federal Rule of Civil Procedure 23(a) and at

least one of the alternative requirements of Rule 23(b). *See* Fed. R. Civ. P. 23; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613–14, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Because Plaintiffs seek class certification, they bear the burden of establishing that these requirements have been met. Under Rule 23(a), Plaintiffs must show that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These four prerequisites are commonly referred to as "numerosity, commonality, typicality, and adequacy." *Piazza v. EBSCO Indus., Inc.*, 273 F. 3d 1341, 1346 (11th Cir. 2001) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). If the requirements under Rule 23(a) are met, Plaintiffs must establish at least one of the requirements in Rule 23(b). Under Rule 23(b), Plaintiffs must show:

> (1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications ... or (B) adjudications ... [that] would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods ....

Fed. R. Civ. P. 23(b). Class actions are "exception[s] to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Thus, the Court must conduct a "rigorous analysis" to determine ***283** whether the prerequisites of Rule 23 have been satisfied. *Id.* at 350–51, 131 S.Ct. 2541. This analysis will often "entail some overlap with the merits of the plaintiff's underlying claim," such that the Court may consider merits issues that also bear directly on class certification. *Id.* at 351, 131 S.Ct. 2541. While courts may not conduct "free-ranging merits inquiries at the certification stage," such questions may be considered "to the extent —but only to the extent—that they are relevant" to the Rule 23 analysis. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 466, 133 S.Ct. 1184, 185 L.Ed.2d 308 (2013). Once the elements of Rule 23 are met, the Court does not have discretion to deny certification of a class. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398, 130 S.Ct. 1431, 176 L.Ed.2d 311 (2010).

DISCUSSION

As discussed below, Plaintiffs have standing to bring this suit and they meet the requirements for class certification.

I. Standing

[5] **[6]** "[A]ny analysis of class certification must begin with the issue of standing...." *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987). And Rule 23 mandates that class representatives "be part of the class and 'possess the same interest and suffer the same injury' as the class members." *E. Tex.*

Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977) (citation omitted). Thus, the Court starts its analysis with the issue of standing.

[7] Under ERISA, plaintiffs must have both statutory and constitutional standing. *See* *In re ING Groep, N.V. ERISA Litig.*, 749 F. Supp. 2d 1338, 1345 (N.D. Ga. 2010). A plaintiff has statutory standing by being a plan participant, beneficiary, fiduciary, or the Secretary of Labor. *See* 29 U.S.C. § 1132(a)(2). For constitutional standing, a plaintiff must show that he: (1) suffered an injury in fact (i.e., "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"); (2) causation (i.e., a traceable connection between the alleged injury in fact and the purported misconduct), and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Defendants challenge Plaintiffs' standing on two grounds: (1) that Plaintiff Nofi lacks statutory standing, and (2) that Plaintiffs Nofi and Gamache lack constitutional standing. As explained below, Plaintiffs have both statutory and constitutional standing.

[8] First, Defendants argue that Plaintiff Nofi lacks statutory standing because—as a former employee—he is not a "participant" in the ESOP. (Doc. 56 at 8–9). Defendants also assert that Plaintiff Nofi does not have a colorable claim for benefits because he "was retired from TAG, had no expectation of returning to work there, and had received a full distribution of his benefits under the ESOP." (*Id.* at 9). ERISA defines a "participant" as "any employee or *former* employee of an employer, or any member or *former* member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7) (emphasis added). And a plan participant "may include a former employee with a colorable claim for benefits." *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 256 n.6, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008) (citation omitted). A colorable claim is merely one that is not frivolous. *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 790–91 (7th Cir. 1996). The Court previously denied Defendants' Motion to Dismiss, finding that Plaintiffs have stated claims upon which relief can be granted. (*See* Doc. 43). Thus, the claims as presented in the Complaint are not frivolous.

[9] **[10]** The question is, therefore, whether Plaintiff Nofi, independently, has stated a non-frivolous claim. A participant's benefits in a defined contribution plan, like an ESOP, includes "the value of his account unencumbered by any fiduciary impropriety." *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1223 (11th Cir. 2008) (quoting *Graden v. Conexant Sys. Inc.*, 496 F.3d 291, 297 (3d Cir. 2007)). Put differently, "the benefit in a defined contribution pension plan is ... *whatever would have been there had the plan honored the employee's entitlement*, which includes an entitlement ***284** to prudent management." *Id.* at 1222–23 (alteration in original) (quoting *Harzewski v. Guidant Corp.*, 489 F.3d 799, 804–07 (7th Cir. 2007)); *see also* *Larue*, 552 U.S. at 256 n.6, 128 S.Ct. 1020 (stating that a former employee who withdrew all his benefit funds was still a participant); *Lanfear*, 536 F.3d at 1223 (finding that former employees who had received benefits payments still had statutory standing). Defendants' reliance on *Nechis v. Oxford Health Plans, Inc.*, 421 F.3d 96 (2d Cir. 2005), is unpersuasive for two reasons. First, the Second Circuit standard required evaluation of the participant status at the time the suit was filed, whereas the Eleventh Circuit has adopted a standard which evaluates participant status at the time of the violation. *See* *Piazza*, 273 F.3d at 1350–51 (holding that a plaintiff could be a class representative in an ERISA claim for breach of fiduciary duty for the period that he was a participant of the defendant's plan, even though he was no longer a participant when he filed the complaint). Second, unlike the welfare plan in *Nechis*, here, ESOP is a pension plan subject to ERISA's vesting and participation requirements. *See* *Alday v. Container Corp. of Am.*, 906 F.2d 660, 663 (11th Cir. 1990) (citing 29 U.S.C. §§ 1051, 1081). If Plaintiffs prevail, the ESOP will recover the amount that would have been in the ESOP absent Defendants' alleged ERISA violations and those amounts will be distributed among the participants—including Plaintiff

Nofi. Therefore, Plaintiff Nofi has statutory standing because he has a colorable claim for benefits.

[11] **[12]** **[13]** Second, Defendants argue that Plaintiffs lack constitutional standing because "they have not alleged nor have offered evidence that they failed to receive all benefits under the ESOP to which they are entitled, or that they personally suffered an injury." (Doc. 56 at 10). The Court disagrees. "[A] claim cannot be asserted on behalf of a class unless one named plaintiff has suffered the injury that gives rise to that claim." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (citation omitted). Here, both Plaintiffs have asserted that they personally suffered an injury. The Complaint alleges that the ESOP's ownership stake declined as a result of the "stock grants" to "Hogue and Thompson in the 2011 Refinancing," which also diluted the value of the stock held by the ESOP and the "value of participants' interests" in the stock. (Doc. 30 ¶¶ 51–53). An ERISA plaintiff is not required to allege that his account balance declined or that he was not paid to satisfy the personal injury requirement. *See* *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 365–66 (4th Cir. 2015) ("[A] financial loss is not a prerequisite for Article III standing to bring a disgorgement claim under ERISA." (alterations and citations omitted)). Unlike the plaintiffs in *Johnson v. Delta Air Lines, Inc.* and *Fuller v. Suntrust Banks, Inc.*—cases upon which Defendants seek to rely—who the court found lacked standing because they did not allege that they were invested in the funds at issue. *Johnson v. Delta Air Lines, Inc.*, No. 1:17-cv-2608-TCB, 2017 WL 10378320, at *2 (N.D. Ga. Dec. 12, 2017); *Fuller v. Suntrust Banks, Inc.*, No. 1:11-CV-784-ODE, 2012 WL 12869318, at *3 (N.D. Ga. Oct. 30, 2012) (finding that Plaintiff did not have constitutional standing because she was "not an investor in the Plan"). Plaintiffs, here, held stock in the ESOP—the same stock that was allegedly harmed by Defendants' actions. (Doc. 30 ¶¶ 2, 51–53, 107). Thus, Plaintiffs have satisfied the injury in fact requirement for Article III standing.

[14] **[15]** **[16]** Further, Defendants argue that the named Plaintiffs lack constitutional standing to seek injunctive relief because they failed to allege a risk of future harm. (Doc. 56 at 10). "A plaintiff has standing to seek declaratory or injunctive relief only when he allege[s] facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1340 (11th Cir. 2000) (citation and internal marks omitted). And "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). But, ERISA "participant[s] may have Article III standing to obtain injunctive relief related to ERISA's ... fiduciary duty requirements without a showing of individual ***285** harm to the participant." *Cent. States Se. and Sw. Areas Health and Welfare Fund v. Merck-Medco Managed Care, LLC*, 433 F.3d 181, 199 (2d Cir. 2005). Moreover, courts have removed fiduciaries when they have engaged in past wrongdoing. *See, e.g.,* *Perelman v. Perelman*, No. 10-5622, 2012 WL 3704783, at *6–7 (E.D. Pa. Aug 28, 2012) (finding participant had Article III standing for injunctive relief based on trustees' past violations of their fiduciary duties), *aff'd*, 793 F.3d 368 (3d Cir. 2015). "This broad view of participant standing under ERISA is further supported by ERISA's goal of deterring fiduciary misdeeds." *Fin. Inst. Ret. Fund v. Off. of Thrift Supervision*, 964 F.2d 142, 149 (2d Cir. 1992) (citation omitted). Under this broad view, Plaintiff Gamache has constitutional standing.

[17] The cases cited by Defendants do not alter this conclusion as they clearly are distinguishable. (*See* Doc. 56 at 10 (citing *Bowen*, 233 F.3d 1331 and *Atkins v. Greene County Hosp. Bd.*, No. 7:16-cv-00567-LSC, 2017 WL 6383183 (N.D. Ala. Dec 14, 2017))). Unlike the plaintiff in *Bowen*, Plaintiffs in this case are not faced with a mere possibility of an enforcement provision; and unlike the plaintiff in *Atkins*, at least one Plaintiff has not withdrawn from the ESOP. Furthermore, neither has alleged that he has received all payments in full absent allegations that the fiduciary breaches would affect the amounts he would receive. *See* *Bowen*, 233 F.3d at 1340; *Atkins*,

2017 WL 6383183, at *2–4; *see also* *Prado-Steiman*, 221 F.3d at 1279 ("[A]t least one named class representative [must have] Article III standing to raise each class subclaim."). Instead, the Complaint alleges that Defendants—as fiduciaries—engaged in self-dealing and *continue* to be paid dividends that further harm the ESOP since the 2011 Refinancing. (Doc. 30 ¶¶ 59–60). Thus, Plaintiff Gamache, a current participant in the ESOP, has constitutional standing to seek prospective relief because present adverse effects exist.

II. Class Certification under Rule 23

Plaintiffs have Article III standing and, as explained below, they have also carried their burden under Rule 23.

A. Ascertainability

[18] [19] [20] [21] While not expressly included in Rule 23, "a plaintiff seeking to represent a proposed class must establish that the proposed class is adequately defined and clearly ascertainable." *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (internal marks and citations omitted). Therefore, the Court begins its Rule 23 analysis with the issue of ascertainability. A class is ascertainable when its definition contains "objective criteria that allow for class members to be identified in an administratively feasible way." *Karhu v. Vital Pharms., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) (citation omitted). "Identifying class members is administratively feasible when it is a 'manageable process that does not require much, if any, individual inquiry.' " *Id.* (quoting *Bussey v. Macon Cnty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014)). A plaintiff may rely on business records to establish class membership if "the records are in fact useful for identification purposes, and that identification will be administratively feasible." *Id.* at 948 (citation omitted).

Defendants do not argue that the class is not ascertainable. For the record, the Court notes that Plaintiffs' proposed class is defined as "Participants in the [TAG] ESOP on or after the date the stock was issued to Defendants Hogue and Thompson in connection with the 2011 Refinancing who vested under the terms of the Plan (or ERISA) and those participants' beneficiaries." (Doc. 51 at 9). Plaintiffs' proposed class explicitly excludes Defendants and their immediate families. (*Id.*). Moreover, the "participants" are readily identifiable given that ERISA requires Defendants to maintain records of the ESOP's participants and beneficiaries via form 5500s. *See* 29 U.S.C. §§ 1027, 1059. As these criteria are clearly defined and require little to no individual inquiry, and as the identification of the proposed class members is administratively feasible via the form 5500s, the proposed class is ascertainable.

B. Rule 23(a)

The Court now turns to whether Plaintiffs have established numerosity, commonality, typicality, and adequacy under Rule 23(a).

*286 1. Numerosity

[22] [23] Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Courts consider several factors in determining whether joinder is practicable, including the size of the class, the nature of the action, the size of each member's claim, and their geographical dispersion. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1038 (5th Cir. 1981). "[W]hile there is no fixed numerosity rule, 'generally less than twenty-one [persons] is inadequate, [but] more than forty [is] adequate, with numbers between varying according to [the] other factors.' " *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (citation omitted).

[24] Defendants do not argue that Plaintiffs have not met the numerosity requirement. (Doc. 56 at 7). Plaintiffs allege that the ESOP has 327 participants throughout the proposed class period, including 166 active participants and 161 former employees entitled to future benefits as of December 31, 2018. (Doc. 51

at 15; Doc. 51-9 at 3). This number is sufficient to establish numerosity.

2. Commonality

[25] **[26]** **[27]** Rule 23(a)(2) requires plaintiffs to show that "there are questions of law or fact that are common to the class." Fed. R. Civ. P. 23(a)(2). To satisfy commonality, the claims must depend on a common contention "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Carriuolo v. Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) (quoting *Dukes*, 564 U.S. at 350, 131 S.Ct. 2541). "[F]or purposes of Rule 23(a)(2) even a single common question will do." *Id.* (alteration in original) (quoting *Dukes*, 564 U.S. at 359, 131 S.Ct. 2541). This is a "low hurdle" to overcome. *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1356 (11th Cir. 2009). Even "[a]n alleged policy or practice of treating an entire class unlawfully satisfies the commonality requirement." *Herman v. Seaworld Parks & Ent., Inc.*, 320 F.R.D. 271, 290 (M.D. Fla. 2017) (citing *Cox*, 784 F.2d at 1557–58). Plaintiffs' claims present a number of questions common to the proposed class including: (1) whether Defendants breached any fiduciary duties, (2) whether the ESOP suffered any losses, (3) how to calculate those losses (if any), and (4) what relief is appropriate. These questions are capable of class-wide resolution. *See, e.g., Henderson v. Emory University*, No. 1:16-CV-2920-CAP, 2018 WL 6332343, at *5 (N.D. Ga. Sept. 13, 2018); *Krueger v. Ameriprise Fin., Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014).

[28] Defendants dispute that commonality exists, arguing that unique defenses would apply to various plaintiffs in the defined class based on the statutes of limitations and repose. [1] The applicable statute of limitations requires that a participant must sue within six years from the last breach or violation, within three years from the date of "actual knowledge" of a breach of fiduciary duty, or, in the case of fraud or concealment, within six years from the date of the discovery of the breach or violation. 29 U.S.C. § 1113. According to Defendants, commonality is absent because the three-year statute of limitation will start running at different times and bar the claims of 20–35 class members who had "actual knowledge" that Defendants Hogue and Thompson owned stock outside the ESOP. (Doc. 56 at 13).

[29] Without opining on the merits of Defendants' proposed argument that some claims may be time-barred, the Court notes that, while the statute of limitations may present the need for individual inquiries, it ***287** also creates common ones. For example: whether the meetings and disclosures referenced in the declarations that Defendants point to did, in fact, operate to give anyone "actual knowledge" of the claims. (*See* Doc. 56-3 ¶ 4; Doc. 56-4 ¶¶ 3–4; Doc. 56-5 ¶¶ 3–4; Doc. 56-7 ¶ 3). Should this question be resolved in the negative, there will be no basis for raising individual defenses as to the statute of limitations. At this stage of the case, however, there is nothing in the record establishing whether any class members were aware that Defendants Hogue and Thompson acquired stock through the 2011 Refinancing or with a transaction involving the ESOP. "[I]t is not enough that [Plaintiffs] had notice that something was awry; [Plaintiffs] must have had specific knowledge of the actual breach of duty upon which [they] sue[ ]" to trigger the statute of limitations. *Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir. 1987). The issue of "actual knowledge" then is capable of class-wide resolution and is central to the validity of the claims. *Carriuolo*, 823 F.3d at 984.

Defendants also contend that commonality is lacking because named Plaintiffs are time-barred by the six-year statute of repose. (Doc. 56 at 13). Specifically, Defendants claim that named Plaintiffs "do not allege facts or offer any evidence supporting that Defendants concealed Hogue's or Thompson's ownership of the stock outside the ESOP." (*Id.* at 14). The Court has already rejected this argument, ruling that Plaintiffs have sufficiently alleged fraud and concealment, such that their claims may proceed. *See Gamache v. Hogue*, 446 F. Supp. 3d 1315, 1329–31 (M.D. Ga. 2020). Contrary to Defendants' contention, erroneously citing to the Court's Order on the Motion to Dismiss, that they

have "demonstrated, *as a matter of law*, that the six-year statute of repose provision in 29 U.S.C. § 113(1) bars their claims," the Court rejected this argument when Defendants previously made it. (Doc. 56 at 11 (emphasis added)). The Court found that:

> As discussed in Part I, Plaintiffs sufficiently allege ERISA violations by Defendants in Counts I and II. Plaintiffs sufficiently allege that Defendants took affirmative steps to conceal those alleged ERISA violations. Plaintiffs further allege that, as a result of Defendants' concealment, Plaintiffs discovered the violations no earlier than May 23, 2018—less than two years before they filed this lawsuit. (Doc. 30 ¶¶ 70–71.) Plaintiffs' claims, therefore, invoke § 1113's fraud or concealment exception, this action is well within that exception's six-year limitations period, and this suit was timely filed.

Gamache, 446 F. Supp. 3d at 1330. As is the case with the statute of limitations, this issue could be resolved in a manner that affects the class as a whole, alleviating any need for individualized defenses. Moreover, regarding the possibility that individual defenses may be necessary for the statute of limitations or statute of repose defenses, should the evidence or the development of the case reveal the applicability of unique defenses to individual Plaintiffs, the Court may revisit the issue and decertify the class, if appropriate.

Plaintiffs have leapt over the "low hurdle" by demonstrating that there are multiple common questions of law and fact. The answer to these question affects the entire class, and a resolution of these claims would resolve the issue for all claimants in "one stroke." *See, e.g.,* *In re Suntrust Banks, Inc. ERISA Litig.*, No. 1:08-CV-03384-RWS, 2016 WL 4377131, at *6 (N.D. Ga. Aug. 17, 2016) (finding breach of fiduciary duty satisfied the commonality requirement). Thus, Plaintiffs have satisfied the commonality requirement.

3. Typicality

[30] **[31]** **[32]** Rule 23(a)(3) requires that plaintiffs show that their claims or defenses "are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). While related to the commonality requirement, typicality focuses on the "individual characteristics of the named plaintiff in relation to the class." *Piazza*, 273 F.3d at 1346. A plaintiff's claim is typical if there is a "nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984). But a plaintiff's claims or defenses need not be identical to the proposed class, and minor variations will not render the plaintiff's claims atypical. *Id.* Instead, a plaintiff ***288** satisfies typicality by showing that the claims or defenses "arise from the same event or pattern or practice and are based on the same legal theory." *Id.*

[33] Plaintiffs have met their burden as to typicality. The members claims are based on the same events and legal theories: breach of fiduciary duties and monitoring the ESOP. Proof of Defendants' alleged misconduct and the alleged harm would be the same for each class member rather than turning on individual circumstances. Nor does the possible statute of limitations defense destroy typicality. As discussed above, whether the meetings and statements at issue were sufficient to have provided "actual knowledge" has the potential of being resolved in a manner that eliminates it as a defense against the class as a whole. That said, should the evidence or the development of the case reveal the applicability of unique defenses to individual Plaintiffs, the Court may revisit the issue and decertify the class, if appropriate.

4. Adequacy

[34] **[35]** Under the final requirement of Rule 23(a) plaintiffs must show that they "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement ensures that the legal rights of absent class members are protected. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987). There are two areas for which plaintiffs must demonstrate adequacy. First, the plaintiffs must show that they and their counsel "will adequately prosecute the action." *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) (citation omitted). Second, the plaintiffs must show that no "substantial conflicts of interest exist between the representatives and the class." *Id.* (citation omitted). The Defendants argue that Plaintiffs have failed to establish either.

a. Prosecution of the Action

[36] Whether the named plaintiffs will prosecute the action with sufficient vigor generally turns on "whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation." *Kirkpatrick*, 827 F.2d at 726 (citation omitted). Defendants do not challenge the qualifications, experience, or ability of Plaintiffs' counsel to prosecute the action. (Doc. 56 at 7.) Instead, they argue that Plaintiffs lack the knowledge and understanding of their claims to represent the proposed class. (*Id.* at 15–19).

[37] **[38]** **[39]** While "a potential class is entitled to more than blind reliance upon even competent counsel by uninterested and inexperienced representatives," adequacy "generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class." *Kirkpatrick*, 827 F.2d at 727 (citation and internal marks omitted). Courts rarely find that plaintiffs are inadequate due to a lack of involvement or awareness. Rather, a finding of inadequacy generally requires plaintiffs to "have abdicated their role in the case beyond that of furnishing their names as plaintiffs, [such that] the attorneys, in essence, are the class representatives." *Id.* (citations and internal marks omitted). Certification will be denied when the plaintiffs display "so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Id.* (citations omitted). But there is no requirement under *Kirkpatrick* that the lead plaintiffs possess expert knowledge of the details of the case; rather, plaintiffs are expected to rely on counsel for guidance and advice. *See id.* at 728.

Defendants assert that named Plaintiffs will not adequately represent the class for three reasons: (1) Plaintiff Nofi lacks a basic understanding of his own claims and is not seeking an individual claim, (2) Plaintiff Gamache has demonstrated fundamentally erroneous conclusions about ERISA and the Plan, and (3) Plaintiff Gamache's credibility will be the focal point at trial. The named Plaintiffs have produced documents and responded to interrogatories (Doc. 51-16 at 2:3; Doc. 56-2 at 56:20–25, 57:3–6), appeared for depositions (Doc. 51-10; Doc. 51-11), and submitted affidavits and testimony regarding their participation in this case (Doc. 51-16; Doc. 51-18; Doc. 56-2 at 58:1–8). Plaintiff ***289** Nofi's deposition testimony also indicates a basic understanding of the case—that Defendants allegedly breached their fiduciary duties by misappropriating stocks during the 2011 Refinancing. (*See* Doc. 56-2 at 11:21–25, 50:18–25). Though Defendants criticize Plaintiff Nofi and Gamache's ability to explain the allegations of the lawsuit and inner workings of ERISA, that does not necessarily signify that he will not adequately represent the class. ERISA itself is a dense regulation and claims arising from it are complex. It is understandable that a plaintiff might not fully grasp the facts and legal theories of an ERISA action. *See Henderson*, 2018 WL 6332343, at *7 (citing *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 15 Civ. 9936 (LGS), 2017 WL 3868803, at *7 (S.D.N.Y. Sept. 5, 2017)); *Sims v. BB&T Corp.*, No. 1:15-CV-841, 2017 WL 3730552, at *5 (M.D.N.C. Aug. 28, 2017) (stating that ERISA claims are of

a "complex nature"). Accordingly, "[t]here is no requirement under *Kirkpatrick* that the lead plaintiff must possess expert knowledge of the details of the case," and plaintiffs are expected to rely on counsel for guidance. *In re Wells Real Est. Inv. Tr., Inc. Sec. Litig.*, No. 1:07-CV-862-CAP, 2009 WL 10688777, at *5 (N.D. Ga. Sept. 16, 2009).

Further, it is not clear that Plaintiff Nofi testified he does not have an individual claim. Defendants correctly state that Plaintiff Nofi testified that he was not personally seeking anything. (Doc. 56-2 at 50:3). That statement on its own, however, fails to capture the full context of this case. Plaintiff Nofi also stated that he was seeking "retribution on behalf of all the ESOP participants." (Doc. 56-2 at 50:7–8). As previously discussed, Plaintiff Nofi would stand to benefit if he were successful. Likewise, Plaintiff Nofi was asked whether he intended to only look out for his own personal interest, to which he responded no. (*Id.* at 58:1–8). Read in context, Plaintiff Nofi's statement does not disqualify him.

[40] Plaintiffs in the case at bar are distinguishable from the plaintiffs in the cases cited by Defendants. *See* *Gregory v. Preferred Fin. Sols.*, No. 5:11-CV-422(MTT), 2013 WL 6632322, at *11 (M.D. Ga. Dec. 17, 2013) (finding plaintiff was inadequate because he "appear[ed] to lack an understanding for the basis" of his claims); *Sanchez v. Velocity Invs., LLC*, No. 1:15-CV-3096-LMM-WEJ, 2015 WL 12777990, at *5 (N.D. Ga. Dec. 11, 2015) (holding plaintiff was inadequate because she failed to submit evidence of adequacy); *Wein v. Master Collectors, Inc.*, No. 1:94-CV-2694-JOF, 1995 WL 550475, at *3 (N.D. Ga. Aug. 15, 1995) (finding plaintiff inadequate due to contradictions). Here, Plaintiffs have articulated the basis for their claims, submitted evidence of adequacy, and have not contradicted the core allegations in the complaint. Considered as a whole, Plaintiffs sworn submissions, involvement in discovery, and testimony indicating knowledge of the claims are sufficient to show that Plaintiffs have not abdicated their role in the case beyond that of furnishing their names as plaintiffs. "The Supreme Court ... [has] expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance," and the Court finds no basis to depart from the Supreme Court's guidance to find that the class representatives are inadequate. *Baffa v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000) (citing *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 86 S.Ct. 845, 15 L.Ed.2d 807 (1966)).

[41] **[42]** **[43]** Last, Defendants argue that Plaintiff Gamache is inadequate because of two credibility issues: (1) whether Plaintiff Gamache attended a staff meeting at which Defendants discussed Defendant Hogue's ownership outside the ESOP, and (2) that the Department of Labor (DOL) opined that Defendants had not committed any wrongdoing. (Doc. 56 at 19–20). Neither constitutes a credibility issue rendering Plaintiff Gamache inadequate as a class representative.

Rule 23(a) requires that class representatives "possess the personal characteristics and integrity necessary to fulfill the fiduciary role of class representative." *Kirkpatrick*, 827 F.2d at 726. Class representatives serve as "guardian[s] of the interests of the class and because of the fiduciary relationship [they] must be held to a high level of responsibility." *Hall v. Nat'l Recovery Sys., Inc.*, No. 96-132-CIV-T-17, 1996 WL 467512, at *4 (M.D. Fla. Aug. 9, 1996) (citation omitted). And it is ***290** "[w]ithin the Court's sound discretion" to deny class certification "if there is strong indication that Plaintiff's testimony 'might not be credible.' " *Id.* at *5 (quoting *Amswiss Int'l Corp. v. Heublein, Inc.*, 69 F.R.D. 663, 671 (N.D. Ga. 1975)). But "a court must be wary of a defendant's efforts to defeat representation of a class on grounds of inadequacy when the effect may be to eliminate any class representation." *Kline v. Wolf*, 702 F.2d 400, 402 (2d Cir. 1983) (citation omitted).

At this time, there is no basis for the Court to find Gamache not credible. While Defendants offer five declarations suggesting Gamache acquired "actual knowledge" in 2014–2015, only one of the five Defendants cite explicitly states that Plaintiff Gamache was at the meeting where the TAG ownership was discussed. (*See* Doc. 56-3 ¶¶ 4–5). While there may be a question of fact for a jury to ponder, these declarations do not establish that Plaintiff Gamache lacks credibility such that the Court would have any basis to disqualify him as a class representative.

The declarations certainly do not evince the type of grave misconduct at issue in the cases relied on by Defendants. Defendants' credibility arguments are a tortured stretch as the cases relied on found class representatives not credible after one accepted money in exchange for testimony, and the other actively attempted to conceal his own involvement in the defendant's security fraud. *See* *Wagner v. Lehman Bros. Kuhn Loeb, Inc.*, 646 F. Supp. 643, 661 (N.D. Ill. 1986); *Amswiss Int'l Corp.*, 69 F.R.D. at 669. An unresolved factual dispute about a key element of the case does not begin to raise a question of credibility that would disqualify Gamache as a class representative. Furthermore, that the DOL opinion did not find wrongdoing by Defendants does not mean that Gamache is not credible. Accordingly, there is no basis to find that the named Plaintiffs will not appropriately prosecute this action.

b. Intra-Class Conflicts

[44] **[45]** **[46]** **[47]** Rule 23(a)(4) also requires Plaintiffs to show that no "substantial conflicts of interests exist between the representatives and the class." *Valley Drug Co.*, 350 F.3d at 1189 (citation omitted). "[T]he existence of minor conflicts alone will not defeat" adequacy. *Id.* Adequacy is only defeated when there is a "fundamental" conflict "going to the specific issues in controversy." *Id.* (citations omitted). "A fundamental conflict exists where some party members claim to have been harmed by the same conduct that benefitted other members of the class." *Id.* Conflict, however, is not fundamental when "all class members share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants." *Owens v. Metro. Life Ins. Co.*, 323 F.R.D. 411, 418 (N.D. Ga. Sept. 29, 2017) (quoting *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010)). Adequacy is not defeated by mere speculative or hypothetical conflicts. *Ward*, 595 F.3d at 180 (citation omitted). But courts may disqualify a class representative if he is "so unduly antagonistic as to render h[im] inadequate as a class representative." *Woznicki v. Raydon Corp.*, No. 6:18-cv-2090-Orl-78GJK, 2020 WL 1270223, at *1 (M.D. Fla. Mar. 16, 2020).

[48] Defendants argue that Plaintiff Gamache's animosity toward Defendants Hogue and Thompson creates a potential intra-class conflict. (Doc. 56 at 20–21). Defendants point to Plaintiff Gamache's deposition testimony where he admitted posting copies of Defendant Hogue in a bathing suit "because he found Hogue arrogant, and thought the photograph would embarrass him." (Doc. 56 at 21; Doc. 56-1 at 10:2–6, 56:4–14). Additionally, Defendants suggest that other examples of Plaintiff Gamache's animosity exist, such as: (1) calling Defendant Thompson a "lying thief," (2) telling Defendant Thompson that he "would be waiting for [him]," and (3) displaying jealousy about supposed purchases by Defendant Hogue. (Doc. 56 at 21; Doc. 56-1 at 87:5–13, 89:22–25, 278:13–24, 279:16–25).

[49] While the Court may "properly consider the plaintiff's vindictiveness toward the defendant in determining whether the plaintiff is an adequate representative," Plaintiff Gamache's comments do not rise to the level of a substantial conflict of interest between him and the class. *Smith v. Ayres*, 977 F.2d 946, 949 (5th Cir. 1992) (citing *Davis v. Comed, Inc.*, 619 F.2d 588, 593–94 (6th Cir. 1980)); *see also* ***291** *Valley Drug Co.*, 350 F.3d at 1189. This is especially true as the proposed class explicitly excludes Defendants and their immediate families. Antagonism only renders a class representative inadequate when the plaintiff has ulterior motives unrelated to the instant litigation. *Compare* *Smith*, 977 F.2d at 949 (finding plaintiff had an ulterior motive when he peppered his brief with epithets and had numerous previous lawsuits with the defendants), *with* *Woznicki v. Raydon Corporation*, 2020 WL 857050, at *11–12 (M.D. Fla. Feb. 20, 2020) (finding plaintiff was not unduly antagonistic despite social media threats against defendant's family members). It was only after Plaintiff Gamache learned of Defendant Hogue's alleged breach of fiduciary duty that he displayed any antagonistic behavior. (Doc. 51 at 16; Doc. 56-1 at 140–41). Prior to this litigation Plaintiff Gamache and Defendants enjoyed a good

relationship. (Doc. 51 at 16; Doc. 56-1 at 140:9–25, 151:14–16).

It would be highly illogical not expect a certain amount of animosity from a plaintiff against a defendant who the plaintiff believes has wronged him. But such animosity stemming from the subject matter of the litigation is not unduly antagonistic. *See, e.g.,* *Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1415–16 (E.D.N.Y. 1989) ("It is stating the obvious to say that litigation is often born of ill will, and this is no less true in class actions. To expect these plaintiffs to be completely neutral when they allege that the defendants have defrauded them ... is to expect too much."); *Woznicki*, 2020 WL 857050, at *12 (collecting cases). Despite Plaintiff Gamache's antagonism against Defendant Hogue, at this time, it does not appear to render him inadequate as a class representative. The Court will monitor "potential" conflicts as the case proceeds and may "revisit and de-certify the class," if appropriate. *Henderson*, 2018 WL 6332343, at *7 (citation omitted).

C. Rule 23(b)

Having satisfied each element of Rule 23(a), Plaintiffs must also satisfy "through evidentiary proof [that] at least one of the provisions of Rule 23(b)" applies. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33, 133 S.Ct. 1426, 185 L.Ed.2d 515 (2013). Plaintiffs claim that class certification is proper under Rule 23(b)(1) or (b)(2). (Doc. 51 at 26). Recently, Courts in this circuit have certified classes in ERISA breach of fiduciary duty actions, like this case, under either subsection of Rule 23(b)(1). *See, e.g., Henderson*, 2018 WL 6332343, at *10; *Agnone v. Camden Cnty., Ga.*, No. 2:14-cv-00024-LGW-BKE, 2019 WL 1368634, at *7–8 (S.D. Ga. Mar. 26, 2019); *Clark v. Duke Univ.*, No. 1:16-CV-1044, 2018 WL 1801946, at *9–10 (M.D.N.C. Apr. 13, 2018). Consistent with those decisions, the Court finds that the proposed class satisfies Rule 23(b)(1).

As noted above, Rule 23(b)(1) permits certification in two scenarios. First, under Rule 23(b)(1)(A), when separate actions by the individual class members would create a risk of "inconsistent or varying adjudications ... that would establish incompatible standards of conduct for the party opposing the class." Fed. R. Civ. P. 23(b)(1)(A). And second, when individual adjudications "as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B).

[50] The proposed class meets the requirements of Rule 23(b)(1)(A). Plaintiffs allege that Defendants breached their fiduciary duties based on management of the ESOP. As participants in the ESOP, the alleged breach affects all class members. And, as the Eleventh Circuit has recognized, adjudicating these claims among 327 participants individually runs the risk of inconsistent results that could place "incompatible standards of conduct" on Defendants. *See* *Piazza*, 273 F.3d at 1352. Defendants, however, argue that certification under Rule 23(b)(1)(A) is inappropriate because the relief sought is primarily monetary. (Doc. 56 at 22). Plaintiffs seek a declaratory judgement, including the disgorgement of profits made as a result of the allegedly prohibited transaction, a constructive trust over the proceeds of any such transaction, and "any other equitable relief, whatever is in the best interest of the Plan." (Doc. 30 at 34). "[T]he fact that this relief takes the form of a money payment does not ***292** remove it from the category of traditionally equitable relief." *CIGNA Corp. v. Amara*, 563 U.S. 421, 441, 131 S.Ct. 1866, 179 L.Ed.2d 843 (2011). Considering *CIGNA*, it is appropriate to certify a class action seeking both monetary damages and "other forms of equitable relief" under Rule 23(b)(1)(A). *See* *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 451 (5th Cir. 2013) (explaining that a "monetary make-whole remedy" could be classified as equitable relief under ERISA § 502(a)(3)); *Harris v. Koenig*, 271 F.R.D. 383, 393–94 (D.D.C. 2010) (collecting cases holding that Rule 23(b)(1)(A) certification is appropriate for ERISA §

502(a)(2) claims for monetary relief). Furthermore, disgorgement and constructive trusts have been held to be equitable remedies. *See* *Liu v. SEC*, —— U.S. ——, 140 S. Ct. 1936, 1947, 207 L.Ed.2d 401 (2020) (finding disgorgement is an equitable remedy); *CIGNA Corp.*, 563 U.S. at 439, 131 S.Ct. 1866 (2011) (defining a constructive trust as an equitable remedy if "the funds in question were '*particular* funds or property in the defendant's possession.' " (citation omitted)). Accordingly, certification under Rule 23(b)(1)(A) is proper.

[51] Second, the proposed class also meets the requirements under Rule 23(b)(1)(B). "In light of the derivative nature of ERISA § 502(a)(2) claims, breach of fiduciary duty claims brought under § 502(a)(2) are paradigmatic examples of claims appropriate for certification as a Rule 23(b)(1) class, as numerous court have held." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 604 (3d Cir. 2009) (citations omitted). The allegations in the complaint are based on alleged duties and relief owed to the ESOP. Rule 23(b)(1)(B) was drafted for "situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of others to protect their own interests." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) (citation omitted). A classic case of a Rule 23(b)(1)(B) suit includes one with an "action[ ] charging 'a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class' of beneficiaries, requiring an accounting or similar procedure 'to restore the subject of the trust.' " *Id.* at 834, 119 S.Ct. 2295 (quoting Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment). Stated differently, because the fiduciary claims are brought on behalf of the ESOP, individual adjudication would necessarily affect—or be "dispositive of the interest of"—plan participants absent from that individual action, or otherwise "would substantially impair or impede their ability to protect their interests" as participants in the ESOP. Fed. R. Civ. P. 23(b)(1)(B).

Despite Defendants' assertion that certification under Rule 23(b)(1)(B) is improper because "many individual questions between and among the putative class members exist," as stated above, individual differences among class members will not destroy class certification and Plaintiffs in this case have not "rejected the gravamen of the class claims." *In re BellSouth Corp. ERISA Litig.*, No. 1:02-CV-2440-JOF, 2005 WL 8154294, at *8 (N.D. Ga. Sept. 30, 2005). Plaintiffs seek recovery on behalf of the entire ESOP to correct and prevent the alleged breach of fiduciary duties. Accordingly, class certification is also proper under Rule 23(b)(1)(B). [2]

CONCLUSION

Accordingly, Plaintiffs' Motion for Class Certification (Doc. 51) is **GRANTED**.

a. The Court **CERTIFIES** the following class:

> Participants in the Technical Associates ESOP on or after the date stock was issued to Defendants Hogue and Thompson in connection with the 2011 Refinancing who vested under the terms of the Plan (or ERISA) and those participants beneficiaries.
>
> Excluded from the Class are Defendants and their immediate families, any other fiduciary of the Plan and his or her immediate family the officers and directors ***293** of Technical Associates and their immediate family, and legal representatives, successors, and assigns of any such excluded persons.

b. The Court **DEFINES** the class claims as those stated in Plaintiffs' Amended Complaint (Doc. 30), dated April 19, 2019.

c. The Court **APPOINTS** Plaintiffs Nelson Gamache and Edward Nofi as class representatives.

d. The Court **APPOINTS** R. Joseph Barton of Block & Leviton LLP and Nina Wasow and Daniel Feinberg of Feinberg, Jackson, Worthman & Wasow LLP as co-lead class counsel. The Court also **APPOINTS** Stone Law Group Trial Lawyers, LLC as liaison class counsel.

e. The Court **DIRECTS** Defendants to disclose to Plaintiffs, within **fourteen (14) days** of this Order, the names, last known addresses, email addresses (to the extent known), dates of birth, and job titles of all potential class members employed by Defendants, in electronic, importable, and searchable format.

SO ORDERED, this 2nd day of March, 2021.

All Citations

338 F.R.D. 275, 2021 Employee Benefits Cas. 110,683

Footnotes

1 Defendants merge their arguments regarding unique defenses under commonality, typicality, and adequacy. (Doc. 56 at 7 n.6.). "In many ways, the commonality and typicality requirements of Rule 23(a) overlap." *Prado-Steiman*, 221 F.3d at 1278. Both requirements, however, are "separate inquiries," even though "proof of each also 'tend[s] to merge.' " *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 456 (11th Cir. 1996) (per curiam) (citation omitted). Accordingly, the Court addresses Defendants' unique defenses separately under the commonality, typicality, and adequacy requirements. *See Ockerman v. King & Spalding*, No. 1:85-CV-2958-RCF, 1988 WL 39937, at *3 n.4 (N.D. Ga. Mar. 31, 1988) ("The unique defense argument could be addressed under the Rule 23(a) tests of commonality, typicality, or adequacy of representation.").

2 Because the Court finds that Plaintiffs satisfy Rule 23(b)(1) it need not address Rule 23(b)(2) or (b)(3). *See* *Piazza*, 273 F.3d at 1352 (holding that where a claim meets the requirements of Rule 23(b)(1) or (b)(2), certification under Rule 23(b)(3) is an abuse of discretion).