

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-10-10490

BRAD J. WALBECK, AND LEA ANN
 ADKINS, INDIVIDUALLY AND
 DERIVATIVELY ON BEHALF OF THE P'ON
 ASSEMBLY, INC., P'ON ASSEMBLY, INC.
 PLAINTIFF(S)

THE P'ON COMPANY, LLC; THE P'ON
 CLUB, LLC; THE P'ON GROUP, LLC
 F/K/A CIVITAS, LLC; and P'ON REALTY,
 LLC
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional Information for the Clerk : _____

FILED
 JUL 16 AM 11:53
 JULIE J. ARMSTRONG
 CLERK OF COURT

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
BRAD J. WALBECK	THE P'ON COMPANY, LLC; THE P'ON CLUB, LLC; THE P'ON GROUP, LLC F/K/A CIVITAS, LLC; and P'ON REALTY, LLC	\$ 225,000.00
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
 Note: Title abstractors and researchers should refer to the official court order for judgment details.


 _____ 2163 7/14/13
 Circuit Court Judge Judge Code Date

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
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 I'ON ASSEMBLY, INC.; BRAD J.)
 WALBECK AND LEA ANN ADKINS,)
 BOTH INDIVIDUALLY AND)
 DERIVATIVELY ON BEHALF OF THE)
 I'ON ASSEMBLY, INC.,)
)
 Plaintiffs,)
)
 vs.)
)
 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,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT
 CASE NO. 2010-CP-10-10490

**ORDERING GRANTING PLAINTIFF,
 BRAD WALBECK'S, PETITION FOR
 ATTORNEYS' FEES**

ORDER

THIS MATTER CAME BEFORE THE COURT on September 4, 2014, upon Petition filed by the Plaintiff, Brad Walbeck (hereinafter "Walbeck"), requesting that the Court award attorneys' fees, interest and costs in connection with the prosecution of the above-captioned action.

At the September 4, 2014 hearing, Walbeck was represented by attorneys Justin Lucey, Joshua F. Evans, and Dabny Lynn; the I'On Defendants¹ were represented by attorneys Brian Duffy, Rutledge Young, and Seth Whitaker; and re-aligned Plaintiff, the I'On Assembly, Inc., was represented by attorney Tim Bouch.

Having reviewed the submissions of the parties and having heard the oral arguments presented by counsel, this Court GRANTS Walbeck's Petition, and awards Justin O'Toole Lucey, P.A. a total of \$225,000 in attorneys' fees.

¹The I'On Company, LLC; the I'On Club, LLC; the I'On Group, LLC f/k/a Civitas, LLC; and I'On Realty, LLC are collectively referred to as the "I'On Defendants."

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INTRODUCTION

This matter came before the Court upon a Petition for Attorneys' Fees, Interest and Costs filed by Walbeck following the trial of this case in which the jury returned a verdict and awarded damages in favor of Walbeck on a number of causes of action, including negligent misrepresentation, breach of contract, and violation of the Interstate Land Sales Full Disclosure Act (ILSA). Walbeck avers he is entitled to receive the actual damages awarded him under his negligent misrepresentation claim and an award of reasonable attorneys' fees under his ILSA claim, a separate verdict. The I'On Defendants oppose Walbeck's Petition on three grounds: (1) the I'On Defendants maintain Walbeck's nominal recovery under his ILSA claim precludes an award of attorneys' fees and costs; (2) the I'On Defendants suggest their meritorious defense precludes an award of attorneys' fees and costs; and (3) the I'On Defendants challenge the reasonableness of the fees requested by Walbeck.

Based upon the evidence presented, and as further detailed below, Walbeck is entitled to an award of attorneys' fees under his ILSA claim, and this Court awards Walbeck's counsel, Justin O'Toole Lucey, P.A., \$225,000 in attorneys' fees.

SUMMARY OF PERTINENT FACTS²

This case was tried before a jury between July 29, 2014 and August 2, 2014. At the conclusion of trial, the jury returned a verdict and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the Interstate Land Sales Full Disclosure Act ("ILSA" or "the Act"); (b) Negligent Misrepresentation; and (c) Breach of Contract.³ In addition, the jury returned a verdict and awarded damages in favor of Plaintiff, I'On Assembly, Inc. ("the

² This Order incorporates by reference the factual background encompassed in this Court's other post-trial Orders including the Order Denying the I'On Defendants' Motion for JNOV.

³ Following deliberation, the jury awarded Walbeck actual damages in the amount of Twenty Thousand Dollars (\$20,000.00) on his negligence misrepresentation claim; Ten Thousand Dollars (\$10,000.00) on his breach of contract claim; and One Dollar (\$1.00) on his Interstate Land Sales Full Disclosure Act (hereinafter "ILSA") claim.

Assembly”), on the following causes of action: (a) Breach of Fiduciary Duty; and (b) Negligent Misrepresentation. Subsequently, Walbeck elected to recover the \$20,000 in actual damages awarded to him on the negligent misrepresentation claim while the Assembly elected to recover the \$1,750,000 in actual damages awarded to it for Defendants' breach of fiduciary duty.

On August 11, 2014, Walbeck filed his Petition requesting a total award of \$1,070,500 in attorneys' fees and costs.⁴ On August 25, 2014, the P'On Defendants filed a Memorandum in Opposition to Walbeck's Petition under seal due to confidential settlement terms discussed within the pleading. Approximately one week later, Walbeck filed a Supplemental Memorandum in Support of his Petition and arguments were then heard at a motion hearing scheduled for September 4, 2014. Following the September 4th hearing, the Court took the fee issue under advisement, requesting that the parties submit additional arguments and substantiating evidence. Over the course of the next week, both parties submitted additional arguments and Walbeck's counsel submitted their statements of time and expenses for *in camera* review by letter dated September 11, 2014.

FINDINGS AND CONCLUSIONS

A.) Walbeck is Entitled to Recover Attorneys' Fees Under His ILSA Claim in Addition to Actual Damages Under his Negligent Misrepresentation Claim

Walbeck is entitled to an award of attorneys' fees under the provisions of ILSA⁵ in addition to the actual damages Walbeck elected to receive under his common law negligent misrepresentation claim. *See* 15 U.S.C. § 1709(a)-(c) (2012) (allowing statutory recovery of attorneys' fees, interest and costs).

⁴Walbeck's Petition was accompanied by the Affidavit of Justin Lucey, lead counsel for the Plaintiffs. Mr. Lucey's Affidavit itemized the \$1,070,550 total award requested as being comprised of \$1,015,000 in attorneys' fees and \$55,500 in costs.

⁵The Interstate Land Sales Full Disclosure Act provides for the recovery of attorneys' fees, interest and court costs when a developer violates the disclosure or anti-fraud provisions contained therein. *See* 15 U.S.C. § 1709(b) (2012) (“The amount recoverable . . . may include, in addition to matters specified [in this section] interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot.”).

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

Here, as in *Austin*, Walbeck’s recovery of attorneys’ fees under his statutory claim, ILSA, is not duplicative of the award of actual damages under his common law claim, negligent misrepresentation. Accordingly, Walbeck is entitled to recover reasonable attorneys’ fees under his ILSA claim.

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

The United States Supreme Court’s decision in *Farrar* does not serve to automatically preclude attorneys’ fees awards in nominal damages case. See *Mercer v. Duke University (Mercer III)*, 401 F.3d 199, 206-09 (4th Cir. 2005) citing *Mercer v. Duke University (Mercer II)*, 50 Fed. Appx. 643, 646 (4th Cir. 2002) (“[w]e have never interpreted *Farrar* as automatically precluding attorney’s fee awards in all nominal-damage cases.”) (unpublished); *Clark v. Sims*, 28 F.3d 420, 425 (4th Cir. 1994) (remanding fee award in nominal-damage case for reconsideration in light of plaintiff’s limited success). Rather, in *Farrar*, the Supreme Court held where a

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prevailing party⁶ recovers nominal damages, “the only reasonable fee is *usually* no fee at all.” *Farrar*, 506 U.S. at 115 (emphasis added); *Id.* at 121 (O’Connor, J., concurring) (“[n]ominal relief does not necessarily a nominal victory make.”); *Id.* at 124 (White, J., dissenting) (noting that the majority did not hold “that recovery of nominal damages *never* can support the award of attorneys’ fees”).

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

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

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

Relying on the “O’Connor factors,” several courts of appeal, including the Fourth Circuit, permit attorneys’ fees awards despite the award of only nominal damages. In *Mercer*, for example, the plaintiff was awarded only nominal damages; however, the Fourth Circuit upheld an award of \$350,000 in attorneys’ fees despite the de minimis compensatory relief.⁷ *Mercer III*, 401 F.3d 199 at 206-09. As noted by the *Mercer III* Court:

⁶ “[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). This standard is satisfied by a “judgment for damages in *any amount*, whether compensatory or *nominal*.” *Id.* at 113 (emphasis added). Accordingly, the award of nominal damages in favor of Walbeck on his ILSA claim suffices to qualify Walbeck as a prevailing party.

⁷The Fourth Circuit’s decision in *Mercer versus Duke University* resolved a number of issues originating from a Title IX action brought by Heather Mercer, a former kicker on Duke University’s Division I-A football team. Mercer, who enrolled at Duke University in 1994 as a full-time student, was an all-state place kicker on her high school football team and wanted to continue playing football at the collegiate level. Following several attempts by Mercer to join Duke’s football team, Duke’s head football coach, Mr. Goldsmith, made Mercer a playing member of the team in April of 1995. After Mercer officially became part of the team, an onslaught of media attention and publicity ensued; some of which cast Mercer’s membership in a negative light. Goldsmith appeared to begin to

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

Although the majority opinion in *Farrar* provides little guidance for courts considering whether an award of attorney's fees is warranted, Justice O'Connor in a separate concurring opinion addressed the question in more detail. . . She suggested that when determining whether attorney's fees are warranted in a nominal-damages case, courts should consider "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served" by the litigation . . .

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

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

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

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

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

1.) Walbeck Succeeded on a Significant Legal Issue

First, Walbeck succeeded on an important legal issue – ILSA's anti-fraud provisions. Walbeck's reliance on these provisions, as opposed to the I'On Defendants' reliance on ILSA's anti-disclosure provisions, emphasizes this point. Walbeck's case confirmed that wronged purchasers may proceed under ILSA's anti-fraud provisions based upon a developer's material

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misrepresentations, whether made orally, in writing, or otherwise. Additionally, Walbeck's case resulted in a first of its kind liability determination – the facts as found by the jury determined the I'On Defendants were legally responsible for violating Walbeck's rights under ILSA's anti-fraud provisions. Consequently, Walbeck succeeded on a significant legal issue, and thus, the second O'Connor factor weighs in favor of an award of fees to Walbeck.

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

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

Not only does Walbeck's ILSA claim serve a public purpose, the public interest is best served by shifting the burden of the expense of litigation onto the shoulders of those whose unfair and deceptive acts are responsible for the litigation in the first place. Ultimately, the I'On Defendants were the cause of the litigation at issue, and thus, it is "reasonable" that the I'On Defendants should bear the burden of the attorneys' fees necessarily expended in vindicating wronged purchasers' rights. Allowing a plaintiff who successfully pursues an action under ILSA to recover his attorneys' fees encourages individuals to pursue litigation to protect the public interest. Similarly, requiring unsuccessful defendants to pay the plaintiff's attorneys' fees

discourages developers from engaging in deceptive and unfair practices, such as promulgating false advertisements and material misrepresentations, thereby enforcing the purpose of ILSA. *See Farrar*, 506 U.S. at 121–22, 113 S.Ct. 566 (O'Connor, J., concurring) (explaining that a plaintiff's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client").

Moreover, if this Court focused on the dollar value and the result of the case when awarding attorneys' fees, the remedial purpose of ILSA would be frustrated. If attorneys' fees awards in ILSA cases do not provide a reasonable return, it will be economically impossible for attorneys to represent their clients. In other words, the courthouse doors will be closed to all but those with either potentially substantial damages, or those with sufficient economic resources to afford the litigation expenses involved. Such a situation would defy legislative intent – it is precisely those individuals with ILSA complaints who cannot afford attorneys' fees whom ILSA's remedial provisions are intended to protect:

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

3.) *Walbeck's Total Recovery is Not Nominal*

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

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recovery on related, common law claims may affirmatively demonstrate the “successfulness” of plaintiff’s statutory claim.

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

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

Jama v. Esmor Correctional Services, Inc., 577 F.3d 169, 179-80 (3rd Cir. 2009) (emphasis added) (citations omitted).⁸ See also *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903 (8th Cir. 2012)(holding quarry was a “prevailing party” under 42 U.S.C. § 1988 even though constitutional claim went unaddressed where non-constitutional claim upon which it prevailed arose from same common nucleus of operative fact as constitutional claim).⁹

⁸ See also *Farrar v. Hobby*, 506 U.S. at 111–12 (“[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”); *Stevenson v. Branch Banking and Trust Co.*, 159 Md. App. 620, 662-663 (2004) (“[F]ederal courts characterize a plaintiff as the prevailing party when she *succeeds on any significant issue that achieves some of the benefit sought in bringing the action*; he or she *does not* have to win it all to be regarded as prevailing . . . this Court held that plaintiffs may be considered the prevailing parties *if a significant issue is resolved so as to achieve some of the benefit through litigation.*”) (emphasis added).

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Here, Walbeck's individual and derivative claims all involved a "common core of facts" based upon the I'On Defendants' repeated promises to convey certain amenities to the I'On community. Thus, the overall success of Walbeck is not measured solely by the amount of monetary recovery he was awarded on the ILSA claim;¹⁰ rather, Walbeck's success is measured by: (a) the results Walbeck achieved on his negligent misrepresentation claim; and (b) the results Walbeck achieved on behalf of the I'On Assembly on its breach of fiduciary duty claim. Walbeck's success is further measured by the fact that he prevailed on his ILSA claim, and in so prevailing, he succeeded on a significant legal issue and served a public purpose. Simply stated, the crux of Walbeck's ILSA claim, and the nucleus from which it stemmed, resulted in both a substantial success for the Assembly, of which he is a member, as well as significant success for the public at large. Based upon the foregoing, the balance of the O'Connor factors weighs in favor of Walbeck, and thus, Walbeck is entitled an award of reasonable attorneys' fees.

The I'On Defendants' failure to provide promised amenity property to the I'On Assembly and its members was the catalyst for both Walbeck's ILSA claim as well as Walbeck's and the Assembly's common law claims. Because all of these claims were based upon a common core of facts, and involved interrelated theories, it is impractical, if not impossible, to ascertain how many of the hours spent by Walbeck's counsel were devoted solely to Walbeck's ILSA claim.¹¹ See *Austin*, 406 S.C. at 192-93, 750 S.E.2d at 80-81 citing *Austin*, 387 S.C. at 64, 691 S.E.2d at 153 (noting plaintiff "was entitled to the entire amount of his request as it would have been difficult to dissect [plaintiff's] counsel's fee affidavit to ascertain how much time was spent on

⁹ This is distinct from the "common fund" doctrine. See e.g., *Layman v. State*, 376 S.C. 434, 452, 658 S.E.2d 320, 329-30 (2008) (as discussed in Defendants' Opposition Memorandum).

¹⁰ It is worth noting that, but for the I'On Defendants' destruction of ILSA-related evidence such as the "Letter to JoAnn.doc" and the HUD subdirectory, Walbeck's ILSA verdict may well have been more than one dollar. See Order Finding the I'On Defendants in Contempt for Destruction of Evidence.

¹¹ The interrelation of these claims is further supported by the jury's findings - not only did the jury find that the I'On Defendants wronged the I'On Assembly, into whose shoes Walbeck stepped, the jury found the I'On Defendants also wronged Walbeck, individually.

this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud.”) (internal citations omitted); *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (“We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney’s services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim . . .”).

D.) Walbeck is Entitled an Award of Reasonable Attorneys’ Fees in the Amount of \$225,000.

Walbeck has requested an award of attorneys’ fees in the amount of \$1,015,000.¹² Based upon the record produced at trial, this Court awards Walbeck \$225,000 in attorneys’ fees¹³ and makes the following findings in support of this award’s reasonableness.¹⁴

1) *The Nature, Extent and Difficulty of the Legal Services Rendered*

Walbeck was represented by the law firm of Justin O’Toole Lucey, P.A. (“Lucey Law Firm”). The Lucey Law Firm spent considerable time and effort on the prosecution of this complex and lengthy case. The prosecution of this case involved complex legal issues,

¹² The \$1,015,000 in attorneys’ fees requested by Walbeck does not include the portion of attorneys’ fees paid by other parties pursuant to a settlement entered before the trial of this matter.

¹³ In addition to the “constellation of factors” comprising the court’s consideration of the fee award, the following items account for the difference between the attorneys’ fees requested and the amount awarded: (i) an \$86,600 reduction in fees associated with the initial trial of this matter; (ii) an \$18,224.50 reduction in fees associated with attorneys’ fees related to Plaintiffs’ Rule to Show Cause; and (iii) a \$260,175.50 reduction in fees associated with the I’On Defendants’ objections as to fees incurred on other claims and fee rates. *See Austin and Taylor, supra*.

¹⁴ Although Walbeck received a limited monetary recovery under his ILSA claim, this Court retains its discretion to determine what constitutes a “reasonable” attorneys’ fee. *Farmers and Merchants Bank v. Fagnoli*, 274 S.C. 23, 260 S.E.2d 185 (1979) (noting the amount of attorney fees to be awarded in a particular case is within the discretion of the trial judge provided the award is reasonable); *see also Footnote 9, supra*. When determining the reasonableness of attorneys’ fees under a statute mandating the award of attorneys’ fees, a court must consider six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. Consideration should be given to all six criteria in establishing reasonable attorneys’ fees; none of these six factors is controlling. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989).

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voluminous discovery, many dispositive and pre-trial motions, trial preparation and trial, all of which necessarily required tremendous resources of time and expenses.¹⁵ The complexity of the issues involved in this case, coupled with the I'On Defendants' active role in defending this litigation, warranted the time expended by the Lucey Law Firm in bringing this matter to an ultimate resolution.

2) *The Time and Labor Necessarily Devoted to the Case.*

This Court has reviewed the time records of the Lucey Law Firm, along with the Affidavit of Justin Lucey, the firm's principal and lead counsel in this matter. Mr. Lucey documented the time billed by him and his staff since the commencement of this matter through trial. The Lucey Law Firm expended more than 4,000 hours of time in prosecuting this action, and the verdicts speak to both the preparation and competency of the firm as well as the amount of time, labor and expenses exhausted in the prosecution the lawsuit. The reasonableness of the hours necessarily expended by the Lucey Law Firm on this case is further supported by: (a) the vigorous defense presented by the I'On Defendants; (b) discovery efforts which spanned a time frame of more than three years; (c) significant pre-trial and dispositive motion practices; and (d) a complex procedural posture.

3) *The Professional Standing of Counsel.*

As previously mentioned Walbeck was represented by the Lucey Law Firm, with Justin O'Toole Lucey serving as lead counsel, and Joshua F. Evans and Dabny Lynn serving as associate counsel. Mr. Lucey has been practicing law, specifically complex litigation, for twenty-eight (28) years. Mr. Lucey is a highly regarded member of the Charleston and South Carolina

¹⁵ This lawsuit was made more complex as a result of a settlement agreement and mistrial that occurred in January 2014. Prior to the filing of this lawsuit, the I'On Defendants sold the Creek Club property to a third party. That third party was originally made a party to this suit, but eventually entered into an intricate settlement agreement that allowed the Plaintiffs to purchase the property in exchange for monetary consideration and a long-term term lease with many terms and conditions. Furthermore, the case was originally tried in January 2014. As a result of many different variables, a mistrial was declared and the suit was re-tried in the recent proceeding.

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bars, has tried many cases, and has achieved some record verdicts on behalf of his clients. This court is aware that Mr. Lucey and his firm have high standing and regard in the legal community. Furthermore, the Plaintiff Defendants have not objected to the quality or standing of any of Walbeck's attorneys in this matter.

4) *The Contingency of Compensation.*

The Lucey Law Firm accepted this case on a contingency basis, with no assurance that it would be able to collect the attorneys' fees incurred in this matter. As indicated by Mr. Lucey, recovery remained almost completely contingent up and until a week before trial, with only a limited amount being secured from settling defendants.¹⁶ The fee agreement between Walbeck and the Lucey Law Firm (upon appeal or retrial) is for 38.5% of any award or the fee awarded by the court, whichever is greater. Clearly, a contingency award would yield a greater sum than the fees and costs awarded by this court today.

5) *The Fee Customarily Charged in the Locality for Similar Legal Services.*

The Lucey Law Firm kept contemporaneous time records throughout this case and these records indicate that the hourly rates charged by the firm for lead counsel, associate counsel, paralegals and legal assistants are reasonable and commensurate with rates charged by other firms in the area with the same or similar experience in complex litigation.

6) *The Beneficial Results Obtained.*

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

Having weighed the complexity of the issues involved in this case, the time and service necessary to fully prosecute this matter, the competency of counsel, the contingencies of

¹⁶The portion of attorneys' fees secured by settling parties was deducted from Walbeck's Petition.

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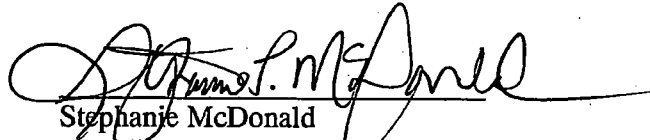
compensation, the appropriateness of fees incurred, and the beneficial results obtained, this Court finds an award of \$225,000 in attorneys' fees to be reasonable. In awarding a fee in an amount significantly less than that sought in the Petition, the court attempts to reflect proportionality in the award as to both the degree of success obtained and the hours devoted to the ILSA claim, while recognizing the impracticality articulated by our supreme court in *Austin*.

CONCLUSION

Based on the foregoing and after full consideration of the factual and legal issues presented, it is hereby ordered that Walbeck's Petition for Attorneys' Fees is GRANTED; and,

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Walbeck is awarded attorneys' fees in the amount of Two Hundred Twenty-Five Thousand Dollars and 00/100 (225,000.00) for the I'On Defendants' violation of ILSA.

AND IT IS HEREBY ORDERED!


Stephanie McDonald
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina

July 13, 2015