FORM 4

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 I'On Assembly, Inc., and I'On Assembly, Inc.

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

RECEIVED
JUL 24 2015
SC Court of Appeals

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Joshua F. Evans

Attorney for : ☒ Plaintiff ☐ Defendant or ☐ 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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.

FILED
2014 SEP 30 PM 4:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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 :

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 and Lea Ann Adkins, derivatively for I'On Assembly, Inc..	The I'On Company, LLC The I'On Club, LLC The I'On Group, LLC f/k/a Civitas, LLC I'On Realty, LLC	$1,350,000.00 Actual Damages
Brad J. Walbeck, individually.	The I'On Company, LLC The I'On Club, LLC The I'On Group, LLC f/k/a Civitas, LLC I'On Realty, LLC	$20,000.00 Actual Damages
		$

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.**

Stephanie P. McDonald | 2163 | 09/18/14

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Defendants Motion for Set Off is Denied as to values received from settlement with Civitas.

Defendants and Granted as to payments made by other settling parties.

Additional Post Trial Orders to Follow on Other Motions Under Advisement.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2010-CP-10-10490

BRAD J. WALBECK, AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC., 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.

FILED
2015 JUL 16 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL ABSOLUTE, AND FOR A NEW TRIAL NISI REMITTITUR

RECEIVED
JUL 24 2015
SC Court of Appeals

Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute or a New Trial Nisi Remittitur (hereinafter "Defendants' JNOV Motion" or "Defendants New Trial Motion"), came before the Court for a hearing on September 4, 2014. As the jury weighed the evidence presented at trial and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of Defendants' conduct, these motions are now denied.

BACKGROUND

The present case concerns the I'On neighborhood's community amenities, Defendants' representations regarding the amenities during the lot sales, marketing, and development process, and the Defendants' alleged obligations to convey said amenities to the I'On Assembly (the

homeowners' association) and its members (I'On homeowners). Specifically, the amenities at issue included the "Creekside Park," "Community Dock," and the Community Dock's associated parking and boat ramp, all of which are located along the deep waters of Hobcaw Creek on a specific civic lot within I'On known as CV6.[1] According to the testimony of four witnesses at trial, the amenities at issue also included an overflow parking facility which was located on another civic lot within I'On known as CV5.[2] Evidence was presented at trial that during the I'On development and sale process, Defendants obligated themselves to convey these amenities to the I'On Assembly and its members, free and clear of all encumbrances. However, the Defendants entered into talks in mid-2008 to sell the Deep Water Amenities to an unaffiliated, third-party "for profit" entity (the third-party is hereinafter referred to as "Buyers" or "Civitas").[3] Upon learning of the potential sale, several I'On Assembly members, including Plaintiffs, made demands upon the I'On Assembly to secure the rights to the amenity property. (*See, e.g.*, March 11, 2009 Bruce Kinney e-mail, Pl. Ex. 56; February 26, 2009 Templeton letter, Pl. Ex. 53).

As a result of the I'On Assembly members' demands, the Assembly eventually demanded the transfer of the docks and made inquiry regarding the Creekside Park (Pl. Ex. 56). Board members also privately met with Buyers to negotiate modifications to the use limitations on the Creek Club and the HOA amenities.[4] Thereafter, Buyers allegedly withdrew their offer to purchase the Creek Club.

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[1] Defendants also constructed a neighborhood clubhouse, known as the Creek Club, on CV6.

[2] CV5 and CV6 are hereinafter collectively referred to as the "amenity property" or the "community property" or the "Deep Water Amenities".

[3] Notably, documents produced by the I'On Defendants late in this litigation reveal they appeared to be in the process of transferring the Community Dock and boat ramp to the Assembly in 2008. (*See* 2008 Newkirk Environmental E-Mail, Pl. Ex. 85).

[4] Believing the Board had an agreement with Buyers on future use limitations, one Board member supported the commercial use of the Creek Club at a Town hearing on the civic use challenge by several neighbors. After Mount Pleasant denied the use appeal, Buyers refused to negotiate the use limitations further.

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In the interim, it was represented to the I'On Assembly members that the Defendants were finalizing the paperwork, and "preparing to deed the Community Dock to the I'On Assembly." (*See* March 25, 2009 Chad Besenfelder e-mail, Pl. Ex. 58). The deed was to include the waterfront portion of the CV6 parcel, providing access to the amenities. Unknown to the residents or the Assembly Board, the Defendants and Buyers immediately resumed negotiations amongst themselves, reached a contract, and prepared for transfer of the very amenities that the Defendants represented they were in the process of deeding to the Assembly.

The existence of the pending sale came to light on August 1, 2009, and the sale took place four days later. The I'On Defendants sold the property to Buyers on August 5, 2009.[5] Again, following (a) an unsuccessful demand made by Walbeck to the Defendants requesting that Defendants fulfill their promise to convey the property to the I'On community (Pl. Ex. 71); and (b) continued failure to act by the Assembly, Plaintiffs initiated this action, individually and derivatively on behalf of the Assembly, on December 22, 2010.

Following the filing of Plaintiff's initial Complaint, Plaintiffs twice amended their Complaint on March 8, 2011, and February 7, 2012, respectively.[6] After the filing of Plaintiffs' Second Amended Complaint, Defendants moved for the dismissal of certain claims and/or parties. However, the Defendants' Motion to Dismiss was denied. Thereafter, Defendants filed a Motion for Summary Judgment, which, in turn, was followed by a Motion to Dismiss filed by the Assembly, as well as a Motion to Intervene filed by Tidelands Bank.

At a motion hearing held on October 23, 2012, Defendants' Motion for Summary Judgment, the Assembly's Motion to Dismiss, and Tidelands Bank's Motion to Intervene were

[5] Buyers substantially increased the number of wedding events, prior to and following the Assembly's repurchase of the property, again adversely affecting I'On residents' access to the property.

[6] Plaintiffs' Second Amended Complaint asserted claims of violation of the Interstate Land Sales Act, breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, unfair trade practices, civil conspiracy, unjust enrichment, promissory estoppel, and amalgamation against the Defendants

all denied. During this same hearing, Plaintiffs' dismissed their veil-piercing claims against the individual defendants, but maintained their direct causes of action against the individual Defendants as well as their veil-piercing/amalgamation claims against the corporate Defendants.

Approximately one year later, at a motion hearing on January 8, 2013, Plaintiffs were granted leave to file a Third Amended Complaint alleging an additional cause of action of "aiding and abetting." The case was scheduled for a date certain trial for February 18, 2013; however, immediately prior to trial, all parties settled in two separate agreements. Given the then-pending negotiations, mediation, and trial preparations, the Third Amended Complaint was not filed. Buyers later abdicated their settlement agreement, which eventually led to the collapse of the parallel I'On Defendants' settlement agreement. Therefore, the case was reinstated and the Third Amended Complaint was filed on January 2, 2014.

Shortly thereafter, the first trial of this case commenced, but ultimately, ended in a mistrial late on the third full day of trial. Following the January mistrial, Plaintiffs filed a Fourth Amended Complaint, and the case was re-tried before this Court beginning Tuesday, July 29, 2014 and ending Saturday, August 2, 2014. The jury returned verdicts for the Plaintiffs on several causes of action. Specifically, 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. In addition, the jury returned a verdict and awarded damages in favor of the Assembly on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and (c) Breach of Contract. As to Adkins' individual claims, the jury returned defense verdicts. 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 under the breach of fiduciary duty claim. Defendants' post-trial motions followed.

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

A.) The Evidence Presented Regarding Defendants' Collective Development of the I'On Neighborhood

Plaintiffs presented evidence at trial demonstrating the Defendants' "grand plan" to develop and market the I'On neighborhood as an upscale, residential neighborhood which featured many public common areas as opposed to private individual home sites. (*See* Grand Plan, Pl. Ex. 145). I'On was developed and operated by The I'On Company, a family owned business owned by Tom Graham (75% owner) and his son, Vince Graham, (25% owner).[7] During the initial planning phase of I'On, the I'On Company, under the direct control of the Grahams, also established several other "I'On" entities. I'On Realty was established as the listing and sales agent for the I'On home sites on behalf of the I'On Company. The I'On Club was established to own and operate certain neighborhood amenities, including the pool and tennis club, as a private, members-only club. The I'On Club was a wholly owned subsidiary of The I'On Company. The I'On Company originally served as the Manager for both I'On Realty and the I'On Club. Subsequently, The I'On Group became the Manager of the various I'On LLCs. As evidenced by the record, each of the foregoing I'On entities, along with the Grahams, were involved in many aspects of the development of I'On including planning, financing, marketing, and execution.

[7] Tom Graham holds his interest in The I'On Company through Graham Holdings. Original development work was done in the name of The Graham Company, which appears to have transferred the developmental aspect to the I'On Company. Sometime subsequent to the formation of The I'On Company, Tom Graham sold a 5% interest to his other son, Geoff Graham.

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B.) Evidence Regarding Defendants' Collective Representations and Contractual Obligations

Plaintiffs also presented evidence at trial demonstrating the many promises, representations and contractual obligations made by the Defendants in connection with providing amenity property, free and clear of all encumbrances, to the Assembly and its members.

First, Plaintiffs evidenced the promotional campaign launched by the Defendants regarding the development of I'On during its conceptual planning. Specifically, Defendants: (a) filed an Impact Assessment with the Town of Mount Pleasant; (b) prepared a Property Report as required by the Interstate Land Sales Act; (c) submitted applications to the Town of Mount Pleasant, DHEC and the Army Corp of Engineers; (d) directed the plans and plats drawn for the neighborhood; and (e) made presentations at town hall meetings and adjacent neighborhood homeowners' association meetings. Inclusive within each of the foregoing were material representations made by the Defendants as to the Deep Water Amenities planned for the I'On development, property which the I'On Defendants represented would belong to the Assembly and its members:

1.) The Impact Assessment

For example, the Impact Assessment filed by "The Graham Company" with the Town of Mount Pleasant in January of 1997, provides:

> There will be no private docks in the neighborhood. Instead, I'On residents will be able to use seven community docks which will provide access to the marsh and waters of Hobcaw Creek of fishing and boating. These docks will range from small crabbing docks to a larger community dock reminiscent of the dock pavilion at Newpoint or at the Sea Island Yacht Club in Rockville.

(*See* Impact Assessment, Pl. Ex. 3 *cf.* Aerial Photos, Pl. Ex. 187, 188, 192).[8]

Notably, the Impact Assessment includes a depiction of the Community Dock at Newpoint, a Beaufort County project developed by Vince Graham, and this dock contains a boat landing and gazebo similar to what was represented by Defendants to be constructed on the I'On amenity property (CV6).

2.) The Property Report

Similarly, the November 3, 1998 Property Report, required by the Interstate Land Sales Act, was drafted by the Defendants to inform potential purchasers of the development plan for the I'On neighborhood. (*See* Property Report Receipts, Pl. Ex. 150). The 1998 Property Report was provided to numerous I'On lot purchasers prior to the execution of their respective purchase contracts. Among other representations regarding the neighborhood, the Property Report includes a "Recreational Facilities" chart representing that the "Community Dock" and "Creekside Park" will be conveyed to the I'On Assembly at no cost during Phase Two of the I'On development process. (*See* Property Report, Pl. Ex. 1). The Property Report's list of "Recreational Facilities" also separates the Creekside Park" from "sidewalks, paths, and trails", indicating a distinction between these various amenities. Moreover, as described in the 1998 Property Report, the "major" characteristic of I'On includes "300 feet of deep water frontage along Hobcaw Creek" which "rather than subdividing into lots. . .is planned as parks" to serve ". . .as an amenity for residents."

As evidenced by the testimony of Walbeck, Eble, and Hussey, the Defendants and/or their agents represented that the "Community Dock" and "Creekside Park" were located on CV6.

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[8] Upon Mount Pleasant's subsequent approval of I'On's developmental plans, the Impact Assessment, as a part of said plans, was incorporated by the Ordinance permitting development of the neighborhood.

Moreover, the Defendants and/or their agents represented that the "300 feet of deep water" on Hobcaw Creek would remain unencumbered, and thus, be easily accessible to all I'On residents. The record further reflects Plaintiff Walbeck relied on the representations made in the 1998 Property Report when entering his lot purchase agreement.

3.) The Dock Application

The evidence also reveals plans, applications, and letters submitted between June and October, 1999 to DHEC by Newkirk Environmental, Inc., on behalf of the Defendants. Certain of these documents submitted in support of the dock application similarly represent that the Creekside Park and Community Dock will be owned by the I'On Assembly for the common, recreational use of Assembly members, and that no docks in I'On will be private. In fact, the application touts that the plan, as submitted, preserves the entire waterfront for community access and "the purpose of the proposed structures (the docks) is for the common, recreational use of residents within the I'On community." (*See* Dock Application and Dock Plan, Pl. Ex. 6, 37). In a letter to the Corps of Engineers dated October 28, 1999, the Defendants' agent stated as follows:

> It is important to note that I'On's master plan does not provide for individual docks. The six docks requested by The I'On Company are for the use and enjoyment of the I'On community and are proposed in lieu of private docks along approximately 2,600 linear feet of waterfront.

(*See* October 28, 1999 Corp. of Engineers letter, Pl. Ex. 7).

The dock plan submitted by Defendants and later approved by DHEC, the Army Corp. of Engineers, and a host of other governmental authorities, reveals that the principal I'On dock, the only dock with a both ramp which sits on 300 ft. of deep water frontage along Hobcaw Creek

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and is adjacent to a "creekside park",[9] to be located on CV6. Moreover, the dock plan sets forth this amenity as being owned by the "HOA," i.e., the Assembly. (*See* Dock Plan, Pl. Ex. 37).

4.) Plans and Plats

The location of the "Creekside Park", "Community Dock", and boat ramp are also shown on plats and plans of I'On submitted as evidence at trial. Specifically, surveys prepared on behalf of Defendants by Thomas & Hutton Engineering and Palmetto Land Surveying, as well as hand-drawn plats prepared by Defendant's employee, Chad Besenfelder, depict a Creek Club, Community Dock & Boat Ramp, and "HOA Open Space" located on CV6 which, in turn, is located on Hobcaw Creek. (Pl. Ex. 196; Pl. Ex. 200, Pl. Ex. 218).

5.) Marketing Materials and Agent Representations

Plaintiffs presented evidence that, in furtherance of the I'On plan, Defendants reiterated their promises regarding amenity properties directly to I'On lot purchasers via various marketing materials, agent representations, and the lot purchase agreements themselves. Indeed, Plaintiffs showed, through witness testimony and other evidence, that the Developers issued "updated" marketing materials to potential purchasers, including Plaintiff Walbeck, as construction of I'On progressed; however, none of these materials ever disclosed the substitution of an easement, let alone a thirty (30) year easement in lieu of ownership. Notably, *Civitas*, the I'On newsletter and marketing magazine, repeated the representation in the Impact Statement that the waterfront would be accessed through the Parks. (Pl. Ex. 31).

[9] The Creekside Park referred to herein was referred to as "Shelmore Park" in the I'On Park Design, Pl. Ex. 227, Sheet P-7

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Plaintiffs also demonstrated, by way of an advertising document created by the Defendants entitled "I'On Neighborhood Plan", that Defendants continued to promote the representations included in the pre-amended 1998 Property Report. Specifically, the amenity descriptions within the "Living at I'On" section of the I'On Neighborhood Plan separately advertised "miles of marshfront paths" and "the parks", showing a distinction between the two. In the same advertisement, it promotes that "a boat ramp along Hobcaw Creek" can be "enjoyed by all." (Pl. Ex. 77 at "Recreational Facilities" section). In another piece of promotional material published and created by the Defendants, the amenities are promoted as follows: "Community Dock & Boat Ramp", "3 Crab Docks", "12 Neighborhood Parks", and "2.5 Miles of Marsh-Front Paths". (Pl. Ex. 51).

Moreover, the I'On Defendants promulgated and distributed several brochures, plans, and fact sheets, which represented the: (a) Creek Club; (b) Community Dock; (c) Creekside Park; and (d) 300 feet of deep water frontage along Hobcaw Creek as exclusive amenities for the use and benefit of I'On Residents. For example, in neighborhood plans spanning from pre-development through at least 2008, the Creek Club, Creekside Park, and Community Dock are touted as "recreational facilities" and "amenities" to be "enjoyed by all" I'On residents. (*See* Ponsbury Neighborhood Plan, Pl. Ex. 32; I'Onsborough Neighborhood Plan, Pl. Ex. 41; I'On Neighborhood Plan, Pl. Ex. 77). Similarly, I'On's 2005, 2006, and 2007 neighborhood fact sheets provide "[t]he boat landing and community docks on Hobcaw Creek and Shelmore Creek are available to all I'On Residents." (*See* I'On Fact Sheets, Pl. Ex. 48). In the inaugural issue of *Civitas*, the I'On Journal represents that neighborhood "parks provide access to the neighborhoods' lakes and community docks along Hobcaw Creek, [enabling] all the residents to enjoy its beauty." (*See Civitas*, The I'On Journal, Inaugural Issue, Pl. Ex. 31).

The testimonies of Brad Walbeck and Tim Eble demonstrated that Defendants' agent, Bill Orange, provided guided tours of the neighborhood, all the while representing the amenities to be constructed by the Defendants. According to Walbeck's testimony, for example, Mr. Orange represented that a park, a dock and boat ramp, as well as the "deepest porches in the Lowcountry" would be "located right around the bend" from his lot. Walbeck further testified that the lot "right around the bend" from his lot was CV6 and CV6 was the "only place" in I'On with a dock and boat ramp located on the deep water of Hobcaw Creek. According to Walbeck, Mr. Orange represented that a community clubhouse would be located on this same lot, CV6, and that overflow parking for the clubhouse and dock/boat ramp would be available on another, nearby lot, CV5. Hussey corroborated this testimony. Just as Walbeck relied on the 1998 Property Report, Walbeck also testified that he relied on the aforementioned representations made by Defendants' agent when he entered his purchase contract.

6.) Purchase Contracts

Walbeck testified that his decision to purchase a lot within I'On was based upon the marketing materials distributed and the many representations made by the Defendants as to the I'On amenities, including the Community Clubhouse, Creekside Park, Community Dock, and Associated Parking. After visiting the I'On Sales Center, taking a guided tour of I'On courtesy of Defendants' agent, and reviewing the 1998 Property Report, maps, and other marketing materials depicting I'On's development plan, Plaintiff Walbeck entered into his purchase contract on November 27, 1999. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Notably, the Walbeck purchase contract expressly referenced the 1998 Property Report which set forth that: (a) the Community Dock and Creekside Park would be conveyed to the I'On Assembly at no cost

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during the I'On development process; and (b) the "300 feet of deep water frontage along Hobcaw Creek" would serve "as an amenity" for I'On residents. *Id.* Additionally, the Walbeck contract separately included a version of the "Recreational Chart" contained in the 1998 Property Report and specifically provided that Walbeck could "rely" on the representations included in both the contract and the 1998 Property Report. *Id.* Moreover, the signature page of Walbeck's contract contains an attestation clause, as well as two other "signed, *sealed* and delivered" references, evidencing an intent by both parties that the contract be considered a "sealed instrument." *Id.* [10]

7.) Defendants' Internal Communications

Defendants own internal communications further reveal that Defendants were aware of their promises, and their obligations in connection with same.

For example, in a November 15, 2006 e-mail between Defendant's employee, Chad Besenfelder, and the Grahams, Defendants recognized they still owned "common areas" including the "Creek Club Boat Ramp and Dock" which belonged to the "HOA". (Pl. Ex. 179). A few months later, between April and July of 2007, the Defendants outline their options in connection with several of the I'On amenities, one of which includes giving the HOA "the infamous boat ramp and docks" because "the docks are too controversial and taking away even part of this community amenity would cause trouble." (Pl. Ex. 180, Pl. Ex. 181). Perhaps most significant is the Besenfelder e-mail noting "the docks were promised handover to the homeowners and Vince would like to honor their promise one day" (Pl. Ex. 15), a promise

[10] By special interrogatory, the Jury found this to be a sealed instrument. Plaintiff, Lea Ann Adkins, signed a purchase contract with the Defendants on February 1, 2003. The Adkins' purchase contract differed from the Walbeck purchase contract in that it did not specifically incorporate the 1998 Property Report. (*See* Adkins Purchase Contract, Pl. Ex. 45); however, Adkins testified she was provided with the Property Report at the time of contracting to purchase her lot.

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repeated in 2009 when Defendants represented they were "preparing to deed the [C]ommunity [D]ock to the I'On Assembly." (*See also* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217).

C.) Evidence Presented at Trial Regarding Defendants' Creation, Control and Management of the I'On Assembly

On or about February 5, 1998, the I'On Company incorporated the Assembly for purposes of serving as the I'On homeowners association, as set forth in the Declaration of Covenants, Conditions, and Restrictions of I'On filed February 9, 1998. As set forth therein, all property owners in I'On are members of the Assembly; however, the Assembly Board was not completely "turned over" to the I'On homeowners until December, 2005. Prior to this transition, the Defendants, by and through the I'On Company, remained in control of the I'On Assembly and directed all aspects of the development of the I'On community, including entering into negotiations regarding various real estate transactions. The record reflects one such transaction involving the Defendants' recording of an invalid Recreational Easement on February 9, 2000. (Pl. Ex. 42). Executed by the same Defendant employee on behalf of three Defendant entities, the Recreational Easement purportedly provided for "perpetual" access and usage of CV6, yet the easement's term was expressly limited to thirty years. The record reflects another, similar transaction involving the Defendants' internal conveyance of CV6 on August 15, 2000, for nominal consideration in the amount of five dollars. (Pl. Ex. 11). As this internal transfer of CV6 among the Defendants occurred *after* the Defendants granted the Recreational Easement, Defendants did not have the right to grant the Easement, rendering the Easement null and void.

Not only did Defendants direct, manage, and control all aspects of I'On through 2005, the record further reflects the Defendants still influenced and controlled the day-to-day operations of the Assembly, even after the Assembly was transferred to the I'On homeowners. (See Pl. Ex.

74). In fact, as evidenced by the testimony of Deborah Bedell: (a) the transfer of control and community property from Defendants to the Assembly continued through the time of trial; (b) the Defendants retain and exercise their power to reinstate their own agents as members of the Assembly's Board; and (c) the Defendants retain the absolute power to veto any Board action. Defendants absolute "veto power" is perhaps highlighted best by the testimony of Tom Graham who conceded that the Developer had unilaterally placed Besenfelder back on the Assembly Board in January of 2014, and who compared the Defendants' power to veto any action taken by the Assembly Board to that of the United States Supreme Court.

D.) The Evidence Presented Regarding Defendants' Broken Promises and Failure to Act in Assembly's Best Interest

One month after finalizing the 1998 Property Report, and following many representations that the amenity property would be solely for the use of I'On residents, the Defendants submitted a proposal to a neighboring development, Olde Park, allowing Olde Park residents to use "the I'On Club and I'On's community dock and boat ramp" so long as Olde Park paid a usage fee to the tune of $350,000. (Pl. Ex. 189, 191). Olde Park accepted Defendants' proposal on February 19, 1999, *nine months before* Walbeck entered his purchase contract, yet neither the Defendants nor Defendants' agent informed Walbeck of this material change to his use and enjoyment of the amenity property. (Pl. Ex. 190). Vince Graham conceded this on the witness stand.

In 2000, the Defendants, unbeknownst to I'On purchasers such as Walbeck, amended the 1998 Property Report to remove their obligation to convey a "Creekside Park" and "Community Dock". Notably, this amendment was made within days of Walbeck's closing, yet again, Defendants never informed Walbeck of any change as to the amenities specifically referenced in Walbeck's purchase contract, amenities Walbeck testified that he relied upon in entering the

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contract. The record reflects Defendants sent three letters to Walbeck around the amendment time frame, none of which informed Walbeck that the Defendants were no longer going to fulfill their contractual obligations. (Pl. Ex. 167).

Moreover, realizing they still owned the amenity property in 2006, and despite their promises to convey these amenities to the Assembly at no cost, the Defendants entered discussions on how to "capitalize" on the "potential value" of the Community Dock and outlining their options in "selling community facilities", all the while keeping their ideas "quiet for now." (Pl. Ex. 180, 181, 201). Additionally, Defendants tried to capitalize by selling the Creek Club to the HOA, a sale which was contingent on "additional lot entitlement to enable 5 or 6 lots on CV5", despite the Defendants' knowledge that the Creek Club could not be "functional without the parking lot" already located on CV5. (Pl. Ex. 193).[11]

In mid-2008, Defendants entered talks with Civitas regarding the sale of the amenity property, and in August 2008, Civitas contracted to purchase CV6. Although clearly a contract was on the table, Defendants represented to Assembly members that they had "not sold or initiated the sale of the Creek Club." (Pl. Ex. 208).

In response to a demand by I'On resident Catherine Templeton, the Assembly Board wrote Tom Graham and requested that the Docks be deeded to the Assembly on March 11, 2009. The Board further queried Graham as to the location and existence of the "Creekside Park". Concurrently, in a process that began on March 2, 2009, and ended sometime later in March, Civitas' offer/contract to purchase the amenity property was allegedly withdrawn.

Several times in March of 2009, the Defendants reiterated to the Assembly its intention to transfer the amenity property to the Assembly; however, unbeknownst to the I'On homeowners

[11] There was another attempt to sell the Deep Water Amenity to the Assembly in conjunction with the permitting of forty more lots in Phase 11.

and the Assembly, the Defendants and Civitas immediately resumed negotiating the sale of CV6 and CV5, reaching a contract in June of 2009. (*See* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217). The contract specifically referenced and acknowledged the existence of the Homeowners' claims relating to the deep water amenities. Pl. Ex. 148 (June 18, 2009 Contract).

On August 1, 2009, the Assembly learned the amenity property was again under contract and, between August 1 and August 5, 2009, the Assembly orally demanded the docks be excluded from the sale and/or that the modifications to the use agreement be consummated. Defendants ignored the Assembly's demand, and on August 5, 2009, Defendants sold and transferred the amenity property to Civitas. The transfer from Defendants to Civitas was at a price of nearly one million dollars less than the then-appraised value of the parcel, and included the overflow parking lot (CV5) that had been previously represented to be available for parking.

Due to the sale of the amenity property to Civitas, which used the amenity property for commercial purposes, Plaintiff Walbeck and Adkins, as well as other Assembly members, were restricted in their use of the amenity property. Specifically, Plaintiffs faced repeated dock closures, increased traffic, drunken parties, and rowdy visitors, all taking place on the very amenity property they were promised to own free and clear of all such encumbrances. (Pl. Ex. 167).

E.) The Evidence Presented as to Plaintiffs' Demands Concerning the Defendants' Failure to Fulfill its Promise and the Assembly's Need to Take Action

Upon learning of the 2008 potential sale of the amenity property, several Assembly members, including Plaintiffs, made oral demands at Assembly meetings and written demands upon the Assembly to secure the rights to the Creekside Park and Community Dock property. (*See, e.g.*, I'On Board Meeting Minutes, Pl. Ex. 52; Templeton Letter, Pl. Ex. 53; Adkins Letter,

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Pl. Ex. 54; Bruce Kinney letter, Pl. Ex. 56; Adkins Letter, Pl. Ex. 57). Plaintiffs also demanded that Defendants fulfill their obligations to convey the Creekside Park and Community Dock to the I'On Assembly. (*See, e.g.,* Pl. Ex. 63). Thereafter, the proposed sale of the amenity property was cancelled, and in the interim, it was represented to the Assembly and its members that the Defendants were finalizing the paperwork for the transfer of this common property to the Assembly. (*See* March 25, 2009 Chad Besenfelder e-mail, Pl. Ex. 58). However, this never occurred, and instead, the Defendants sold the property to Civitas on August 5, 2009.[12]

F.) The Evidence Presented Regarding Plaintiffs' Repurchase of the Amenity Property

Plaintiffs settled with Civitas at the commencement of the first trial, and pre-trial hearings were held prior to the commencement of the second trial (Trial II). One of the issues to be addressed was how and whether to reference the Civitas settlement agreement in Trial II. Another issued involved Defendants' motion to assert a counterclaim regarding the validity of the easement. Defendants also filed a new, nearly identical action regarding the validity of the easement and moved to consolidate the new action with pending matter. In both the proposed counterclaim and the new action, Defendants pled the transfer of title of CV6 to the Assembly, thereby further putting into issue what the Assembly had paid for title to CV6. Still, Defendants objected to the amount of consideration paid coming into evidence. Defendants sought to show that the Assembly was not damaged since it had gotten the Deep Water Amenities back; but they

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[12] Civitas purchased the property in order to enhance Civitas' profitable bed and breakfast business located in the commercial section of I'On.

objected to the evidence of the amount of consideration paid by the Assembly for these same Deep Water Amenities. The Court ruled that the consideration paid would be admissible.[13]

As a result, Plaintiffs introduced evidence that the Assembly paid $495,000 for the title, while granting Civitas a twenty (20) year free lease, with two additional five-year options, to get the property back. Plaintiffs calculated the damage at $3.5M; but reduced their request to the jury to $2.5M to allow for any offsetting benefit gained by eventual unencumbered title to CV5, eventual possession of the Creek Club, etc., which the Defendants argued were enhancements to which Plaintiffs were not entitled. On the other hand, Defendants discounted the value of the twenty (20) year lease granted by the Assembly and argued to the jury that the enhancements exceeded the Assembly's cost; therefore, the Assembly had not suffered any damage (in Defendants' assessment). The resulting $1.75M verdict in favor of the Assembly HOA demonstrates that the jury weighed the evidence and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of the Defendants' conduct.

STANDARD OF REVIEW

A.) Judgment Notwithstanding the Verdict

In ruling on a motion for directed verdict, and similarly on a motion for JNOV, the trial court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the trial court must view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the plaintiff. *Gilliiand v. Doe*, 357 S.C. 197, 592

[13] Defendants later stipulated to the admission of the settlement in consideration of Plaintiffs' agreement that the Defendants rights to appeal the threshold ruling would be preserved.

S.E.2d 626 (2004); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct.App.1997). Specifically, the trial court is concerned with the existence of evidence, not its weight, and the trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Thus, the trial court must deny a motion for JNOV when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Similarly stated, the trial court should uphold a jury's verdict if there is any evidence to sustain it. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). Moreover, issues not raised or presented to the trial court or not decided by the trial judge may not be later raised in a post-trial motion for JNOV or otherwise. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (noting a party may not use a post-trial motion to raise an issue that could have been raised at trial); *Skinner v. Elrod*, 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992).

B.) <u>New Trial Absolute and New Trial Nisi Remittitur</u>

Unlike motions for JNOV, new trial motions assume the existing evidence presents questions reserved for the jury's determination, but ask whether, in light of all the evidence, the jury reached the appropriate result. Thus, in ruling on new trial motions, the trial court, as the "thirteenth juror", has the discretionary power to deny a new trial absolute or *nisi remittitur* if the court agrees with the jury's verdict based upon the law and the facts, evidence and testimony presented at trial. Rule 59, SCRCP; *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253,

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217 S.E.2d 778 (1975); *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (noting the trial court's discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them. . . .").[14]

A trial court may grant new trial *nisi* motions only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). However, the jury's determination of damages is entitled to substantial deference, and therefore, a jury's verdict should be upheld when it is possible to do so in order to effectuate the jury's express intentions. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996).

LEGAL DISCUSSION

I. Defendants' Motion for JNOV is Denied

Plaintiffs Properly Maintained a Derivative Action on Behalf of the I'On Assembly

As evidenced by the jury's verdict in favor of the Assembly, Plaintiffs' derivative action, brought by Adkins and Walbeck on behalf of the Assembly, fairly and adequately represents the interests of the other I'On Assembly members in accordance with Rule 23(b)(1) of the South Carolina Rules of Civil Procedure ("SCRCP").

Rule 23(b)(1), SCRCP, governs derivative actions and sets forth the requirements necessary to maintain derivative claims. Specifically, Rule 23(b)(1), SCRCP, requires: (a) the verification of a derivative complaint; (b) particular allegations of the plaintiff's efforts to "obtain action he desires from the directors or comparable authority;" and (c) "the reason for the

[14] In other words, the grant or denial of new trial motions rests within the trial court's discretion, and the court's decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by an error of law. *Vinson v. Hartley,* 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct.App. 1996).

plaintiff's failure to obtain the action or for not making the effort." Rule 23(b)(1) further provides that a plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." In determining whether an individual plaintiff is an adequate representative, South Carolina Courts consider: (1) the common interests between the plaintiff and the members he represents; and (2) the plaintiff's ability and commitment to prosecute said common interests.

Here, the record reflects that Plaintiffs satisfied Rule 23's verification, demand and futility requirements as well as the aforementioned adequacy considerations. (*See* Plaintiffs' Complaints). First, there is a common interest between the named Plaintiffs and the Assembly members, as all Assembly members suffered due to Defendants' sale of amenity property promised to the Assembly. Moreover, Plaintiffs testified they were not part of any "Civic Lot Gang" and had no interests adverse to other members of the I'On Assembly – in fact, Plaintiffs advanced these members' interests according to the testimony of Julie Hussey, Tim Eble, and Deborah Bedell. Second, by virtue of the verdict and monetary awards rendered in favor of the Assembly, it is clear that the representative Plaintiffs prosecuted this action in an effort to preserve *all* I'On lot purchasers' common interest in the amenity property. Third, any challenge by the Defendants as to the "demands" made upon the Assembly is unavailing as demands were repeatedly made upon the Assembly, an Assembly controlled by the Defendants, thus evidencing the futility of any demand in the first place. Given Plaintiff's satisfaction of Rule 23(b)'s requirements, Plaintiffs' derivative claims are supported by South Carolina law. Thus, the Court declines to set aside the jury's award of $1,750,000 to the Assembly.

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Plaintiffs' Claims are Not Barred by the Statute of Limitations

1.) Based Upon the Evidence Presented, the Jury Determined Each Plaintiff "Discovered" their Respective Claims on August 5, 2009

Contrary to Defendants contentions, Plaintiffs' claims are not barred by the Statute of Limitations as evidenced by the jury's verdict specifically finding August 5, 2009, as the date upon which Plaintiffs "discovered" their claims against Defendants. Thus, Plaintiffs claims were brought well within the three-year statute of limitations.[15]

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code § 15-3-530 (2005). The three-year statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 SC. 172, 183 (2001) *quoting Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). According to the discovery rule, "the three year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Holly Woods*, 392 S.C. at 183 *citing Martin*, 357 S.C. at 576, 593 S.E.2d at 627. Consequently, the question becomes "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his had been invaded, or that some claim against another party might exist." *Holly Woods*, 392 S.C. at 183-84 *quoting Young v. S.C. Dep't of Corrs.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).

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[15]Moreover, even assuming the jury concluded Plaintiffs "discovered" their claims on an earlier date which would result in Plaintiffs' Complaint falling outside of the Statute of Limitations, the doctrine of equitable estoppel would have served to toll the Statute of Limitations in light of Defendant's misrepresentations and efforts to keep their negotiations with Civitas "quiet for now".

Here, the jury considered the circumstances of this case and concluded that August 5, 2009 was the date Plaintiffs knew or should have known of their claims against Defendants. The jury's conclusion is supported by the evidence presented at trial demonstrating that Defendants sold amenity property promised to the Plaintiffs, including the Creekside Park, Creek Club, Community Dock *and* Boat Ramp, to an unaffiliated, for-profit entity on August 5, 2009. *See* CV5 Deed, Pl. Ex. 66; Lot 275 Deed, Pl. Ex. 67; Assignment of Club Owners' Rights and Obligations, Pl. Ex. 68; CV6 Purchase Agreement, Pl. Ex. 148).

While Defendants maintain the jury ignored other evidence in reaching its conclusion, this argument is without merit – the Court is concerned with the existence of any evidence supporting the jury's findings and has no authority to resolve conflicts purportedly created by the jury's disregard of other evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

The evidence documenting the August 5, 2009 conveyance of the community property to a "for profit" business (Civitas) as well as the evidence reflecting the Defendants' promise to convey this property to the Assembly, a promise Defendants repeated over the course of many years and even reiterated on the very day they negotiated the sale of the community property, sustains the jury's findings. (*See* Handover Agreement, Pl. Ex. 47; January 15, 2009 Board Meeting Minutes, Pl. Ex. 52; March 11, 2009 Bruce Kinney letter, Pl. Ex. 56; March 25, 2009 Besenfelder E-mail, Pl. Ex. 58; Russo/ Besenfelder E-mails, Pl. Ex. 119-137, 139, 140, 154; Graham/Besenfelder E-mails Pl. Ex. 180-181, 193-196, 201-205, 212, 214-218, 220-224).

Moreover, the public notice and constructive notice doctrines are inapplicable here in light of the Defendants' misrepresentations concerning the conveyance of the community

property. *See Moseley v. All Things Possible*, 395 S.C. 492, 497, 719 S.E.2d 656, 659 (2011) (noting "while Buyers could have ascertained the existence of the easement through investigation of public records, their failure to do so does not preclude them from asserting a tort claim for fraud or negligent misrepresentation.") (internal citations omitted); *Tucker v. Weathersbee*, 98 S.C. 402, 402, 82 S.E.2d 638, 640 (1914) (noting the "mere act of recording" does not establish constructive notice). Accordingly, the Defendants bore the burden of demonstrating that the Plaintiffs had knowledge of the 2009 conveyance of the community property prior to 2009 – a burden the jury found Defendants failed to satisfy after considering the evidence presented by Defendants.[16] *See Richardson v. Mounce*, 19 S.C. 477, 447 (1883) (holding "statute of limitations does not run in favor of fraud until the discovery of the facts which constitute the fraud; and such knowledge being denied [by Plaintiff] in the complaint, the defendant must prove [Plaintiff's] knowledge").

2.) Based Upon the Evidence Presented, the Jury Determined the Purchase Contracts at Issue Were "Sealed Instruments"; thus, a 20 Year Statute of Limitations Applies to Plaintiffs' Breach of Contract Claims

The signature page of Walbeck's purchase agreement includes an attestation clause referencing a "seal" and twice references the agreement was "signed, *sealed* and delivered" - once in connection with Walbeck's signature and once in connection Defendants' signature. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Thus, Walbeck's purchase agreement contains a

[16]Thus, even though the Defendants attempted to record a Recreational Easement, transferred the community property amongst themselves, and amended the Property Report to delete references involving the Creekside Park and Community Dock prior to 2009, such discrete, unpublished acts cannot be deemed to have put Plaintiffs on notice of the Defendants' actual transfer of community property in 2009.

minimum of three references to a "sealed" instrument, the combination of which supports the jury's findings that the agreement was sealed.[17]

Testimony from a party revealing a special intent to create a sealed instrument is not necessarily required as a factfinder looks to the instrument to determine the intent to seal the same. Section 19-1-160 of the South Carolina Code specifically provides:

> *Whenever it shall appear from the attestation clause or from any other part of any instrument in writing* that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

S.C. Code § 19-1-160 (1976) (emphasis added).

A.) Plaintiff Walbeck's Standing to Maintain His Individual Claims as Evidenced by Walbeck's Recovery of Individual Damages

Defendants' argument as to Walbeck's purported lack of standing lacks merit. Walbeck testified regarding his individual damages, and ultimately, he recovered individual damages on three separate claims. Defendants simply cannot, one the one hand, aver "Walbeck has no damages as an individual plaintiff" while, on the other, admit "Walbeck testified he wanted $50,000 in individual damages." (*See* Def. JNOV Motion, p. 14). The testimony Walbeck proffered at trial regarding his individual damages, damages suffered irrespective of his membership in the I'On Assembly, is sufficient to both (a) establish Walbeck's standing to bring his individual claims; and (b) sustain the jury's findings as to Walbeck's individual claims.

Moreover, as a party to his purchase contract, Walbeck is unquestionably a "real party in interest" in connection with the same, and therefore, has standing to personally bring claims

[17] The Walbeck purchase agreement, including its signature page, was prominently displayed repeatedly before the jury, and Walbeck also testified as to the "signed, sealed and delivered" language included on the agreement's signature page.

against Defendants for their failure to fulfill their contractual obligations referenced therein. (*See* Walbeck Purchase Agreement, Pl. Ex. 2); *see also Ex parte Morris,* 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006) ("As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation. . .One must be a real party in interest, *i.e.,* a party who has a real, material, or substantial interest in the subject matter of the action . . .").

B.) Plaintiffs' Breach of Fiduciary Duty Claim

"A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Wogan v. Kunze,* 366 S.C. 583, 605, 623 S.E.2d 107, 119 (Ct. App. 2005); *see also Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003); *O'Shea v. Lesser,* 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Island Car Wash, Inc. v. Norris,* 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). South Carolina Courts carefully define fiduciary relationships so as to not exclude new cases which may give rise to the relationship. *Goddard v. Fairways Dev. Gen. P'ship.*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) *citing Island Car Wash,* 292 S.C. at 599, 358 S.E.2d at 152. Generally, a fiduciary relationship may be presumed from the relationship between the parties, such as the attorney-client relationship, or it may be found to exist by the facts of the particular situation, such as a relationship where trust is reposed on one side and there is resulting superiority and influence on the other side.

When considering facts similar to those presented here, South Carolina courts have found a fiduciary relationship exists between developers and property owners. In *Goddard,* for example, the Court of Appeals expressly recognized a fiduciary relationship between the

developer of multiple villas and the owners of said villas by virtue of the organization of homeowners' association and the conveyance of the common areas to the association. *Goddard,* 310 S.C. at 415, 426 S.E.2d at 832-33. By virtue of these very facts - the developers' obligation to create a homeowners' association as well as the developers' obligation to ultimately transfer common elements to the same - the villa owners reposed a special confidence in the developer, "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 [villa owners] imposing the confidence." *Id.* at 414, 426 S.E.2d at 832.[18] Accordingly, Defendants' emphasis on *Hansen* and *Dunes West* is misplaced as case law makes clear there is no limitation to establishing the existence of a fiduciary relationship so long as "trust" is reposed on one hand and "influence" or "superiority" results on the other.

Here, the record reveals Plaintiffs trusted --and the Defendants promised--to: (a) *construct, repair* and *transfer* common amenities to the I'On Community; and (b) form a property owners' association for purposes of, among other things, protecting homeowners' investments. The record further reflects Defendants (a) controlled the Assembly as evidenced by their veto power; (b) managed the Assembly as evidenced by the testimony of Tom and Vince

[18]The *Goddard* Court further referenced the case of *Duncan versus Brookview House, Incorporated* in which the South Carolina Supreme Court found a fiduciary relationship existed between a corporation's promoters and the corporation they were creating. *Id.* at 414-15, 426 S.E.2d at 832. Finding a "corollary" between *promoters* and *developers*, the *Goddard* Court noted: [b]oth [developers and promoters] are *entrusted by interested investors* to bring about a viable organization to serve a specific function." *Goddard's* holding confirms the fiduciary relationship which exists between developers and property owners, a holding which correlates with other South Carolina decisions recognizing a fiduciary relationship between a promoter and the ensuing project. Notably, most associations are organized as nonprofit corporations, and thus, the developer often assumes a dual role as (1) developer-promoter of the development; and (2) director-officer of the developments' property owners' association until the association is self-sufficient. The effect of this dual role is that the developer, during this period, has two separate and distinct loyalties: (1) the operation of the association; and (2) the development and marketing of the project. Such inherent conflict of interest creates a high threshold for the developer to act in the best interests of both his company and the ward (the promoted, new, neighborhood). This conflict of interest often manifests itself adversely in situations where the developer fails to manage the association adequately or where the developer engages in self-dealing. Indeed, a developer in control of an association assumes management and supervision responsibilities similar to those of a corporate director or officer. Therefore, the developer may be held liable if such control results in mismanagement.

Graham; and (c) influenced both the Assembly and its members by making promises (regarding both the repair and conveyance of community amenities) which they failed to keep.

Simply stated, a developer in control of an association may not make decisions which benefit its own interest at the expense of the association and its members. The dual role of developer and officer or director of an association presents an inherent conflict of interest because decisions the director makes for the benefit of the association may in fact be detrimental to the developer's own economic interests. The developer's interest in self-preservation combined with its drive to make a profit often draw judicial scrutiny on conflict situations having the appearance of self-dealing. As noted by our Court of Appeals in *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App. 1987):

> [I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.

In *Dunes West*, for example, the developer served as the original director of the property owners' association, and in this capacity, it failed to properly maintain the property's common areas and failed to create a sufficient reserve fund for maintenance of said common areas. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002). Due to the developer's collective failures, the South Carolina Supreme Court found the developer breached the fiduciary duties it owed to the association holding as follows:

> The developer of a PUD owes a duty to the POA ***to turn over common areas that are not substandard*** and that are in good repair. ***Failure to do so*** subjects the developer to liability for bringing the common areas ***up to standard***.

Id. (emphasis added).

Here, 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 s*hould have been conveyed* and *properties which were actually conveyed in a substandard condition* is a distinction without a difference.[19] Moreover, the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the Assembly, while simultaneously, negotiating the sale of this very property to a third-party for profit. In other words, by failing to convey the community properties *as promised* to the Assembly, the Developers failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly. Thus, Defendants' Motion for JNOV as to the claim for breach of fiduciary duty is denied.

C.) Plaintiffs' Remaining Claims - Breach of Contract, ILSA, and Negligent Misrepresentation

The record reflects that Defendants deliberately failed to fulfill certain promises by selling the very amenity property they promised would belong to the Assembly and its members to an unaffiliated, for-profit entity in 2009. As further demonstrated below, the evidence presented at trial indicates (a) Defendants breached a contract which was intended to directly benefit the Assembly; (b) Plaintiff Walbeck relied on misrepresentations promulgated by the Defendants to his detriment; and (c) Defendants, through various marketing materials and their agents' oral representations, deceived Plaintiff Walbeck as to the purchase of his lot. Accordingly, the jury's findings as to Plaintiffs breach of contract, ILSA, and negligent misrepresentation claims are not untenable, and the motion for JNOV is denied.

[19] Contrary to Defendants' assertion, no South Carolina Court has ever held that "restrictive recognition of fiduciary duties" advances the public policy of this State. (Def. JNOV Motion, p. 17).

Breach of Contract

In South Carolina, a contract between two persons for the benefit of a third person can be enforced by the third person, even if he or she is not named in the contract. *Svenningsen v. Knight*, 286 S.C. 299, 333 S.E.2d 78 (Ct. App. 1985). The third person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to the third person. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005) (noting a third-party may enforce a contract which is made for the third-party's benefit); *Bob Hammond Const. Co. v. Banks Const. Co.,* 312 S.C. 422, 440 S.E.2d 890, 891 (Ct. App. 1994) ("[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct. . .benefit to such third person.").

Here, the record reflects the Assembly is a third-party beneficiary of the developer's contractual obligation, as stated in Walbeck's purchase contract, and again, in the 1998 Property Report, to convey the amenity property directly to the Assembly and its members. (*See* 1998 Property Report, Pl. Ex. 1, Walbeck Purchase Agreement, Pl. Ex. 2). Accordingly, Defendants argument must fail – the language of both Walbeck's purchase contract as well as the 1998 Property Report confer a direct benefit upon the Assembly and its members, and thus, the evidence supports the jury's finding that the Assembly qualified as a third-party beneficiary to the same.[20]

Not only do Walbeck's purchase contract and the incorporated 1998 Property Report provide that the amenity property will be conveyed to the Assembly and its members; the I'On Declaration of Covenants, Conditions, and Restrictions ("I'On CCRs"), drafted by the

[20]Defendants maintain a similar argument as to Plaintiff Walbeck's individual breach of contract claim; however, as a party to his own purchase contract, Walbeck clearly has a right to bring an individual breach of contract claim. The jury's award of $10,000 in actual damages on Walbeck's individual breach of contract claim, following the jury's deliberation as to the representations made by Defendants contained therein, is evidence of this fact. In any event, Plaintiff did not elect to recover actual damages under his breach of contract claim.

Defendants, specifically provide that *the I'On Assembly* owns the "Commons" and grants a "non-exclusive easement of use and enjoyment of the Commons" to *all titleholders*. (*See* I'On CCRs, Pl. Ex. 84) (emphasis added). The I'On CCRs further describe the "Commons" as "real property and interests therein which the *Assembly* owns or otherwise holds possessory or use rights in *for the common use and enjoyment of Titleholders*" which necessarily includes the Creekside Park and Community Dock property. (*See* I'On CCRs, Ex. A, Pl. Ex. 84) (emphasis added).

Similarly, the many agreements entered into between the Defendants and governmental authorities, such as HUD, DHEC, and the Town of Mount Pleasant, during the development of the I'On community also directly benefit, by reference, the Assembly and its members. Indeed, the 1997 Impact Assessment, 1998 Property Report, and 1999 Dock Permitting Application prepared and submitted by the Defendants all indicate the amenity property will be owned by the Assembly for the common, recreational use of I'On residents. Each of the foregoing submissions constitutes proposed developmental plans which, once approved by the applicable governing authority, create an obligation, on behalf of the developers, to fulfill said plans.[21]

Finally, Defendants' own representations evidence they intended to directly benefit the Assembly by transferring the amenity property to Assembly on multiple occasions and in reference to the Assembly's and homeowner's concerns regarding the very contracts which also contained these representations.

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[21] In fact, most if not all of the government permits require the successful applicant to sign the permit, indicating the Applicant's acceptance of and *agreement to* the conditions of the permit before the permit becomes valid. The permits typically incorporate the Applicant's representations as a condition of the actual permit, which the Applicant must, thereafter, agree to as a condition of the permit being finalized. All of the DHEC and Army Corps of Engineers permits in this case appear to follow this exact process.

Interstate Land Sales Act (ILSA)

Plaintiff (a) repeatedly established the applicability of ILSA to I'On; (b) repeatedly referenced the applicability of ILSA's anti-fraud provisions to Plaintiff Walbeck's claim; and (c) repeatedly presented evidence demonstrating Walbeck's reliance on Defendants' misrepresentations.

(a) Plaintiff Walbeck Qualifies as a Purchaser and the I'On Defendants Qualify as Developers

To warrant protection under the Act, Plaintiffs must show they purchased lots within I'On from a defendant who qualifies as a "developer" or "developer's agent". *Id.* The Act defines a developer as any person who, directly or indirectly, sells, or offers to sell, or advertises for sale any lots in a subdivision. 15 U.S.C. § 1701(5). The Act further defines an agent as a person who represents, or acts for or on behalf of a developer in selling, or offering to sell, any lot or lots in a subdivision. 15 U.S.C. §1701(6).

As evidenced by the record, the I'On Defendants qualify as "developers" or "developer's agents" under ILSA. Indeed, I'On was originally developed by The I'On Company, an entity owned by Tom and Vince Graham. Throughout several developmental stages, the I'On Company managed I'On Realty and The I'On Club, both of which promoted I'On home sites or I'On community amenities.[22] The I'On Group was formed to manage the other I'On entities, and all of these entities, along with the Grahams, participated in the development of I'On. Accordingly, each I'On Defendant qualifies as a "developer" or "developer's agent" as defined by ILSA. (*See* Pl. Ex. 78).

Per ILSA, a "purchaser" is an actual or prospective purchaser of any lot in a subdivision. 15 U.S.C. §1701(10). As evidenced by their respective purchase contracts, Plaintiffs actually

[22] I'On Realty and I'On Club are owned by the same individuals who own the I'On Company.

purchased lots within I'On. Moreover, Plaintiffs directly purchased their lots from the I'On Company (a/k/a the developer) or its representatives. The other named I'On Defendants are agents or controllers of the I'On Company which promulgated and/or failed to correct the misrepresentations made to Plaintiffs during the I'On sale process. As such, Plaintiffs may maintain their cause of action under ILSA against the I'On Defendants. *See Kemp,* 940 F.2d at 113 ("[O]fficers, directors, and participating planners may be held individually liable for violations of the Act. . ."); *Gibbes*, 794 F. Supp. at 1333 ("[T]he determining factor is whether each defendant participated in sales or could be considered as a controlling person in an organization that participated in sales.").[23]

Notably, Defendants themselves repeatedly represented to the public and prospective purchasers, Walbeck included, that they were subject to ILSA.

(b) The I'On Defendants Violated ILSA's Anti-Fraud Provisions By Deceiving Plaintiffs in the Purchase of Their Respective I'On Lots.

Per ILSA's anti-fraud provisions, it is unlawful for a developer or agent to: (1) employ any device, scheme, or artifice to defraud potential purchasers with respect to the sale or lease of property. 15 U.S.C §1703(a)(2)(A); (2) obtain money or property by means of any untrue statement of a material fact, or *any* omission to state a material fact, with respect to any information pertinent to the lot or subdivision. 15 U.S.C. §1703(a)(2)(B); or (3) engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser. 15 U.S.C. §1703(a)(2)(C).[24]

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[23] Defendants' assertion that Plaintiff failed to satisfy ILSA's 100 lot requirement is untenable given that the 1998 Property Report received by Walbeck, and repeatedly referenced in Walbeck's testimony, provides: "this report covers ***two hundred and forty-four lots (244)*** in Charleston County, South Carolina. . .It is estimated that this subdivision will eventually contain approximately ***seven hundred and eighty (780) lots.***" (Pl. Ex. 1)(emphasis added).

[24] In bringing claims based upon the foregoing anti-fraud provisions, a plaintiff need not demonstrate reliance on defendant's statements in order to prove a violation of § 1703(a)(2)(A) or (C). Under § 1703(a)(2)(B), plaintiff need not demonstrate reliance based on an omission; however, plaintiff may be required to show reliance to maintain a

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The record indicates Defendants promulgated an ongoing, interrelated scheme involving multiple representations and omissions made to the Plaintiffs concerning the amenity property that Defendants promised to transfer to the I'On Community. The evidence also shows Defendants knew and should have known of the falsity and materiality of these representations and nondisclosures, and the Defendants, through lot sales, annual homeowner dues, and amenity usage fees, profited from said misrepresentations and non-disclosures. As such, the Defendants are liable to Plaintiff Walbeck under each of the above-described ILSA anti-fraud provisions. Simply stated, a single material misstatement or nondisclosure made by the Defendants in dealing with Plaintiff Walbeck constitutes a violation of ILSA's anti-fraud provisions. Here, the record is riddled with such material misrepresentations and omissions, each of which distinctly establishes the Defendants' liability under the Act, and thus, sustains the jury's verdict in favor of Walbeck on his ILSA claim. (*See, e.g.,* Pl. Ex. 1;[25] Pl. Ex. 2; Pl. Ex. 3; Pl. Ex. 7; Pl. Ex. 37; Pl. Ex. 167).

(c) The I'On Defendants' Misrepresentations and Nondisclosures Were Material

As evidenced by the record, it is precisely this information concerning amenity availability, accessibility, and operation to which Plaintiff Walbeck was entitled before he entered into his purchase agreement. Consequently, any facts related to said amenity availability, accessibility, and operation is undoubtedly "material," particularly, since Walbeck testified that he considered the amenity property and Defendants' representations regarding such in deciding to buy within the I'On Community. As facts related to the amenities are material, and the

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cause of action for an affirmative misrepresentation. Here, Plaintiff satisfies any reliance requirement as detailed in the discussion of the negligent misrepresentation section set forth below.

[25] Also of note is that Plaintiff Walbeck received a copy of the 1998 Property Report before he entered his I'On lot purchase agreement. Moreover, the Walbeck purchase contract expressly referenced the 1998 Property Report which set forth that the community property would be conveyed to the I'On Assembly at no cost during the I'On development process. *Id.*, para. 10. Additionally, the Walbeck contract specifically copied and set forth a version of the *amenity chart* set forth in the Property Report. *Id.*

Defendants misrepresented amenity-related facts in their dealings with Plaintiff Walbeck, the I'On Defendants are in violation of ILSA's anti-fraud provisions.[26] In other words, the evidence presented demonstrates that Plaintiff Walbeck was induced, by the Defendants' sales campaign, to purchase the lot within a subdivision consisting of a number of promised amenities about which he knew little. In the view of Congress, purchasers such as Walbeck are entitled to information, and the developers selling said property are, by Congress's direction, obligated to *truthfully* and *accurately* provide it. By failing to include material information, concealing significant facts, and otherwise misrepresenting community amenities, Defendants deceived Plaintiff Walbeck through various acts, instruments, and communications in connection with his I'On lot purchase.

(d) Defendants' Arguments to the Contrary are Without Merit

Plaintiffs' fraud-based ILSA claims are not barred by the Statute of Limitations. According to the Act, any claim brought under Sections 1703 (a)(2)(A)-(a)(2)(C) is governed by the discovery rule, and Plaintiffs brought this action within three years of discovering the I'On Defendants' material misrepresentations and nondisclosures.[27]

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[26] The Fourth Circuit has made clear that the fact itself must be material, *not* the misrepresentation or omission. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004). Thus, assuming other requirements are met, as is the case here, any omission of a material fact is *prohibited. Id.* In addition, the materiality inquiry is objective and examines the significance of the omitted fact to a hypothetical reasonable investor or purchaser, not to the specific plaintiff. *See Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004). Further, materiality "does not require proof that an investor would not have invested had he known the truth; rather, the reasonable investor standard requires a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [investor]."*Dunn v. Borta,* 369 F.3d 421, 427 (4th Cir. 2004) (internal citation omitted) (alteration in original). Moreover, in the analogous context, the fact that omitted information is publicly available does not defeat materiality as to a seller's omission. *See, e.g., Dunn,* 369 F.3d at 429. "[I]nvestors are not generally required to look beyond a given document to discover what is true and what is not." *Dunn,* 369 F.3d at 429.

[27] The discovery rule and its implications as to the timing-based affirmative defenses maintained by the I'On Defendants are discussed in detail above.

Further, any argument offered by the Defendants in attempting to disclaim their collective liability for their acts or their agent's acts is baseless in light of the following language noted by the Fourth Circuit in *In Re Total Realty Management, LLC*, 706 F.3d 245, 253 (2013):

> Given the Interstate Land Sales Act's plain language, Congress's intent to address fraudulent promotion in enacting the statute, and our precedent stating that the Interstate Land Sales Act should be read broadly, we agree with the district courts and hold that the Interstate Land Sales Act's fraud provision encompasses entities that participated in the advertising and promotional efforts leading to a challenged real estate transaction, even if they ultimately were not party to the transaction.

Defendants also attempt to disguise their wrong-doing by claiming they conveyed *different* amenity property to the Assembly which they now describe as the "Creekside Park" and the "Community Dock". Contrary to the Defendants' claims, the evidence leads but one logical conclusion – in 2009, the I'On Defendants conveyed *the* Creekside Park and *the* Community Dock listed in the 1998 Property Report and promoted in other marketing materials to Buyers. A "*Marsh*walk" and "*Crabbing* Docks" are simply not the equivalent of the "*Creek*side Park" and deep-water "*Community* Dock" promised to Plaintiffs as they are not located on the 300 feet of deep water frontage along Hobcaw Creek, and neither has a boat ramp or gazebo, as originally depicted, for the use of I'On residents. The Defendants' argument in this regard illustrates the very "bait and switch" type scheme Congress sought to protect innocent purchasers against in enacting ILSA's anti-fraud provisions.

Negligent Misrepresentation

Like Plaintiffs' breach of contract and ILSA claims, Plaintiffs' negligent misrepresentation claims are supported by South Carolina law and the evidence presented at trial. A plaintiff must establish the following elements to recover for negligent misrepresentation: (1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the

defendant in making the statement; (3) a duty of care owed by the defendant to communicate truthful information to the plaintiff; (4) the defendant's breach of said duty by failing to exercise due care; (5) the plaintiff's justifiable reliance on the defendant's representation; and (6) the plaintiff's direct and proximate damage resulting from his reliance on the representation. *Sauner v. Public Serv. Auth. of South Carolina,* 354 S.C. 397, 581 S.E.2d 161, 166 (2003).[28]

Here, the I'On Defendants misrepresented the availability, accessibility, and future ownership of community amenities to Plaintiffs on multiple occasions by varied means of communication for one primary purpose – profit. As the developers of the I'On Community, the Defendants' owed duties, including duties fiduciary in nature, to convey truthful information to Plaintiffs. The record demonstrates the Defendants breached these duties by failing to transfer the very amenities they represented would be transferred to the community for the use and enjoyment of Plaintiffs. Rather, the I'On Defendants sold said amenities for profit on August 5, 2009, and in so doing, continued to transmit to Plaintiffs misrepresentations regarding the Community amenities in an attempt to conceal their own self-dealings. *See Redwend Ltd. P'ship v. Edwards,* 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003) ("A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction.").

Plaintiffs may rely on Defendants' representations without making further inquiry in cases such as this when a fiduciary relationship exists between the parties. *Epstein v. Howell,* 308 S.C. 528, 530-31, 419 S.E.2d 379, 380-82 (Ct. App. 1992). Thus, by the very nature of their relationship, Plaintiffs had a right to justifiably rely upon the I'On Defendants' representations, and did rely on those representations to their pecuniary detriment. Simply stated, the instant case

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[28] The key distinction between fraud and negligent misrepresentation is that "fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated *upon transmission of a negligently made false statement.*" *May v. Hopkinson,* 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986) (emphasis added).

involves developers, the Defendants, who owed fiduciary duties to the Assembly and its members, the Plaintiffs, to disclose all relevant facts concerning the conveyance of the amenity property to the I'On community and to refrain from taking advantage of the Plaintiffs by the slightest misrepresentation or concealment. *Goodard,* 310 S.C. at 415, 426 S.E.2d. at 832-33. Under these circumstances, Plaintiffs were justified in relying upon the truth of the I'On Defendants' repeated representations that said amenities would be ultimately transferred to the I'On community, regardless of whether Plaintiffs might have ascertained the falsity of the representation had they further investigated.[29]

Even if a showing of his "actual" reliance is required, as Defendants suggest, Plaintiff Walbeck specifically testified he "relied" on (a) the representations made by Defendants' agent, Mr. Orange, that the Defendants promised to convey the amenity property to the community, and this amenity property was located "around the bend" from Walbeck's lot; (b) the representations contained in his purchase contract wherein Developers promised to convey the same amenity property to the community; (c) the representations contained in the 1998 Property Report, a report which was specifically referenced in his purchase contract and wherein Developers again promised to convey the amenity property to the community; and (d) the graphic representations depicting amenity property "located around the bend" from his lot on maps provided by

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[29] *See, e.g., Epstein,* 308 S.C. at 530-31, 419 S.E.2d at 380-82 *citing Halsell v. First Nat'l. Bank,* 48 Okla. 535, 150 P. 489 (1915) (an often-cited case holding a director cannot practice fraud upon a co-director by making false statements concerning corporate affairs to induce the purchase of his stock by the co-director and then successfully defend on the ground that the co-director is charged with the knowledge of corporate affairs and a duty to keep informed of corporate business); 37 Am.Jur.2d *Fraud and Deceit* § 254, at 342 (1968) ("It is well settled that a representee has a right to rely upon representations where a. . .fiduciary relationship exists between the parties [and] in such a case, the buyer generally has the right to rely upon the seller's representations with reference to the property sold, even though the buyer has the opportunity to investigate the matter and ascertain the truth with respect thereto."); *see also Reid v. Harbison Development Corp.,* 285 S.C. 557, 330 S.E.2d 532 (Ct.App.1985), *aff'd in part and remanded,* 289 S.C. 319, 345 S.E.2d 492 (1986) (holding a recipient of a fraudulent representation of fact is justified in relying on its truth, although the recipient might have ascertained the falsity of the representation had the recipient investigated); 37 Am.Jur.2d *supra* § 252, at 337 ("[T]he rule is widely followed. . .that one to whom a positive, distinct, and definite representation has been made is entitled to rely on such representation and need not make further inquiry concerning the particular facts involved. . .").

Defendants throughout the progression of I'On's development. Moreover, Plaintiff Walbeck's testimony also established that Defendants never informed him that they did not intend to fulfill their promises to Walbeck at any time prior to his closing, nor any other time thereafter.

Amalgamation

Prior to submission of the case to the jury, the Court held Defendants are amalgamated as a matter of South Carolina law. At the trial of this case, Plaintiffs demonstrated that any legal distinctions among the Defendant entities are blurred, all are controlled, managed, and owned by the same individuals, and all collectively functioned as one in the day-to-day operations of all aspects of I'On's development, including promulgating deceptive and misleading representations. As noted by the Court, even the Grahams were unsure about which person worked for which entity at which time during which activity. Although not necessary for purposes of warranting this Court's amalgamation ruling, Plaintiffs sufficiently demonstrated both "fundamental unfairness" and many "wrongs" committed by the Defendants.

Specifically, under South Carolina jurisprudence, the "amalgamation" theory provides an avenue for relief when a "piercing the corporate veil" analysis is inapplicable. Unlike the "veil-piercing" theories, amalgamation does not require a showing of a parent company's "domination" of its subsidiary. Rather, under the amalgamation theory, a demonstration of the comingling of corporate interests, entities, and activities which blurs the legal distinction between the corporations and their activities is all that is required in order to hold each Defendant liable for the acts of the others. *See Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91, 344 S.E.2d 869, 871 (Ct. App. 1986). [30]

[30] In *Kincaid*, three related corporations (a development corporation, a management corporation, and a construction corporation) were sued for negligent construction and breach of warranty. The management corporation argued the court should have directed a verdict in its favor because it was merely the marketing and sales company. *Id.* at 96,

Although not required for purposes of establishing amalgamation under *Kincaid*, the record in the present case reflects that the I'On Company and I'On Group did, in fact, dictate the day-to-day operations of the other Defendants and controlled all business decisions related to the I'On development. For example, according to the testimony of Tom Graham, he had direct control over the Defendants "through companies [he] owns or [has]" such as the I'On Company. Additionally, Tom Graham repeatedly testified to the "major" degree in which both he and Vince Graham controlled the conceptual planning of the I'On neighborhood, negotiated business deals in connection with the I'On Development, and directed the managers of the other Defendant entities when making business decisions.

Not only do the I'On Companies employ the same general managers, including themselves, both the owners and managers simultaneously engaged in business dealings acting on behalf of the separate entities. For instance, the invalid Recreational Easement entered into between the I'On Company, I'On Club, and I'On Assembly during February of 2000 in connection with the Community Dock was executed on behalf of *all three entities* by the then general manager for the I'On Company, Joe Barnes. (*See* Recreational Easement, Pl. Ex. 10). Subsequently, another General Manager of the *I'On Company*, Chad Besenfelder, represented to the I'On Assembly, on behalf of the *I'On Group*, that the "I'On Company [was] preparing to deed the [C]ommunity [D]ock to the I'On Assembly" in March of 2009 and the "*I'On Club* will continue to operate the facility." (*See* March 25, 2009 Besenfelder e-mail, Pl. Ex. 58) (emphasis added). At the time this statement was made, the docks were owned by the I'On Club, not the

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344 S.E.2d at 874. In addition to sharing owners, the three companies shared a location. *Id.* Furthermore, the management company was the corporation called to remedy problems. *Id.* Finally, the company's letterhead identified the management company as "A Development, Construction, Sales, and Property Management Company." *Id.* On appeal, the *Kincaid* court affirmed the trial court's finding that this evidence revealed "an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Id.* (emphasis added). As a result, the three related corporations were held liable for the negligent acts of each other.

I'On Company – thus, by virtue of his own statement, General Manager Besenfelder blended all I'On companies into one interchangeable company.

The misuse of this collective control is further evidenced by the various real estate transactions involving the amenity property. For example, CV5 and CV6 were first transferred by the I'On Company to the I'On Club on August 15, 2000, for nominal consideration in the amount of $5.00. (*See* August 15, 2000 Deed, Pl. Ex. 11). Two years later, CV5 was transferred by the I'On Club to the Grahams for the same inadequate consideration and, not surprisingly, no evidence presented to date indicates the Grahams actually paid said consideration to the I'On Club. *Id.* Subsequently, CV5 was sold by the Grahams to Civitas for a discounted purchase price of $225,000 on August 5, 2009. (*See* Settlement Statement, Pl. Ex. 16).

Notably, during the same closing, CV5 was sold to Civitas by the Grahams, CV6 was sold to Civitas by the I'On Club for a discounted purchase price, and a residential lot was also sold by the I'On Company to Civitas for a discounted purchase price. *Id.* As evidenced by the Settlement Statement in connection with the closing of these three properties, the I'On Group, under the direction of the Grahams, executed the closing documents on behalf of both the I'On Club and I'On Company, further reflecting the amalgamation of the Defendants' business operations. *Id.* Similarly, the June 18, 2009 Purchase Agreement for the Creek Club located on CV6 indicates the collective function of the I'On Defendants. (*See* Creek Club Purchase Contract, Pl. Ex. 148). Specifically, the Creek Club Purchase Agreement was entered into between Civitas and the I'On Club, but was executed on the I'On Club's behalf by the I'On Group, and specifically, the I'On Group's Manager, Vince Graham, who is also the manager for both the I'On Company and the I'On Club. *Id.*

Directed Verdict on Defendants' Claim for Abuse of Process

Finally, this Court granted a directed verdict on Defendant's claim for abuse of process. as Defendants failed to establish a question of fact as to all necessary elements of an abuse of process claim. Defendants' motions as to their abuse of process claim are denied.

First, for an ulterior purpose to exist, there must be an illegitimate use of process. Food Lion Inc. v. United. Food & Commercial Workers Intern. Union, 351 S.C. 65, 71 (Ct. App. 2002). Regardless of the exclusion of Defendants' Exhibit 106, Defendants did not present any evidence that the Plaintiffs used the judicial process for anything other than a legitimate purpose. The record reflects Plaintiffs' initiated and prosecuted this action for the sole purpose of righting a wrong – a wrong which affected not only Plaintiffs, but also, community and public interests. Furthermore, Defendants did not produce any evidence of a willful act in the use of the process that was improper because it was unauthorized or aimed at an illegitimate collateral objective. *Id.*

II. Defendants' New Trial Motions are Denied as the Jury's Verdict is Consistent with the Evidence Presented and Supported by the Record

A trial court must grant new trial motions *nisi* only when the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some influence outside of the evidence. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993) (noting "the denial of a motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion . . . If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.") (emphasis added) (internal citations omitted).

Here, the verdict is not grossly excessive,[31] and the jury's determination of damages is entitled to substantial deference. Accordingly, this Court denies Defendants' New Trial Motions. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996).

CONCLUSION

Based upon the foregoing, this Court denies Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute or New Trial Nisi Remittitur.

AND IT IS SO ORDERED.

Stephanie P. McDonald
Presiding Judge, Ninth Judicial Circuit

Charleston, South Carolina
Dated: June 15, 2015

[31] In fact, the jury awarded less than the amount the Plaintiffs requested at trial and declined to award punitive damages despite finding that Defendants acted recklessly and without the slightest care.