

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APR 10 2019

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

I'On Assembly, Inc., Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of I'On Assembly, Inc.,

Petitioners,

v.

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

Respondents.

**CONSENT MOTION TO HOLD TIME TO FILE PETITIONS FOR WRIT OF
CERTIORARI IN ABEYANCE**

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**CONSENT MOTION TO HOLD TIME TO FILE PETITIONS FOR WRIT OF
CERTIORARI IN ABEYANCE**

Pursuant to the South Carolina Appellate Court Rules (“SCACR”), Petitioners, I’On Assembly, Inc., Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of I’On Assembly, Inc.; Respondents, 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; and, the I’On Assembly, Inc. (collectively “the Parties”) respectfully request this Court hold the time for them to serve and file their Petitions for Writ of Certiorari (“Petitions”) in abeyance until one month after the Court of Appeals decides the Parties’ pending Petitions for Rehearing.¹

The Parties make this request because they are Petitioning to Rehear the Court of Appeal’s Substituted Opinion (No. 5588) filed February 27, 2019. While the Court of Appeals originally filed its Opinion on August 8, 2018, the Court withdrew this Opinion and re-filed a substantively different, Substituted Opinion after considering the Parties’ initial Petitions for Rehearing. The Parties’ Petitions to Rehear the Substituted Opinion are currently due on April 15, 2019.

Under Rule 242(c), SCACR, the Parties understand that a Court of Appeal’s opinion is final for purpose of review by the Supreme Court when a Petition for Rehearing “has been acted upon by the Court of Appeals”. However, under Rule 242(d)(2), SCACR, the Parties understand that “only those questions raised in the Court of Appeals and in the Petition for Rehearing shall be included in the Petition for Writ of Certiorari as a question presented to the Supreme Court.” In its Substituted Opinion, the Court of Appeals reversed itself in several respects, decided unraised

¹ By Order dated March 19, 2019, this Court granted the Parties’ first request for an extension, extending the time for serving and filing their respective Petitions from March 29, 2019 until April 18, 2019. In this Motion, the Parties specifically request that the Court issue an Order staying their time to file their Petitions.

issues, and raised questions that were not pertinent to the Court of Appeal's Original Opinion or the Parties' Petition to Rehear this Opinion.

In light of the foregoing restriction on questions that may be included in a Petition for Writ of Certiorari, it is necessary for the Parties to file a second Petition for Rehearing as to the Court of Appeal's Substituted Opinion in order to address the substantial, substantive differences in this Opinion and to preserve questions regarding these difference and other issues for further appeal.

The Parties recognize the Court customarily provides one, twenty (20) day extension absent extraordinary circumstances; however, the Parties believe the 180-degree turn the Court of Appeals took from its Original Opinion to its Substituted Opinion, coupled with the confusion as to whether the Parties can wait until after the Court finally decides their second Petitions before requesting certiorari, presents an extraordinary circumstance that warrants the requested relief.

Notably, a very similar situation was presented in *Parsons versus John Weiland Homes*,² and in that case, the Supreme Court implicitly recognized a party's option to first seek certiorari after a second Petition to Rehear a Substituted Opinion is decided by the Court of Appeals. *Parsons* involved the denial of a motion to compel arbitration which the Court of Appeals initially affirmed on two grounds in its Original Opinion. The Court of Appeals first affirmed because it found evidence supported the trial court's ruling that the claims at issue fell outside the arbitration agreement's terms; and, alternatively, affirmed because it found the claims alleged conduct that was too outrageous to be foreseeable even if the claims otherwise fell within the agreement's terms. John Wieland Petitioned to Rehear the Original Opinion. In response, the Court of Appeals filed a Substituted Opinion which affirmed the denial of arbitration on the first ground and declined to say on whether the claims alleged conduct that was too outrageous to be

²Appellate Case No. 2014-00782.

foreseeable. This was the only change. John Wieland then filed a second Petition to Rehear the Substituted Opinion and waited until after the Court of Appeals denied this second Petition before it sought certiorari. John Wieland's Petition for Certiorari was filed more than 30 days from the date the Court of Appeals decided its first Petition for Rehearing, but within 30 days from the date of the Court denied its second Petition for Rehearing. By Order dated July 14, 2014, the Supreme Court granted certiorari and asked the parties to also brief the following issue:

Was the petition for a writ of certiorari timely filed where rehearing was denied, the opinion was amended by the Court of Appeals without a change to the substance thereof, and the petition for a writ of certiorari was not filed until after a second petition for rehearing was denied?

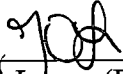
The Supreme Court ultimately issued a decision on the merits without directly addressing this question which suggests that the Court considered the Petition for Certiorari timely filed even though it was filed after a second Petition for Rehearing. *Parsons v. John Wieland Homes*, 418 S.C. 1, 791 S.E.2d 128 (2016). At minimum, it appears the Supreme Court considered circumstances which involve a Substituted Opinion with several, substantive changes, like here, "extraordinary" so as to justify extending the petition for certiorari deadline until after any rehearing of such an Opinion are decided by the Court of Appeals.

In addition to these extraordinary circumstances, the Parties also believe judicial economy would be better served by allowing them to file one Petition after the Court of Appeals "finally decides" the Parties' Petitions to Rehear the Substituted Opinion rather than file two, separate Petitions for Certiorari as to each of the Court of Appeal's Opinions. *See, e.g.*, Rule 242(c), SCACR, ("A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service. . .within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals.").

As such, the Parties request this Court hold the time to serve and file their Petitions for Writ of Certiorari in abeyance until one month after their Petitions to Rehear the Court of Appeals' Substituted Opinion is acted upon and finally decided by the Court of Appeals.



A check for the \$50.00 filing fee associated with this Motion is enclosed.

JUSTIN O'TOOLE LUCEY, P.A.

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April 9, 2019
Mount Pleasant, South Carolina

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April 9, 2019
Charleston, South Carolina

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April 9, 2019
Charleston, South Carolina

Attorney for I'On Assembly

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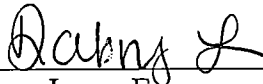
PROOF OF SERVICE

I, Dabny Lynn, hereby certify that on April 9, 2019 I served a copy of the ***Consent Motion to Hold the Time to File Petitions for Writ of Certiorari in Abeyance*** on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

Brian Duffy, Esq.
Julie Moore, Esq.
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Former Attorneys for I'On Assembly, Inc.

Signed: 
Dabny Lynn, Esq.

April 9, 2019
Mt. Pleasant, South Carolina

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S.C. SUPREME COURT

JUSTIN O'TOOLE LUCEY, PA

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Anna S. McCann
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Taylor M. Morris
Sohayla M. Roudsari
Collin H. Fuller

April 9, 2019

VIA OVERNIGHT MAIL

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

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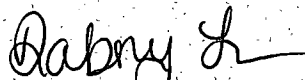
Re: Brad Walbeck v. The I'On Company
Appellate Case No.: 2015-001590

Dear Mr. Shearouse:

Enclosed please find the original and seven (7) copies of the parties' *Consent Motion to Hold the Time to File Petitions for Writ of Certiorari in Abeyance* in the above-referenced matter. Also enclosed is a proof of service of this document upon counsel and a check in the amount of \$50.00 for filing this Motion. Please return an additional, filed copy of the Motion in the self-addressed, stamped envelope provided for your convenience.

Thank you for your time and attention to this matter. Please do not hesitate to contact us with any questions or concerns.

Sincerely,


Dabny Lynn

DL/dl

Enclosures

cc: Brian C. Duffy, Esquire
Julie L. Moore, Esquire
Shawn R. Willis, Esquire
Timothy W. Bouch, Esquire
Yancey A. McLeod, III, Esquire