THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

The I'On Company, LLC, The I'On Club, LLC, The I'On Group, LLC f/k/a Civitas, LLC, and I'On Realty, LLC,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in holding that Adkins and Walbeck met the requirements to maintain a derivative action on behalf of the I'On Assembly?

II. Did the trial court err in denying Appellants' JNOV motion as to the statute of limitations when Respondents knew as early as 2001 that the I'On Assembly did not own Lot CV-6 or the Creek Club dock and that construction of each had been completed?

III. Did the trial court err in ruling that Appellants owed Respondents a fiduciary duty to convey amenity property to the I'On Assembly as a matter of law?

IV. Did the trial court err in holding that the 2000 Recreational Easement was void *ab initio*, and if so, is the portion conveying an easement to the I'On Assembly for the use of the Creek Club docks perpetual?

V. Did the trial court err in directing a verdict as to Appellants' counterclaim for abuse of process where a handful of antagonists sought to continue their longstanding efforts to thwart The I'On Company's plans and to obtain property for free and where such individuals repeatedly used legal process improperly to those ends, including Walbeck and Adkins knowingly verifying false allegations in an attempt to survive challenges to their purported derivative action?

VI. Did the trial court abuse its discretion in denying The I'On Company's petition for attorney's fees and costs when The I'On Company prevailed on Adkins' breach of the contract claim which has a mandatory fee-shifting provision?

VII. Did the trial court abuse its discretion in considering the success of the Assembly's claim for breach of fiduciary duty in awarding Walbeck $225,000.00 in attorney's fees and costs on his claim for violation of the Interstate Land Sales Full Disclosure Act when the jury awarded him only $1.00?

VIII. Did the trial court err in ruling that Appellants were amalgamated without conducting the legal analysis for disregarding the corporate form and piercing the corporate veil?

IX. Did the trial court err in holding that reliance is not required to establish a claim under the anti-fraud provision of the Interstate Land Sales Full Disclosure Act?

STATEMENT OF THE CASE

This is an appeal from a jury trial that reached verdict on August 1, 2014, in the Charleston County Court of Common Pleas. The case involves a dispute between property owners and a developer regarding a promise made in 1998 to convey a community dock and a park to the homeowners' association. Appellants contend that the developer fulfilled this promise in 2001 upon completion of construction and conveyance of those amenities. Respondents contend that the developer should have conveyed different property. In any event, the construction of the amenities on the property Respondents target was completed by April of 2001. No respondent brought suit until December 22, 2010.

Two property owners, Brad Walbeck and Lea Ann Adkins, alleged claims in their individual capacities as well as derivatively on behalf of the homeowners' association, the I'On Assembly. The defendants included the developer, The I'On Company, LLC, and several related entities: The I'On Club, LLC, The I'On Group, LLC, I'On Realty, LLC, Vince Graham, and Tom Graham (collectively with The I'On Company, the "I'On Defendants"). Respondents also sued the purchaser of the property they contend had been promised to them, 148 Civitas, LLC, and its principal, Mike Russo.

Walbeck alone filed suit on December 22, 2010 but never served the summons and complaint. (Summons and Complaint.) Walbeck filed an amended summons and complaint on March 8, 2011, alleging violation of the Interstate Land Sales Full Disclosure Act ("ILSA"), breach of contract, breach of fiduciary duty, fraud, and negligent misrepresentation. (Amended Complaint.) The I'On Defendants filed a motion to dismiss, answered, and counterclaimed for abuse of process. (Motion to Dismiss and

Answer.) The I'On Defendants challenged the pleading based on, inter alia, the expiration of the statute of limitations, the absence of the alleged fiduciary duty, and the failure to properly bring the derivative claims. (*Id.*)

On the day before the hearing on the motion to dismiss, February 7, 2012, Adkins joined Walbeck in a second amended complaint purporting to assert claims individually and derivatively on behalf of the Assembly. (Second Amended Complaint.) Walbeck and Adkins each verified the facts and allegations and sought to bolster the claims as to the derivative procedure. (*Id.* at 18-19.) They added the Assembly as a defendant to the action. (*Id.*) The court denied the motion to dismiss. (March 15, 2012 Order.) The I'On Defendants later moved for summary judgment based on, among other things, the expiration of the statute of limitations and the plaintiffs' failure to bring a proper derivative claim. (May 31, 2012 Motion for Summary Judgment.) The court also denied that motion. (November 6, 2012 Order.)

On January 2, 2014, Walbeck and Adkins filed a third amended summons and complaint. (Third Amended Complaint.) The plaintiffs later verified this complaint. (January 9, 2014 Verifications.) The I'On Defendants answered and counterclaimed. (Third Answer.)

On the eve of what proved to be a mistrial, January 13, 2014, the plaintiffs reached a settlement with defendants Mike Russo and 148 Civitas, LLC. (February 11, 2014 Order.) In that settlement agreement—in which the Assembly acquired more than anyone had ever contended was promised it—the Assembly agreed to support the plaintiffs' claims against the I'On Defendants. (Pl. Ex. 225; Jan. 13, 2014 Hear. 25:24-26:16; Tr. 939:7-16, 943:4-6.) The case proceeded to trial the following day, but the

court declared a mistrial on January 17, 2014. On February 26, 2014, in light of the settlement agreement, the court realigned the Assembly as a nominal plaintiff. (February 26, 2014 Order.) The Assembly never filed pleadings alleging any causes of action against the I'On Defendants. Walbeck and Adkins prosecuted the Assembly's claims, and only in a derivative capacity.

On May 12, 2014, The I'On Company and The I'On Club filed a separate suit against Walbeck, Adkins, and the Assembly seeking a declaration that an agreement which included two easements executed in 2000 was valid, and that the easement for use of the boating facilities contained therein was perpetual. (Complaint – DJ Action.) The trial court consolidated the declaratory judgment action with the present action. (June 20, 2014 Order.)

The case was tried to verdict from July 28 to August 1, 2014. At the close of the plaintiffs' case, the court denied the I'On Defendants' motion for directed verdict. (Tr. 583:11-630:15; Memorandum in Support of DV.) At the close of the defendants' case, the court directed a verdict in favor of the plaintiffs as to the I'On Defendants' counterclaim for abuse of process. (Tr. 1029:15-1033:16.) The court denied the I'On Defendants' renewed motion for directed verdict at the close of evidence. (Tr. 1009:23-1037:12.)

The jury returned a verdict in favor of the I'On Defendants as to all claims for fraud and violation of the South Carolina Unfair Trade Practices Act, and as to all claims brought by Adkins, including breach of contract, violation of ILSA, fraud, and negligent misrepresentation. (Verdict Form.) The jury returned a verdict in favor of Walbeck in the amount of $1.00 for his claim for violation of ILSA; $10,000.00 for breach of

contract; and $20,000.00 for negligent misrepresentation. (*Id.*) The jury returned a verdict in favor of the Assembly in the amount of $1,000,000.00 for breach of contract; $1,750,000.00 for breach of fiduciary duty; and $1,000,000.00 for negligent misrepresentation. (*Id.*) The jury also found that each of the plaintiffs knew or reasonably should have known that a claim existed against the defendants on August 5, 2009. (*Id.*) The court entered judgment on August 11, 2014. (August 11, 2014 Order.)

The I'On Defendants moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. (JNOV Motion.) Walbeck petitioned for attorney's fees and costs, Adkins petitioned for unjust enrichment, and plaintiffs moved for judgment as to the validity of the 2000 Recreational Easement. (Walbeck Fee Motion; Adkins Unjust Enrichment Motion, Motion on Easement.) The I'On Company petitioned for attorney's fees and costs as the prevailing party in Adkins' breach of contract action. (August 12, 2014 I'On Fee Motion.)

On July 16, 2015, the court filed orders denying Adkins' petition for unjust enrichment; denying the I'On Defendants' motion for JNOV and a new trial; denying The I'On Company's petition for attorney's fees; declaring the 2000 Recreational Easement void and invalid; and awarding Walbeck $225,000.00 in attorney's fees and costs. (JNOV Order, I'On Fee Order, Easement Order, Walbeck Fee Order, Adkins Unjust Enrichment Order.) On July 20, 2015, Appellants timely served notice of appeal.

FACTUAL BACKGROUND

A few longtime protesters of the I'On development manufactured this lawsuit in order to frustrate The I'On Company's latest development efforts, to quash the sale of I'On Club property, and to obtain that property for free. This group ("the Gang") knew

the property was not rightfully theirs, and they never claimed any right to it for the near decade they now contend the homeowners were supposed to have had ownership.[1] Ultimately, the Gang decided to redirect its failed efforts to circuit court and recruited Walbeck to assert claims they manufactured. (Def. Memo in Support of Motion for Summary Judgment, Ex. A: Walbeck Dep. at 99:5-19.)

Walbeck's initial complaint claimed that the developer's promise to convey a "Creekside Park" and a "Community Dock" included in a 1998 ILSA Property Report actually referred to (1) Lot CV-6, an entire waterfront lot designated for civic use;[2] (2) multiple docks; (3) a boat ramp; (4) a parking lot; and (5) the 2,967 square-foot Creek Club. At trial, after having acquired rights to receive another parking lot down the street, Lot CV-5, as part of the 2014 settlement with 148 Civitas, LLC, Respondents grabbed for even more. (Pl. Ex. 225; Tr. 877:13-878:11; 879:10-880:5.) They swore under oath for the first time, directly contradicting their prior testimony, that this additional lot, at least ten parcels and 750 feet away from Lot CV-6, was also part of the simple 1998 promise to convey a "Creekside Park" and a "Community Dock."[3] (*Compare* Tr. 425:15-426:13,

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[1] The Gang included Respondent Lea Ann Adkins, Steve Brock, Assembly Board member Ward Mundy, and attorney Catherine Templeton. (Def. Ex. 105.) Respondent Brad Walbeck was recruited to join the Gang for the purpose of filing this action. (I'On Def. Memo in Support of Motion for Summary Judgment, Ex. A: Walbeck Dep. at 99:5-19.)

[2] The "civic use" designation in I'On is distinct from residential, commercial, and other parcels designated for common homeowners' ownership. Civic properties in I'On, for example, are owned and operated by churches, a school, and The I'On Club. (Def. Exs. 15, 17-19; Tr. 456:20-24; 740:23-742:17.) In fact, many civic lots were donated to those civic organizations. (Tr. 707:25-708:7; 735:2-21.) Walbeck and Adkins concede that the lot they seek here, Lot CV-6, was always designated for a civic use and that they knew as much when they purchased. (Tr. 541:3-10; Tr. 456:12-457:9.)

[3] Prior to trial Respondents informed the trial court that "under no theory of this present case would [the Assembly] have any claim . . . at all" to Lot CV-5. (Jan. 13, 2014 Hear. 25:24-26:16.)

454:3-455:1, 458:11-459:5, 460:1-7 *with* Jan. 13, 2014 Hear. 25:24-26-16; July 24, 2014 Hear. 12:1-13:7; Tr. 871:19-24.)

I. **The Developer's Vision of I'On and Efforts to Realize It.**

The I'On community is an award-winning, early example of a "new urbanism" development located off of Mathis Ferry Road in Mount Pleasant, South Carolina. (Def. Ex 8.) I'On's visionaries, Vince Graham and his father, Tom Graham, planned a mixed-use development with designated residential, commercial, and civic spaces. The Grahams sought to recapture the charm of traditional walking neighborhoods such as downtown Charleston and the Old Village of Mount Pleasant. (Def. Ex. 52.) From its inception, I'On "was going to be a community, not just a subdivision" designed "so that neighbors would have more interaction with each other." (Tr. 158:18-22; 728:5-24.) Every residential lot is within a three-minute walk of a playground or park. (Tr. 734:4-23.) The Grahams envisioned many amenities including multiple parks and trails, docks and boating facilities, commercial spaces, churches, schools, and swim and tennis facilities. (Tr. 688:20-689:4, 689:16-690:2, 733:21-735:7.) By design, these amenities would promote this sense of community spirit. By design, most of these amenities, including the civic spaces, were not intended to be owned by the Assembly. (Tr. 690:3-17, 735:2-13; Def. Ex. 22 at 23).

The Grahams' relatively radical promotion of higher density development had detractors from the outset. Respondent Adkins and her domestic partner Steven Brock (now an I'On resident but neither a lessee nor owner) were chief among them. (Def. Ex. 106; Tr. 464:5-22; 752:11-753:1; 755:21-757:4; 758:15-22; 759:12-760:4). Despite ironically becoming residents of the project they sought to stifle, Adkins and Brock have

consistently continued to oppose The I'On Company's development efforts. (Def. Ex. 106, 150 at 3-4; Tr. 755:23-757:4, 758:15-22, 761:14-762:25.)

After years of zoning and legal battles beginning in 1995,[4] the family business where Tom Graham supported his son's commitment to the vision for I'On has been a resounding success. The development has been featured in the *Wall Street Journal* and *Southern Living* magazine, recognized by the Department of Natural Resources, and has attracted tours by the National Mayors Institute of Design, colleges, and developers from all over the world. (Tr. 743:16-744:22.) The residents even bestowed upon Vince Graham the singular honor of dedicating a public garden to him with a fitting monument. (Tr. 738:8-739:10; Def. Ex. 151.) Even I'On's detractors in the Gang recognize the achievement it represents: neither Respondents nor a witness who received the 1998 Property Report could testify that the "Creekside Park" and "Community Dock" issues central this lawsuit were material to their decision to purchase in I'On. (Tr. 169:8-18; 174:25-175:15; 462:9-13; 537:21-538:4; 642:17-25.) It's no wonder—their property values have increased dramatically, at least 400% from 2000 and at least 100% since 2003. (Tr. 745:11-22.)

II. <u>The 1998 Property Report.</u>

On November 3, 1998, The I'On Company prepared a property report pursuant to ILSA ("Property Report") which addressed expectations for Phase II of the development. (Def. Ex. 22.) I'On Realty distributed this Property Report to prospective purchasers of property in Phase II. It included this table:

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[4] *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (rejecting effort by citizens to block development pursuant to voter referendum on zoning).

RECREATIONAL FACILITIES

Facility	% of Construction Now Complete	Estimated Date of Start of Construction (Month/Year)	Estimated Date Available for Use (Month/Year)	Financial Assurance of Completion	Buyer's Annual Cost or Assessments
PHASE 2					
Creekside Park	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Community Dock	0%	1/1999	9/1999	None	Part of annual HOA Assessment
Sidewalks, paths and trails	0%	1/1999	10/1999	None	Part of annual HOA Assessment
Parks and Open Space	0%	1/1999	10/1999	None	Part of annual HOA Assessment

(Def. Ex. 22 at 21.) Appellants' only obligation to convey any amenity arose from this chart. The Property Report provided that these amenities would be conveyed to the Assembly "upon completion of construction" in Phase II. (Def. Ex. 22 at 21-22.) The Property Report also prominently disclosed that other recreational facilities may be owned by persons other than the Assembly. (Def. Ex. 22 at 23.)

The Property Report's promises were intentionally conservative and generic because much of the plan for I'On was still a vision at the time the report was prepared. (Tr. 370:1-13; 375:1-8; 674:6-15; 675:20-676:18.) The Property Report does not provide any further description of the planned amenities, does not indicate any proposed locations for the amenities, and does not contain maps or photographs. (Def. Ex. 22; Tr. 377:16-380:6.) Adkins even concedes that the terms "Creekside Park" and "Community Dock" are "vague" and that determining what they mean "requires" review of other documents.

(Tr. 442:12-23; Def. Ex. 32.) Walbeck also had to refer to other documents to define these terms. (Tr. 538:22-539:7.) The I'On Company did not purchase the Phase II parcel of land until March of 1999 after the Town of Mount Pleasant rezoned the property—several months after the Property Report was issued. (Def. Ex. 3; 673:18-674:1.) It therefore could not obtain a dock permit until December of 1999. (*Compare* Def. Ex. 4 *with* Pl. Ex. 33.)

The I'On Company amended the Property Report in April and December of 2000. (Def. Exs. 23, 24; 690:18-691:5.) Potential purchasers after those dates were provided with an amended report—not the 1998 Property Report. (Tr. 704:21-705:21.) The three reports applied only to Phases I through IV of the ten phases of the development. (Def. Ex. 23 at 33; Def. Ex. 24 at 33.) Ultimately, The I'On Company determined that ILSA's reporting requirement did not apply to I'On and stopped distributing the reports altogether. It even changed the form of the lot purchase agreement—which form was used for Adkins' agreement—to make clear that ILSA did not apply. (Def. Ex. 25 at 5.) All purchase agreements, however, contained a merger clause and a disclaimer of reliance on oral representations as to amenities. (Def. Exs. 25, 34.)

III. <u>The I'On Company Exceeded the Promises Contained in the 1998 Property Report.</u>

The I'On Company over-delivered on the promises made in the Property Report. (Tr. 691:6-11.) The "Creekside Park" is a 2.86 acre linear park, the Marshwalk, which runs along Shelmore Creek and other areas. (Tr. 374:10-20; 375:16-377:13; 692:12-13; Def. Exs. 140, 141.) The concept of a linear park, and this park in particular, had long been part of the vision of I'On, and The I'On Company advertisements confirm that.

(Def. Ex. 98; Tr. 575:16-577:13.) The I'On Company conveyed this "Creekside Park" to the Assembly on November 21, 2000. (Tr. 686:10-12; 375:9-376:12; Def Exs. 140, 141.)

Respondents contend that the promise to convey a "Creekside Park" is a reference not to the Marshwalk, but to Lot CV-6. The primary improvement to Lot CV-6 is the Creek Club, a 2,967 square-foot event facility built at a cost of more than $600,000.00. (Def. Ex. 182.) The I'On Club received the certificate of occupancy for the Creek Club on April 10, 2001 and immediately began operating the facility as a private event venue. (Def. Ex. 49; Tr. 179:8-25.) Lot CV-6 also has two docks, a boat ramp, and a parking lot. These improvements were all complete by April of 2001. (Def. Ex. 49, Def. Exs. 164a, 167; Tr. 696:4-22.)

Respondents conveniently took their position only *after* they began looking for ways to use legal process to disrupt Appellants. When she read the promise to convey a "Creekside Park" many years after her purchase, Adkins unwittingly conceded that she had to go check other documents—besides the Property Report—to determine what these two words mean. (Def. Ex. 32.) Tellingly, Adkins did not see these other documents, which she declares are crucial to her position, before she bought her lot in I'On. (Tr. 442:24-443:3.) Walbeck followed the same path—reviewing documents ten years after his purchase to determine what he thinks the 1998 Report means. (Tr. 538:22-540:7.)

Although Adkins did not openly support the Assembly's potential purchase of Lot CV-6 in 2007, her opinion on the matter revealed a truth she cannot escape. She never believed that The I'On Company was legally obligated to convey Lot CV-6 to the Assembly for free:

> *I heard someone jokingly say once that they should give it to us; I laughed thinking that wasn't a serious consideration.* After thinking about it, it

> began to sink in that perhaps they should – in lieu of other mega-donations to various causes. There is, I believe, big opposition to the churches receiving such large donations, and these comments come from church-going individuals. Also, the school has its own fundraising. The I'On Trust ......c'mon.......and I'm a member! But I realize Vince gets a tax deduction for all these huge donations, as well. And probably takes a loss on the "sale" of the Creek Club. A proposal more people could get behind would involve nixing the donations to the organizations. And *no $$ exchanged for the club....*

(Def. Ex. 173 (emphasis added); *see also* Def. Ex. 180.)[5]

Respondents could not testify that the Creek Club facility, a boat ramp, a staging dock or a parking lot were promised to the Assembly. (Tr. 455:16-19; 540:22-541:2; 541:20-542:17.) In fact, before the Assembly promised to cooperate with Respondents' case, its President, Deborah Bedell, told the Assembly membership that The I'On Company "did not promise the Creek Club or a particular dock or a deep water dock." (Tr. 882:13-884:17; 887:4-15.) After the Assembly directed its attorneys to support Respondents' case, Bedell attempted to reverse her position but was impeached at trial. (*Id.*; Tr. 898:13-18.) The Gang manufactured a claim that the two lone words "Creekside Park" meant the Assembly was entitled to the free acquisition of Lot CV-6, the Creek Club event facility, multiple docks, a boat ramp, and Lot CV-5. (Tr. 425:15-426:13, 454:3-455:1, 458:11-459:5, 460:1-7.)

As to the "Community Dock" promise in the 1998 Property Report, The I'On Company built and conveyed to the Assembly not one, but two, community docks as part

[5] The proposed Lot CV-6 transaction in 2007 coincided with a proposal for the Assembly's cooperation regarding an amendment to the planned development zoning that would allow development of "Phase 11." (Def. Exs. 127, 137.) As part of the Phase 11 lot sales, The I'On Company proposed donating $60,000.00 per lot and up to $2.88 million among the Assembly, the I'On Trust (a charity created to provide cultural events for the community and promote volunteerism), church organizations, and the community's Montessori school. (Def. Exs. 127, 137.)

of Phase II. (Tr. 378:3-13; 380:7-9, 395:8-20; 704:17-20; Pl. Ex. 187; Def. Exs.142, 164A, 5B.) The Creek Club dock, the largest dock in the community, was owned and operated by The I'On Club, the entity created to build and manage the boating facilities, the Creek Club, and the swim and tennis facilities. (Tr. 688:9-689:4; 689:16-690:2; Def. Ex. 14.) Respondents insist that the Creek Club docks are the "Community Dock" promised to the Assembly.

IV. **<u>The 2000 Recreational Easement.</u>**

On February 9, 2000, The I'On Club, The I'On Company, and the Assembly executed the Recreational Easement and Agreement to Share Costs. (Def. Ex. 27.) The Recreational Easement provided the Assembly members' rights to access the Creek Club docks, boating facilities and parking lot located at Lot CV-6.[6] (*Id.*) At this early stage of the development, the manager of The I'On Company also served as the manager of The I'On Club and as the President of the Assembly's board of directors. He executed the document on behalf of each entity. (*Id.*) On February 15, 2000, the Recreational Easement was recorded and indexed to I'On's Declaration of Covenants, Conditions and Restrictions, rendering it a matter of public record contained in all subsequent lot purchasers' chains of title. (Def. Ex. 27.)

The Recreational Easement unequivocally "grants to Assembly...a perpetual, nonexclusive easement" to access the amenities at Lot CV-6. (Tr. 241:2-8; Def. Ex. 27 at 2-3.) The "Agreement to Share Costs" portion sets forth a division of costs between The I'On Club and the Assembly for the maintenance of the boating facilities. (Def. Ex. 27 at 8.) A 30-year limit on the term of the cost-sharing agreement gave Respondents a wedge

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[6] The Recreational Easement sets forth rights and obligations among the parties to considerable property besides the Creek Club dock and boating facilities. (*Id.*)

which they used to galvanize support for their lawsuit by instilling fear in the Assembly's membership that it would also lose easement access after 30 years—although all parties to the document understood that the easement for use of the boating facilities was perpetual. The parties operated pursuant to the terms of this document for nearly a decade before the current dispute arose. (Tr. 864:9-21; 893:16-24.)

V. Walbeck and Adkins.

Brad Walbeck entered into his lot purchase agreement on November 27, 1999, and in doing so, acknowledged that he entered into the contract "without reliance on any warranties, statements or representations, either written or oral, express or implied, by Seller, or by any agent of the Seller ...." (Pl. Ex. 2, at 3-4.) Walbeck received a copy of the 1998 Property Report, the amenity portion of which was incorporated into his contract. (Pl. Ex. 2; Tr. 522:18-523:2.) Walbeck built a home in I'On and has lived there and been a member of the Assembly for the decade before he filed suit. (Tr. 523:21-524:4.) Walbeck understood that the amenities promised in the Property Report were to be constructed and conveyed to the Assembly "*in* Phase II." (Tr. 527:11-5 (emphasis added).) Each year, he received written notice of the Assembly's budget and attended the annual meetings, both of which put him on notice that the Assembly was paying for use of the Creek Club and the Creek Club Dock. (Tr. 543:14-545:12; Def. Exs. 70, 72, 73, 75, 77-84.) Plainly and simply, Walbeck knew for years that the construction was complete and that those amenities had not been transferred to the Assembly. He never brought a claim until he was recruited to do so a decade later. (Def. Memo in Support of Motion for Summary Judgment, Ex. A: Walbeck Dep. at 99:5-19.) In fact, when he learned of the proposed sale of Lot CV-6 to 148 Civitas, LLC, Walbeck raised questions,

not about rights to ownership, but about whether the zoning of the lot was proper. (Tr. 549:19-550:3; Def. Ex. 131.)

On February 1, 2003, Lea Ann Adkins executed a purchase contract to buy a lot in Phase V of I'On—several years after Walbeck and several years after the 1998 Property Report had been amended. (Pl. Ex. 45; Tr. 470:1-2.) Adkins conceded that the Creek Club and the Creek Club dock were constructed when she purchased her lot. (Tr. 443:15-21.) Adkins testified that she received the 1998 Property Report prior to her purchase but could not testify as to when she actually read the very document on which she based her claims. (Tr. 410:25-411:14; 476:24-478:25; Adkins' Unjust Enrichment Order.) The 1998 Property Report had been amended twice and was no longer provided to prospective purchasers by the time Adkins purchased her lot. There is no receipt of delivery of the Property Report to Adkins, as with the other early purchasers. (Tr. 472:4-12; 490:9-491:8; 704:21-705:21.) Adkins' transaction was expressly and prominently "exempt[ed] from the Interstate Land Sales Full Disclosure Act." (Pl. Ex. 45 at 5; Tr. 468:18-469:4.)

VI. The I'On Assembly.

The I'On Company organized and formed the I'On homeowners' association, the I'On Assembly, as a South Carolina nonprofit corporation on June 4, 1998. (Pl. Ex. 1 at 27.) All lot owners in I'On are members of the Assembly. (*Id.*) The Assembly's responsibilities include managing the organization's annual budget, operating and maintaining the common areas, and administering and enforcing the Declaration of Covenants. (*Id.* at 28.)

As I'On continued to develop, Appellants accelerated transfer of control of the Assembly to the I'On homeowners. (Tr. 748:13-25.) By December of 2003, a majority of the Assembly's board of directors (the "Board") were I'On homeowners with no association with Appellants.[7] (Tr. 355:20-21; Def. Ex. 107.) After December of 2005, no developer representatives served on the Board. (Tr. 355:22-356:8; Def. Ex. 121.) The Assembly's Finance Committee, which had primary responsibility for reviewing and preparing the Assembly's budget each year, contained no developer representatives from 2003 on, if ever.[8] (Tr. 749:6-17; Def. Ex. 107.) Further, Appellants never exercised any of the limited veto rights the developer retained pursuant to I'On's Declarations. (Tr. 205:9-15; 356:18-23; 989:14-991:3; Def. Ex. 120.) Deborah Bedell, the current Board President, spoke with many former Board members and did not believe that Appellants controlled the Board. Bedell conceded that she is aware of *no* decision of the Board that Appellants' veto power impacted. (Tr. 867:9-25; 868:5-9; 910:17-911:5; 990:23-991:3.)

The Assembly knew that the construction of the amenities at issue was complete in 2001 and knew that it did not own this property. In fact, it paid for use of the property annually: for more than six years before this suit was filed, the Assembly paid The I'On Club to rent and maintain use of the very property Respondents claim the Assembly was supposed to own. (Tr. 179:8-25.) The Assembly's Finance Committee allocated $1,800.00 for "Creek Club Rental Fee" and $4,044.00 for "Creek Club Dock usage fee" to be included in the Assembly's 2005 budget. (Def. Ex. 39.) The Assembly's later

[7] The I'On homeowners serving on the Assembly Board at this time included Andy Gowder, Gaye Joyner, and Libby Eble. Each received the 1998 Property Report as part of their lot purchase. (Def. Ex. 62, 107, 158; Tr. 747:17-748:12.)

[8] Members of the Finance Committee included Libby Eble, Annie Bonk, Ed Clem, and Andy Gowder. (Def. Ex. 107.) Each received a copy of the 1998 Property Report. (Tr. 641:1-5; Def. Exs. 61A, 63, 67, 157, 158.)

budgets contained similar allocations for the Assembly's "Creek Club Rental Fee" as well as for "Creek Club Dock usage fee." (Def. Exs. 40-43.)

I'On resident Ed Clem was an active member of the Assembly's leadership for many years, serving on the Finance Committee and eventually on the Board. (Tr. 633:20-634:9.) Clem purchased a lot in I'On in March of 1999 and received the 1998 Property Report. (Tr. 633:4-11; Def. Exs. 60, 61A). In 2004, Clem identified concerns with the Recreational Easement—a document that makes plain that The I'On Club and not the Assembly owned the subject property. (Tr. 636:8-24.) The Assembly Board asked Clem to work with an attorney on the Assembly's behalf to review the Recreational Easement. (Tr. 637:22-638:12; 638:8-24; Def. Ex. 109.) By May 6, 2004, that attorney, Rick Brownyard, had reviewed the Recreational Easement "from the point of view of the Assembly" and shared his initial thoughts. (Tr. 639:5-9; Def. Exs. 109, 155.) Brownyard offered to meet with Clem and the Assembly Board to further discuss proposed changes. (*Id.*)

Several months later, at the February 9, 2005 meeting, the Assembly Board again reviewed and discussed the terms of the Recreational Easement. (Def. Ex. 113.) The April 27, 2005 Assembly Board Minutes note that "the boat ramp agreement still holds" even if the Creek Club was sold. (Def. Ex. 116.) The July 27, 2005 Board Minutes state plainly that "the Creek Club is the property of the I'On Club." (Def. Ex. 118; Tr. 178:5-11.) The Assembly knew that the Recreational Easement provided access—as opposed to ownership—to the amenities at Lot CV-6, but it took no legal action.

Any lingering question as to whether the Assembly knew it did not own the property at issue and would not receive it for free may be answered by the Assembly's

considering its purchase as early as 2005. (Def. Exs. 113, 118, 123-125, 127, 137.) On April 25, 2007, the Assembly again discussed a potential purchase of the Creek Club, noting that it would "include the building, boat dock, ramp, parking lot," and a separate, overflow parking lot down the street. (Def. Ex. 124.) The Assembly decided not to purchase Lot CV-6 at that time because of potential liability. (Tr. 645:4-25.) On August 22, 2007, the Assembly entertained a proposal to purchase Lot CV-6, the Creek Club, and the boating facilities for $700,000.00. (Def. Exs. 137 at 3, 180.) The Assembly received and considered the disparate views of more than one hundred members as to whether it should own the property. (Def. Ex. 87; Def. Ex. 180.) Throughout these discussions, occurring more than three years before any action was brought, no one claimed that the Assembly was entitled to receive Lot CV-6 for free.

On October 30, 2008, the Assembly met and discussed the potential sale of Lot CV-6, this time to 148 Civitas, LLC. (Def. Ex. 131.) Neither the derivative plaintiffs nor anyone else protested that the Assembly was supposed to receive Lot CV-6 pursuant to the 1998 Property Report. (*Id.*) Instead, the homeowners expressed concerns regarding the use of Lot CV-6 by the purchaser and what impact that may have on the nearby residents. (*Id.*) On August 5, 2009, The I'On Company sold Lot CV-6 to 148 Civitas, LLC. (Tr. 217:2-12.)

VII. The "Free Lot CV-6 Gang"

With the prospect of more events at the Creek Club exciting some interest in the community, the Gang took advantage of the opportunity to push its opposition to The I'On Company and the proposed sale of Lot CV-6 to 148 Civitas, LLC. (Def. Ex. 33; Tr. 357:6-358:22; 358: 10-16.) It did not initially seek ownership of the property. Rather, it challenged the zoning. The Gang's immediate goal was to block the sale. Why? One of

the early Gang members articulated where a successful effort would lead it. At the January 15, 2009 Assembly Board meeting, Catherine Templeton explained that "should the zoning appeal find that the use of the Creek Club is commercial rather than civic then that would lessen the value of the Creek Club for the Graham family [and . . .] the Homeowners Association could then purchase the Creek Club for a dollar since it would be of no value to the Graham family and they would not be able to sell it." (Def. Ex. 132 at 1-2.) This dovetailed with Adkins' professed belief that The I'On Company should give Lot CV-6 to the Assembly instead of selling it and making charitable contributions. (Def. Ex. 173.) The Gang's goal was to scuttle the sale and obtain Lot CV-6 for free.

On the heels of hosting community meetings, the Assembly refused the pleas to join this effort or to fund it and instead spoke in support of the intended uses of the Creek Club as properly civic, a benefit to the community, and not overly commercial. (Def. Exs. 34, 133.) At the February 23, 2009 meeting of the Board of Zoning Appeals, Templeton and Adkins spoke in opposition. (Def. Ex. 33; Tr. 473:10-474:8.) The challenge failed on April 7, 2009, when the Board of Zoning Appeals determined that use of Lot CV-6 was in compliance with the zoning code. (Tr. 359:2-6; Def. Exs. 33, 152.)

The Gang regrouped the day after this defeat. It did not bemoan some injustice of another party selling property that rightfully belonged to the Assembly. It did not decry the promises relied on in purchasing I'On property. Instead, it evaluated other ways to foil The I'On Company's sale, considering: "So . . . where do we go from here?" (Def. Ex. 105.) Ward Mundy, an attorney, suggested finding someone who received the 1998 Property Report on the theory that "I'On residents that purchased a lot directly from the I'On Company might have a civil claim for damages" pursuant to ILSA. (*Id.*) Not

incidentally, Mundy identified a statute of limitations problem. Also telling, at that time, Adkins did not profess that *she* had received the 1998 Property Report when she purchased her lot in 2003—as she would later swear she had. (*Id.*) Enter Brad Walbeck, a recipient of the 1998 Property Report whom the Gang knew because he too raised concerns about zoning. He had never before insisted that the very same property at issue was supposed to be given to the Assembly or that he relied on that promise as part of his purchase—until Adkins recruited him for the effort. (I'On Def. Memo in Support of Motion for Summary Judgment, Ex. A: Walbeck Dep. at 99:5-19.)

The Gang sought counsel to bring its claims. Walbeck initiated the lawsuit. After years of paying to use the property, contemplating purchase of the property, and challenging zoning after learning of the potential sale of the property, the lawsuit asserted that the 1998 Property Report's promise to convey a "Creekside Park" and "Community Dock" meant The I'On Company would convey all of Lot CV-6 as well as its improvements to The Assembly. Later, after an eleventh-hour settlement with 148 Civitas, LLC also gave Lot CV-5 to the Assembly, Respondents threw in Lot CV-5 as something else that those four words in the Property Report entitled the Assembly to for free.[9] (*Compare* Tr. 425:15-426:13, 454:3-455:1, 458:11-459:5, 460:1-7 *with* Jan. 13, 2014 Hear. 25:24-26-16; July 24, 2014 Hear. 12:1-13:7; Tr. 871:19-14.)

STANDARD OF REVIEW

At the directed verdict and JNOV stages of trial, the trial court views the evidence and inferences that can be drawn therefrom in the light most favorable to the party opposing the motions. *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct.

[9] *See* note 3, *supra.*

App. 2009). When the trial court's ruling lacks evidentiary support or is controlled by an error of law, the appellate court will reverse. *Id.*

A decision to award attorney's fees and the denial of a motion for a new trial are reviewed for abuse of discretion. *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E2d 431, 434-35 (Ct. App. 2005) (applying abuse of discretion standard to an award of attorney's fees pursuant to contract); *Krepps by Krepps v. Ausen*, 324 S.C. 597, 608, 479 S.E.2d 290, 296 (Ct. App. 1996) ("The grant or denial of new trial motion . . . will not be disturbed on appeal unless [the court's] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law").

ARGUMENT

I. RESPONDENTS CANNOT PURSUE THIS ACTION AS A DERIVATIVE ACTION.

The rule governing derivative actions, Rule 23(b), SCRCP, "seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Respondents, as derivative plaintiffs, never met the requirements of alleging demand and refusal or futility of demand as required by Rule 23(b).

While hearing directed verdict motions following the close of all the evidence, the trial court suggested that the demand requirement had not been met because the Board did not understand what was demanded, but nonetheless allowed the derivative action to proceed. (Tr. 1027:20-1028:9.) This casual dismissal of Rule 23 as a procedural technicality is contrary to established South Carolina law. The strict demand

requirements for derivative suits serve an important purpose: to ensure that boards of directors retain control of the acts taken on their corporations' behalf. *Carolina First*, 343 S.C. 176, 185-87, 539 S.E.2d at 407-08. For a plaintiff to bring a derivative action, Rule 23(b) requires that the plaintiff "allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority." As this Court explained in *Carolina First*, "[a]t a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. . . . Such a pre-suit demand must be alleged, not in a conclusory fashion, but through particularized allegations." 343 S.C. at 189, 539 S.E.2d at 409-10. The shareholder must make "an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court." *Id.* at 186, 539 S.E.2d at 408.

Respondents never properly initiated and maintained a derivative action, despite an initial and four amended complaints. Specifically, Respondents failed to make or allege with verification and particularity proper demand on and refusal by the Assembly, and likewise failed properly to plead the futility of demand. Respondents conceded at trial that substantive facts they alleged and verified to be true were facts they did not know. They swore that other I'On residents had relied on the 1998 Property Report, but did not know anyone else who had done so. (Tr. 447:8-452:16.) Respondents convinced the trial court to permit a derivative action to proceed based on the verification of facts which are untrue. This would be no less than to permit Respondents to use the rule requiring verification of derivative pleadings, which was designed to prevent shareholders from hijacking control of a corporation's litigation decisions through

fraudulent allegations, to do exactly that. This Court should reverse and dismiss the derivative claims to prevent this abuse of the judicial process.

1. Respondents have never pleaded or proved a proper demand and refusal.

Respondents have argued that two demands were made on the Board, but neither is sufficient in law.[10] Respondents' principal effort to satisfy Rule 23(b) is what they call the "Adkins Demand." (Pl. Exs. 54, 57.) In these two letters to the Assembly Board's attorney, Adkins only requests that he give an opinion as to the Assembly's rights.[11] The allegations of the complaint, at all stages, have been equally vague regarding these "demands." Respondents repeatedly failed to describe specific wrongful acts, to identify the specific harm caused to the corporation, and to request any relief. (Third Am. Compl. ¶ 55); *cf. Carolina First*, 343 S.C. at 189, 539 S.E.2d at 409-10. These Adkins "demands" are therefore an improper basis for a derivative suit. The trial court correctly found that Respondents' other alleged "demand," made by a person other than Respondents, Catherine Templeton, was not a proper demand.[12]

2. Respondents have failed properly to plead or prove futility of demand.

Knowing their "demands" are legally insufficient, Respondents also pleaded and argued that demand was futile. If alleging futility, a shareholder must demonstrate "why the Board of Directors should not be allowed to decide whether to institute litigation."

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[10] Although Walbeck brought this suit initially, he never claimed to have made any demand on the Assembly Board for ownership of any property. (Tr. 549:19-550:3.) He should therefore have been dismissed as a derivative plaintiff. S.C.R. Civ. P. 23(b)(1).

[11] The "Adkins Demand," if it exists, certainly did not include ownership of Lots CV-5 and 275 within its scope. (Tr. 871:11-24.)

[12] (Tr. 595:4-24; Pl. Ex. 53.) Templeton settled her zoning claims against the Appellants, which were separate from this litigation. (Tr. 289:10-290:15.) The Templeton letter did not demand that the Board take the actions Respondents seek here. For these reasons, the trial court correctly held that Templeton's letter of February 26, 2009 is not a derivative demand.

Id. at 188, 539 S.E.2d at 409. Respondents failed to show why the Board was not qualified to make that decision.

Up through and including the Third Amended Complaint, Respondents maintained this action by alleging and verifying that additional demands on the Assembly "would now be futile as The Assembly has failed to act to protect the rights of The Assembly and its members...." (Third Am. Compl. ¶ 55.) This bare allegation falls far short of specific facts showing why the Assembly Board should not have been allowed to make the litigation decision.

Respondents' deficit goes beyond a pleading defect; the evidence demonstrates that the Assembly Board should have been permitted to make the decision whether or not to institute litigation. *Carolina First*, 343 S.C. at 188, 539 S.E.2d at 409. The decision was a complex one which the Assembly considered carefully. There was much conflict among Assembly members as to whether they wanted ownership of the Creek Club docks, the boating facilities, or the Creek Club itself when they were presented with opportunities to own them at various times over the years. (Tr. 645:4-25; 865:8-866:13; 882:2-12; Def. Ex. 124-129.) The Board hosted homeowner forums to hear community concerns regarding the sale of CV-6 which the Gang took issue with. (Tr. 182:18-183:18; 645:4-25; Def. Ex. 130-133.) It was very reasonable for the Board to exercise its business judgment to refuse to pursue the claims Respondents now allege. Although Respondents have argued that the developers had a "veto power" over Board actions which would have rendered demand futile, they could not identify any decision regarding this litigation (or any other matter) made by the Board which the existence of such power actually influenced. (Tr. 989:14-991:3.) The Board president, Deborah Bedell, had

previously testified that she did not believe that the developers maintained control over the Board; she attempted to reverse herself at trial and was impeached on the witness stand, eventually agreeing with her prior statement. (Tr. 867:9-25; 868:5-9; 910:17-911:5; 910-22:911:5; 989:14-991:3.) Nor was any "veto power" ever used. (Tr. 205:9-15; 356:18-23.)

3. <u>New claims arose following the partial settlement of this action in January 2014, for which no demand and refusal or futility of demand has ever been alleged or established.</u>

In their most recent Fourth Amended Complaint, Respondents' prior allegation that demand "would *now be* futile" became "would *have been* futile." (Third Am. Compl. ¶ 55; Fourth Am. Compl. ¶ 52 (emphases added)). Respondents thus concede that demand is no longer futile. The Assembly instructed its attorney to support and cooperate with Respondents as part of a partial settlement on the eve of the mistrial of this case in January 2014. (Pl. Ex. 225 ¶ 9; Tr. 4:1-11; 15:2-14; 871:2-10; 896:5-15.) Immediately thereafter, the Assembly gained ownership of the property which Respondents claimed and was realigned with the Respondents. (February 26, 2014 Order; Tr. 905:25-96:2; 939:11-16; 942:14-943:6.)

The nature of the relief sought against Appellants thus changed substantially—substantially enough that Respondents' claims are new claims. (Tr. 880:6-13.) Bedell testified at trial that the Assembly's damages all arose after the mistrial and settlement. (Tr. 897:13-24.) Walbeck and Adkins likewise admitted in pre-trial depositions that all their monetary damages arose post-settlement—an admission directly contrary to their earlier verified allegations. (*Compare* Adkins July 9, 2014 Dep. 60:13-61:11; Walbeck July 9, 2014 Dep. 29:8-30:14 *with* Third Am. Compl.¶¶ 61-108.) No demand ever has

been presented to the Assembly to press Respondents' claims arising out of the settlement, including claims for damages based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease. (Tr. 880:14-24.)

The Assembly Board never refused a demand regarding these new claims—because none has ever been made. (*Id.*) Nor is there any evidence suggesting futility of demand—because the Assembly supported Respondents' new claims. (Pl. Ex. 225 ¶ 9; 896:5-15.) The prosecution of such claims, therefore, could not be through a proper derivative action.

4. Respondents' claims are contrary to the interests of the Assembly and many of its other members, and thus may not be maintained derivatively.

A plaintiff bringing a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRCP. If the plaintiff does not, "[t]he derivative action may not be maintained." *Id.* The Assembly Board is infinitely better placed to balance the interests of all its members than Respondents, who represent only one among many points of view with respect to the claims at issue here. To allow Respondents to proceed derivatively is contrary to the very essence of the sound policy that boards of directors should retain control of the acts taken on their corporations' behalf. *Carolina First*, 343 S.C. 176, 185-87, 539 S.E.2d at 407-08.

Respondents have perpetuated their case by taking positions in this litigation contrary to the entire Assembly's interests. As discussed in Part III, *infra*, they have argued that the easement in favor of the Assembly granting perpetual access to the Creek Club docks and boating facilities was either invalid or not perpetual, for no purpose other

than to stir up interest and to increase their damages. In no conceivable case could it be contrary to the Assembly's interests for it not to have perpetual *access* to these amenities. The issue calling for business judgment, as the Assembly rightly saw, was whether ownership was worth the liability and maintenance concerns. (Tr. 645:4-25; 882:2-12.) This manipulation of the facts by Respondents for a litigation advantage violates the requirement that derivative plaintiffs lack interests contrary to those of their corporation.

Respondents' claims also sharpen antagonisms among Assembly members. In *Waller v. Seabrook Island Property Owners Association*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990), the Supreme Court held that the mere fact that the plaintiffs were property owners in a large or populous development did not qualify them to represent the interests of the other property owners. Rather, the plaintiffs "must demonstrate they have no interest antagonistic to or in conflict with the interest of the unnamed members of the class such that they are fairly and adequately able to protect the interest of the purported class." *Id.* Respondents fail by a wide margin to meet this test.

The homeowners' legal interests require careful balancing. The evidence at trial revealed a wide range of opinion within the Assembly membership about whether outright ownership was in the Assembly's best interests. (Tr. 178:5-16; 494:2-495:19; 645:4-25; 663:22-665:24; 865:8-866:13; 882:2-12.) Because most homeowners did not receive the 1998 Property Report, their legal interests differed from Respondents'. (Tr. 891:1-892:1.) Rather than attempt to obtain Assembly action by democratic processes, Respondents used the derivative action mechanism to have their own way.

Because Respondents' purported derivative claims are inherently antagonistic to the interests of both the Assembly as a whole and of many of its other members, this

Court should reverse and dismiss all derivative claims in this action.

II. RESPONDENTS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS AS A MATTER OF LAW.

Any claim based on the pivotal 1998 promise to convey a "Creekside Park" and a "Community Dock" accrued "upon completion of construction" in 2001 when the conveyance was promised to occur, more than nine-and-a-half years before suit was filed. Respondents knew that Lot CV-6 and the adjacent Creek Club dock had been completed but had not been transferred to the Assembly: they were paying to use these amenities. Respondents knew there was no intent to transfer the property to the Assembly for free: they actively considered purchasing it for $700,000.00. With one exception, the claims at issue here are barred by the statute of limitations.

Respondents' claims are subject to a three-year limitations period and subject to the discovery rule.[13] *See* S.C. Code Ann. § 15-3-530(1), (2), and (5); 15 U.S.C. § 1711(a)(2). When there is no conflicting evidence, or when only one reasonable inference can be drawn from the evidence, the determination of when a party knew or should have known that he had a claim becomes a matter of law and should not be submitted to the jury.[14] With the exception of his breach of contract claim, Walbeck's claims are time-barred because they accrued before December 22, 2007—more than three years before suit was filed. (Summons and Complaint). Likewise, should the Court

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[13] The trial court determined that Walbeck's purchase contract was executed under seal and that his breach of contract claim was subject to a twenty year limitations period pursuant to Section 15-3-520(2) of the South Carolina Code.

[14] *See Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (finding the trial court properly directed a verdict when there was no conflicting testimony regarding time of discovery such that the notice issue was one for the trial court to decide); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 680 S.E.2d 778 (Ct. App. 2009) (reversing trial court's denial of JNOV motion when account statements put plaintiff on notice of claim more than three years before suit was filed).

determine that plaintiffs' derivative action is proper, the claims brought on behalf of the Assembly are time-barred because they accrued before February 7, 2009. (Amended Complaint). The trial court erred in submitting the question to the jury and in denying Appellants' JNOV motion.

1. Respondents knew or should have known of the existence of the claims against Appellants.

Respondents base their claims on Appellants' promise to convey a "Creekside Park" and "Community Dock" to the Assembly upon completion of construction. (Pl. Ex. 1; Tr. 412:21-413:4; 417:5-11; 454:3-21; 460:1-7; 520:15-24; 532:7-11; 887:20-22.) Respondents knew and repeatedly received further notice that the Assembly did not own Lot CV-6 and that Appellants did not intend to convey Lot CV-6 to the Assembly. Among the examples are the following:

- Upon completion of construction of amenities in Phase II in 2001, Appellants conveyed two community docks and the Marshwalk to the Assembly; (Def. Ex. 49.)
- When the Creek Club opened for business on April 10, 2001, Respondents knew that this facility was operated as a private event rental space that was not owned and operated by the Assembly; (Def. Ex. 49; Tr. 179:8-25; 696:12-14.)
- The Recreational Easement was properly recorded on February 15, 2000 and made clear that the Assembly did not own Lot CV-6 or its amenities; (Def. Ex. 27.)
- The Assembly engaged counsel in 2004 to study its rights under the 2000 Recreational Easement; (Def. Ex. 109.)
- The I'On Company reminded the Assembly Board in 2004 in no uncertain terms that The I'On Club owns the Creek Club dock; (Def. Ex. 108.)
- The Assembly annually budgeted and paid fees to rent the Creek Club and to use the Creek Club docks; (Def. Exs. 39-44.)
- The Assembly mailed the budget to every homeowner every year and approved it at annual meetings; (Def. Exs. 76, 77, 79, 81.)
- Walbeck and Adkins received the budgets and attended annual meetings; (Tr. 543:14-544:20; Def. Exs. 78, 80, 81.)
- In 2007, the Assembly entertained offers to purchase Lot CV-6 and solicited feedback from I'On homeowners; (Def. Exs. 113, 118, 123-125, 127, 137.) and

- Adkins served on the Assembly's Boating Committee, whose purpose was to advise the Assembly Board on the community boat ramp, community dock, and to interpret the 2000 Recreational Easement; (Def. Exs. 128, 129 at 18; Tr. 466:12-467:4.)

The only reasonable inference that can be drawn from the Record is that Respondents knew or had notice that the Assembly did not own the subject property and failed to act to protect their alleged rights.

a. The Assembly hired a lawyer to analyze the Recreational Easement, which makes clear that the Assembly does not and will not own the property in dispute.

By May of 2004, a lawyer retained by the Assembly had completed a review of the Recreational Easement—a document that makes absolutely clear that the Assembly did not and would not own the Creek Club or the Creek Club docks. (Def. Exs. 27, 28 109, 155, Tr. Tran. 637:22-638:12; 638:8-24; 639:5-9.) Despite receiving legal advice on the terms of the Recreational Easement, the Assembly made no claim that it was supposed to own Lot CV-6. *See Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575 593 S.E.2d 624, 627 (Ct. App. 2004) (holding that a claim accrues when circumstances would put a person of common knowledge on notice that some right of his has been invaded—not when advice of counsel is sought or a full blown theory of recovery is developed).

In February of 2004, Vince Graham expressly told the Assembly: "the I'On Club owns the dock at the Club because of the easement agreement with the Assembly." (Def. Ex. 108.) The Assembly continued to consider and evaluate the provisions of the Recreational Easement as well as the impact of any potential sale of the Creek Club to a third party. In November of 2004, the Assembly discussed a request that The I'On Company convert the Creek Club into a private residence but maintain the Assembly's

rights to access the boating facilities. (Def. Ex. 111.) In 2005, the Assembly discussed frustrations over the terms of the cost sharing provisions of the Recreational Easement as well as the Assembly's rights to continue to access the boating facilities if The I'On Company ever sold the Creek Club. (Def. Exs. 115, 116, 121.)

Moreover, the 2000 Recreational Easement was properly recorded within all I'On purchasers' respective chains of title and cross-referenced to the I'On Declaration. (Def. Ex. 27 at 1.) The I'On Declaration was also included in all I'On purchasers' chain of title. *Harbison Cmty. Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995) (finding a recorded declaration of covenants, restrictions and easements that is noted in a deed is within chain of title and provides constructive notice to property owner). Property owners are charged with constructive notice of any restriction properly recorded within the chain of title. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001). The 2000 Recreational Easement was properly indexed, and as such "supplies inquiry notice of an instrument." *Thomas v. Thomas*, 286 S.C. 294, 298, 333 S.E.2d 76, 78 (Ct. App. 1985).

b. The Assembly paid to use the Creek Club and the Creek Club dock and provided written notice of its budget to its members, including Adkins and Walbeck, annually.

The Assembly budgeted funds to rent the Creek Club and use the docks and boating facilities at Lot CV-6. Beginning in at least 2004, the Assembly proposed an annual budget that included an allocation for "Creek Club Rental Fee" as well as an allocation for "Creek Club Dock usage Fee." (Def. Exs. 39-41; Tr. 179:8-21.) The proposed budget was prepared by the Assembly's Finance Committee and sent to all

members of the Assembly prior to the annual meeting.[15] (Tr. 543:20-544:20; Def. Exs. 76-82.) Walbeck and Adkins, along with every other Assembly member, received a notice of the Assembly's annual meeting along with a proposed budget each year. Walbeck and Adkins reviewed these written documents and attended the Assembly's annual meetings. (Def. Exs. 70-82; Tr. 543:14-545:12.) When a party is provided with written notice of a potential claim, his duty to investigate the claim is triggered. *Gibson,* 383 S.C. at 403-04, 680 S.E.2d at 780-81.

In *Gibson,* this Court determined that if the plaintiff would have reviewed the bank statements provided to her, she should have been prompted to investigate her potential claims that there had been wrongful withdrawals from her accounts. *Id.* The Court noted "[w]here the bank renders a statement to the depositor showing him the status of his checking account, it says to him in effect: 'This bank owes you this stated balance and no more.' Such statement may be fairly construed as a notice that any claim the depositor may make in excess of the stated balance would be resisted by the bank." *Id.* at 408, 680 S.E.2d at 783 (quoting *Citizens & S. Nat'l Bank of S.C. v. State Budget & Control Bd.*, 246 S.C. 140, 144, 142 S.E.2d 874, 875 (1965). This analysis is equally applicable here. Each year, Respondents, along with every other member of the Assembly, received written notice that the Assembly did not own Lot CV-6.

c. The Assembly repeatedly discussed and considered purchasing Lot CV-6.

Perhaps the most inescapable evidence that Respondents knew they were not entitled to Lot CV-6 was the discussion about purchasing the property that persisted for several years and culminated in an offer for the Assembly to purchase it in 2007.

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[15] As discussed above, many members of the Finance Committee also were recipients of the 1998 Property Report. (Def. Exs. 61A, 63, 67, 69.)

As described above, discussions regarding the Assembly's purchase of the property began as early as 2005. (Def. Exs. 113, 118). After the Assembly was initially approached with the 2007 proposal to purchase the property, the parties negotiated the potential sale of these amenities throughout the spring and into the fall of 2007— more than three years before this suit was filed. (Def. Exs. 123-127, 137.) In response to this offer, the Assembly held a meeting to gather input and approximately 200 people attended. (Tr. 645:4-17.) Each of these Assembly members knew Lot CV-6 had not been conveyed as a "Creekside Park" upon completion of construction and that the adjacent Creek Club docks had not been conveyed to the Assembly for free.

d. The Assembly Board was comprised of several recipients of the 1998 Property Report.

From December 3, 2003, through January 6, 2008, there was at least one I'On homeowner who received the 1998 Property Report in attendance at the vast majority of Assembly Board meetings. (Def. Exs. 107-110, 112-130, 174.) This is significant. Each time—over the course of five years—the Assembly reviewed the Recreational Easement, prepared a budget that allocated funds to rent the Creek Club and the Creek Club docks, or considered purchasing the property, none of these individuals ever claimed or suggested that the Assembly was entitled to own any of the property that is the subject of this lawsuit. To the contrary, Ed Clem testified: "It was my belief that [Lot CV-6] wouldn't become the property of the homeowners." (Tr. 642:22-25.)

Viewed in any light, including that most favorable to Respondents, the only reasonable inference is that Respondents received repeated and express notice for *nearly a decade* that Lot CV-6 would not be conveyed to the Assembly at no cost. Respondents' claims are time barred and judgment should be reversed.

2. <u>Respondents' failure to exercise reasonable diligence bars application of equitable estoppel.</u>

The trial court erred in holding that equitable estoppel would serve to toll the running of the limitations period even if the jury had determined that Respondents' claims accrued on a date outside the limitations period. (JNOV Order at 22 n.15.) Respondents failed to demonstrate the elements of equitable estoppel and, as a result, this doctrine cannot excuse Respondents' failure to exercise due diligence to investigate potential claims within the limitations period.[16]

The party "claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped." *Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts. *Id.*

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[16] The application of the equitable tolling doctrine is equally inappropriate. *See Magnolia North Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) (equitably tolling the limitations period for a property owners' association because the property association's board of directors was composed entirely of officers of the developer until eight months before suit was commenced). As discussed above, I'On homeowners gained control over the Assembly Board in 2003. (Tr. 335:20-21; Def. Ex. 107.) The *Magnolia* court was persuaded by the diligence of the property owners association in filing suit just eight months after property owners gained control. *Id.* No action was filed for more than seven years after the Assembly's Board was controlled by I'On homeowners. Further, unlike *Magnolia*, this action was not brought by the Assembly. Here, long after the homeowners took control of the Board, the Assembly chose not to bring a claim. Even considering the trial court's finding of a December 2005 handover, tolling is insufficient to resuscitate claims long expired.

As discussed above, there is no tenable argument that Respondents lacked the means to obtain the truth regarding the ownership of Lot CV-6 or that Appellants ever concealed this information. Respondents were explicitly told the Assembly did not own it, they paid to use it, and considered buying it. *See Rushing v. McKinney*, 370 S.C. 280, 294, 633 S.E.2d 917, 925 (Ct. App. 2006) ("One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mislead (sic)"). The public recording of the Recreational Easement only confirms these facts. (Def. Ex. 27.)

The trial court relied on representations made by an employee of Appellants, Chad Besenfelder, to the Assembly. None of Besenfelder's representations change the analysis. First, the statute of limitations had expired by the time Besenfelder made any of the statements. Further, the representations pertained only to the conveyance of docks. For example, the Assembly Board Minutes dated September 26, 2007 state: "Chad Besenfelder advised he would like to turn over the community docks." (Pl. Ex. 111.) On March 25, 2009, Besenfelder emailed the Assembly and stated "[t]he I'On Company is preparing to deed the community dock to the I'On Assembly. We plan to subdivide a parcel to be recorded and deeded." (Pl. Ex. 58.) These representations do not support the conclusion that Respondents were led to believe Appellants intended to convey the Creek Club, Lot CV-6, or Lot CV-5 to the Assembly.

The trial court also pointed to private email exchanges between Besenfelder and Russo, the purchaser of Lot CV-6, as well as exchanges between Besenfelder and Appellants, as evidence of Appellants' misrepresentations to Respondents. (Pl. Exs. 119, 180, 181.) The Record makes plain that none of these emails were sent to or shared with

Respondents prior to the commencement of this litigation. These communications cannot suffice as evidence of Appellants' intent to mislead Respondents.

Further, for equitable estoppel to apply, the plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to "some conduct or representation by the defendant," the plaintiff must be "induced . . . to delay in filing suit." *Kelly*, 383 S.C. at 639, 682 S.E.2d at 8 (quoting *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)). Left only with Besenfelder's representations to the Assembly regarding the conveyance of a dock located at Lot CV-6, these representations were made more than three years after Respondents knew or reasonably should have known they had a potential claim with regard to the ownership of that dock or of Lot CV-6 and could not have induced Respondents to delay taking legal action. The statute of limitations expired as to all claims prior to any of Besenfelder's representations concerning a transfer of the docks.

Respondents' claims are time-barred as a matter of law and this Court should reverse and enter judgment in favor of Appellants.

III. THE 2000 RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS WAS VALID, AND THE EASEMENT GRANTING THE ASSEMBLY ACCESS TO THE CREEK CLUB DOCKS WAS PERPETUAL.

The trial court incorrectly held that the 2000 Recreational Easement and Agreement to Share Costs was void *ab initio*. The document's validity from the time of its execution until the Assembly's acquisition of title to Lot CV-6 is important to this appeal, even though the easement regarding the boating facilities merged into the deed after the Assembly acquired the Creek Club boating facilities in February 2014, because it affects Respondents' measure of damages and title to other property in I'On.

1. The 2000 Recreational Easement was valid.

The trial court held that the 2000 Recreational Easement was invalid solely because it was executed prior to the transfer of the servient property to The I'On Club, LLC. This analysis ignores significant South Carolina precedent which permits parties to ratify such documents by their later conduct.

South Carolina has long recognized the "after-acquired title" doctrine, which provides that a deed which conveys property to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title. *See, e.g., Tolar v. Marion Cty. Lumber Co.*, 93 S.C. 274, 75 S.E. 545 (1912); *Nettles v. Cummings*, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857); *Corbin v. Carlin*, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) (*citing Richardson v. Atlantic Coast Lumber Corp.*, 93 S.C. 254, 75 S.E. 371, 372 (1912)). There is no indication that the after-acquired title doctrine does not apply to servitudes. The sole case on which the trial court relies to reach its conclusion, *Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985), is inapposite because it does not involve any claim of after-acquired title or ratification. Courts in other jurisdictions have applied the after-acquired title doctrine to easements. *See, e.g., Supraner v. Citizens Sav. Bank*, 303 Mass. 460, 465, 22 N.E.2d 38, 41 (1939) (applying after-acquired title doctrine to easement and stating that it "has been held to apply to easements").

The I'On Club, as servient landowner, and the Assembly, as easement holder, operated under the terms of the 2000 Recreational Easement—with respect to both the use of the boating facilities and the Assembly's maintenance contributions—for many years after the conveyance of Lot CV-6 and the docks to The I'On Club. (Tr. 179:8-25;

638:1-10; 893:16-24.) The Assembly continued to do so even well after the Assembly Board was entirely composed of homeowners, by annually budgeting and paying dock usage and rental fees to The I'On Club. (Def. Exs. 39-43.) The Assembly also engaged legal counsel to advise it as to the easement, but never suggested any problem with its validity or term. (Tr. 178:5-11; 639:13-640:6; Def. Exs. 109, 113, 116, 118, 155.) The parties thereby repeatedly ratified the 2000 Recreational Easement's validity and cured any defect.

If the parties to a deed acquiesce, a third person cannot invalidate the deed by showing what might be fraud or mistake. *Sanders v. Hartzog*, 6 S.C. 479 (1876); *McCullough v. Wall*, 38 S.C.L. (4 Rich.) 68 (1850). Respondents therefore cannot challenge the validity of the 2000 Recreational Easement, only its interpretation.[17]

Respondents' position that the 2000 Recreational Easement was invalid is troublesome for another reason: it is contrary to the representations and interests of the Assembly, on behalf of whom Walbeck and Adkins purport to bring derivative claims. The 2000 Recreational Easement gives a significant benefit to the Assembly: a perpetual right to use and enjoy the boating facilities. Prior Assembly boards determined that easement access would be *superior* to outright ownership of the boating facilities because of liability and maintenance concerns. (Tr. 645:4-25; 882:2-12.) The trial court's order, however, aids Respondents in acting inequitably and contrary to the Assembly's best interests by rejecting this significant benefit for the litigation-driven purpose of

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[17] The present case is distinguishable from *Noronha v. Stewart*, 199 Cal. App. 3d 485, 491 (1998), which the trial court cited for the proposition (stated *in dicta* in *Noronha*) that a grantee cannot invoke the after-acquired title doctrine to validate a transfer when the grantee has knowledge of a title defect. Here, *all* parties to the easement acquiesced in its validity after the title defect was cured. In *Noronha*, the defect was never cured.

artificially inflating their damages. True to form, after the partial settlement of the case requiring the Assembly to support the Respondents, the Assembly reversed its position and began claiming that the easement "might be" invalid. (Tr. 894:1-12.) Rather than be required to prove the difference in value between the easement and outright ownership—which, as noted above, the Assembly had previously found to be negligible *or perhaps even negative*, Respondents were entitled by the invalidity finding to take the difference in value between no access to the boating facilities and outright ownership as their measure of damages. This was their measure of damages even though the Assembly *always had access* to the boating facilities, since all parties always believed and operated as though the easement was valid. This failure of the trial court to recognize the simple truth of the matter before it constitutes reversible error.

2. <u>The Assembly's easement for use of the boating facilities was perpetual.</u>

Because it found that the 2000 Recreational Easement was void *ab initio*, the trial court did not reach the question whether the easement which it provided to the Assembly to use the boating facilities was perpetual or limited to a term of 30 years. Standard rules of interpretation, as well as the language of the document itself, compel the conclusion that should this Court determine that the 2000 Recreational Easement was valid, the section granting I'On homeowners access to the boating facilities was perpetual.

As a matter of law, a court must interpret the terms of deeds and easements as a whole and give effect to all of the provisions contained therein if possible. *Millvale Plantation, LLC v. Carrison Family Ltd. P'ship*, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. 2012); *K & A Acquisition Group, LLC v. Island Pointe, LLC*, 383 S.C. 563, 682

S.E.2d 252, 262 (2009). Section 4.3 of the 2000 Recreational Easement reinforces this rule of law.

The 2000 Recreational Easement document has several components. It grants perpetual easements for the use and enjoyment of the boating facilities by the Assembly, and the I'On Commons by The I'On Club. It also establishes a cost-sharing agreement that obligates the Assembly and The I'On Club to each contribute to boating facilities maintenance. The easement for use and enjoyment of boating facilities is "a perpetual, nonexclusive easement." (Def. Ex. 27, § 1.1(a).) The section pertaining to the easement for The I'On Club's use and enjoyment of the Commons contains similar language. (Def. Ex. 27, § 1.2(a).)

These provisions are reconcilable with Section 4.2 of the 2000 Recreational Easement, which establishes a 30-year duration for the Assembly's financial obligations with respect to boating facility maintenance. Appellants' proposed interpretation, unlike Respondents', gives effect to the perpetual nature of the use easement and the 30-year term of the cost-sharing agreement. The sections describing the cost-sharing agreement and the I'On Club and Assembly's respective maintenance obligations do not contain any durational language. (*See* Def. Ex. 27, Arts. II and III). Finally, Section 4.2 states that "[t]his Agreement . . . shall have a term of 30 years." The Agreement is distinguishable from the perpetual easements for use and enjoyment of the boating facilities and I'On Commons. The distinction between easement and agreement is even made by the document title: Recreational Easement *and* Agreement to Share Costs. Appellants' interpretation complies with Section 4.3 and South Carolina precedent by giving effect to all provisions of the 2000 Recreational Easement. Respondents' interpretation would ask

the Court to ignore the language specifically establishing the easement contained therein as perpetual.

IV. APPELLANTS DO NOT HAVE A FIDUCIARY DUTY TO CONVEY AMENITIES TO THE ASSEMBLY AS A MATTER OF LAW.

Disregarding the existing law, the trial court pronounced that "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." (JNOV Order at 28.) The trial court's expansive new rule eliminates a developer's business judgment and, instead, subjects a developer who contemplates building common areas to an unrealistic and impractical standard. If endorsed by this Court, the new rule will stifle development generally and discourage developers' considerations of providing amenities. Even if a developer decided to build certain amenities but, instead of conveying them for free, opted to fund or operate the amenities through a small club, the developer would be subject to liability. The trial court's ruling constitutes legal error and, if upheld, would set a dangerously sweeping precedent that South Carolina courts have previously rejected.

South Carolina views the relationship between a developer and a homeowners association as fiduciary in nature in very limited circumstances and only at very specific times. A developer has a fiduciary duty to bring about a viable homeowners association, and any further fiduciary obligation is triggered only if the developer conveys common areas to the association. Outside these narrow parameters, South Carolina law has never held that a developer must act, not on its own behalf, but on behalf of property owners.[18] Appellants are not liable to the Assembly for breach of fiduciary duty as a matter of law.

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[18] *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) ("Historically, [our courts have] reserved imposition of fiduciary duties to legal or

1. Appellants satisfied their fiduciary duty as a promoter of the Assembly.

Appellants organized and created a functional homeowners association. In *Goddard v. Fairways Development General Partnership*, this Court identified a "corollary between the promoters of a corporation and the developers of a PUD" and explained, "[b]oth are entrusted by interested investors to bring about a viable organization to serve a specific function. Both should be expected to use good faith and act in utmost good faith to complete the formation of their organizations." 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993). Like a promoter of a corporation, a developer's fiduciary obligations are satisfied when a functional organization has been created.[19] Appellants incorporated the Assembly on June 4, 1998 and ceded control of the Assembly Board well in advance of the scheduled transition set forth in the governing documents. (Tr. 748:13-25). By 2014, this self-governing homeowners association had reserves on hand totaling $1.3 million and had long-made its own decisions on development issues. (Def. Ex. 139; Tr. 872:3-8; 867:9-25; 868:5-9; 910:17-911:5; 990:23-991:3.)

2. Appellants satisfied their fiduciary duty to convey amenities in good repair.

Respondents do not claim that Appellants conveyed amenities to the Assembly that were in need of repair or created a financial burden. In *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, the Court confirmed that a developer's fiduciary duty is triggered at the time the developer conveys common areas to a homeowners

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business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters").

[19] *See Bivens v. Watkins*, 313 S.C. 228, 233 n.5, 437 S.E.2d 132, 135 n.5 (1993) (Promoters are persons or entities "who plan or organize a corporation." Promoters have a "duty to act in good faith and with due regard to [investors] interest in the formation and start-up of the corporation." *Id.* at 233, 327 S.E.2d at 135).

association: "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 for liability for bringing the common areas up to standard." 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (citing *Goddard.* 310 S.C. 408, 426 S.E.2d 828).

A limited developer fiduciary duty has been invoked to thwart decisions by a developer to saddle a homeowners association with the financial burden associated with ownership of common areas. After building and selling only five of the ninety units planned, the *Goddard* developer "unload[ed]" common areas to a newly created homeowners association that consisted of only five homeowners and did not have adequate financial resources to operate. 310 S.C. at 410-11, 426 S.E.2d at 830. The Court determined that "[i]t seem[ed] unfair to the villa owners for the Developer to burden them with substandard or deteriorated common areas that require an immediate expenditure of funds to bring them up to standard without a plan or a reserve fund to cover the expenditures." *Id.* at 415, 426 S.E.2d at 832-33. Similarly, in *Concerned Dunes West*, the developer conveyed the common areas to the homeowners association within a week of discovering that the common areas were in need of "significant" repair at the time of conveyance. 349 S.C. at 255, 562 S.E.2d at 635-36.

Such facts are wholly absent here. The Record contains no evidence that Appellants unloaded common areas to the Assembly to relieve themselves of maintenance costs or for Appellants' own financial well-being. Further, the Record contains no evidence that any of the amenities conveyed to the Assembly were in need of

repair, were conveyed at a time when the Assembly was not financially ready to maintain them, or were conveyed in a matter that created an unfair financial burden.[20]

3. South Carolina has refused to impose a broad developer fiduciary duty.

In the same two cases that announced a limited developer fiduciary duty, the Court declined to recognize a broad fiduciary duty. The *Goddard* plaintiffs contended that the developer had a fiduciary obligation based on its superior voting strength on the homeowners association's board of directors. 310 S.C. at 413, 426 S.E.2d at 832. Significantly, this Court rejected this argument because even "assuming a fiduciary relationship exists" on this basis: (1) the evidence was clear that the developer had refrained from exercising its superior voting strength; and (2) in its role as a director, a developer's conduct should to be judged by the business judgment rule. *Id.* at 413-14, 426 S.E.2d at 832. Similarly, in *Concerned Dunes West,* the Supreme Court answered a certified question regarding a developer's obligation to maintain common areas during the period of time in which the developer exercises control of the homeowners association. 349 S.C. at 260, 562 S.E.2d at 638. In its analysis, the Court looked only to the obligations the developer undertook in the PUD's covenants to resolve the question. *Id.* at 260-61, 562 S.E.2d at 638-39. Given the opportunity to recognize a broad developer law fiduciary duty, the Court declined.

The fact that the Court passed on the opportunity to recognize a broad developer fiduciary duty in both *Goddard* and *Concerned Dunes West* cannot be ignored. The specific fiduciary duty imposed on a developer at limited times during its dealings with a

[20] At the time the Assembly acquired Lot CV-6, the Creek Club, the Creek Club docks, the boating facilities and Lot CV-5 in its settlement with 148 Civitas, LLC, the acquisition did not require the Assembly to increase I'On homeowners' annual dues. (Tr. 871:25-873:18.)

homeowners association strikes an appropriate balance between a developer's ability to operate its business and a homeowner's desire to protect his investment.

4. The trial court mistook a contractual duty for a fiduciary duty.

The trial court held "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which should have been conveyed and properties which were actually conveyed in a substandard condition is a distinction without a difference." (JNOV Order at 29.) The trial court also found: "by failing to convey the community properties as promised to the Assembly, [Appellants] failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly." (JNOV Order at 29.)

Simply, if the 1998 Property Report did not include a promise to convey amenities to the Assembly, Respondents would admittedly have no basis for the claims pursued in this action. (Tr. 412:21-413:4; 417:5-11; 454:3-21; 460:1-7; 520:15-24; 532:7-11; 887:20-22.) At best, this evidence supports a claim for breach of contract and does not support a claim for breach of fiduciary duty. In *Goddard* and *Concerned Dunes West*, the Court was focused on fashioning a remedy because no existing legal theory fit the allegations made by the property owners, who had no contract requiring that amenities be conveyed in a certain condition. *See Goddard*, 349 S.C. at 257, 562 S.E.2d at 637; *Concerned Dunes West*, 349 S.C. at 255, 562 S.E.2d at 635-36. The question of whether amenities are promised at all, on the other hand, is one which can be expected to be covered by an agreement among parties—which was alleged here. No sweeping new fiduciary duty is needed to redress the allegations pursued by Respondents in this action.

The Record makes plain that there is no evidence that Appellants violated any fiduciary duty under South Carolina law. This Court should reverse and again refuse to recognize the sweeping duty pronounced by the trial court.

V. THE TRIAL COURT ERRED IN DIRECTING A VERDICT AS TO APPELLANTS' COUNTERCLAIM FOR ABUSE OF PROCESS WHERE A SMALL GROUP OF OBJECTORS, IN CONTINUATION OF THEIR LONGSTANDING EFFORTS TO THWART THE I'ON COMPANY'S PLANS, SOUGHT TO OBTAIN PROPERTY FOR FREE, WITHOUT PROPER JUSTIFICATION, AND THROUGH IMPROPER USE OF LEGAL PROCESS.

Appellants' defense at trial centered on exposing the lawsuit as part of a scheme devised by the Gang—a handful of ardent I'On opponents and disgruntled lawyer residents. The Gang's actions and statements revealed the claims to be an effort to defeat The I'On Company and to obtain property for free—decidedly not an effort to redress any failure by The I'On Company to deliver on promises on which these individuals relied when purchasing property. Walbeck and Adkins were so committed to this cause that they admittedly verified pleadings they knew to be false in order to prosecute their derivative claims.

Unfortunately, the trial court did not properly evaluate the evidence of this improper motive and improper use of the legal process and even wrongfully refused to admit additional evidence of the antagonists' efforts against The I'On Company. (Def. Ex. 106; Tr. 753:17-754:13; 760:5-10.) The trial court erred in directing a verdict as to Appellants' counterclaim for abuse of process. Not only was relief on this cause of action not available to Appellants, the trial court's ruling told the jury that Appellants' contention that the claims were manufactured as part of a scheme with an ulterior purpose

was baseless—scuttling Appellants' theory of the case. The trial court should have let Appellants' claim for abuse of process go to the jury, and this Court should reverse.

Appellants provided ample evidence in support of both elements an abuse of process claim: "(1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014).

Addressing the second element first, Appellants demonstrated an improper and willful act. Adkins and Walbeck each falsely swore to facts that were critical to alleging claims in a derivative capacity and surviving challenges as to the statute of limitations. The knowingly false statements are willful acts in the use of the process which are not proper. (Tr. 447:8-452:16; 545:13-546:8; 547:6-14.) As discussed above, Rule 23(b)(1) of the South Carolina Rules of Civil Procedure mandates that derivative claims be verified and provides that "[t]he derivative action may not be maintained" if the plaintiff does not fairly any adequately represent the other members' interests.

Adkins conceded that she did not know of any other purchaser who received the 1998 Property Report after it was amended, much less relied on it, despite the fact that she swore to the court that the 1998 report "continued to be distributed to potential purchasers with the intent that the information contained in said report would be relied upon by potential buyers when making their decision to purchase a lot in I'On." (Tr. 447:8-448; 449:18; 452:10-16; Second Am. Compl. ¶ 36.) When asked the same question, Walbeck admitted that he could not identify anyone either. (Tr. 547:6-11.) This is a willful and improper act in the use of legal process to obtain Lot CV-6 for free.

As to the ulterior purpose, Appellants presented evidence that would allow a jury to reasonably conclude that Respondents used legal process to obtain The I'On Company's property for free and that they did not believe that such a gratuitous conveyance was legally required. *See Scott v. McCain*, 275 S.C. 599, 601, 274 S.E.2d 299, 301 (1981) (holding that an improper purpose "usually takes the form of coercion to obtain a collateral advantage ...such as the surrender of property or the payment of money, by the use of the process as a threat or club." (internal quotations omitted)).

The Gang knew the Assembly was not entitled to receive the subject property for free. When Assembly Board member Ward Mundy[21] solicited comments on the 2007 proposal for the Assembly to purchase the property, Adkins revealed what she and the Gang knew to be true—Appellants did not intend to convey Lot CV-6 to the Assembly for free. (Def. Ex. 173.) As the proposal was considered, neither Adkins nor Mundy[22] ever uttered a word about their purported beliefs that this property was supposed to belong to the Assembly or about relying on such a promise when purchasing their lots.

When it learned of the proposed sale of property it contends was promised to Assembly, the Gang did not cry foul or contend the Assembly should own the property. (Def. Exs. 131-133, 152.) Rather, it decided to challenge the zoning to frustrate the sale. Prompted by the efforts of I'On resident and lawyer Catherine Templeton, the Gang initiated the January 2009 zoning appeal challenging the civic use of Lot CV-6 with the express purpose of driving down the value of the property to prevent a sale. (Def. Ex.

[21] When the Board discussed the proposal in October of 2007, Mundy only "expressed his concerns that the issue should be put to the vote of the owners" and suggested that the Assembly seek legal counsel. (Def. Ex. 129.)
[22] Mundy and Adkins both served on the Boating Committee, whose purpose included "utliz[ing] and interpret[ing the] easement between the I'On Assembly and the I'On Company and its subsidiary organizations including the I'On Club." (Def. Ex. 129.)

132.) At the February 26, 2009 Board Meeting, Adkins and Templeton discussed the Board's support of the zoning challenge and easement access to the docks in the event the Creek Club was purchased. (Def. Ex. 133.) Neither ever mentioned a belief the Assembly was entitled to own this property for free. The day after the zoning appeal failed, Adkins, along with the other members of the Gang, began evaluating other methods of interfering with Appellants' ability to sell Lot CV-6.

Walbeck had the same reaction. After learning of the potential sale of CV-6, Walbeck attended the Assembly meeting and raised concerns only about whether zoning was proper. (Def. Ex. 131; Tr. 548:15-550:3.) Despite proclaiming at trial that the potential sale was something he "couldn't fathom," Walbeck never uttered a word about Assembly ownership or relying on any promise of a conveyance at the time. (*Compare* Tr. 548:15- 550:3 *with* Tr. 524:13-20.) In fact, he made no mention of any right to ownership until he was recruited for the second phase of the Gang's challenge. (Memo in Support of Motion for Summary Judgment, Ex. A: Walbeck Dep. 99.) Ultimately, the Gang determined the best course of action to achieve its goals was to file this lawsuit. (Def. Ex. 105). In their zeal, Walbeck and Adkins verified false statements to both to bring derivative claims and to circumvent a big obstacle they recognized from the beginning: "there is a two-year statute of limitations." (Def. Ex. 105.)

Moreover, the evidence revealed this specific effort to be part of a longstanding campaign against The I'On Company's development efforts. Members of the Gang have fought The I'On Company since 1997 and this lawsuit is just a recent effort to thwart The I'On Company's plans. Adkins and her domestic partner, Steve Brock, both opposed the concept of I'On from the beginning. (Tr. 712:2-713:1; 713:19-714:17.) In fact, Brock in

mounting a challenge to the initial re-zoning effort for I'On Brock made plain he "intend[ed] to do everything in [his] power to defeat the [I'On] project." (Def. Ex. 106.) He sought out to do just that.[23] (Def. Ex. 106.) In 2010, after the zoning challenge, Adkins, Brock and Mundy also opposed a proposal to build an additional entrance to The I'On Club (Def. Ex. 150; Tr. 758:15-25; 760:14-762:25.)

This evidence presented at trial demonstrated an ongoing campaign against The I'On Company and a quest to best the developer out of property and additional profit through any means necessary, including abuse of legal process. Appellants satisfied their burden of putting forth evidence that would permit a reasonable jury to conclude Respondents abused legal process. *See McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) (reversing directed verdict as to abuse of process claim when more than reasonable inference can be drawn from evidence). The trial court erred in refusing to submit this counterclaim to the jury. The error was hugely prejudicial and affected the entire defense of the case. This Court should reverse and remand for a new trial.

VI. THE I'ON COMPANY IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AND COSTS AS THE PREVAILING PARTY ON ADKINS' BREACH OF CONTRACT CLAIM.

The 2003 Lot Purchase Agreement between Adkins and The I'On Company contains a mandatory fee-shifting provision for the prevailing party in an action for breach of the agreement. (Def. Ex. 25 ¶ 12(d).) Adkins brought a breach of contract

[23] Brock led other opposition challenges to The I'On Company's plans, including: a proposal to add a street to connect I'On to an adjacent neighborhood (Tr. 752:11-21; 755:23-756:11); a proposal to convert approved houses from single family detached homes to attached dwellings (Tr. 756:12-757:4); and a neighbor's request to purchase a small parking space from The I'On Club (Tr. 759:12-760:4).

claim, and The I'On Company prevailed. (Verdict Form ¶ 14.) The trial court abused its discretion in denying The I'On Company's petition for attorney's fees and costs.

The trial court's order denying The I'On Company's petition for attorney's fees and costs is based on two untenable conclusions: (1) Adkins was a prevailing party, and (2) the I'On Company was not. Perhaps the trial court veered off course when mistakenly holding that Adkins did not pursue a "direct breach of contract claim." (I'On Fee Order at 2, n.2.) Adkins' claim was plainly included in the governing complaint and on the verdict form where the jury rejected it. (Verdict Form ¶ 14.) In fact, the trial court recognized both Adkins' breach of contract allegations and several reasons why the jury rejected her claim in its order denying Adkins' petition for unjust enrichment. (Adkins' Unjust Enrichment Order at 4-5.)

Adkins' Lot Purchase Agreement expressly provides for attorney's fees and costs as follows:

> **Fees and Costs**: If either party requires services of an attorney to enforce obligations under this Agreement, the prevailing party shall be due from the non-prevailing party reasonable attorneys' fees, costs and expenses actually incurred.

(Def. Ex. 25 at 7.) In the face of this known risk of the fee-shifting provision, Adkins sought to pursue any and all potential avenues of recovery and alleged breach of this Lot Purchase Agreement. Although the jury found in favor of Walbeck on his contract claim, the jury specifically rejected Adkins' breach claim—along with every other claim she asserted. Adkins was not the "prevailing party" under the terms of the Lot Purchase Agreement. The trial court entirely disregarded the jury's resolution of these claims in favor of Appellants and analyzed Adkins' "success" based on the success of the Assembly's claims. (I'On Fee Order at 2-3.) The only logical conclusion that can be

drawn from the jury's verdict completely rejecting Adkins' claims, however, is that the success achieved on behalf of the Assembly is not the result of her claims or efforts. Moreover, the trial court's order improperly shifts risk calculation that the parties' had bargained for in the contract and subsequently operated under throughout this litigation.

In similar cases, this Court has held that it was an abuse of discretion for the court to refuse to award attorney's fees pursuant to a contract in less than the specific amount agreed to by the parties. *West v. Gladney*, 341 S.C. 127, 135-36, 533 S.E.2d 334, 338 (Ct. App. 2000) (holding it is "not for us to determine whether the parties' agreement was reasonable or wise, or whether they carefully guarded their rights" when a contract unequivocally provides for attorney's fees at a specified rate); *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992) ("[I]t is a well established principle of law that where there is a contract providing for such, the amount of attorneys fees is governed by the contract").

Further, a trial court's discretion is limited to evaluating a "reasonable amount" of an attorney's fee award and does not include discretion to deny fees. In *Fici v. Koon*, the court denied the prevailing party's request for attorney's fees on the basis that the underlying contract was unenforceable. 372 S.C. 341, 348-49, 642 S.E.2d 602, 605-06 (2007). In reversing, the Supreme Court determined: "Under the terms of the contract, Sellers are entitled to attorney's fees as the prevailing party" and remanded with instruction enter an award of fees. *Id.* at 349, 642 S.E.2d at 606. In *Prevatte v. Asbury Arms*, this Court considered the statutory fee provision of the Landlord-Tenant Act and concluded: "The appellate courts of this state have never construed this language as giving the trial judge discretion to award or deny attorney's fees." 302 S.C. 413, 415,

396 S.E.2d 642, 643 (Ct. App. 1990). Instead, "[w]hat constitutes a reasonable fee is a matter for the court to determine as a matter of informed judicial discretion." *Id.* In an unpublished decision, this Court applied the analysis of *Prevatte* to reverse the trial court's denial of attorney's fees pursuant to a mandatory fee-shifting contract. *Meetze v. Saylors*, ___ S.C. ___, 2005 WL 7082989, at *2 (Ct. App. 2005) ("Since the covenants contractually provide a prevailing party with the right to recover attorney's fees and costs, the court should have determined what constitutes a reasonable fee").

In support of its petition, The I'On Company requested half of the attorney's fees and costs incurred to reflect only the time spent defending Adkins' claims. (I'On Fee Petition at 2.) This amount is reasonable and the trial court abused its discretion in denying The I'On Company's petition. This Court should reverse and award The I'On Company attorney's fees in the amount of $264,115.25.

VII. THE TRIAL COURT'S AWARD OF $225,000.00 IN ATTORNEY'S FEES TO WALBECK WHEN THE JURY AWARDED HIM $1.00 IS NOT REASONABLE.

Walbeck requested that the trial court award him attorney's fees and costs for his claim for violation of ILSA. He asked the jury for $50,000.00 in damages and the jury awarded him the nominal amount of $1.00. Yet, the trial court awarded him $225,000.00 "for the Defendants' violation of ILSA"—almost five times what Walbeck asked for and 225,000 times what the jury actually awarded. (Walbeck Fee Order at 15.) Only leaps in logic, skips over parties, and jumps across claims can explain this shocking result. The result is neither reasonable nor supported by law.

Analyzing Walbeck's fee petition under the Interstate Land Sales Act makes clear that no fee award was proper. ILSA affords the court the discretion to award "reasonable" attorney's fees and court costs to a prevailing party:

> The amount recoverable in a suit authorized by this section may include . . . interest, court costs, and reasonable amounts for attorneys' fees, independent appraisers' fees, and travel to and from the lot.

15 U.S.C. § 1709(c) (2012).

The trial court found:

> Walbeck's individual and derivative claims all involved a "common core of facts" based upon the I'On Defendants' repeated promises to convey certain amenities to the I'On Community. Thus, the overall success of Walbeck is not measured solely by the amount of monetary recovery he was awarded on the ILSA claim;[] rather, Walbeck's success is measured by: (a) the results Walbeck achieved on his negligent misrepresentation claim; and (b) the results Walbeck achieved on behalf of the I'On Assembly on its breach of fiduciary duty claim.

(Walbeck Fee Order at 11.)

1. Neither ILSA nor South Carolina common law support an award of attorney's fees for the success of another party on other claims.

The trial court's award of fees can be upheld on appeal only if this Court endorses the flawed proposition that ILSA's fee provision entitles Walbeck to attorney's fees for the success of claims of a different party, the Assembly, on its non-ILSA claims. The trial court enabled Walbeck to bootstrap the success of the Assembly's breach of fiduciary duty claim to bolster his individual claim for attorney's fees and costs. (Walbeck Fee Order at 11.) This was an abuse of discretion, particularly where the Assembly had no standing to even pursue an ILSA claim. *See Terre Du Lac Assoc., Inc.*

v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985) (holding that homeowners' association lacks standing to assert ILSA claims on behalf of its members).

The trial court cannot treat the Assembly's success as Walbeck's success. Walbeck's claims in his individual capacity are entirely distinct from the Assembly's derivative claims. In a derivative action, "[t]he corporation or its shareholders can bring the cause of action on the corporation's behalf. If any relief is granted, it goes to the corporation; shareholders cannot recover the damages in their individual capacities because their loss is the indirect result of the injury to the corporation." *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002); *Ward v. Atlas Const. Co.*, 276 S.C. 346, 347, 278 S.E.2d 621, 622 (1981) ("In a derivative action in this state the stockholder is the nominal plaintiff and the corporation is the real party in interest"). Moreover, the Assembly—not Walbeck—is responsible for legal fees resulting from any success on claims brought on the Assembly's behalf, by the parties' agreement. (Ct. Ex. 1 ¶ 8.)

South Carolina has never held that it is proper to award attorney's fees to one plaintiff based on the success of another plaintiff on another claim. The trial court erroneously relied on *Austin v. Stokes-Craven Holding Corporation*, 406 S.C. 187, 750 S.E.2d 8 (2013), to support this conclusion. (Walbeck Fee Order at 11.) In *Austin*, however, the Supreme Court considered only whether a singular plaintiff who pursued several claims should be limited to collecting attorney's fees incurred for time spent on the cause of action providing for fees. 406 S.C. at 192-93, 750 S.E.2d at 80-81. *Austin* does not remotely suggest that it is appropriate to consider the success on other claims of other parties. *See also Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) (holding that fees related to non-statutory causes of action should be excluded from an

attorney's fee aware pursuant to statute to the extent it can be demonstrated that a portion of services was unrelated to the statutory claim).

2. <u>A reasonable fee for Walbeck's ILSA verdict is no fee at all.</u>

A reasonable fee on a $1.00 ILSA verdict is no fee at all. Courts have considered the propriety of an award of fees and costs after an award of nominal damages in the context of another federal fee-shifting statute: Section 1988 which governs Section 1983 civil rights litigation.[24] The United States Supreme Court determined that an award of no fee is the proper result when a plaintiff recovers only nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 104 (1992). In a concurring opinion,[25] Justice O'Connor determined "[w]hen the plaintiff's success is purely technical or *de minimis*, no fees can be awarded. Such a plaintiff has either failed to achieve victory at all, or has obtained only a Pyrrhic victory for which the reasonable fee is zero." *Id.* at 117 (O'Connor, J., concurring).

The jury was instructed to make a full and complete award as to each of Walbeck's claims and, in light of the evidence presented, determined that Walbeck was entitled to $1.00 on his ILSA claim. (Verdict Form.) Courts have declined to award fees based on similar nominal recoveries. *See Farrar*, 506 U.S. at 104 (reversing award of fees on a nominal-damages civil rights case because "the reasonable fee . . . was no fee at all"); *Kebe ex rel. K.J. v. Brown*, 91 F. App'x 823, 829 (4th Cir. 2004) (denying

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[24] Appellants are aware of no case law specifically addressing the appropriateness of a fee award on an ILSA nominal damages award.

[25] Justice O'Conner identified three factors for the analysis of nominal damage awards in Section 1983 civil rights cases: courts consider "the extent of relief, the significance of the legal issue on which the plaintiff prevailed, and the public purpose served by the litigation." *Farrar*, 506 U.S. at 117 (O'Connor, J., concurring). This framework has been adopted by the Fourth Circuit to analyze fee awards in nominal damages cases. *See Mercer v. Duke Univ.*, 401 F.3d 199, 203-04 (4th Cir. 2005).

attorney's fees because plaintiff sought compensatory damages and was awarded only nominal damages).[26] The reasonable result, in light of the jury's nominal award, was for the trial court to deny Walbeck's fee petition in its entirety.

The Assembly did not prevail on a claim for violation of ILSA and the trial court abused its discretion in considering the success on the Assembly's claims in evaluating Walbeck's petition for attorney's fees. The trial court further abused its discretion in awarding Walbeck attorney's fees on a nominal verdict. This Court should reverse and reject Walbeck's petition in its entirety. In the alternative, Walbeck's fee petition should be remanded to the trial court with the instruction that any consideration of the success of the Assembly's claims is wholly improper.

VIII. A NEW TRIAL SHOULD BE GRANTED BECAUSE THE TRIAL COURT IMPROPERLY RULED THAT APPELLANTS WERE AMALGAMATED.

The trial court held that Appellants were amalgamated. (JNOV Order at 39.) Respondents were not required to prove—and the jury was not asked to evaluate—the liability of each individual Appellant. Thus the statutory and equitable protections afforded corporate entities were entirely neglected. The trial court's disregard of the corporate form does not comport with the law of South Carolina and merits a new trial.

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[26] *See also Romberg v. Nichols*, 48 F.3d 453, 455 (9th Cir. 1994) (affirming the denial of attorney's fees in § 1983 case in which the plaintiffs "requested a substantial sum, but received only one dollar each," noting that "although they prevailed, the [plaintiffs] did not succeed"); *Cramblit v. Fikse*, 33 F.3d 633, 635 (6th Cir. 1994) (affirming trial court's denial of attorney's fees in § 1983 case where the plaintiff received only nominal damages because the court found that the plaintiff's "primary goal in the underlying § 1983 action was to obtain monetary damages"); *Bristow v. Drake St. Inc.*, 41 F.3d 345, 352 (7th Cir. 1994) ("The Supreme Court has made clear that if all you win in a Title VII case is nominal damages (with no punitive damages and no injunctive or declaratory relief—nothing but $ 1 in compensatory damages, as here), the reasonable attorney's fee, one commensurate with results obtained, is—zero").

"[A] corporation is an entity that is separate and distinct from, and its debts are not the individual debts of, its officers and stockholders." *Mid-S. Mgt. Co. Inc. v. Sherwood Dev. Corp.*, 374 S.C. 588, 597, 649 S.E.2d 135, 140 (Ct. App. 2007) (finding plaintiffs failed to prove necessity for piercing corporate veil to hold parent companies liable for subsidiary's obligations). A corporation is liable only for its own obligations. Business owners the right to organize and conduct business affairs with the express purpose of limiting liability. *See* S.C. Code §§ 33-1-200, 33-3-102, 33-6-220(b) (2006).

In light of these protections, our courts have concluded: "Although the corporate entity may be disregarded in some situations, piercing the corporate veil is not a doctrine to be applied without substantial reflection." *Mid-S. Mgmt.* at 597, 649 S.E.2d at 140 (citing *Baker v. Equitable Leasing Corp.*, 275 S.C. 359, 367, 271 S.E.2d 596, 600 (1980)). Courts are generally reluctant to disregard the corporate entity:

> If any general rule can be laid down, it is that a corporation will be looked upon as a legal entity until sufficient reason to the contrary appears; but when the notion of legal entity is used to protect fraud, justify wrong, or defeat public policy, the law will regard the corporation as an association of persons.

Drury Dev. Corp. v. Found. Ins. Co., 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008) (quoting *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984)).

In *Sturkie*, this Court developed a two-part test to determine whether a corporate veil should be pierced. The first step analyzes the observance of corporate formalities and the second prong requires that there be an "element of injustice or fundamental unfairness" if the acts of the corporation are not regarded as the acts of the individual. *See Mid-S. Mgmt. Co.*, 374 S.C. at 598, 649 S.E.2d at 140-41 (citing *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318).

Piercing the corporate veil is the equitable remedy available when a plaintiff demonstrates an alter-ego claim or a claim that a corporation is a mere instrumentality of a controlling individual. *Drury*, 380 S.C. at 101-02, 668 S.E.2d at 800-01 (addressing alter-ego claims); *see Wilson v. Friedberg*, 323 S.C. 248, 253, 473 S.E.2d 854, 856-67 (Ct. App. 1996) (addressing the instrumentality rule). A plaintiff has always been required to demonstrate fraud, injustice, or fundamental unfairness before the corporate form may be properly disregarded. *See Drury*, 380 S.C. at 101-02, 668 S.E.2d at 800; *see also Jones v. Enter. Leasing Co.*, 383 S.C. 259, 267-68, 678 S.E.2d 819, 824 (Ct. App. 2009) (requiring demonstration that retention of separate corporate personalities would promote fraud, wrong, or injustice in addition to control or dominance by a parent over a subsidiary); *Wilson*, 323 S.C. at 257, 473 S.E.2d at 859 (noting that the "instrumentality rule" should be used to pierce the corporate veil only where "retention of separate corporate personalities would promote fraud, wrong, or injustice or contravene public policy").

Amalgamation was first recognized in *Kincaid v. Landing Development Corp.*, where the trial court ruled that the "evidence revealed 'an amalgamation of corporate interests, entities, and activities so as to blur the distinction between the corporations and their activities.'" 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct. App. 1986). This Court affirmed in summary fashion: no cases or statutes were cited in support of its ruling, no analysis was provided as to whether the defendants observed corporate formalities, and no reason was stated as to why the court was not applying the *Sturkie* test. This lack of

an informed holding on the issue is significant—all subsequent amalgamation cases rely on *Kincaid* as the primary precedent.[27]

Amalgamation was discussed again in *Mid-South Management Co. v. Sherwood Development Corp.*, 374 S.C. 588, 605, 649 S.E.2d 135, 144-45 (Ct. App. 2007). There, the trial court refused to find parent companies liable for the judgment obtained against a subsidiary. *Id.* This Court affirmed without addressing whether the *Sturkie* analysis was required to amalgamate the defendants. *Id.* Most recently, in *Pope v. Heritage Communities, Inc.* and *Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc.*, the Court relied entirely on *Kincaid* to affirm the trial court's amalgamation ruling. *See Pope*, 395 S.C. at 419, 717 S.E.2d at 773; *Magnolia*, 387 S.C. at 359, 725 S.E.2d at 118. In neither opinion is there any mention of corporate formalities, fundamental unfairness, or substantial injustice. *Sturkie*, 280 S.C. at 457-58, 313 S.E.2d at 318. The Court has never plainly ruled that the amalgamation doctrine may be applied without a demonstration of the *Sturkie* factors.

The trial court failed to consider the *Sturkie* factors.[28] (JNOV Order at 39-41.) Amalgamation resulted in significant prejudice to Appellants. Respondents were relieved of their burden of establishing the liability as to each individual Appellant. Respondents were able to assert claims against all Appellants that were otherwise applicable as to only

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[27] *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989); *Mid-South Mgmt. Co. v. Sherwood Dev. Corp.* 374 S.C. 588, 605, 649 S.E.2d 135, 144-45 (Ct. App. 2007); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 419, 717 S.E.2d 765, 773 (Ct. App. 2011); *Magnolia N. Prop. Owners' Ass'n v. Heritage Communities, Inc.*, 397 S.C. 348, 359, 725 S.E.2d 112, 118 (Ct. App. 2012), *cert. dismissed*, 2015 WL 5725683 (Sept. 30, 2015) (No. 27577).

[28] Each Appellant is a properly formed, distinct South Carolina limited liability corporation created for a unique purpose. (Def. Exs. 54-56, 59, 153 Tr. Tran. 332:1-333:16; 334:18-336; 336:11-338:8; 338:13-18;).

one or two of the Appellants. The ruling also suggested to the jury that Appellants had engaged in some form of misconduct and deserved to be stripped of their status as separate corporate entities. This court should grant a new trial.

IX. WALBECK'S CLAIM FOR VIOLATION OF THE INTERSTATE LAND SALES ACT FAILS FOR LACK OF RELIANCE ON APPELLANTS' STATEMENTS.

Respondents failed as a matter of law to establish claims under the anti-fraud provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* ("ILSA"). To establish such a claim, a plaintiff must prove one or more of the fraudulent acts defined in the statute. 15 U.S.C. § 1703(a)(2). Under ILSA, a plaintiff cannot construe ambiguities in a property report as material misstatements or omissions. *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327, 1335 (D.S.C. 1992). Where a term is not defined by a property report, allegations that such term was ambiguous and intended to encompass a specific meaning beyond its literal reading does not constitute violation of ILSA, so long as the developer satisfied the terms of the property report as written. *Id.* at 1335. As discussed in detail *supra*, Appellants provided a Creekside Park and Community Dock within the literal meaning of such terms.

1. The better-reasoned authorities hold that reliance may not be presumed in anti-fraud actions under ILSA.

A key question of law for this appeal is whether the anti-fraud provisions of ILSA require proof that the plaintiff actually relied on the defendant's statements, rather than permitting the court or jury to presume such reliance. A correct interpretation of the anti-fraud provisions of ILSA shows that they do require proof of reliance by the plaintiff, as with a common-law fraud claim. *See Ivar v. Elk River Partners, LLC,* 705 F. Supp. 2d 1220 (D. Colo. 2010); *Dongelewicz v. First Eastern Bank,* 80 F. Supp. 2d 339 (E.D. Pa.

1999). The *Dongelewicz* opinion resolves a split among prior authorities by holding that claims under the *reporting* requirements of ILSA—which have no discovery rule and are thus indisputably time-barred here—do not require reliance, but that the anti-fraud provisions do.

The question whether anti-fraud ILSA claims require reliance has a complex history, which is complicated by the attempts courts have made to apply to it the more developed jurisprudence under federal securities Rule 10b-5 on which ILSA was modeled. The interpretation of Rule 10b-5 has evolved over time, however, and securities are distinguishable from real estate in important respects. An illustrative but distinguishable case is *Taplett v. TRG Oasis (Tower Two) Ltd., L.P.*, 755 F. Supp. 2d 1197 (M.D. Fla. 2009). *Taplett* notes that 15 U.S.C. § 1703(a)(2), the anti-fraud provision of ILSA, is modeled on § 17 of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, which require reliance for affirmative misrepresentations. *Taplett* thus required reliance under § 1703(a)(2) as well.

In modern securities law, a material omission calls forth a presumption of reliance, but a material misrepresentation does not. The justification for the presumption of reliance in Rule 10b-5 cases is set forth in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988). Its basis is the so-called "fraud-on-the-market" theory, which holds that the market price of a stock reflects the public information available about it in a way very different from face-to-face transactions contemplated by common-law fraud cases.

The "fraud-on-the-market" theory has *no application* to sales of real estate. Courts considering the matter have refused to deviate from common-law fraud principles by applying the "fraud-on-the-market" theory to consumer fraud cases outside the

securities context. *Brinker v. Chicago Title Ins. Co.*, ___ F. Supp. 2d. ___, 2012 U.S. Dist. LEXIS 44503, at *39-40 (M.D. Fla. 2012) (denying class certification in real estate fraud case because reliance issues required individualized proof); *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1363-65 (11th Cir. 2002) (reversing class certification in telemarketing fraud case on same ground). A careful review of the cases compels the conclusion that under § 1703(a)(2) of ILSA, reliance is not presumed for either misstatements or omissions, and must be proved in all cases.

2. Walbeck cannot establish actual reliance on any material misrepresentation for ILSA purposes.

Walbeck's claim under ILSA fails for lack of actual reliance. He could not have relied the extrinsic documents which now form the basis of his interpretation of the meanings of the terms "Creekside Park" and "Community Dock" in making his purchase because he had never seen them at that time. (Tr. 521:11-24; 523:6-12; 538:22-540:7.) He was never told orally that the Assembly would own the Creek Club building or Lot CV-6. (Tr. 540:8-543:8.) Nor do any of the marketing materials make such a claim. Nor could he testify that the "Creekside Park" and "Community Dock" issues central this lawsuit would have changed his decision to purchase in I'On, making them immaterial. (Tr. 537:21-538:4.)

A South Carolina federal district court addressed a similar issue in *Gibbes v. Rose Hill Plantation Development Co.*, 794 F. Supp. 1327 (D.S.C. 1992). In that case, plaintiffs contended a violation of ILSA on the ground that the "stables" and "docks" which had been promised to their homeowners' association in two ILSA property reports were supposed to be a fifty-two acre "Equestrian Center" including a polo field and floating docks. *Id.* at 1335. Developer actually conveyed a 17.24 acre stable complex,

no polo field, and non-floating docks. *Id.* at 1331, 1335. The *Gibbes* court granted summary judgment as to claims of false statements in the property report, because the property report did not define the terms "docks" or "stables" or specify their size or configuration, and the developer did in fact transfer docks and stables to the homeowners' association; therefore, the property reports at issue neither misstated nor omitted any material fact on such points. *Id.* at 1335-36. Likewise here, the Assembly received a "Creekside Park" and "Community Dock" in the ordinary meaning of those terms, which the Property Report did not further define.

In fact, the *Gibbes* reasoning is even more appropriate here: Respondents somehow contend that the reference to "Community Dock" in the singular in the 1998 Property Report actually entitles them to *both* docks at Civic Lot 6. The term "community dock" is in fact a legal term which DHEC and OCRM use in permitting. A community dock must be a certain length and be able to accommodate a certain size boat. (Tr. 676:19-678:9.) The uncontradicted evidence showed that the two docks in Phase 2 of I'On which were conveyed to the Assembly meet this legal definition of a community dock; DHEC and OCRM would not have allowed them to be built otherwise. (Tr. 678:5-9; Def. Ex. 4.) That conveyance satisfies the 1998 promise to convey a "Community Dock".

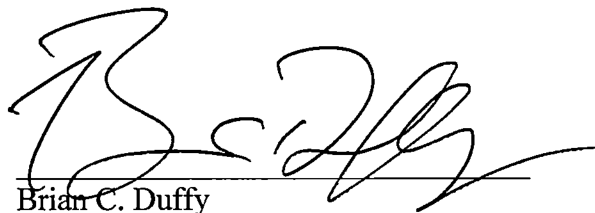
Walbeck attempted to circumvent the Property Report at trial by claiming reliance on oral representations by agents of Appellants under § 1703(a)(2). In *Gibbes*, one plaintiff alleged that he had been told orally that the stables promised in the property report would be of a certain size, and was found to have established a genuine issue of fact for trial under § 1703(a)(2). *Gibbes*, 794 F. Supp. 1336-37. Walbeck's claim is

distinguishable. Importantly, *Gibbes* erroneously held that reliance could be presumed for the plaintiff's claim under § 1703(a)(2) of ILSA. The *Gibbes* court noted the split among courts on this issue, but did not consider the difficulties in applying securities fraud concepts to the real estate context. 794 F. Supp. at 1336, n.22.

Walbeck also lacks evidence of a misrepresentation on which he could have actually relied as a purchaser. Walbeck testified at length about oral representations supposedly made to him by real estate agents of Defendants regarding *access* to the Creek Club and docks before his purchase. At no time have I'On residents lacked reasonable access to the Creek Club and docks. (See Part III, *supra.*) But Walbeck admits that no one ever told him that the I'On Assembly would receive *ownership* of Lot CV-6. Rather, he *assumed* that since CV-6 was a civic lot on plans of I'On, it would be owned by the Assembly. Appellants have consistently stated that civic lots, such as those which are now home to schools and churches, can be privately owned. (Tr. 540:8-543:8.) Furthermore, Walbeck's purchase contract contains a standard no reliance clause prohibiting him from relying on statements other than those contained in his actual contract and certain specified documents, including the Property Report. (Pl. Ex. 2, at 3-4.) His ILSA claim therefore fails as a matter of law.

CONCLUSION

Appellants respectfully pray this Court to reverse the trial court on the matters described herein and enter judgment in their favor.



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October 19, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

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

Respondents,

v.

The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; and I'On Realty, LLC,

Appellants.

PROOF OF SERVICE

I, Liane Marcotulli, paralegal for Duffy & Young, LLC, certify that I have served the **INITIAL BRIEF OF APPELLANTS** on Respondents by U.S. mail on October 19, 2015 by depositing a copy of it to their attorneys of record as shown below:

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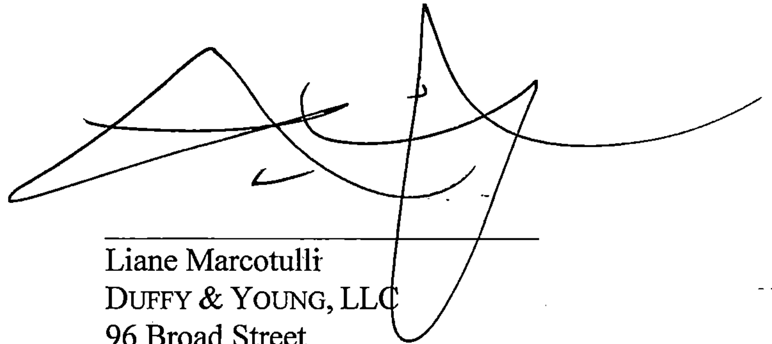

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