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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, individually and derivatively on behalf of I'On Assembly, Inc., and 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.

RESPONDENTS' PETITION FOR REHEARING

Justin O'Toole Lucey, Esquire (SC Bar No.: 15438)
Joshua F. Evans, Esquire (SC Bar No.: 77448)
Dabny Lynn, Esquire (SC Bar No.: 78703)
JUSTIN O'TOOLE LUCEY, PA
415 Mill Street
Mount Pleasant, South Carolina 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
Attorneys for the Respondents

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure ("SCACR"), Respondents[1] respectfully file this Petition for Rehearing of this Court's Substituted Opinion filed February 27, 2019 (Opinion No. 5588) ("Substituted Opinion"). Respondents seek a rehearing because this Court overlooked and misapprehended points of law and fact in partially affirming and reversing the circuit court, and in partially reversing this Court's Original Opinion.

INTRODUCTION

By all appearances, the promised, waterfront Amenities were possessed, owned, or to be owned, by the I'On community from shortly after inception until late 2008 because the homeowners used and enjoyed these Amenities.

Even for those who realized that a use easement was in place, there was nothing in the easement that indicated the homeowners would not be deeded the Amenities; and, use was assured by the easement's purportedly, perpetual term. Unbeknownst to the homeowners, the Developers[2] had implemented stage one of their deception by initially starting with this easement, instead of a deed to facilitate the undisclosed, Olde Park deal.

It was not until the first, attempted sale of the Amenities in Fall 2008 that it was realized a contrary term buried in the easement limited it to thirty years, a third of which expired by the time of discovery; half of which would expire before the Developers completed construction; and, two-thirds of which will have expired by the time this Petition is ruled upon. The thirty-year term was the second of the Developers' efforts to retain the ultimate value of the Amenities.

[1] The "Respondents" are: Brad Walbeck ("Walbeck"), Lee Ann Adkins ("Adkins"), and the I'On Assembly, Inc. ("HOA").

[2] The "Developers" or "Appellants" are: 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.

Even once the term ambiguity was discovered, no one understood that the easement was void *ab initio* because the conduct of the later amalgamated Developers obscured that the Grantor of the easement did not own the property subject to the easement. This third defect was not discovered until after this litigation was filed.

By the foregoing, the Developers camouflaged for over a decade that these "waterfront" Amenities they promised to the HOA and I'On homeowners would eventually be lost and the neighborhood would no longer be a waterfront community.

The jury, by its verdict, and circuit court, by its post-trial orders, agreed that the Developers promised these "waterfront" Amenities to the I'On community, wrongfully failed to keep this promise, and that they could not justify or otherwise defend this failure.

The Developer's earliest, factual defense at trial was that the obligation to convey the Amenities matured "upon the completion of construction," which, as to the Community Dock, occurred in 2001. Respondents showed that "completion of construction" just as logically referred to the completion of construction of the neighborhood – which had not occurred at the time of the attempted sales. The jury found for Respondents on this factual issue.

The Developers' second, factual defense at trial was that a line item buried in an annual budget received in late 2004 should have commenced the running of "the knew or should have known" discovery period. Respondents presented contrary evidence and the jury found for Respondents.

The Developers' third factual defense at trial was that the representations and promised Amenities were ambiguous and generic – and had been satisfied by the transfer of a few crab docks and a "Marshwalk" path. Implicit in this representation is that the Developers believed they complied with their obligations – and that reasonable minds could so agree; therefore, a

"homeowners knew or should have known" statute of limitations defense by the Developers is not palatable. The jury discredited this testimony when it found for Respondents on nearly all causes of action; and, found that August 5, 2009 is when these claims accrued.

The circuit court found adequate evidence and testimony to support the jury's verdict. This Court originally agreed with the circuit court (and jury) in multiple respects; yet, completely reversed itself in a Substituted Opinion that if, left uncorrected, provides a "how to wrongfully manipulate and profit from a HOA" guide for Developers, upends fundamental equitable principles, and subverts South Carolina's substantive law as well as this state's long-standing public policy of protecting homeowners.

QUESTIONS TO REHEAR

I. Did the Court err in its dismissal of Walbeck's and Adkins' derivative claims?

a. Did the Court err in considering Developers' Motion to Dismiss when Developers failed to appeal this Order ?

b. Did the Court err in failing to consider Developers' Answer to Respondents' Complaints in which Developers admitted demands were made to the HOA which the HOA refused to act on?

c. Did the Court err in overlooking Developers' failure to seek the dismissal of Walbeck's derivative negligent misrepresentation claim?

d. Is the Court's ultimate decision to dismiss Respondents' derivative claims irreconcilable with the Supreme Court's recent decision in *Patterson versus Witter*?

e. Did the Court err in limiting its substituted derivative analysis to the pleadings available at the Motion to Dismiss stage versus the evidence available at the JNOV stage?

f. Did the Court err in discounting the demands described in Respondents' Complaints?

g. Did the Court err in following "non-binding" precedent throughout its derivative analysis?

h. Did the Court err in analyzing what is required to maintain a derivative action and by ignoring the "lenient" standard for excusing a demand as recognized by the Supreme Court?

i. Does a circuit court have the discretionary authority to excuse a derivative demand where it finds sufficient facts of futility are pled and then proven?

j. Did the Court wrongfully increase the threshold Rule 23 derivative demand requirement by requiring a specific request to "initiate litigation"?

k. Is it wasteful and unfair for a Court to ignore ample evidence of demands made and demand futility in dismissing derivative claims which survived dismissal, summary judgment, and JNOV?

l. Did the Court err in overlooking that the HOA's direct claims mooted any pleading defect?

II. Did the Court err in reversing its original conclusion that Developers' violated their fiduciary duties to the HOA?

a. Did the Court err in ignoring its original finding that Developers failed to act in good faith and with due regard to the HOA and its members?

b. Do developers, who control an HOA for years, make multiple misrepresentations while in control, and then sell common property they promised to give to a HOA free and clear, act against the HOA's interest and in violation of the fiduciary duties they owe the HOA?

c. Did the Court err in relying upon *Cedar Cove* in its fiduciary duty analysis?

d. Does self-dealing, *e.g.*, the sale to a third party of common areas promised to a HOA, shift the burden of proof to the fiduciary to show the fairness of the transaction?

III. Did the Court err in finding that Walbeck's negligent misrepresentation and ILSA claims were barred by the Statute of Limitations?

a. Did the Court err in substituting its own judgment for that of a jury when there is more than one reasonable inference as to when these claims were discovered?

b. Did the Court err in finding Walbeck's claims are barred when more than one inference can be drawn from the proposed budget and surrounding evidence?

c. Did the Court err in overlooking Developers' omissions and affirmative representations in its equitable estoppel analysis?

d. Did the Court err in failing to consider the applicability of equitable tolling to Respondents' claims?

IV. Did the Court of Appeals err in reversing its original finding that Developers were amalgamated?

a. Did the Court err by overlooking Developers' consent to the circuit court deciding amalgamation?

b. Did the Court err by overlooking the ample evidence of Developers' bad faith and unfairness resulting from Developers' collective evasive conduct which makes the single business enterprise theory especially applicable here?

V. Did the Court err in reversing itself and depriving Respondents of the remedies awarded to them in this admittedly convoluted case?

SUMMARY OF ARGUMENT

This Court's Substituted Opinion departs 180 degrees from its Original Opinion[3] and rewards Developers who, as expressly found by a jury, "recklessly, willfully, or wantonly"[4] took advantage of a HOA they created and controlled for years.

In completely reversing itself, this Court concluded: (1) derivative claims it originally found were proper are now improper; (2) Developers it originally found were liable for acting against a HOA's best interest are no longer liable for their bad acts; (3) Developers who it originally found voluntarily undertook to convey Amenities to a HOA now owe nothing to that HOA for failing to convey these Amenities as promised; (4) promises which it originally found were made by the Developers to the HOA and its members no longer preclude the Developers from relying on the statute of limitations as a defense; (5) evidence it originally found established fundamental unfairness resulting from the Developers' intertwining of their operations no longer exists; and, (6) the multiple inferences it originally found could be drawn from the evidence now only lead to one conclusion.

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[3] In addition to substantively altering its initial analysis, the Court's Substituted Opinion also addresses unraised issues and creates new questions which were not applicable to the Court's Original Opinion or Respondents' Petition to Rehear that Opinion ("Original Order Petition"). As such, Respondents submit this Petition to address the Court's Substituted Opinion ("Substituted Order Petition"). Rather than repeat questions and arguments already asserted, Respondents fully incorporate their Original Order Petition into this Substituted Order Petition by reference.

[4] (R. pp. 1858-59) (Verdict Form).

The Court not only erred as to its substituted conclusions, it also erred by overlooking important points, including that: (1) the HOA's direct claims are unaffected by any alleged Rule 23 pleading defect; (2) the HOA's direct claims are not barred by the statute of limitations; (3) the Circuit Court's Order denying the Developers' Motion to Dismiss is the law of the case because Developers failed to appeal this Order; (4) Developers admitted in their Answer that a demand to bring this suit was made to the HOA which refused to act on this demand; (5) prevailing Supreme Court precedent does not limit derivative determinations to the pleadings; (6) Developers repeatedly violated their fiduciary duty to Respondents by acting in their interest as opposed to the HOA's interest; (7) Developers' failure to convey promised Amenities also violated their fiduciary duty to Respondents; (8) Developers continually concealed claim-related information which justifies the application of equitable estoppel; (9) Developers controlled and misled the HOA and its members from day one which justifies the application of equitable tolling; (10) Developers waived any right to challenge the verdict rendered by the jury collectively against them; (11) "Fundamental unfairness" resulted from Developers' abuse of the corporate form; and, (12) Developers' continued evasiveness makes the single business enterprise theory especially applicable here.

As part of the foregoing, this Court has come to the illogical and unsustainable conclusion that a developer who deprives a community of a promised common area, does not breach a fiduciary duty; when the jury, charged with the same fiduciary duty precedent espoused by this Court in its Original and Substituted Opinions, considered the facts and decided otherwise.

This Court's Substituted Opinion has far-reaching negative, public policy implications unless rectified by this Court; this Court should grant the rehearing requested for each of the foregoing reasons.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.,* 168 S.C. 163, 172-73, 167 S.E.2d 234, 238 (1933) ("The purpose of such a petition is to aid the court in deciding correctly a case heard by it" and a properly drawn rehearing petition must state "the points. . .overlooked or misapprehended by the court.").

ARGUMENT

I. This Court Erred in Reversing its Original Opinion and the Circuit Court's Ruling that Walbeck and Adkins Properly Filed Derivative Claims

This Court's new decision reversing the circuit court's ruling on Walbeck and Adkins' derivative claims is procedurally and substantively flawed, places form over substance, disregards the pleadings and the evidence, and ignores prevailing precedent which establish these derivative claims were properly pled and ultimately proven.

A. The Court Overlooked Developers' Failure to Appeal the Circuit Court's Ruling on the Pleadings, and Consequently, Misapplied the Law

The Court erred procedurally in reversing the circuit court's denial of Developers' Motion to Dismiss because this ruling is the law of the case and cannot be reversed. In a huge departure from its original derivative analysis, the Court limited its substituted derivative analysis to the pleadings and the circuit court's ruling on these pleadings at the motion to dismiss stage. *Compare* (Opinion, p. 144) (finding "judicial economy would not be served by limiting our review to the record as it existed when the circuit court denied [Developers'] motion to dismiss") *with* (Substituted Opinion, pp. 10-11) ("[T]he determination of whether plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the

complaint."). However, this Court missed the fact that Developers did not appeal this ruling, and consequently, this ruling stands regardless of whether it's right or wrong. (R. p. 9).

On May 27, 2011, Developers filed a Rule 12(b)(6) Motion seeking the dismissal of only three of the four or more derivative claims (fraud, breach of contract, and breach of fiduciary duty) asserted by Walbeck. (R. pp. 1763-64).

On March 15, 2012, following a Second Amended Complaint filed by Walbeck and Adkins, the circuit court issued an Order denying Developers' Motion ("2012 Dismissal Denial"). In the 2012 Dismissal Denial, the circuit court ruled that the pleadings "were sufficient to state a claim upon which relief can be granted on these three causes of action." (R. p. 9) (emphasis added).

Developers did not file a Motion to Reconsider the 2012 Dismissal Denial and did not appeal this Denial after final judgment was rendered. (Developers' Notice of Appeal filed July 20, 2015 omitting the 2012 Dismissal Denial from the list of Orders on appeal);[5] *see also* Rule 203, SCACR; Rule 59, SCRCP; *Davis v. Parkview Apartments*, 409 S.C. 266, 280, 762 S.E.2d 535, 542-43 (2014) ("As a matter of procedure. . .Appellants have only appealed. . .the Dismissal Order. As such, the merits of the underlying discovery orders, including the Privilege Order and the Discovery Order, are not before us for consideration.") (emphasis added); *see also Overland, Inc. v. Nance*, 423 S.C. 253, 257, 815 S.E.2d 431, 433 (2018) ("The failure to serve a Rule 59(e) motion within ten days of receipt of notice of [order entry] converts the order into a final judgment, and the aggrieved party's only recourse is to file a notice of intent to appeal.") (emphasis added).

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[5] According to their Notice of Appeal, Developers only appealed five of the circuit court's trial-related Orders, including the Order Denying Developers' Motion for JNOV ("2015 JNOV Denial"), the Order Denying the I'On Company's Petition for Attorneys' Fees, the Order Awarding Walbeck's Petition for Attorneys' Fees, the Order Declaring the 2000 Recreational Easement Invalid, and the Order Denying Developers' Motion on Abuse of Process.

Therefore, this Court cannot reverse the 2012 Dismissal Denial's ruling that the "pleading were sufficient" because this ruling is not preserved for appellate review. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("[D]ifferent preservation rules apply to an *appellant*—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.") (emphasis in original and added).

Further, the circuit court's ruling that the "pleadings were sufficient" is the law of the case, and this Court must accept that ruling as correct. *Town of Mt. Pleasant v. Jones,* 335 S.C. 295, 298-99, 335 S.E.2d 468, 470 (Ct. App. 1999) *citing ML–Lee Acquisition Fund, L.P. v. Deloitte & Touche,* 327 S.C. 238, 489 S.E.2d 470 (1997) (an unchallenged ruling, right or wrong, is the law of the case); *Continental Ins. Co. v. Shives,* 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App. 1997) (an unappealed ruling is the law of the case, and the appellate court must assume the ruling was correct).[6]

Simply stated, it's procedurally impossible for this Court to "revers[e] the circuit court's ruling that Walbeck and Adkins properly filed derivative claims on the HOA's behalf" because Appellants never appealed this ruling. (Substituted Opinion, p. 12). This Court must correct this

[6] In its Original Opinion, this Court cited to *Edge versus State Farm* for the proposition that "the denial of a motion to dismiss may be considered in an appeal from other appealable rulings in the same action". (Opinion, p. 144) *citing Edge*, 366 S.C. 511, 523 S.E.2d 387 (2005). *Edge* is distinguishable from this case because it involved a denial of a motion to dismiss that was immediately appealed to the Supreme Court. *Edge,* 366 S.C. at 517, 523 S.E.2d at 390. Here, Developers did not appeal, immediately or otherwise, the 2012 Dismissal Denial which, even under *Edge*, means this Court is precluded from considering this Denial. *Id.* at 520, n. 6, 523 S.E.2d at 392, n. 6. ("The trial judge dismissed the 3rd and 4th causes of action against the Facility and the plaintiffs did not appeal the dismissal.") (emphasis added).

procedural error and acknowledge that this ruling is the law of the case and is precluded from appellate review.

B. The Court Overlooked that the Circuit Court's JNOV Denial is the Only Ruling Appealed by Developers

The Court also erred by failing to recognize that the only circuit court ruling Developers appeal from which discusses derivative claims is the circuit court's post-trial denial of their JNOV Motion. *See* (Notice of Appeal).[7] This Court's review of the 2015 JNOV Denial is in no way limited to the pleadings; rather, this Court must consider all the evidence. *See, e.g., Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (the denial of a JNOV motion is within the trial court's discretion and its rulings will not be disturbed on appeal unless no evidence supports the ruling or the ruling is controlled by an error of law) (emphasis added); *see also* (App. Br. at. 20-21) (agreeing as to the applicability of the JNOV standard).

This is an important point: The primary reason this Court reversed itself in its substituted derivative analysis is because it considered the wrong motion which, in turn, resulted in the Court applying the wrong standard. The Court is precluded from reviewing the 2012 Dismissal Denial, and thus, the Rule 12(b)(6) pleading standard is not applicable here.[8] The Court is not precluded

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[7] *See* Footnote 5, *supra.*

[8] In *Patterson versus Whitter*, the South Carolina Supreme Court decided an analogous issue in the derivative action context. In *Patterson*, the Supreme Court confronted the issue of whether a circuit court erred by failing to convert a Rule 12(b)(6) Motion to a Rule 56 Motion. 425 S.C. 213, 225-26, 821 S.E.2d 677, 684 (2018) ("In considering a motion for dismissal under Rule 12(b)(6), if matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated and disposed of as provided in Rule 56.") (citations and quotations omitted) (emphasis added). The Supreme Court held the motion to dismiss was converted into a motion for summary judgment and the Court **"review[ed] it as such."** *Id.* at 226, 821 S.E.2d at 685 (emphasis added). *Patterson*, therefore, establishes that the standard applicable to derivative determinations is a function of the standard applicable to the derivative ruling appealed. Here, the only derivative ruling appealed is a JNOV ruling, and consequently, the JNOV standard applies.

from reviewing the 2015 JNOV Denial, but in so reviewing, the Court must consider the evidence, which is exactly what the Court did in its Original Opinion:

> [J]udicial economy would not be served by limiting our review to the record as it existed when the circuit court denied the motion to dismiss. Rather, as a result of surviving the motion to dismiss and the summary judgment motion, Walbeck and Adkins endured the time and expense of a lengthy trial on the derivative claims. Therefore, it would be wasteful, not to mention unfair, to ignore the evidence generated at trial on this issue.
>
> Therefore, we will look the record before the circuit court at trial. The documentary evidence. . .as well as the testimony before the circuit court showed that Appellants had veto power over the decisions of the Board. . .Further, one Board member, Deborah Bedell, testified regarding her understanding that the veto power would have prevented the Board from initiating litigation. Therefore, the evidence shows that a demand on the Board to initiate litigation against the Appellants would have been futile.
>
> Additionally, the circuit court properly found Walbeck and Adkins fairly and adequately represented the interests of other HOA members because Walbeck and Adkins were represented by highly qualified counsel and were similarly situated to the other HOA members. . .According to the circuit court, the testimony of three HOA members, Julie Hussey, Tim Eble, and Deborah Bedell, indicated that Walbeck's and Adkins' assertion of the derivative claims advanced the interests of the HOA's members. The testimony of these witnesses supports the circuit court's finding. *See Hinkle*, 354 S.C. at 96, 579 S.E.2d at 618 (holding an appellate court may reverse the circuit court's ruling on JNOV motions only when there is no evidence to support the rulings or when the ruling is controlled by an error of law)
>
> A new demand was unnecessary following the settlement [of their claims against Russo] because the resulting change to the damages sought did not change the nature of the original claims. Moreover, the HOA's realignment as a plaintiff allowed the jury to award damages to the HOA as if Walbeck and Adkins had never brought derivative claims.
>
> Based on the foregoing, we affirm the circuit court's ruling that Walbeck and Adkins properly maintained a derivative action on the HOA's behalf.

(Opinion, pp. 144-46) (emphasis added) (some internal citations omitted); *see also Grant v. Gosnell,* 266 S.C. 372, 375, 223 S.E.2d 413, 414 (1976) (noting the issue of whether the failure to

seek redress within the corporation is excusable is a factual question, the resolution of which by trial court should be affirmed unless unsupported by the evidence) (emphasis added).[9]

Because this Court has already affirmed the circuit court's JNOV ruling that "Walbeck and Adkins properly maintained a derivative action," and this is the only derivative ruling properly before this Court, it should grant rehearing, note the correct standard, and reinstate the derivative verdicts that it wrongfully vacated it its Substituted Opinion.

C. The Court Ignored Developers' Admission that Demands were Made Upon the HOA to Initiate Litigation Which the HOA Refused to Act on

The Court additionally erred in disregarding Developers' admission that an adequate demand was made to the HOA and refused by the HOA. *Compare* (Opinion, p.144-46) (refusing to limit its analysis to the motion to dismiss record) *with* (Substituted Opinion, pp. 10-11) (limiting its analysis to the motion to dismiss record).

In its Substituted Opinion, this Court found that (1) the "pleadings fall short of alleging facts indicating an adequate demand by either Walbeck and Adkins directed to the Board or the futility of making such demand;" and, (2) "the pleading do not allege that either Walbeck or Adkins directed a demand to the Board to initiate litigation against Appellants to enforce the HOA's alleged rights and recover the disputed amenities." (Substituted Opinion, pp. 11-12).

None of this is correct given Developers' pleadings concede that HOA members made an adequate demand upon the HOA and the HOA refused to act on this demand. The same day Developers filed their Motion to Dismiss, they filed an Answer admitting:

> [A] certain member or members of the [HOA] had **made demands upon the [HOA] to bring suit regarding the issue raised in the Amended Complaint and that the [HOA] refused to do so**.

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[9] The Court's additional reasons for originally not limiting its review to the pleadings are also still valid. (Opinion, pp. 144-46).

(R. p. 144) (emphasis added); *see also* (R. pp. 141-50) (Answer filed on May 27, 2011); (R. pp. 1763-74) (Motion filed on May 27, 2011); *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2nd Cir. 2011) (finding a defendant's answer and exhibits attached or integral to the answer can be considered in making derivative determinations).[10] This concession establishes that an adequate demand was made; and further, evidences the futility of any further demand. *See, e.g., Johnson v. Alexander,* 413 S.C. 196, 201-02, 775 S.E.2d 697, 700 (2015) ("In determining the scope of Alexander's duty, we accept his consistent characterization of this responsibility—ensuring Johnson received good title. In her complaint, Johnson alleged '[d]efendants had professional duties to ensure that Plaintiff was receiving good and clear title. . .and if there was a problem. . .to correct said deficiencies and/or advise Plaintiff how to correct said deficiencies.' In Alexander's answer he *admitted* those allegations. Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions.") (emphasis in original).

D. The Court Overlooked Developers' Failure to Seek Dismissal of Walbeck's Direct and Derivative Negligence Misrepresentation Claim

Again assuming this Court's analysis is "limited to the record at the time the circuit court decided the motion to dismiss," the Court also erred by overlooking the fact that Developers only moved to dismiss three derivative claims: breach of fiduciary duty, breach of contract and fraud. Developers did not move to dismiss the negligent misrepresentation claim; the circuit court did not rule on the sufficiency of the negligent misrepresentation claim; and, the jury later returned a

[10] The *Patterson* Court cited to this decision in its derivative analysis. *Patterson,* 425 S.C. at 235, 821 S.E.2d at 685; *see also United Educational Distributors, LLC v. Educational Testing Services*, 350 S.C. 7, 13, 564 S.E.2d 324, 327-28 (Ct. App. 2002) (acknowledging that a dismissal on the pleadings is considered a drastic procedure, and therefore, the pleadings should be construed liberally and presumed to be true as pled so that substantial justice is done between the parties).

$1,000,000 verdict in favor of the HOA and a $20,000 verdict in favor of Walbeck on this claim. (R. pp. 1763-64) (Developers' Motion to Dismiss excluding Walbeck's direct and derivative negligent misrepresentation claim); (R. p. 9) (2012 Dismissal Denial ruling on the breach of fiduciary duty, breach of contract and fraud claims); (R. pp. 1858-59) (Verdict form awarding the HOA $1,000,000 and Walbeck $20,000 for "negligent misrepresentation"). Because the negligent misrepresentation claim was neither raised to, nor ruled upon, at the motion to dismiss stage, this Court's reversal of the circuit court's 2012 Dismissal Denial does not affect this claim. *Lucas v. Rawl Family Ltd. Pship.*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) ("It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."); *Elam v. S. Carolina Dep't of Trans.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e) motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). The Court should modify its Substituted Opinion to correct this error; and, should the Court choose not to restate the HOA's and Walbeck's elected awards despite the arguments outlined herein, it should alternatively restate the HOA's and Walbeck's negligent misrepresentation awards.[11]

II. The Court's Substituted Opinion Misapprehends Both the Law and the Facts as it Relates to Rule 23's Derivative Requirements

The Court's substituted derivative analysis is also wrongfully limited to the pleadings contrary to prevailing Supreme Court precedent and ignores the entirety of the allegations and the evidence which establish these derivative claims are proper.

[11]Respondents briefed the issue of restating non-elected claims in their Original Petition and refer this Court to that Petition for this argument. (Original Petition, pp. 18-19). Further, given this Court's Substituted Opinion remanded, albeit erroneously, Walbeck's breach of contract claim and ordered a new trial as to that claim, it appears the Court is already inclined to permit such alternative relief. (Substituted Opinion, p. 26).

A. The Court's Substituted Derivative Analysis Disregards the Supreme Court's Recent Decision in *Patterson* and Applies the Wrong Standard

In *Patterson versus Witter*, the Supreme Court recently held derivative determinations are not limited to the pleading and expressly rejected the approach taken by this Court in its substituted derivative analysis. 425 S.C. at 226, 821 S.E.2d at 684; *see also* Rule 12(b)(6), SCRCP.

Patterson involved a misappropriation action brought by members of a home builders corporation and purported trust fund the corporation established. *Id.* at 218, 821 S.E.2d at 680. A dispute arose after the corporation's Board of Directors announced plans to wind down the fund and use $5 million from the fund to establish a separate, insurance company — monies which should have been returned to the members according to the trust agreement. *Id.* at 219-20, 821 S.E.2d at 680-81.

In February 2012, the members filed an initial complaint against the fund and the corporation's Board seeking, among other things, their share of the $5 million. *Id.* at 222, 821 S.E.2d at 682. The fund and Board moved to dismiss the members' complaint on several grounds, including that the complaint was derivative in nature and did not meet Rule 23's derivative requirements. *Id.* In September 2012, a hearing was held on the motion to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction over trusts. *Id.*

On January 30, 2013, after the hearing but before the circuit court issued its written order, the members sent a written, demand letter to the attorneys for the fund and Board itemizing specific requests, none of which included a request to "initiate litigation". *Id.* at 222-23, 821 S.E.2d at 682-83. The fund and Board did not respond to the members' demand; and, on March 5, 2013, the circuit court issued an order dismissing the action without prejudice for lack of jurisdiction. *Id.* at 223-24, 821 S.E.2d at 683.

Still having received no response to their January 2013 demand, the members refiled their action in probate court on April 9, 2019. The probate complaint alleged the same causes of action and included a new paragraph which stated:

> [Members], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the [corporation], meetings with counsel for the [corporation], correspondence to [fund] and a previous lawsuit to no avail.

Id. at 224, 821 S.E.2d at 683 (emphasis added).

The probate action was removed to circuit court; the corporation and fund then moved to dismiss the probate complaint on similar grounds as the first complaint; and, ultimately, the circuit court held that the complaint failed to comply with Rule 23. *Id.* at 225, 821 S.E.2d at 683. Members filed a Rule 59(e) Motion, arguing their January 2013 demand was properly made, the circuit court's order elevated form over substance, and that they should be able to amend their pleadings if more detail was needed. The circuit court denied this Motion and members appealed. *Id.* On appeal, this Court affirmed the circuit court, finding that the members' complaint did not properly allege a Rule 23 demand. *Id.* at 225, 821 S.E.2d at 684.

The Supreme Court then granted certiorari and reversed this Court's decision because it found members satisfied Rule 23's derivative requirements and that the Court of Appeals erred in multiple respects.

First, the Supreme Court held that a court's review of motions to dismiss are not necessarily limited to the pleadings:

> If matters outside the pleading are presented to and not excluded by the Court, a [Rule 12(b)(6)] motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . .Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

Id. at 226, 821 S.E.2d at 684.

Second, the Supreme Court disagreed with this Court's reliance on *Whittle*[12] and found *Patterson* clearly distinguishable:

> The facts of this case are distinguishable from those in *Whittle*. Here, although the [January 2013 demand] was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the [January 2013] letter *does* constitute an adequate demand in this case. Another issue here is [members] failure to include the magic

[12] Approximately twenty years before *Patterson*, this Court addressed the derivative issue in *Carolina versus Whittle.* 343 S.C. 176, 188, 539 S.E.2d 402, 409 (Ct. App. 2000), *certiorari granted* August 23, 2001, *remains viable in result only* by Order dated January 10, 2003. In a departure from the Supreme Court's derivative decisions, the *Whittle* Court wrongfully imposed additional pleading requirements, restricted the demand requirement as recognized under South Carolina's substantive law, and limited its derivative analysis solely to the pleadings. While this Court makes a point to note that it does not consider *Whittle* "binding precedent" following the Supreme Court's 2003 Order indicating that *Whittle* "remains viable in result only," this Court quotes extensively from *Whittle* in explaining its interpretation of Rule 23's derivative requirements. (Substituted Opinion, p. 11, n. 5) ("[w]e do not view *Whittle* as binding precedent"). In fact, the legal discussion included in the Court's substituted derivative analysis appears to be derived from *Whittle* – the Court just does not cite *Whittle* and choses instead to cite the same cases cited in *Whittle* to try to justify applying the same flawed analysis here. In other words, the primary point this Court attempts to make in its Substituted Opinion – that derivative determinations should be limited to only reviewing the pleadings – appears entirely based on its former decision in *Whittle* which the Court admits is non-binding precedent. *Compare* (Substituted Opinion, pp. 10-11) (noting "the determination of whether a plaintiff has met the requirements of Rule 23 is limited to assessing the sufficiency of the allegations within the complaint.") (emphasis added) *with Whittle,* 343 S.C. at 188-189, 539 S.E.2d at 409 ("the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it.") (emphasis added). Not only is this proposition not binding per this Court's own admission, it's wrong. *Whittle*, like this Court, relied on *McCormick versus England* for the proposition that derivative determinations can only be based on the pleadings; yet, *McCormick* did not involve Rule 23 – it concerned whether a physician's breach of confidentiality constituted a cause of action. *Compare* (Substituted Opinion, pp. 10-11) *with McCormick*, 328 S.C. at 632-33, 494 S.E.2d at 434 (referencing Rule 23 nowhere). Further, the Supreme Court makes clear in *Patterson* that derivative determinations are not limited to the pleadings, and *Patterson* is the prevailing authority on this issue. On a separate, but equally important note, this Court in *Whittle* also acknowledged that the appellants in that case, like here, failed to appeal the circuit court's order granting the dismissal of their complaint. *Id.* at 190-91, 539 S.E.2d at 410 ("Shareholders have not appealed this ruling, nor have they appealed the refusal to allow further amendment to the Third Amended Complaint. An unappealed ruling is the law of the case. . .and is not properly before us on appeal.") (emphasis added). Thus, even according to this Court in *Whittle*, this Court erred procedurally in considering the unappealed 2012 Dismissal Denial.

> phrase "which is incorporated herein by reference" [when describing the demand in their complaint}. Indeed, the allegations concerning the [demand] in {members'] complaint are appreciably more detailed than those in *Whittle*. And certainly, when the [January 2013 demand] is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.

Id. at 234, 821 S.E.2d at 688 (emphasis added).

Third, the Supreme Court expressly rejected the approach that this Court has taken here in its Substituted Opinion:

> [W]e reject an approach that approves of a trial court's consideration of everything *except* [a] demand letter that was actually sent and received. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint.") *quoting Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004)...

Id. at 235, 821 S.E.2d at 689 (emphasis added).

B. The Court Erred in Concluding that Rule 23's Derivative Requirements Were Not Met

Applying Rule 23 and *Patterson* to this case, it is clear that all applicable derivative requirements are satisfied, regardless of which "pleading" or "evidentiary" standard is applied, and this Court erred in concluding otherwise.

Like *Patterson*, these complaints allege Walbeck and Adkins' member status and the efforts they, and other members, made to "obtain the action desired" – securing the HOA's rights to the Creekside Park and Community Dock. For example, the Amended Complaint provides:

> 1. [Walbeck]...is an owner of a [home] located in...I'On.
>
> 2. [Walbeck] brings this action on behalf of himself, and derivatively on behalf of the [HOA] and its members, the other property owners in I'On, because the [HOA] has failed to protect and enforce the rights of [the HOA] and its members with respect to the matters alleged herein.

(R. p. 132) (emphasis added).

The Amended Complaint, much like *Patterson's* probate complaint, also includes a paragraph that provides:

> 35. Several I'On homeowners have made repeated demands upon the [HOA] and its Board to secure the [HOA] and its members rights to the Creekside Park and Community Dock; and, provided the Board with the necessary information to do so. However, the Board has failed to secure the rights and has acquiesced to the sale of these amenities.

Compare (R. p. 132) (emphasis added) *with Patterson,* 425 S.C. at 224, 821 S.E.2d at 683 ("[Members], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the [corporation], meetings with counsel for the [corporation], correspondence to [fund] and a previous lawsuit to no avail.") (emphasis added).

The Second Amended Complaint, which was in the record at the time of the 2012 Dismissal Denial, provides even more detail and expressly references repeated "correspondence" and "meetings" where "[HOA] members, their agents or others on their behalf" demanded "the [HOA] Board and its counsel" "to act to secure the Creekside Park and Community Dock," all "to no avail":

> 4. [Adkins]. . .is an owner of a [home] located in. . .I'On.
>
> 21. [HOA] is the homeowners association for the I'On neighborhood.
>
> 22. By virtue of property ownership in I'On, Walbeck and Adkins are members of the [HOA], and have been members of the [HOA]. . .
>
> 45. On or about February 26, 2009, [HOA] member and I'On property owner Catherine Templeton made a demand upon the [HOA] (the "Templeton Demand") to act in order to secure the [HOA] and its members' unencumbered title, access, and use of the Creekside Park and Community Dock. . .
>
> 46. Plaintiffs were contemporaneously aware of the Templeton Demand as Templeton's Demand was made both by letter and overtly and publicly at an [HOA] meeting.

> 47. On or about March 5, 2009 and March 11, 2009, Adkins made a request to the [HOA's] attorney (the "Adkins/Bouch" Demand). . .to investigate the allegations that the I'On Company was contractually obligated to convey the Community Dock and Creekside Park to the [HOA].
>
> 48. Walbeck was contemporaneously aware of the Adkins/Bouch Demand.
>
> 49. On or about March 10, 2009, the [HOA's] attorney. . .informed Adkins, and copied the [HOA's] Board President. . .that the [HOA] was working to secure title to properties represented to be the property of the [HOA]. . .
>
> 50. On or about March 11, 2009, the [HOA's] Board President demanded that [Appellants] convey the Community Dock to the [HOA] but failed to demand conveyance of the Creekside Park.
>
> 52. During the month of April 2009, Adkins and [HOA] Board Member. . .discussed the [Appellants'] obligation to convey the Creekside Park and Community Dock to the [HOA]. Concurrently, the [HOA Board Member] relayed Adkins demands to [Appellants]. Walbeck was contempareously aware of these communications.
>
> 53. During the months of June and July 2009, Walbeck and Adkins made demands upon the [Developers] to convey the Creekside Park and Community Dock to the [HOA]. The [HOA] was aware of the demands and subsequent refusal from the [Developers].
>
> 54. Despite repeated demands to the [Developers] and the [HOA] Board, the Board has failed to take the necessary action to secure unencumbered title, access and use of Creekside Park and Community Dock.
>
> 55. Additional demands upon the [HOA] would now be futile as the [HOA] has failed to protect the rights of the [HOA] and its members, despite being provided with both the information necessary and the opportunity to do so. The [Developers'] conveyance of the amenities to a third-party evidenced the Board's failure to secure the rights to the Property, and the futility of further demand on the [HOA] and its Board.

(R. pp. 156-57) (emphasis added).

Further, after considering the evidence and specific demands that are referenced in these pleadings, there is no doubt that Rule 23 is met. For example, this Court failed to consider the Templeton Demand that was "integrated" in the Second Amended Complaint. This Demand, sent by an HOA member on February 26, 2009 and received by the HOA Board, Walbeck, Adkins, and other HOA members "pre-suit", constitutes an "adequate demand" under Rule 23:

Dear [HOA Board President],

Provided to you and the Board is copy of the property report for I'On which is required under [ILSA]. . .On page 21 of the report you will find a list of recreational properties. On the following page is the clear requirement that these properties be deeded to the HOA upon completion.

The [HOA Board] is on notice that action must be taken immediately to secure any of these properties which have not been so far titled to the [HOA]. . .

If the Board has taken any action that has served to limit rights of use by Titleholders or otherwise release, limit or abandon those rights or ownership or control of property identified, such actions must be unambiguously and immediately reversed.

That specifically applies to the Community Dock at the Creek Club. It has been previously reported that the Board declined to accept ownership of the Community Dock. . .If this is an accurate account, the Board did not have the authority to deprive individual Titleholders of the ownership of property.

If timely property transfer has not occurred, the Board should immediately seek legal counsel. . .determine under which Board the failure occurred since it could be alleged that this Board, and perhaps previous Boards, failed in their fiduciary responsibility to the [HOA]. The current Board must consider, not simply ownership, but pursuit of damages from the [Appellants] on the presumption that the [HOA] has met its obligations. . .

(R. pp. 2229-2230).[13]

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[13] This Court's Substituted Opinion wrongfully imposes ultra-heightened pleading requirements for derivative actions. According to this Court, a member cannot demand that a corporation protect its or its members' interest, and then file a derivative lawsuit on the corporation's behalf when its board fails to protect these interests, unless the member sends another demand specifically requesting that the board "initiate litigation" and then files suit alleging that specific member made this specific demand. (Substituted Opinion, pp. 11-12) (dismissing Respondents' derivative claims because "the pleadings do not allege that either Walbeck or Adkins directed a demand to the [HOA] Board to initiate litigation against the [Developers] to enforce the HOA's alleged rights;" "there are no allegations that a demand on the Board to initiate litigation to recover these amenities would have been futile;" "there are no allegations that [Developers] had veto power over the Board that they would prevent the board from initiating litigation against them.") (emphasis added). Nowhere in Rule 23 is there a requirement that "a member must direct a demand to a corporation's board to initiate litigation" before the member can assert derivative claims. Rather, according to the Rule's plain language, there are only four requirements that a member must satisfy to properly maintain derivative action: (1) verification of a complaint that alleges (2) member status at the time of a challenged corporate act, (3) the efforts, if any, made by the member to get the corporation to act; and, (4) the reasons for the member's failure to get the corporation to act as requested or

Similarly, this Court disregarded the letters Adkins exchanged with the HOA's attorney in March 2009 that were also referenced in the pleadings. (R. pp. 2231, 2234-35). In responding to Adkins' first letter, the HOA's attorney stated: "it is the understanding of the Board that the sale will not include items which were intended to be or are the property of the [HOA]" and the Board was making "efforts to fulfill its responsibilities set for the declarations and covenants". (R. p. 2231). This is important for four reasons. First, it can be reasonably inferred that Adkins' first letter to the HOA's attorney demanded that the Board act to prevent the sale of amenities rightfully belonging to the HOA or else the HOA's attorney would not have referenced that it was the Board's understanding that this was not happening and that the Board would fulfill its responsibilities by making sure this would not happen. *Id.* Second, it shows that Board had a duty to ensure that the amenities were not sold to a third-party and Adkins personally made a "good faith effort" to "induce the Board to act" to prevent such a sale from occurring. *Id.* Third, it establishes that any demand made by Adkins upon the Board to "initiate litigation" about these amenities would have been futile because it was the Board's "understanding" that these amenities were not going to be sold. Fourth, it indicates that the then-Board had not sufficiently acted on the earlier demands made by the homeowners or else Adkins would not have had to write the HOA's attorney in the first place.

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the member's inability to make such a request. Rule 23(b)(1), SCRCP. Not only is Rule 23 void of any language requiring a "litigation-specific" demand, South Carolina's substantive law has recently recognized no such demand is required. In *Grant versus Gosnell*, for example, the South Carolina Supreme Court found that members must only allege that they have "exhausted their remedies within the corporation or show a sufficient reason for not doing so" in order to maintain a derivative action. *Grant v. Gosnell*, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976). Just last year, the *Patterson* Court found a complaint referencing requests for action, which did not include a request to sue, and made to a corporation's attorney (not directly to the corporation's Board), satisfied Rule 23's derivative requirements. *Patterson,* 425 S.C. at 688-89, 821 S.E.2d at 233-35.

In fact, a week after he received Adkins' letter, the HOA's attorney first wrote the developers and admitted that the Board "would have dealt with this matter much sooner," but nevertheless, still expected "a smooth transition since discussions about turning over the docks have been going on for some time." *Compare* (R. p. 2231, 2234-35) *with* (R. p. 2233) ("As stated earlier [to the developers], the [Board] just became aware of the HUD Report and the Impact Statement. Otherwise, this matter would have been dealt with much sooner. However, since discussions about turning the docks over to the [HOA] have been going on for some time, I would expect this to be a smooth transition."). This letter from the HOA's attorney to Developers also shows that the Board demanded the "turn-over" of only the Community Dock but failed to demand the "turn-over" of the Creekside Park. *Id.* The same day the Board wrote the developers, Adkins made another good faith effort by following up with the HOA's attorney to "provide [him] with all information currently available in determining eventual rights to [both amenities] – the [Community Dock] and Creekside Park." (R. pp. 2234-35) (emphasis added).

Approximately one month later, and as referenced in the pleadings, Adkins and HOA Board Member, Matt Walsh, discussed the amenities via e-mails and phone calls. In an April 1, 2009 e-mail between Adkins and Walsh, Walsh writes:

> There is no sale that we are aware of. I am sure that [Developers] will try again, but right now, I am not aware of anything and have been told by the [Developers] that it is going to be run by the I'On Club (aka Developers). That said, anything is possible. In response to your last e-mail, I am not sure what to tell you on the HUD. I have asked for and am waiting from the amended HUD and will share it when I get it. As for Creekside [P]ark, I assume you are not satisfied with Vince's definition, though I am not sure where there is a concrete alternative. The docks should be deeded to the HOA soon, and we are working with [the developers] to make sure that is done properly.

A few hours later, Adkins responds:

> I will admit I was astounded that not one person on the Board had a question for [Developers] in the meeting regarding the linear park explanation. . .The burden is

> on the [Developers] to PROVE what Creekside Park is – in the absence of a map with it stamped on the marshwalk, we have to look to other proof. . .Yes, you might say I don't agree with the explanation – the bigger question is why would anyone? Did you not expect [Developers] would offer objection to the contention that Creekside Park is home to the Creek Club? I can't believe the Board, collectively listened to [Developers'] explanations (about which [Developer] wants no further conversation, remember!) and just said, "Okay. Thank You." What are your thoughts?

(R. pp. 2241) (emphasis added).

After Walsh received Adkin's e-mail, he immediately sent portions of it to the Developers so that they "could clear up what seems to be some confusion". (R. p. 2243). Adkins then responds with a letter to Walsh, stating:

> From the beginning of events involving the Creek Club property, the Board has shown little initiative or interest in representing the [HOA] and insuring its best interest are protected. The [B]oard's first action back in the fall – after denying there even was a potential sale – was to begin "working with" the buyers. The Board failed to ask the question of whether the properties even *could* be sold to private investors by the [Developers]. It took a small group of residents to bring attention to the fact.
>
> Much has happened since that near-disastrous transaction. Having been presented with the 1998 HUD Property Report, which promised [HOA] ownership of certain [amenities] in I'On, the Board took no action to secure them. When told in March by [the Developers] that the 1998 HUD Report was "undone" by a 2000 amendment, the Board took no action. As late as this week, I learned the Board has not even asked its attorney for advice about the [HOA's] rights and whether they were violated by the amendment – not anything else related to this matter. Perhaps the worst offense is the Board never informing the [HOA] of this new information. There has been no communication with us regarding the Property Reports and no opportunity for input from the residents. The last information from the president involved four pages of his explanation about the new easement he negotiated with the Creek Club buyers – which was later confirmed to have been *verbatim* what the buyers proposed to him in the first place. The subject has not been on the Board's meeting agenda for months. . .[F]rom all appearances, it is now a non-issue for the Board.
>
> The questions left unanswered – indeed, even unaddressed – regarding the Creek Club and Civic Site 6 property effect the property rights and values of every, single titleholder in I'On. The Board's failure to secure the properties promised to the [HOA] is beyond understanding, and in my opinion, quite risky. The absence of initiative is irresponsible, and I question whether the Board has even seriously

> studied anything. . .I have written to you and also the [HOA] attorney, I have attended and spoken at meetings of the Board, and even met with you individually. It is increasingly obvious to me that my interests, as a titleholder, are not being represented by the Board, which seems focused on the interests of the [Developers].
>
> As I wrote to you previously, I object to the conveyance of the Community Dock to the [HOA's] ownership with any type of easement or other agreement of any kind attached to it. I expect the Board to work actively, with diligence, to see that the [HOA] acquires any and all the properties promised to it. . .Any agreement that serves to encumber the property should come after notice of intent of the Board and a period of comment by the [HOA] prior to execution.
>
> Further correspondence between us is now uncomfortable to me, following your admission of sharing my most recent e-mails on these same topics with [the Developers] without my prior knowledge or permission.

(R. p. 2245) (emphasis in original and added).

Clearly, the foregoing exchange establishes that: (a) demands were made and refused; (b) the then-Board was in alignment with the developers; (c) the developers effectively controlled the then-Board's decision making; (d) Adkins and other homeowners made efforts made to "seek redress within the HOA"; (e) these efforts were futile because the Board continually failed to act; and, (f) any future efforts would serve no purpose given that the same requests had been repeated multiple times, all to no avail. Moreover, by this point, homeowners like Adkins feel "uncomfortable" communicating with the Board, to make a demand or otherwise, because of the Board's propensity to share what they considered "intra-corporate" communications. *Id.*

Yet, that's not all. The pleadings also reference another demand made by Walbeck's and Adkins' then-attorneys on June 25, 2009. This demand, made to Developers, indicated that Walbeck and Adkins intended to commence litigation on their and the HOA's behalves in order to recover the Amenities:

> The crux of [Walbeck's and Adkin's] complaint against [Developers] is that they were assured by various means that [the Amenities] would be conveyed to [the HOA]. . .[E]nclosed herewith is a copy of [a] draft Complaint for the purpose of

> informing [Developers] of the claims. Our clients have been informed [that] there is no room for discussion on the topic of [the Amenities], which we understand amounts to a refusal to convey [the Amenities]. Further, correspondence sent to the [Developers] from [Adkins] about this situation was never acknowledged. Our clients have come to believe this is the only manner left to seek a fair and promised result. The purpose of this letter is to ask you and your counsel to review the claims that are proposed and to consider complying with the request of our clients that the property described in the Complaint be conveyed to the [HOA]. . .

(R. p. 2248) (emphasis added).

On July 3, 2009, Developers responded in a letter, copied to Board President, Bruce Kinney, and Board Member, Matt Walsh, which "attempted to clarify" that the Amenities had already been conveyed:

> I am in receipt of your letter of June 25, 2009 and draft complaint.
>
> With regard to [Adkins]' correspondence, Matt Walsh, a member of the [HOA], sent me an e-mail on April 1, 2009, saying he had "some neighbors who are troubled by the definition of the Creekside Park" and asking for clarification. Included with Mr. Walsh's note was an excerpt from an e-mail that was sent to him by one of these neighbors concerning the park definition. On April 3, 2009, I responded to Mr. Walsh with an email intending to clarify the issue. A copy of that e-mail correspondence is attached to this letter.
>
> [Adkins] sent me a letter dated April 1, 2009, which I read on April 6, 2009. As this letter contained language identical to that of the excerpt sent by Mr. Walsh, I assumed – incorrectly – that Mr. Walsh had forwarded my attempt a clarification to those neighbors who had contacted him with concerns about the definition. . .
>
> In summary, the "Creekside Park" is the +/- 2 mile linear park adjacent to the marshes of Hobcaw Creek. With regard to the "Community Dock", [Developers] conveyed two Phase 2 community docks to the [HOA] years ago. A third dock in Phase 2 is owned by [Developers]. [Developers] enables members of the [HOA] use of this dock for recreational facilities such as fishing and boating. . .I hope this clarifies matters for you and your clients.

(R. p. 2250) (emphasis added); *see also* (R. pp. 2251-54) (referenced April 2009 e-mails between Developers and these same Board members wherein Developers represent that the Creekside Park is really the "Marsh Walk" and has already been conveyed to the HOA).

This exchange further establishes demand futility and provides ample reason for excusing a demand in this instance because it is "reasonable to infer" that then-Board would not act to recover Amenities it believed Developers had already conveyed. After considering *Patterson* and the above-referenced demands, meetings, discussions, and other communications, all of which were referenced in the pleadings, it is clear that Walbeck's and Adkins' derivative claims were properly pled and this Court erred in finding otherwise.

C. Even Under a Pleading Standard, These Derivative Claims are Properly Pled

Even assuming this Court's analysis was limited solely to "the record as it existed when the circuit court denied the motion to dismiss", the allegations of the Second Amended Complaint, when considered in conjunction with the allegations of the Amended Complaint and Appellants' Answer to the Amended Complaint, establish that Rule 23 is satisfied.[14] There is nothing that precluded the circuit court or this Court from reviewing these pleadings since they were filed before the 2012 Dismissal Denial. Like *Patterson*, the derivative allegations in these pleadings "are appreciably more detailed" than the pleadings previously considered by our appellate courts.[15]

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[14] The Supreme Court's earlier decisions also differ from this Court's Substituted Opinion as to what is required to maintain a derivative action, whether there is a demand requirement, whether a demand can be excused, and which standard is applied in these various scenarios. Based on the Supreme Court's pre-*Patterson* (and, largely, pre-Rule 23) decisions, so long as there was "an allegation that a demand has been made and refused" or "an allegation of an effort to have grievances redressed" or "an allegation that such effort would have been useless" or "an allegation of wrongdoing or control" then "there was enough alleged". *See, e.g., Grant v. Gosnell,* 266 S.C. 372, 373-74, 223 S.E.2d 413, 414 (1976); *Thompson v. Thompson*, 214 S.C. 61, 68, 51 S.E.2d 169, 173 (1948); *Kickbusch v. Ruggles*, 105 S. C. 525, 90 S. E. 163, 166 (1928); *Stahn v. Mills*, 53 S.C. 519, 31 S.E. 498, 498-99 (1898); *Latimer v. Richmond*, 39 S.C. 44, 17 S.E. 258, 260 (1893). The Supreme Court also adopted a "lenient" approach "in excusing demand" based upon the facts of a given case. *Grant*, 266 S.C. at 375-77, 223 S.E.2d at 414-15 ("In evaluating the 'excuse' allegations in a derivative suit, [c]ourts have generally been lenient in excusing demand. . .").

[15] These pleadings are far more detailed than the "vague, unclear, and indefinite" pleadings discussed in earlier South Carolina decisions, and include the allegations those decisions indicated would suffice. *See Grant, Thompson, Stahn, Kickbusch, Latimer, supra.* For example, the pleadings contain a formal demand upon the board of directors, and a refusal by them to act. *See,*

Rule 23 "was not written in order to bar derivative suits." *Surowitz v. Hilton Head Corp.*, 383 U.S. 363, 371 (1966). Rather, the rule's purpose was to prevent "strike suits" which are meritless claims brought by persons trying to get rich quick through a settlement they hope will be reached just to make the case go away. *Id.*

This is not the case here – these are legitimate claims brought for legitimate reasons as evidenced by the jury's verdict. Further, it has been over eight years since Respondents commenced this action, thousands of documents have been reviewed, multiple discovery requests have been answered, several depositions have been taken, more than thirty motions have been decided, two trials have occurred, both sides' appeals have been briefed and were originally determined, but then, this Court took a 180-degree turn and decided to deny these Respondents and hundreds[16] of I'On homeowners any relief. The United States Supreme Court in *Surowitz* made clear that Rule 23 should not prevent the adjudication of legitimate cases such as this one:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby

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e.g., (R. p. 144) (Developers admitting "a certain member or members of the [HOA] had made demands upon the [HOA] to bring suit regarding the issue raised in the Amended Complaint and that the [HOA] refused to do so."); (R. p. 156-57) ("Adkins made a request to the [HOA's] attorney (the "Adkins/Bouch Demand") to investigate"); ("Despite repeated demands to the [Developers] and the [HOA] Board, the Board has failed to take the necessary action. . ."). The pleadings contain allegations of the Board's failures. *See, e.g.*, (R. p. 132) ("[T]he Board has failed to secure the rights and has acquiesced to the sale of these amenities."); (R. pp. 156-57) ("[T]he [HOA's] Board President demanded that [Developers] convey the Community Dock to the [HOA] but failed to demand conveyance of the Creekside Park."). The pleadings describe the many efforts made to try to get the HOA to act. (R. pp. 132, 156-57) (alleging multiple demands, meetings and other communications wherein HOA members, including Walbeck and Adkins, made efforts to induce HOA action, but to no avail). The pleadings also allege that any demand is futile. *Id.*; *see also* (R. p. 157) (Additional demands upon the [HOA] would now be futile as the [HOA] has failed to protect the rights of the [HOA] and its members, despite being provided with both the information necessary and the opportunity to do so. The [Developers'] conveyance of the amenities to a third-party evidenced the Board's failure to secure the rights to the Property, and the futility of further demand on the [HOA] and its Board.").

[16]There are approximately 768 residences in I'On.

> traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice.

Surowitz, 383 U.S. at 373.

III. This Court's Substituted Opinion Ignores the HOA's Direct Claims

This Court's substituted derivative analysis also fails to acknowledge the direct claims of the HOA contrary to its original analysis. The HOA was added as a nominal defendant in February 2012 so that it would be bound by any verdict rendered. (R. p. 153). Thereafter, the circuit court realigned the HOA as a plaintiff[17] and the HOA adopted Walbeck's and Adkins' breach of fiduciary duty, negligent misrepresentation and breach of contract claims. (R. pp. 16-17) ("[HOA]. should be deemed to have adopted [Respondents'] claims, and [Appellants'] responses to [Respondents'] Complaint should be deemed to serve as responses to the [HOA's] adopted claims."). The circuit court charged the jury accordingly. (R. pp. 1676:10-178:12). The HOA was a named plaintiff on the verdict form, and the jury returned a verdict favoring the HOA on each of these three claims. (R. pp. 19; 1857-58). As a result, whether the derivative claims asserted by Walbeck and Adkins are properly pled is a moot point; the same claims were brought directly by the realigned HOA; and, the jury found in the HOA's favor on its direct claims. (R. pp. 1857-1858).

As correctly found by this Court in its Original Opinion that "the HOA's realignment as a plaintiff

[17] The South Carolina Supreme Court recognizes the authority of a trial court to use its "sound discretion" to realign parties "at any stage of the action." *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010).

allowed the jury to award damages to the HOA as if Walbeck and Adkins never brought a derivative action." (Opinion, p. 22).

IV. Alternatively, the HOA's Breach of Contract or Negligent Misrepresentation Verdict Should Be Reinstated

Alternatively, this Court should reinstate the $1,000,000 award to the HOA under either its breach of contract claim or negligent misrepresentation for several reasons. First, if the HOA's breach of fiduciary duty claim should have been directed out, as ruled in the Substituted Opinion, there would have been no election, and these $1,000,000 verdicts would have stood on their own. Second, the sealed nature of the contract, and the applicable twenty-year statute of limitation, is uncontested by Appellants. Third, South Carolina law supports this post-election remedy. Our state law is clear that the purpose of the election of remedies doctrine is to "prevent double recovery for a single wrong." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 152–53 (2010); *see also Jones by Robinson v. Winn-Dixie Greenville, Inc.,* 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995) ("Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts."). For that reason, the doctrine's application "should be confined to cases where double compensation of the plaintiff is threatened." *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). That is no longer the case here.

Here, the HOA elected to recover on the jury's breach of fiduciary duty award immediately post-trial. (R. p. 19). However, in its Substituted Opinion, this Court determined that the HOA's breach of fiduciary duty award is unrecoverable – a ruling which, if upheld on rehearing, removes the threat of double recovery. Because the HOA still has two available remedies, it should be

allowed to recover on at least one of these claims.[18] In sum, when a verdict, elected by a plaintiff as his remedy, was only rendered due to the circuit court's error, a plaintiff should be allowed to invoke and satisfy a different jury verdict. The alternative, refusing to reinstate either the HOA's breach of contract or negligent misrepresentation award, would leave the HOA without <u>any</u> remedy for the jury's findings in his favor. To ensure a just result, this Court should reinstate either the HOA's breach of contract or negligent misrepresentation verdict.

V. The Court's Substituted Breach of Fiduciary Duty Analysis Misapprehends Both the Law and the Facts

This Court erred in its substituted fiduciary duty analysis by: (a) overlooking facts that demonstrate the Developers' failure to act in good faith and in due regard to the HOA and its members; (b) failing to properly conduct the case-specific fiduciary duty analysis required under South Carolina law; and, (c) failing to recognize that when Developers sold the Creekside Park and Community Dock for a profit to a third party, the burden of proof shifted to Developers to show the fairness of this transaction.

A. The Court Overlooked Evidence Showing the Developers Failed to Act in the Interests of the HOA and its Members

This Court references two circuit court conclusions in its Substituted Opinion, one of which it found was correct and one of which it found was incorrect The first, and correct conclusion, is that: "a developer in control of a homeowner association may not make decisions that benefit the developer's own interest at the expense of the association and its members." (Substituted Opinion,

[18] *See* Footnote 11, *supra*; *see also Ebner v. Haverty Furniture Company*, 138 S.C. 74, 136 S.E. 19, 21 (1926) ("The application of the doctrine [of election of remedies] is not a Procrustean rule; whether at common law or equity side of the court, it does not depend upon technical rules, but upon principles of equity and justice."); *Ex Parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible.").

p. 12). The second, and purportedly incorrect conclusion, is that: "a developer's failure to convey common areas to a homeowners association is at least the equivalent of conveying them in substandard condition." *Id.* (internal quotations omitted). There was considerable discussion on the second conclusion in this Court's substituted analysis but no discussion of the first conclusion despite this Court's original findings that:

- "[Developers] owed a fiduciary duty to protect the rights of the HOA's members to the unfettered use and enjoyment of the [Amenities] and there was evidence showing that [Developers] breached this duty".

- "[Developers'] control of the HOA undoubtedly required the [Developers] to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas. Yet, on two occasions, Developers placed the HOA's members in a position of having to compete with non-members for access to these [common areas]."

- Developers made representations to the HOA, separate from those in the 1998 Property Report, that they would convey the disputed property to the HOA.

- "[T]here is evidence in the record from which the jury could have reasonably inferred [Developers] bad faith. . .[T]he evidence shows [Developers'] intent to profit from the [Amenities] at the expense of the HOA's members."

- "[Developers'] assurances led the HOA's members to 'repose a special confidence' in [Developers], binding [Developers] to act in good faith. . ."

- "[Developers] acted in bath faith and profited at the expense of the HOA's members. . .there is sufficient evidence of [Developers'] breach of fiduciary duty to the HOA's members to affirm [the circuit court]."

(Opinion, pp. 146, 151-53).[19]

This Court should reinstate these original determinations because the facts presented at trial showing Developers' conduct to this end are plentiful. For instance:

- Developers agreed to allow residents of a neighboring subdivision, Olde Park, to use the Community Dock if Olde Park paid Developers a $350,000 fee but failed to inform Brad Walbeck and I'On residents of this material change to their use and enjoyment of the Dock. (R. pp. 2899-2900; 2901-2905).

[19] Respondents address the Court's errors as to that conclusion separately in Section V(B) below.

- Developers removed their obligation to convey Creekside Park and the Community Dock from the amended 1998 Property Report without informing I'On purchasers such as Walbeck. (R. pp. 2845-2847).

- Developers entered into a "2005 Handover Agreement" with the HOA, which the record shows Developers failed to adhere to, providing details on the transfer of common areas to the HOA, Developers' performance of repairs as to the common areas, and the "asset handover forecast" to be included in the HOA's budget relating to these common areas. (R. pp. 2216-2217).

- Developers subsequently failed to disclose to homeowners a second, material change when, upon realizing they still owned the property in 2006, they discussed how to "capitalize" on the "potential value" of the Community Dock but kept their ideas "quiet for now". (R. pp. 2855-2861; 2910-2912; 2922-2924). Developers provided no indication that they were not going to honor the 2005 Handover Agreement for the waterfront "common areas".

- Developers engaged in talks with a potential buyer, Russo, regarding the sale of the Creekside Park and Community Dock, and even entered into a purchase contract with Russo in 2008, while simultaneously representing to the HOA that Developers had "not sold or initiated the sale of the Creek Club". (R. pp. 2933-2935). This offer/contract to purchase these Amenities was allegedly withdrawn in late March 2009. (R. pp. 2842, 2950-2951).

- Developers reiterated several times to the HOA that it intended to transfer the Creekside Park and Community Dock to the HOA all the while Developers and Russo resumed negotiating the sale of these Amenities and reached a contract in June of 2009. (R. pp. 2236; 2946-2949; 2953). That contract acknowledged the existence of homeowner claims relating to the deep-water amenities. (R. pp. 2703-2719).

- Despite the HOA's request to deed these Amenities and multiple demands that these Amenities be excluded from the sale, Developers sold the Community Dock, Creekside Park, and their associated parking lot, resulting in restrictions in use of the disputed property for the HOA and its members, including repeated dock closures, increased traffic, drunken parties, and rowdy visitors on what was promised to be conveyed to the HOA and which was promised to be free and clear of all such encumbrances. (R. pp. 2845-2847).

Based on this evidence, the Court's original conclusions were correct – Developers breached the fiduciary duties they owed to the HOA. *Welch*, 342 S.C. at 299, 536 S.E.2d at 418 ("When reviewing the denial of a motion for. . . .JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the

nonmoving party."). Furthermore, the jury was properly charged on South Carolina's fiduciary duty law:

> The plaintiffs have asserted a claim for breach of fiduciary duty. A **developer** of a planned unit development **owes fiduciary duties to both the property owners association, as well as the individual homeowners**. The developer's fiduciary duties include the duties to hand over common elements, which the developer has represented as a part of the planned development, in good condition, or with the funds to effectuate any needed repairs; and **to act in the best interests of property owners while controlling the development's property owners association**.
>
> Whenever a fiduciary relationship exist[s] between two parties, and a business transaction occurs between them, and **the superior party obtains an advantage or a possible benefit**, a **presumption arises against the transactions validity**, and **shifts the burden of proving the good faith nature of said transaction upon the superior party.**
>
> Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. When this duty to disclose is triggered, a party's silence may constitute fraud.
>
> Furthermore, a fiduciary relationship is one of **mutual trust and confidences**, imposing upon the party the **requirements of loyalty, good faith, and fair dealing**. One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relationship.
>
> In a breach of fiduciary duty case, the Plaintiff is entitled to damages for harm by the breach of fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty, are those proximately resulting from the wrongful conduct of the defendant.

(R. p. 1699-1701) (emphasis added). Based on this charge, which this Court originally agreed with, the jury properly concluded that Developers failed to prove their good faith, especially considering the overwhelming evidence of their bad faith. (R. p. 1857) (verdict in favor of HOA on breach of fiduciary duty claim); *Welch*, 342 S.C. at 300, 536 S.E.2d at 419 ("The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision.") (emphasis added).

Thus, this Court's reversal of the circuit court's denial of JNOV based solely on the circuit's court second conclusion is incorrect. (Substituted Opinion, p. 6). This reversal is improper because the circuit court recognized at least two bases for its determination that the jury's verdict should be sustained, one of which was the developer's failure to act in the interests of the HOA. (R. p. 49) (JNOV Order providing "the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the [HOA], while simultaneously, negotiating the sale of this very property to a third-party for profit."). On this basis alone, Developers' failure to act in the HOA's interests, the Court's original conclusion was correct, and as a result, the circuit court's denial of JNOV should be sustained.

B. The Court Failed to Properly Conduct the Case-Specific Fiduciary Duty Analysis Required Under South Carolina Law

The Court also erred in its analysis of fiduciary duty law by: (1) relying on *Cedar Cove*; (2) misapplying provisions of the Covenants; (3) misconstruing an ambiguous disclaimer in the 1998 Property Report; and, (4) overlooking evidence of the HOA's right to own the disputed property, including the developer's unequivocal representations that these common areas were to be owned and operated by the HOA.

1. The Court Misapplied *Cedar Cove*

First, this Court erroneously pointed to *Cedar Cove* to resolve whether a particular fiduciary duty exists to convey title to common areas in this case. (Substituted Opinion, p. 6). This approach is fatally flawed. *Cedar Cove* concerned a dispute between a HOA and neighborhood resident regarding rights emanating solely from the restrictive covenants. *Cedar Cove*

Homeowners Association, Inc. v. DiPetro, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006).[20]

Here, the dispute does not emanate solely from the restrictive covenants, nor was it pled or tried based on only the restrictive covenants. It emanates from, was pled, and tried based upon Developers' conduct, including a decade of representations, omissions, and assurances made by the Developers to the homeowners and HOA. *See, e.g.*, (R. p. 154) (Second Amended Complaint alleging "[i]n the property report, [Developers] represented to the [Respondents] and others that homeowners would have unencumbered access and use of the "Creekside Park" and the "Community Dock" and that the owners' use of these amenities would be transferred and conveyed to [the HOA] for the use and benefit of all owners in I'On"); (R. pp. 3022-33) (1998 Property Report promising transfer of the "Community Dock" and "Creekside Park" to the HOA and availability for use of the "Community Dock" and "Creekside Park" to lot owners and other members of the HOA); (R. pp. 963:4-964:10; 965:4-19) (Brad Walbeck testifying that Developers failed to disclose their revised plans in subsequent communications to him and the HOA); *see also* Section VIII(A)(1), *infra* (detailing Developers' continued silence and subsequent assurances to the HOA and its members). Also, there was no Developer involved in *Cedar Cove* and no fiduciary relationship between the parties, as there is here. Consequently, *Cedar Cove* should not apply to this Court's fiduciary duty analysis. *See Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) ("Courts of equity have been careful to

[20] The *Cedar Cove* complaint cited "no source to support its claim for relief [from the brick patio that encroached approximately three feet onto the common area of the subdivision] other than the restrictive covenants", and the HOA's charge of trespass "was pled and tried on the theory that the [resident] violated the restrictive covenants". *Id.* (emphasis added). As a result, the *Cedar Cove* Court stated: "resolution of this appeal. . . .turns. . . . .on the application of largely undisputed facts to unambiguous restrictive covenants." *Id.*

define fiduciary relationships so as not to exclude new cases that may give rise to the relationship.").

2. The Court Erred in Citing to the Restrictive Covenants to "Resolve" Whether a Common Law Fiduciary Duty Exists Here

Next, this Court wrongfully concluded that the definition of common elements in the Covenants resolved whether this HOA was entitled to own the Community Dock and Creekside Park. (Substituted Opinion, p. 6). This, too, is problematic. In addition to the fact that the Covenants do not necessarily "resolve[] issues involving the common areas," and therefore, do not control, the Court's conclusion conflates the appropriate analysis of whether these circumstances give rise to another common law fiduciary duty under South Carolina law, with a definition of what property in this subdivision constitutes common elements under the Covenants. *Cedar Cove*, 368 S.C. at 259, 628 S.E.2d at 286. Further, if by this Court's analysis, the Developers' fiduciary duty to "convey title" is a function of the Covenants, where the Covenants the Developers drafted indicate title to the common areas are to be held by the HOA, a fiduciary duty to convey does arise. That is the case here – the Covenants state, contrary to the Court's conclusion, that the HOA is to hold "title" to these common areas:

ARTICLE VI
The Commons

> **§6-101 [Title to the Commons]**
>
> The [HOA] shall assume full responsibility for the control and maintenance of the Commons as conveyed to the [HOA] by the Founder unless contrary provisions are made through contract or in the instrument of conveyance. Upon a vote of two-thirds (2/3) or more of outstanding Titleholder votes, the [HOA] may transfer title to some or all of the Commons to another entity.

(R. p. 3634). This reading is in accordance with the representations made by Developers in the 1998 Property Report, the 2005 Handover Agreement, and in their subsequent representations, that

the facilities listed in the chart shall be conveyed to the HOA. *See also* Section VIII(A)(1), *infra*. Further, the fact that the Developers' express grant of ownership rights in common elements is located in the 1998 Property Report, not to mention Developers' other representations of "HOA ownership", makes this right no less enforceable than if it appeared in the Covenants.

3. The Court Overlooked Pertinent Language from the 1998 Property Report in its Analysis

This Court further erred in relying on a purported "notification" from the 1998 Property Report ("Report").[21] Its finding, that the Report "emphasized that there was no guarantee a homeowner would have access" to "certain amenities in I'On Village" because "these amenities could be operated as a private club for its members and guests" and "may be owned or operated by persons other than the [HOA]", is erroneous <u>because the "notification" does not apply to the Community Dock and Creekside Park.</u>

a. Developers' Express Grant of Unimpeded Access and Use of the Amenities

Developers listed the Community Dock and Creekside Park in the Report's recreational facilities chart, and expressly provided that the facilities listed in the Report's chart "**shall**" be conveyed to the HOA and "**will**" be available for use by HOA members and their guests:

> Transfer of the Facilities
>
> The recreational **facilities** listed **in the chart** above **shall**, upon completion of construction, **be conveyed to the [HOA]** by quitclaim deed <u>free and clear of all monetary liens and encumbrances</u> **at no cost** <u>to the [HOA] or its members</u>. Upon conveyance of these facilities to the [HOA], it shall assume full responsibility for the costs of ownership, operation, and maintenance of the facilities conveyed to it. Such costs will increase the responsibilities of the [HOA]. and its board of trustees

[21] Notably, this Court originally found that it "disagreed with [Developers] as to the HOA's breach of fiduciary claim because the allegations in that claim <u>are not limited to the falsity of the representations in the 1998 Property Report</u>"; yet, in its substituted analysis, the Court improperly relies on the purported "critical import" of the 1998 Property Report to disregard the Developers' failures to act in the homeowners' best interest. *Compare* (Opinion, p. 136) (emphasis added) *with* (Substituted Opinion, p. 16).

> and could result in an increase in future assessments or special assessments payable by lot owners to the [HOA].
>
> Who May Use the Facilities
>
> The recreational **facilities** listed **in the chart** above **will be available for use by lot owners and other members of the [HOA]**, including the developer, and their respective guests.

(R. pp. 3022-23) (emphasis added). In doing so, the Developers granted the HOA and its members unfettered access to and use of these Amenities. (R. p. 3023).[22]

b. Provisions Addressed to Other Property and the Purported "Notification"

The Developers also described potential instances when private ownership and operation of "**additional** recreational facilities in the subdivision which are **not** listed in the above chart" may limit HOA members' access to privately-owned facilities:

> There **may be additional recreational facilities in the subdivision which are not listed in the above chart** and which will be privately owned and operated by a person or entity other than the [HOA]. The operation and use of, and access to, **such facilities** is not guaranteed and is subject to the terms and conditions and payment of such fees as the owner and operator of such facilities may establish from time to time. Any or all of **such facilities** may be operated as a private club for members and their guests. Membership in any **such club** may be subject to application, approval and availability, and payment of such initiation fees, dues and other charges as the owner/operator of the facility may establish and change in its sole discretion.

Id. (emphasis added). The purported "notification" language, cited by the Court in its Substituted Opinion, followed the foregoing and described potential limitations in access to "various" facilities not owned by the HOA:

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[22] As one HOA member reasonably understood, the Report:

> [P]rovide[d] that there will be other facilities not listed in the chart and that the "use of, and access to, such (not listed) facilities is not guaranteed." By implication, this indicates that use of and access to all charted recreational facilities is **guaranteed.**

(R. p. 2230) (emphasis added).

VARIOUS RECREATIONAL FACILITIES IN THE SUBDIVISION MAY BE OWNED OR OPERATED BY PERSONS OTHER THAN THE [HOA]. THERE IS NO GUARANTEE THAT ANY **SUCH FACILITIES** WILL BE AVAILABLE FOR USE BY LOT OWNERS. ANY OR ALL OF **SUCH FACILTIIES** MAY BE OPERATED AS A PRIVATE CLUB FOR MEMBERS AND THEIR GUESTS. THERE IS NO ASSURANCE THAT YOU WILL BE ACCEPTED FOR MEMBERSHIP IN ANY **SUCH PRIVATE CLUB** IF YOU APPLY. IF ACCEPTED, THE COSTS OF SUCH A MEMBERSHIP MAY BE SUBSTANTIAL AND ARE IN ADDITION TO THE PURCHASE PRICE OF YOUR LOT. NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU CANNOT OBTAIN A MEMBERSHIP. SINCE THE VALUE OF YOUR LOT MAY BE ADVERSELY AFFECTED BY YOUR INABILITY OR FAILURE TO OBTAIN A MEMBERSHIP, YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IF IT IS BASED UPON YOUR PRESUMED ABILITY TO OBTAIN A MEMBERSHIP IN ANY PRIVATE CLUB AND TO USE ITS RECREATIONAL FACILITIES.

(R. p. 3024) (emphasis added).

c. The "Notification" is Inapplicable, Or Alternatively, Ambiguous

By its plain language, the "notification" quoted by this Court does not apply to the HOA and its members' rights to the Community Dock and Creekside Park.[23] First, the provision is addressed to facilities which may **not** be owned or operated by the HOA; that is, where the Developers have not specified ownership or operation in the Report. *Id.* (emphasis added). The Report **requires** ownership and operation of the Community Dock and Creekside Park by the HOA. (R. p. 3023). The "various" facilities referenced in the provision, consequently, should not be read to include the Community Dock or Creekside Park. *See Bardsley v. Gov't Employees Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013) ("It is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its

[23] These different provisions and the non-applicability of the latter "notification" was reviewed at length with the Graham witnesses. (R. pp. 635:7-636:14; 1111:20-1112:18; 1208:3-1209:17) (Developers admitting that Property Report included a promise to convey a Community Dock and Creekside Park to the HOA and Developers subsequently changed their plan to fulfill this promise); *see also* (R. pp. 963:4-964:10) (Walbeck testifying that the language of the Property Report indicated that the Creekside Park and Community Dock was to be conveyed to the HOA).

ordinary and plain meaning."); *Stanley v. Atl. Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008) ("Agreements, in general, are interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense.").

Second, the purported notification adds, rather than alters, other provisions in the Report on the same subject matter. The "notification" provision does not change the Developers' express grant of unimpeded access to and use of the facilities in the chart to the HOA and its members. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous."); *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) ("[I]n the construction of the language of a contract, it is proper to read together the different provisions therein dealing with the same subject matter, and, where possible, all the language used should be given a reasonable meaning."). As a result, the provision should be applied to those facilities whose ownership and/or operation are not settled by the Report.

Further, to the extent it is unclear which facilities the drafters/Developers intended to include within the "various recreational facilities", the provision should be read in favor of the non-drafting parties, the HOA and its members, whose access and usage rights in the Community Dock and Creekside Park are explicitly granted by the Developers in this Report. *See S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003) ("Ambiguous language in a contract. . .should be construed liberally and interpreted strongly in favor of the non-drafting party. After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings.").

C. The Court Failed to Recognize that the Burden of Proof Shifted to Developers

The Court additionally erred by failing to recognize that it was Developers' burden to prove that they acted in the best interest of the HOA and that they had no independent duty to convey these Amenities to the HOA. Where a fiduciary relationship exists and there is evidence of self-dealing, the burden shifts to the fiduciary to demonstrate that the transaction was, in fact, fair. *See, e.g.*, *Wilson v. Wilson*, 117 S.C. 454, 112 S.E. 330, 331 (1920) ("[W]herever a fiduciary relation exists between two persons and a business transaction occurs between them, as a result of which the superior party obtains a possible benefit, equity raises a presumption against its validity, throwing the burden upon him to prove his good faith."); *see also Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987) ("It is a doctrine repeatedly announced by the courts of this nation that **courts** of equity will **scrutinize with the most zealous vigilance** transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence.") Developers, owing fiduciary obligations to the HOA and its members, have not met their burden, therefore, the presumption that Developers' sale of the common elements for profit to Russo was unfair is unrebutted. (Substituted Opinion, pp. 15-16). The Court's fiduciary duty analysis should be revised to recognize this unrebutted presumption. This burden shifting was charged to the jury without objection and is the law of this case. *See* (R. pp. 1699-1701) (Jury charge setting forth that "[w]henever a fiduciary relationship exist[s] between two parties, and a business transaction occurs between them, and the superior party obtains an advantage or a possible benefit, a presumption arises against the transactions validity, and shifts the burden of proving the good faith nature of said transaction upon the superior party."). (emphasis added).

VI. The Circuit Court Did Not Err in Submitting Statute of Limitations to the Jury

This Court erred in concluding the only inference that can be drawn from the evidence is that Walbeck should have discovered "that he had a claim" by late 2004 when he received a proposed budget listing a cost paid by the HOA for the "Creek Club Dock". (Opinion, pp. 137, 139); (Substituted Opinion, p. 20). The simple fact that this Court originally recognized Walbeck's "claim accrued when he received the proposed budget indicating the HOA did not own the Dock;" yet, now recognizes that the budget "might not" have indicated this, establishes that the statute of limitations question was properly submitted to the jury. *Compare* (Opinion, p. 137) *with* (Substituted Opinion, p. 20).

To be clear, this Court's substituted analysis includes an important change which indicates that at least two inferences can be drawn from the proposed budget. Originally, the Court found "the listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA did not have title to the Community Dock". (Opinion, p. 137) (emphasis added). The Court, however, altered this finding by changing the critical words of "did not have title" to "might not have title" in its Substituted Opinion: "the listing of a fee being paid by the HOA for use of the Community Dock should have alerted Walbeck to the fact that the HOA might not have title to the Community Dock [or Creekside Park]". (Substituted Opinion, p. 20) (emphasis added).

This is important because it establishes that there is more than one inference which can be drawn from the budget – either the HOA "might" or "might not" have title to the Community Dock or Creekside Park. Of these two inferences, the one favoring Walbeck is that the HOA had title to these Amenities, and this Court must accept this inference. *Sabb*, 350 S.C. at 427, 567 S.E.2d at 236 (Courts are required to view the evidence and inferences reasonably drawn "in the light most favorable to the party opposing the motions."). Applying this inference, the proposed budget did

not put Walbeck on notice that he had a claim concerning the conveyance of these Amenities because it appeared these Amenities were already conveyed.

The evidence also shows that there are many reasons why Walbeck should not necessarily not deduce "from the Creek Club Dock usage fee budget item alone" that the Developers' failed to fulfill their promise to convey these Amenities. (Substituted Opinion, p. 20) ("[Walbeck] could have deduced from this budget item alone that the statement indicating title to these amenities would be conveyed upon completion of construction was unfulfilled.").

First, the Developers' did not promise to convey the Amenities upon the completion of their construction; rather, according to Developers, they promised to convey the Amenities upon completion of the construction of the developmental phases that made up I'On. (R. p. 3022) (1998 Property Report drafted by Developers indicating that the "Creekside Park" and "Community Dock" were to be built during "Phase II" of I'On's development.). The Community Dock and Creekside Park were among the facilities to be built in Phase II, a Phase which was not completed until several years after Walbeck received the proposed budget in 2004. *Id.*; *see also* (R. p. 1130:14-25) (Vince Graham admitting that he was uncertain as when construction of each I'On Phase was completed and which recreational facilities were contained in these phases).

Walbeck could not, and admittedly did not, deduce from the budget that Developers had failed to fulfill their promise to convey the Amenities as of 2004 because several of I'On's developmental phases were still in process at this time:

> Q: And what was your understanding as to the Creekside Park and [C]ommunity [D]ock listed in this chart?
>
> A: They were to be conveyed in phase II. My lot was in phase II, and these amenities were also in phase II, Creekside Park [and] [C]ommunity [D]ock.

(R. p. 963:11-15) (emphasis added).

> Q: Now, what's your understanding of the obligation in the Property Report, what does the completion of construction reference mean to you? Is that when -- those facilities are complete, or does it mean when the builders finish building everything in I'On?
>
> A: It could be either one.

(R. pp. 978:24-979:5) (emphasis added); *see also* (R. p. 880:3-16) (Lea Ann Adkins similarly testified that there was confusion as to what the Property Report meant in terms of "upon completion of construction"); (R. p. 698:16-20) (Tom Graham testifying it was the Developers intent to "turn over" the Community Dock to the HOA in 2006); (R. pp. 3475-3477) (December 7, 2005 Meeting Minutes) (Developer-appointed Board Member indicating to the HOA at a meeting Walbeck attended that the Developers were still in the process of "complet[ing] the turnover for phases 1-7" in 2006); (R. p. 3480) (April 26, 2006 HOA meeting minutes noting the Developers were still improving the Marshwalk); (R. p. 3559) (January 15, 2009 HOA meeting minutes noting the Developers were "working on deeding over the [M]arshwalk docks and marsh area to the [HOA].").

Second, any homeowner who glanced at the 2005 proposed budget would not be able to deduce that Developers had not, or were not going to, convey the Community Dock and Creekside Park to the HOA just because it included an ambiguous, "usage" line item as it relates to the $4,044 dock fee. The HOA's proposed budget mentions only the "Creek Club Dock", not the "Creekside Park", and the HOA's 2005 proposed budget did not mention a "Creek Club Rental Fee" as suggested by Developers. (R. pp. 3332; 3441).[24] Assuming this budget did mention such a fee, there's still multiple inferences which can be drawn as to who "owned" the land upon which the Creek Club was built.

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[24] Though Developers asserted they would amend the budget to add this item, they did not add this to the budget that was ultimately mailed to the homeowners. (R. p. 3332).

As to the "Creek Club Dock usage fee", the HOA's proposed 2003 and 2004 budgets preceding the 2005 budget included a "dock maintenance" fee for this same amount; and, the 2005 budget described the 2004 proposed budget as containing a "usage" fee of $4,044 when, in reality, it was a "dock maintenance" fee of $4,044. *Compare* (R. p. 3332) (2005 proposed budget describing 2004 proposed budget) *with* (R. p. 3301) (listing "dock maintenance" fee of $4,044); *see also* (R. p. 3285) (HOA 2003 proposed budget listing $4,044 dock maintenance fee). This leads to two "deductions" – either the usage fee should be a maintenance fee, or the maintenance fee should be a usage fee. At minimum, an ambiguity exists which must be construed against the drafters of this budget which, here, are the Developers since they made up the HOA Board at this time. *Chan v. Thompson*, 302 S.C. 285, 290, 395 S.E.2d 731, 734 (Ct. App. 1990) (any ambiguity will be construed against author of the documents). Construed properly in favor in Walbeck, the "usage" fee is a "maintenance" fee which did not alert Walbeck that the representations in his Property Report were false because the Report expressly provides the HOA is to pay for, among other things, dock maintenance. (R. pp. 3022-3023).

This is also an important point: the Property Report indicates that "[u]pon completion of the recreational facilities described in the chart," the HOA will be responsible for "the annual cost to maintain, **operate**, and insure" the facilities and it is this "annual cost" that is included in the 2005 proposed budget. "Operate" is synonymous with "use". *See, e.g.*, Merriam-Webster, *Thesaurus*, https://www.merriam-webster.com/thesaurus/operate (listing "use" as the first word related to "operate") (last visited April 13, 2019). Thus, it can equally be construed that the "usage" fee is an "operation" fee which did not alert Walbeck that the representations in his Property Report were false. (R. pp. 3022-3023).

Finally, even if the "usage" fee indicated that the "ownership" interest was a perpetual easement, that gave the HOA like rights, this would not be notice that the HOA could be deprived of its never-ending, ownership-like rights by the Developers' scheme.

VIII. This Court Erred in Disregarding the Application of Equitable Estoppel and Equitable Tolling

This Court also erred in concluding that equitable estoppel is "unavailing" to the HOA's and Walbeck's claims and by disregarding the application of equitable tolling to sustain these claims.

A. This Court Overlooked Developers' Control, Omissions and Representations in its 2004-2007 Equitable Estoppel Analysis

Contrary to this Court's substituted estoppel analysis, equitable estoppel does not only apply where a party can show "that he reasonably relied on the words or conduct" of another. *Compare* (Substituted Opinion, p. 22) ("Walbeck has not presented evidence showing that he reasonably relied on the words or conducts of [Developers]") (emphasis added) *with* (Opinion, p. 136) (agreeing that the developers owed a duty to truthfully convey all information regarding Walbeck's purchase without material omission) (emphasis added). Rather, equitable estoppel also applies where, like here, there is evidence Developers failed to disclose facts materials to a homeowner's or HOA's claims. *See, e.g., Maher v. Tietex Corp.*, 331 S.C. 371, 382, 500 S.E.2d 204, 210 (1998) *citing Berkeley Elec. Coop., Inc. v. Town of Mount Pleasant,* 308 S.C. 205, 417 S.E.2d 579 (1992) ("Certainly, silence which amounts to misrepresentation or concealment of facts can satisfy the 'conduct' element of the test for equitable estoppel); *Metromont Materials Corp. v. Pennell,* 270 S.C. 9, 22, 239 S.E.2d 753, 760 (1977) ("It is a well-recognized principle of equity that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first

proper and opportune moment.") (citations and internal quotations omitted); *Welch v. Edisto Realty, Co.*, 170 S.C. 31, 169 S.E. 667, 671 (1933) ("Silence, where it is so intended, or where it has that effect, to mislead a party, to his disadvantage, and to the other party's advantage, is an equitable estoppel; and passive acquiescence *estops* equally with active interference.") (citations and internal quotations omitted) (emphasis in original); *Provident Life and Acc. Ins. Co. v. Driver*, 317 S.C. 471, 475, 451 S.E.2d 924, 928 (Ct. App. 1994). ("Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts.").

1. Developers' Omissions and Misrepresentations

Here, the evidence shows that Developers failed to disclose information they were duty-bound to disclose[25] from 2000-2008; and, between 2004 and 2007, Developers continued to conceal the fact that they were not going to convey the Creekside Park and Community Dock to the HOA.[26]

Developers never disclosed to these homeowners in 2004, 2005, 2006 or 2007, that the "perpetual" easement they unilaterally granted which allowed the homeowners to use the Creekside Park and Community Dock was "flawed" and "should be fixed". (R. pp. 1225-26)

[25]There is no question developers had a duty to disclose information to the HOA and its members due to their fiduciary relationship. *See* (Opinion, pp. 147-48, 151-52) (finding that a fiduciary relationship existed between the Developers and HOA until at least 2009).

[26] The Court's substituted, equitable estoppel analysis focuses on "evidence of Developers' misrepresentations" between 2004 and 2007 based upon its erroneous conclusion that Walbeck's three-year claim clock started running upon his receipt of an ambiguous budget in late 2004. The jury found Walbeck's claim accrued on August 5, 2009, and Petitioners have previously briefed the many reasons why the jury's findings should be upheld (or, at minimum, this Court should restate its original finding that "HOA members" discovered their claims upon learning of the sale in either 2008 or 2009). Rather than repeat these reasons previously briefed, Petitioners incorporate them by reference and focus on Developers' pre-2007 omissions and representations here.

(Vince Graham admitting the easement is "flawed" and "should be fixed"); (Substituted Opinion, p. 5) ("[Tom] Graham described this language as a mistake. . .").

Developers never told these homeowners that they changed their mind between 1998 and 2000 and no longer intended to provide the HOA the Creekside Park and Community Dock as promised in their Property Reports. *Compare* (R. p. 1209) (Vince Graham agreeing that change from deeding the dock to the HOA occurred between November 3, 1998 and February 9, 2000); (R. p. 1216) (Vince Graham explaining that the "Marshwalk" was intended to be the "Creekside Park" described in the Property Report) *with* (R. p. 1233) (Vince Graham indicating Walbeck should rely on his "Property Report" although Developers had decided not to abide by the descriptions in this Property Report and failed to disclose this to Walbeck); *see also* (Opinion, p. 128) ("[Developers] vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park. . .[A]t trial, [Developers] disputed that the 'Community Dock' listed in the 1998 Property Report referred to the Creek Club dock."); (Opinion, p. 130) ("Vince Graham testified that the 'Creekside Park' was actually the Marshwalk").

Developers never corrected homeowners "when they were walking through the neighborhood talking to the homeowners" that the "Community Dock & Boat Ramp" referenced in multiple marketing materials distributed throughout the years was not the "staging dock and main dock" on Hobcaw Creek. (R. pp. 1235-39) (Vince Graham testifying that he walks through I'On and speaks with homeowners about the Amenities).

Developers never informed homeowners that their plans for the Creekside Park and Community Dock "changed depending on the circumstances" or corrected misperceptions created by their representatives, like Chad Besenfelder, who would "sometimes say things in earnest to try to keep a deal going without consulting" the principal Developers. *Compare* (R. pp. 1244-48)

(Vince Graham testifying "I remember. . .that we were going to have community docks. They were going to be made available to the neighborhood. And at some point, we intended to deed them –at some point we intended on making them part of the I'On Club; at some point we intended to deed them again. Plans changed depending on the circumstances, depending on what the other parties wanted to" and "I don't know [whether it was Developers' plan to convey the Community Dock to the HOA] [b]ecause sometimes Chad would say things in his earnestness to try to keep a deal going without consulting me or my father. . .[but these] two documents [in evidence] say that [is the plan]. That's in Chad's view, yes. That's what they say. . .").

Developers also never informed these homeowners that the property descriptions they provided were admittedly misleading:

> Q: So, somebody, who is relying on [the Impact Assessment], to suggest the Creek Club was going to be at Creekside Park is mislead?
>
> A: Yeah, they would.
>
> Q: Somebody would be mistaken?
>
> A: [They] would be mistaken, and I think I have corrected that format [in the April 2009 e-mail from Vince Graham to Lee Adkins clarifying that Developers' definition of the "Creekside Park" is the "Marshwalk"].

(R. pp. 1118-19). Rather, Developers waited until trial to admit that depictions of a creekside park and community dock, such as those included in the Impact Assessment they drafted, were "misleading if relied upon;" and, they did not try to correct this misperception they created until 2009. *Compare* (R. pp. 1118-19) *with* (R. p. 2250) (Vince Graham explaining to Walbeck and Adkins' then-attorney in 2009 that the Creekside Park "is the +/- 2 mile linear park adjacent to the marshes of Hobcaw Creek" and the Community Dock is the "two Phase 2 [crabbing] docks conveyed to the [HOA] years ago.") *and* (R. pp. 2285-86) (Vince Graham explaining to Walbeck in 2009 that the Creekside Park and Community Dock detailed in his Property Report and the

Impact Assessment are the "[Marshwalk] and two [crabbing] docks" previously deeded to the HOA).

In an addition to these omissions which caused Walbeck and the HOA to believe that Developers still intended to convey the Creekside Park and Community Dock as this was Developers' verbalized intention all along, there is evidence that Developers continued to conceal their true intentions specifically within the 2004-2007 time frame:

First, the June 2005 Handover Agreement between the Developers and the HOA (which, according to this Court, Walbeck should be aware of "as a representative of HOA")[27] formalized the process for handing over "common area property and structures to the HOA." (R. pp. 2216-17). As part of this process, "a formal review of the property to be handed over [must] be agreed to by all parties" and an HOA representative "must make a judgment whether the condition of the areas to be transferred" are acceptable. (R. p. 2216). The Developers never informed the homeowners that the "common area property and structures" referenced in this Agreement excluded the Creekside Park and Community Dock. Further, after comparing the June 2005 Handover Agreement to the September 2007 Board Meeting minutes, it is clear the HOA believed the Creekside Park and Community Dock were included in the "common areas" referenced by the Agreement. *Compare* (R. pp. 2216-17) *with* (R. p. 3519). The 2007 meeting minutes indicate that, after Chad Besenfelder told the HOA "he would like to turn over the Community Dock", HOA members responded that they had inspected the Dock and it was in need of repair – which is the exact "handover" process for "common areas" described by 2005 Handover Agreement. *Id.* Besenfelder confirmed the HOA's belief that the Community Dock was a "common area" encompassed by the Handover Agreement by acknowledging that he would "look into needed

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[27] *See* Substituted Opinion, p. 19.

repairs" prior to turning over the Dock to the HOA, but never disclosed that his bosses and Principal Developers, the Grahams, were also outlining their options to sell the Dock at this time. *See* 2006 and 2007 Omission Discussion below. This amounts to both an affirmative representation that Developers were going to convey the Community Dock as well as a concealment of their internal change of plan. Regardless, the Developers are not being truthful within the three years that Walbeck's claims purportedly accrued.

Next, in December 2005, Developers informed I'On homeowners, including Walbeck, that "the turnover for phases 1-7" was near completion. (R. pp. 3475-77); *see also* (R. p. 3342) (Walbeck Sign-in Page from December 7, 2005 Assembly Annual Meeting). Notably, the Community Dock and Creekside Park described in Walbeck's Property Report were to be built "in Phase 2" which is still in the process of being turned over at this time. Developers never mentioned this "turn over" excluded the Creekside Park or Community Dock or that they were considering keeping these properties for themselves. (R. pp. 3475-77); *see also* (R. p. 980:18-21).

By 2006, the Developers are actively conspiring on how to "capitalize" on the "potential value" of the Community Dock and outlining their options in "selling community facilities," all the while keeping their ideas "<u>quiet for now</u>". (R. p. 2855). Not only do Developers fail to disclose their true intention to keep, and later profit from, the sale of the Amenities in the Board and HOA meetings happening around this time, they superficially maintain that it's still their intention to give these Amenities to the HOA. *See, e.g.,* (R. p. 698:16-20) (Tom Graham admitting that a July 18, 2006 e-mail illustrated Developers' intent to turn over the boat ramp); (R. p. 2922-24) (July 18, 2006 e-mail).

Next, in Summer 2007, the Developers sent emails amongst themselves seeking clarification as to the HOA's rights "over the docks and boat ramp" and maintaining that the

"conveyance of [the] Creek Club to the HOA should include the boat ramp, but exclude the dock, which we should keep [because] [w]e have not offered that dock and gazebo. . ." (R. pp. 706-08). Despite the Principal Developers' "idea to keep the dock", Developers' representative, Chad Besenfelder, eventually informs the HOA during a September 2007 meeting that "he would like to turn over the community docks" to the HOA. (R. p. 3519). At this meeting, the Board confronted Besenfelder about Developers failure to repair and turn over the Community Dock in good condition; and, in response, Besenfelder also promised to "look into the needed repairs." *Compare* (R. p. 3159) *with Dillon Cty. Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 219, 332 S.E.2d 555, 561 (Ct. App. 1985), *overruled on other grounds by Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 462 S.E.2d 858 (1995) ("One's assurances to an injured party that defects can be corrected coupled with his attempts to correct them is conduct that 'may lead the injured party to reasonably believe that it will receive satisfaction without resort to litigation.'") (emphasis added). Besenfelder did not disclose that the Principal Developers did not intend to convey the Community Dock to the HOA or that there was any debate concerning the HOA's rights to the Dock. Rather, he assured the HOA that "turn-over" was in process and that needed repairs would be investigated, leading the HOA to believe that everything was okay. Even this Court acknowledged that "**[t]hese [2007] assurances led the HOA's members to "repose[] a special confidence" in Developers**, binding Developers to act in good faith and with due regard to the interest of the HOA's members." (Opinion, p. 152) (emphasis added) (citation omitted). It naturally follows that these same assurances delayed the "HOA's members" from filing suit because they "trusted" that Developers would act in their best interest.

Developers also distributed a brochure in 2007, which Walbeck received, describing "the Community Dock & Boat Ramp", "the Creek Club," and "2.5 Miles of Marshfront Paths" as I'On "Amenities". (R. pp. 2221-28) (Brochure titled "I'On: Celebrating 10 years" with bates noting it was given to Walbeck); *see also* (R. pp. 1234:4-1235:13) (Vince Graham testifying this brochure was distributed for I'On's 10-year anniversary in 2007). Developers did not highlight any difference between "Amenities" or "Common Areas", did not include an asterisk indicating that the HOA did not "own" these Amenities, and did not include a disclaimer that these Amenities could be sold to third-parties or otherwise "taken away". *See* (R. p. 708) (Tom Graham conceding to a 2007 e-mail from Chad Besenfelder that stated "[t]he docks are too controversial, and taking away even part of this community <u>amenity</u> would cause trouble.") (emphasis added).

Due to Developers' repeated non-disclosures and mistruths, the only thing Walbeck and the HOA understood between 2004 and 2007 was that common areas or amenities, including the "Community Dock" and "Creekside Park", were to be conveyed to the HOA. Even if Walbeck was able to deduce from the proposed budget that a "usage" fee was charged for the "Creek Club Dock", Developers failure to disclose that they were never going to convey <u>the</u> Community Dock or the Creekside Park, coupled with their repeated assurances that they were going to convey these Amenities, led Walbeck to believe he had nothing to worry about originally until November 2008. When that deal collapsed, Developers against stated that transfer as in process; and, Respondents did not learn otherwise until August 1, 2009. *See* (Opinion p. 140) (finding that the "HOA members" learned of a "November 2008 agreement to purchase lots CV-5 and CV-6, including the Community Dock and boat ramp" and "the HOA's members" learned of a new contract of sale for the Dock from an "I'On Community Bulletin" posted August 1, 2009).

2. Developers Knew the Real Facts and Concealed these Facts to Avoid this Litigation

Developers were the only persons who knew that they were going to sell the Creekside Park and Community Dock instead of conveying it to the HOA. As the sole steward of information pertaining to these Amenities, the real facts about the status of these Amenities were exclusively within Developers' knowledge. Developers knew or should have known that the perpetual easement was not perpetual and otherwise flawed; the Crabbing Docks were not the Community Dock; the Marshwalk was not the Creekside Park; and, <u>the</u> Community Dock and Creekside Park were not going to be conveyed to the HOA, but these facts were "willfully, recklessly, or wantonly" concealed by the Developers.

Each time Developers concealed these salient facts, their intention was to camouflage their course of conduct. Developers had many opportune moments to disclose the truth to Walbeck between 2004 and 2007, including at any one of the several meetings he attended which Developers also attended during this time frame. (R. p. 3342) (Walbeck Sign-In from December 2005 Meeting); (R. p. 3353) (Walbeck Sign-In from December 2006 Meeting); (R. p. 3374) (Walbeck Sign-In from December 2007 Meeting); *see also* (R. p. 980:18-21) (Walbeck at trial confirming he attended the annual HOA meetings from 2004-2007); (R. p. 3475-77) (December 2005 Meeting Minutes indicating "LeGrand Elebash introduced and thanked Chad Besenfelder who oversees the property owned by the [Developers]."); *see also Metromont Pennell,* 270 S.C at 22, 239 S.E.2d at 760 (recognizing estoppel applies when a party fails to speak or act "at the first proper and opportune moment."). Yet, Developers continued their secret scheme because they knew if they "kept things quiet" that it would only benefit themselves. *See, e.g.,* (R. p. 753) (Tom Graham conceding that Developers "ke[pt] the [sale] quiet because of all the brew ha ha and filings.").

Moreover, the fact the jury found the developers acted "recklessly, willfully or wantonly" means one of two things: the Developers intentionally concealed material facts or carelessly disregarded their duty to speak the truth. Either one eliminates Walbeck's burden to prove: (1) the Developers' intent to deceive; (2) his reliance of the Developers' representations; and, (3) his due diligence in "discovering" otherwise undiscoverable claims. *Compare* (R. p. 1860) *with* (Opinion pp. 134-35) (suggesting Walbeck bore burdens he didn't have to prove).

"He who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to be silent." *Welch v. Edisto Realty, Co.*, 170 S.C. 31, 169 S.E. 667, 671 (1933) (citations and quotations omitted). Developers did not speak the truth for over a decade and, when they did speak, it was to again conceal the real fact that their promise to convey the Creekside Park and Community Dock to the HOA was an empty one. Having chosen to remain silent while simultaneously assuring the HOA and its members to "trust them", Developers cannot speak now. The elements of equitable estoppel are satisfied.

B. This Court Disregarded the Application of Equitable Tolling as to the HOA's Claims

This Court also failed to consider that the equitable tolling doctrine requires the extension of the statute of limitations applicable to the HOA's claims because the evidence establishes: (a) the HOA was effectively controlled by the Developers for more than a decade; (b) Developers' veto power prevented derivative claims on behalf of the HOA; (c) Developers unfairly mislead the HOA and it members through multiple misrepresentations and omissions; (d) Developers committed many "wanton, willful, and reckless" acts at the expense of the HOA and the homeowners; and, (e) Developers destroyed evidence and obstructed justice in multiple respects.

Unlike equitable estoppel, South Carolina courts have <u>not</u> "limited" the application of equitable tolling based upon a defendant's misrepresentation, misconduct or omission. *See, e.g.*,

Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115-16, 687 S.E.2d 29, 33 (2009) ("Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it. Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period <u>to ensure fundamental practicality and fairness.</u>") (citations and quotations omitted); *Magnolia North Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112, 125 (Ct. App. 2012) ("Unlike equitable estoppel, equitable tolling does <u>not</u> require a showing that the defendant had made a representation to the plaintiff.") (emphasis added).[28]

Instead, our Courts recognize that equitable tolling may be applied <u>in any case</u> where "justified under all the circumstances"; and, our Courts have found tolling is justified in circumstances which mirror the circumstances here. *Magnolia North,* 397 S.C. at 372, 725 S.E.2d at 125. For example, our Courts acknowledge that tolling applies: (a) while a HOA and its members are controlled by a developer; (b) when a HOA and its members are prevented from commencing litigation because of events beyond their control; and, (c) where a HOA and its members cannot discover material, claim-related information. *Id.* at 371-72, 725 S.E.2d at 125 (extending the statute of limitations applicable to a homeowners' association until after the developer's control over the association ended) (citations and quotations omitted).

Importantly, South Carolina courts have invoked equitable tolling when confronted with any one of these circumstances; and here, there is <u>all three plus</u> additional evidence of injustice:

[28]*See also Hooper,* 386 S.C. at 116, 687 S.E.2d at 33 *citing Machules v. Dep't of Admin.,* 523 So.2d 1132, 1134 (Fla. 1988) ("[E]quitable tolling. . .does <u>not</u> require misrepresentation by the defendant; <u>rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits</u>.") (emphasis added); 54 C.J.S. *Limitations of Actions* § 85 ("It may be found that the statute of limitations should be tolled <u>where its policies are outweighed by the interests of justice</u> in vindicating the Plaintiffs' rights) (emphasis added).

1. The HOA Was Controlled by the Developers

First, "Developers retained continuing control of the HOA up to and including the day they conveyed lot CV-6 to Russo". (Substituted Opinion, p. 14); (Opinion, p. 14) (emphasis added); *see also* (Opinion, p. 148) ("[Developers] retention of control over the HOA throughout the years preceding [the sale] created a continuing fiduciary relationship between [Developers] and the HOA") (emphasis added); (Opinion, p. 151) ("[Developers'] control of the HOA undoubtedly required the [Developers] to preserve the rights of the HOA's members to the unfettered use and enjoyment of these common areas.") (emphasis added).

The evidence supports this Court's determination and shows the Developers controlled the HOA through at least 2009 (when Developers sold the Amenities to Russo) due to Developers' influence over the then-Board and I'On's Covenants that were intentionally crafted by the Developers to give them unfettered power over the HOA and its affairs.

For example, the Covenants provide that Developers' powers "extend until" all lots in I'On are sold to someone other than Developers, and these powers include:

- The power to conduct all activities requires to complete the Neighborhood Plan which "the [HOA] shall not take any position of opposition [to] in a public setting, nor utilize any of its material or financial resources to oppose development activities of Developers. . ."
- The power to control any action, including litigation, against Developers because "the [HOA] shall make no amendments to the [Covenants] that materially affect the [Developers'] interest, nor shall [the HOA] adopt other measures that materially affect the [Developers'] without [Developers'] concurrence."
- The power to issue invalid easements which the HOA "shall not take action seeking to alter provisions of, nor to prevent establishment of. . ."
- The power, and "full authority", to "appoint, remove and replace" Board members until 75% of all lots are sold, twenty years after the Covenants are recorded, or when, in Developers' discretion, the Developers relinquish control.

(R. pp. 3637-38).

Because there is no question that Developers controlled the HOA from its inception until at least 2009, and that Developers would not initiate litigation against themselves, the HOA's claims were equitably tolled until at least 2009. *Magnolia,* 397 S.C. at 272, 725 S.E.2d at 125 ("In the present case, the POA board consisted of Appellants' officers until the date of "turnover," September 9, 2002. We find unpersuasive Appellants' claim that an organization they controlled would have initiated an action against itself during this period."). [29] Following 2009, the evidence also shows that Developers continued to control the HOA by, among other things, exercising their

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[29] *Magnolia*, *Goddard*, and *Concerned Dunes West* also support the application of the "adverse domination" or "adverse dominion" doctrine which is a form of South Carolina's equitable tolling doctrine adopted by several other states that tolls the statutes of limitation for claims by a corporation against its directors or nondirectors as long as the corporation is controlled by those acting against its interests. Under this doctrine, like *Magnolia*, the statute of limitation is tolled because controlling wrongdoers "are unlikely to initiate actions or investigations for fear that such actions will reveal their own wrongdoing" and because, in such circumstances, outsiders do not generally have access to facts from which they could discover the wrongdoing. *See, e.g., Resolution Trust Corp. v. Gardner,* 798 F. Supp. 790, 795 (D.D.C.1992); *Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1284 (N.D. Ind. 1993); *Fed. Deposit Ins. Corp. v. Bird,* 516 F. Supp. 647, 651 (D.P.R.1981); *Resolution Trust Corp. v. Smith*, 872 F. Supp. 805, 813 (D. Or. 1995); *Shields v. Nat'l Union Fire Ins. Co. of Pittsburgh (In re Lloyd Secs., Inc.)*, 153 B.R. 677, 683 (E.D. Pa.1993); *Resolution Trust Corp. v. Scaletty*, No. 72,230, 1995 WL 111986, at *3-*7 (Kan. Mar. 17, 1995); *Wilson v. Paine,* 288 S.W.3d 284, 288–89 (Ky. 2009); *Hecht v. Resolution Trust Corp.*, 635 A.2d 394 (Md. 1994); *NCP Litigation Trust v. KPMG,* 399 N.J. Super. 606, 945 A.2d 132, 148 (2007); *Clark v. Milam*, 452 S.E.2d 714, 718-20 (W. Va. 1994). The crux of adverse domination is that the individuals who are in the position of bringing the claims are ill-suited from a motivational, ethical, and practical perspective to bring such claims due to their needing to take adverse action against themselves or actions attacking their own decisions, actions, or transactions. Those individuals, and the corporation which they control, are in effect incapacitated from bringing the claims. In adverse domination, the statute of limitation is tolled until those persons no longer control or "dominate" the corporation and the corporation is in the hands of those who have the right, ability and capacity to sue for the wrong done. Thus, the doctrine of adverse domination is not necessarily dependent upon the "discovery" of a wrong—it is premised upon the appropriate parties being in a position to assert the claims against the wrongdoers. The adverse domination doctrine should be applied here to toll both Walbeck and the HOA's claims because it appears the doctrine has been applied in South Carolina based on *Magnolia*; the doctrine is consistent with South Carolina law based on *Goddard's* and *Concerned Dunes West's* comparison of "developers" to "corporate promoters; and, as such, there is a sufficient basis to conclude that the South Carolina Supreme Court would adopt this doctrine.

right to remove and replace and Board members in 2012, and again, in 2014. This evidence of control justifies extending the tolling period all the way through 2014 when the HOA was realigned as a plaintiff which means the HOA's claims are timely under any scenario manufactured by Developers.[30]

2. The HOA Could Not Assert Claims Due to Developers' Veto Power

Second, it was impossible for the HOA to sue the Developers due to the Developers' "Supreme Court-like" veto power which still existed at trial. (Opinion, pp. 144-45) (acknowledging that the Covenants give the Developers the "right to disapprove any action, policy, or program" of the HOA); *see also* (R. p. 3638); (R. p. 642:4-10) (Developers conceding their veto power); (R. p. 642:11-23) (Developers admitting they exercised their right to appoint and remove Board members in 2012); (Substituted Opinion, p. 15) (acknowledging Developers appointed Board members as late as 2014). Consequently, the HOA's direct claim clock could not begin to run prior to when this lawsuit was filed; and, as such, all the HOA's direct claims are timely. *See, e.g., Magnolia North,* 397 S.C. at 272, 725 S.E.2d at 125 (finding "unpersuasive Developers' claim that an organization they controlled would have initiated an action against itself during [the developer control] period.").

3. The HOA Was Misled from Day One

Third, the evidence and testimony show that the HOA was wrongfully manipulated by Developers for over a decade. *See, e.g.,* (Opinion, pp. 128, 144-45, 148, 151-53). For years, the Developers mischaracterized the "Creekside Park" as a "Marshwalk" and the "Community Dock"

[30] Developers' maintain that the HOA's claims are untimely by using the HOA's 2014 realignment date as the date the HOA first asserted claims. This is incorrect. The HOA adopted the derivative claims filed by Walbeck and/or Adkins, and therefore, the HOA's direct claims "relate back" to when Walbeck's and/or Adkins' derivative claims were first asserted.

as "Crabbing Docks". *See, e.g.,* (R. pp. 1130:5-25; 2250; 2285-86). This Court agreed in its Original Opinion. *Compare* (Opinion, p. 128) (finding Developers "vacillated throughout the years concerning what they designated as the Community Dock and Creekside Park") (emphasis added); *with* (R. pp. 977:20-978:15) (Walbeck testifying there was confusion about what "made up" the Creekside Park and Community Dock); *see also* (R. p. 435) (Adkins testifying that she also "never heard of CV-6" being referenced as the "Creekside Park"); (R. p. 1130:14-25) (Developer testifying it was "confusing" as to when construction of each I'On Phase was completed, and which recreational facilities were contained in these phases); (R. p. 3480) (April 26, 2006 Meeting Minutes noting Developers were still improving the Marshwalk).

For years, the Developers "kept quiet" and, when "concerns were raised", Developers lulled the HOA and its members into a false sense of security through repeated promises that the Creekside Park and Community Dock were "in the process" of being turned over, a promise Developers reiterated on the very day they negotiated the sale of these Amenities. *See, e.g.,* (R. pp. 2216-17; 2232-33; 2236-37; 2404-48; 2842; 2855-61; 2910-20; 2922-32; 2939-40; 2946-67; 3558-61) (evidence showing Developers' repeated promises to convey the Creekside Park and Community Dock to the HOA while also negotiating the sale of these Amenities).

For years, the Developers acted in their own interest as opposed to the interest of the HOA and its members by drafting unconscionable Covenants giving Developers unfettered power over the HOA, its members, and these Amenities; issuing admittedly "misleading" marketing materials describing these Amenities; granting a flawed easement instead of ownership of these Amenities; negotiating side deals with neighboring properties to use the Amenities; having closed-door discussions "to keep" and "profit from" these Amenities; concealing the real status of the turn-over of these Amenities; and, selling these promised Amenities behind the HOA's and thousands

of I'On homeowners' backs. *See, e.g.,* (R. pp. 706-08; 1118-19; 1209; 1225-26; 1233; 1244-48; 2216; 2221-28; 2250; 2285-86; 2404-48; 2855; 3475-77; 3519).

There is no doubt the HOA and its members "trusted" Developers and would have acted sooner to prevent Developers' then-hidden "willful, reckless, or wanton" conduct, but for Developers' silence and their promises to turn over these Amenities that "had been going for some time". Developers never informed these homeowners that they were going to sell the "Creekside Park" and "Community Dock" promised; rather, they admittedly "ke[pt] the transaction quiet because of all the brew ha ha and filings." (R. p. 753); *see also* (Opinion, p. 152) ("[Developers'] assurances led the HOA's members to "repose[] a special confidence" in Developers. . ."). The HOA and its members were unaware of the need to make a claim prior to this sale because either the Amenities had been conveyed or were going to be conveyed. Further, they were powerless to bring a claim through the HOA because of Developers' veto power and effective control over the HOA. In other words, the homeowners had no choice[31] but to depend on the Developers to agree to sue themselves in order to bring an action in the HOA's name to recover the Amenities. The jury, circuit court, and this Court originally agreed. (Opinion, pp. 128, 144-45, 148, 151-53).

When viewed in the HOA's favor, this evidence and testimony establishes "extraordinary" unfairness. Compounding this unfairness, is the fact that Developers' misconduct continued

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[31]The "unfairness" determination in the context of equitable tolling is similar to the "unconscionability" determination in the context of contract interpretation. In both instances, "there is no specific set of factual circumstances establishing the line which must be crossed" and it's important to utilize "a case-by-case analysis in order to address unique circumstances" *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 36, 644 S.E.2d 663, 674 (2007); (emphasis added); *see also Holler v. Holler,* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case."). Notably, "unconscionability" exists where the circumstances show (1) "adhesiveness" or an absence of meaningful choice; and, (2) "oppressiveness" or unjust hardship and constraint. Here, the circumstances show both.

throughout this litigation as evidenced by their deletion of over 50,000 files, 229 of which expressly related to these Amenities at issue, and all of which were obviously adverse to Developers. *See, e.g., Kershaw Cty. Bd. of Educ. v. U.S. Gypsum Co.,* 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990) (noting when evidence is lost or destroyed by a party an inference may be drawn that the evidence which was lost or destroyed by that party would have been adverse to that party.). Equitable tolling is intended to prevent exactly this type of misconduct by defendants that makes it unfair for those defendants to hide behind the limitations defense and employ it as a weapon to defeat legitimate claims. Equitable tolling is also intended to prevent the incredible injustice that will result should this Court refuse to restate the verdicts rendered by 12 reasonable people who unanimously determined that Developers wrongfully took advantage of Walbeck and the HOA, leaving neither with an adequate remedy, and instead, rewarding Developers for their bad acts.

Clearly, the overwhelming evidence of Developers' control, manipulation, misrepresentations, obstruction, and "willfulness, recklessness, or wantonness," coupled with the resulting unfairness to the I'On Community which stands to lose all relief a jury awarded them on obviously legitimate claims, justifies the application of equitable tolling here under well-established, equitable principles, South Carolina law and South Carolina public policy. If not, this Court needs to explain to the millions of South Carolina homeowners who reside in developer-controlled regimes, several of which are in litigation at this very moment, what additional injustice this Court will tolerate before equity necessitates the Court to act.

IX. The Court's Substituted Opinion Misapprehends Both the Law and the Facts as it Relates to the Single Business Enterprise Theory

This Court's new amalgamation holding requires revision for three reasons: (a) the verdict form error was self-induced and not preserved for review; (b) the Court's original exemplars of

unfairness were correct; and, (c) the single business enterprise theory should be applied here to place accountability where it belongs.

A. Errors Related to the Jury's Verdict are Unappealable Because They Were Not Preserved

First, the Court overlooked that Developers induced any error relating to the jury's verdict and, as a result, they are precluded from challenging the jury's verdict on appeal. Because the Court missed this, it erred when it wrote:

> [T]he circuit court's ruling relieved Respondents of the burden of establishing liability as to each [Developer] and likewise relieved the jury members from their responsibility to evaluate the liability of each [Developer] [and]. . . .the circuit court's instruction to the jury that [Developers] were amalgamated suggested that [Developers] had engaged in misconduct and the resulting prejudice requires a new trial.

(Substituted Opinion, p. 26).

Respondents proposed, and agreed to, a verdict form that had a finding as to each Developer. (R. pp. 1460-61). The circuit court asked each party if they wanted the amalgamation issue to go to the jury or not. Developers repeatedly indicated that it should not go to the jury. (R. pp. 1460; 1478-79). After several colloquies, Respondents relented, and the circuit court decided the issue. (R. p. 1480). By consenting to the circuit court's decision being made in advance, and in lieu of, submitting amalgamation to the jury, Developers consented knowing that the decision could be favorable or unfavorable. If Developers were concerned about whether the circuit court's ultimate decision would prejudice the jury, they should have expressed this concern to the circuit court – they did not. *See, e.g., Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) ("This Court has repeatedly held that a party should not be permitted to sit idly by while a verdict, erroneous in form, is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus

invited by acquiescence."). Consequently, Developers waived any argument that the jury's verdict was tainted because it was rendered post the amalgamation ruling Developers specifically requested.

B. The Court's Original Exemplars of Unfairness Were Correct

Second, the Court's original finding of amalgamation under *Pertuis* is supported by the evidence. *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018), *reh'g denied* (Aug. 16, 2018).[32] In its review of the Court of Appeals' decision in *Pertuis*, our Supreme Court examined South Carolina's amalgamation of interests theory and set forth a shift in the theory's application – its application would need to conform to what is known as the single business enterprise theory (the "SBE theory"). 423 S.C. at 655, 817 S.E.2d at 280. The crux of

[32] In *Pertuis*, former restaurant manager Kyle Pertuis brought claims against his former employer, Mark Hammond and Larkin Hammond (the "Hammonds"), asserting that he was an oppressed minority shareholder squeezed out of the business in bad faith by the Hammonds, the majority shareholders. 423 S.C. at 645–47, 817 S.E.2d at 275–76 (2018). Pertuis oversaw three restaurants for the Hammonds; and, each was organized by the Hammonds as a separate, s-corporation. *Id.* The Hammonds and Pertuis agreed upon a compensation package that granted Pertuis shares in each of the restaurants. *Id.* Pertuis' shares would vest based on the length of his service for the two North Carolina restaurants; and, his shares in the third South Carolina restaurant would vest when profitability benchmarks were reached. *Id.* After parting ways with the restaurant business, Pertuis argued he was entitled to a forced buyout, including a 10% ownership share in the South Carolina restaurant, though the profitability benchmark, a net operating profit of $500,000, had not been reached. *Id.* The circuit court found the three corporate entities should be amalgamated, citing to "considerable movement of corporate funds between the three corporate Defendants"; "the same shareholders and the same managing partner (Pertuis) who oversaw all three restaurants", a shared website; and, "conveyance of a boat from the Hammonds to Pertuis without any corporate formality. . .to avoid liability and high insurance premiums." 423 S.C. at 656, 817 S.E.2d at 281 (internal citations omitted). The Court of Appeals affirmed, but noted that the circuit court found a "*de facto* partnership" instead of an amalgamated corporate entity. *Id.* Our State's Supreme Court issued a writ of certiorari and reversed the Court of Appeals pointing to: (1) the fact that the circuit court's finding was one of amalgamation, despite its use of the phrase "*de facto* partnership"; (2) the fact that the circuit court failed to assign the burden of proof to the plaintiff as the party seeking amalgamation; (3) the fact that the entities were s-corporations, which are statutorily permitted to disregard the corporate formalities that the circuit court identified as lacking; and, most importantly, (4) the fact that the Supreme Court found "no evidence of bad faith by the Hammonds" in the record. 423 S.C. at 656–57, 817 S.E.2d at 281 (emphasis added).

the change to this State's amalgamation law is that, under the SBE theory, there must be "evidence of some sort of injustice or abuse of the corporate form" to warrant treatment of the entities as a single enterprise. 423 S.C. at 654, 817 S.E.2d at 280.

Both the Court's Original and Substituted Opinions found that the SBE theory overlapped with veil piercing in that it requires a showing of "an element of injustice or fundamental unfairness, **to place accountability where it belongs**." (Opinion, p. 154); (Substituted Opinion, p. 26) (emphasis added). The injustice or unfairness includes "evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions." *Id.*; *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281. This would include "evasion of existing obligations". *Pertuis*, 423 S.C. at 654-55, 817 S.E.2d at 280 *quoting SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008) (emphasis added).

Unlike *Pertuis*,[33] there is evidence of bad faith here.[34] This Court found multiple incidents of wrongdoing to support the circuit court's ruling in its Original Opinion:

- There was "confusion displayed by those who dealt with [Developers] as to which entity they were dealing with" (Opinion, p. 154);
- In March 2009, Besenfelder "represent[ed] to the HOA's management company that the I'On *Company* would deed the Community Dock on lot CV-6 to the HOA when, in fact, the I'On *Club* owned lot CV-6" *Id.* at 155 (emphasis added);
- "Besenfelder's other communications likewise show that he referred to the various entities interchangeably" *Id.*;

[33] 423 S.C. at 657, 817 S.E.2d at 281 ("[O]ur thorough review of the extensive record yields no evidence of bad faith by the Hammonds.").

[34] *Pertuis* also did not involve parties in a fiduciary relationship. *See* (Substituted Opinion, p. 16) (finding Developers' owed a fiduciary duty to the HOA and its members). The fiduciary nature of the relationship here presents a novel question: whether the burden of proving the propriety of the transactions involved rests with the superior, corporate entities when those entities owed a fiduciary duty to the inferior party and the inferior party alleged that the superior parties were amalgamated. South Carolina law appears to answer in the affirmative.

- "[Developers'] common employees and principals **acted in concert to profit at the expense of the HOA's members**" – a "behavior" "undoubtedly **facilitated" by "[t]he intertwining of the operations of [Developers'] entities**" *Id.* (emphasis added);

- In 1998 and 1999, "without the knowledge of the HOA's members", "the I'On *Group*, then known as Civitas, negotiated with a neighboring subdivision's developer for the sale of access rights to the Community Dock and boat ramp on Lot CV-6, although the rights were owned by the I'On *Company* at the time" *Id.* (emphasis added and in original);

- In 2000, "the I'On *Company* transferred lot CV-6 to the I'On *Club*, for inadequate consideration ($5.00) before it was ultimately sold to Russo" *Id.* at 154-55 (emphasis added);

- "[P]receding the sale of lot CV-6 to Russo was Thomas Graham's secret expression of a desire to capitalize [the] potential value of the Community Dock" *Id.* (emphasis added);

- "[T]he HOA's members [were placed] in a position of having to compete with non-members for access to the disputed property" when " Graham's intent [to profit from the disputed property was realized] through the sale to Russo, in addition to the 1999 sale of access rights" *Id.* (emphasis added); and,

- The Developer's conduct concerning the disputed property ("the **secret sale of access rights to a neighboring subdivision's developer** as well as the **surprise sale of ownership to Russo**") "benefited [Developers] at the expense of the HOA" *Id.* (emphasis added).

The Substituted Opinion negates these prior findings – for no explained reason and without new precedent. *Compare* (Opinion, pp. 154-55) *with* (Substituted Opinion, p. 26). This is error; the Court's original findings were proper.[35]

[35] Alternatively, *Pertuis* should not be applied retroactively because the circuit court did not have the benefit of *Pertuis* when this case was heard and when the circuit court ruled on JNOV. *See* (Substituted Opinion, p. 26, n. 19) (expressly acknowledging "the circuit court did not have the benefit of the *Pertuis* decision when it ruled on [amalgamation]"). Respondents should not be held to a standard that did not exist at the time of trial or the circuit court's JNOV determination. *Toth v. Square D Co.*, 298 S.C. 6, 9, 377 S.E.2d 584, 585-86 (1989) (recognizing where a decision "effect[s] more than remedial or procedural change", *e.g.*, when a judicial decision creates "liability where none had previously existed", retroactive application is "unfair and

C. The Single Business Enterprise Theory Should be Applied Here to Place Accountability Where It Belongs

Third, this case is a storybook model for the application of the single enterprise theory.[36] The facts include numerous exemplars of the kinds of exploitive and evasive conduct "that the corporate structure should not shield". *Pertuis*, 423 S.C. at 654, 817 S.E.2d at 280.

The I'On Company, LLC ("TIC") developed the I'On subdivision and established The I'On Club, LLC ("I'On Club") and I'On Realty, LLC ("I'On Realty"). (R. pp. 822:22-834:19). I'On Realty was a subsidiary of TIC. (R. pp. 681; 768). I'On Group managed TIC from its inception in 1998. (R. p. 824:8-17).

1. Developers' Secret Intentions and Verbalized Promises Between 1998 and 2004

I'On Group, also known as Civitas, was Vince Graham's I'On management company. (R. p. 1220). I'On Group was in existence and was managing TIC when TIC published the initial Property Report in 1998 which promised the HOA ownership of the Community Dock and Creekside Park. (R. pp. 817-18). I'On Group's sole member, Vince Graham, signed the Property Report. (R. p. 3032). I'On Realty distributed the Property Report and made marketing representations to the purchasers, Walbeck included, that these Amenities would be conveyed. (R.

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inappropriate."). Assuming, *arguendo*, that the Court's Substituted Opinion properly analyzed and applied *Pertuis* and the SBE theory to this case, the Court utilized a test for amalgamation unlike those previously recognized in South Carolina. *See, e.g., Kincaid v. Landing Development Corp.*, 289 S.C. 89, 91 344 S.E.2d 869, 871 (Ct. App. 1986) (requiring, for an amalgamation claim, comingling of corporate interests, entities, and activities which blurs legal distinction between the corporation and their activities). The new test fundamentally changed our State's amalgamation law. Given that the circuit court's amalgamation rulings (i) were based on South Carolina law in existence at the time of trial and its JNOV ruling; and, (ii) the fundamental shift in the new test as applied by the Court, the new test should not disturb the jury's verdict, properly sustained by the circuit court.

[36]Developers did not, and do not, seriously contest the blurring of operations as found by the circuit court; rather, they argue the fairness prong.

pp. 519-23). I'On Realty wrote the sales contracts referencing the recreational facilities chart in the Property Report. *Id.*

At trial, Vince Graham conceded the Developers decided **not** to convey the Amenities to the HOA eight months prior to contracting to sell Walbeck his lot in a contract that said otherwise.[37] (R. p. 1229). Developers made this decision while negotiating the sale of rights to Olde Park in a transaction which violated the representations made in the Property Report. (R. pp. 1211-14). The Olde Park transaction, negotiated by I'On Group, involved TIC obligating I'On Club to share what was supposed to be the homeowner/HOA's "waterfront" Amenities with a different neighborhood. (R. p. 828). Stated differently, **I'On Group arranged for TIC to compel I'On Club to breach TIC's obligations to the homeowners on TIC's behalf**.

The I'On Group, TIC, and I'On Realty subsequently failed to update or correct the original representations before or after Walbeck's purchase (despite writing Walbeck letters three times, before and after his closing).

I'On Club purported to implement the change from HOA "ownership" to HOA "access" by granting a limited easement to the HOA on property it did not own (CV-6 a/k/a Creekside Park and Community Dock). The easement was invalid *ab initio*. TIC and I'On Club concede that the I'On Club did not own the property and had no rights to grant an easement when they attempted to grant an easement to the HOA. (R. pp. 684-85).[38]

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[37] Vince's offer to Olde Park occurred on December 8, 1998, five weeks *after* the date of the 1998 Property Report and almost one year *before* the Property Report was provided to Walbeck. (R. pp. 643, 649-50). The Olde Park deal was finalized before the Walbeck contract occurred. (R. p. 672). But, no disclosure was given to Walbeck regarding the Olde Park deal or how it modified the Property Report or the recreational facilities chart therein that was incorporated into Walbeck's contract. (R. pp. 672-73). Follow up letters to Walbeck also failed to disclose these changes. (R. p. 676).

[38] When TIC and the I'On Club contend they were unaware that the easement was invalid for thirteen years, how can this Court hold Respondents to a different, higher standard? *Compare*

Civitas supplied the I'On Group employee, Joe Barnes, that staffed the, three entities signing the easement, permitting him to sign the invalid, non-perpetual easement for all three entities. (R. pp. 3131-3141) (easement signed by Barnes on behalf of all three entities); *see also* (R. pp. 676:20-679:15) (Tom Graham admitting Joe Barnes signed the flawed easement).

The Developers' switch from ownership to easement and the invalidity of the easement **went unnoticed** by the homeowners/HOA as the title was held a I'On Developer entity and the common areas transfer process was long and detailed. *See* Sections VII and VIII(A)(1), *infra.*

An amended Property Report was issued in 2000 to affect the removal of the waterfront amenities. (R. pp. 3035-73). No effort was made to notify recipients of the 1998 Property Report of the 2000 amended report that removed the Community Dock from the HOA's owned amenities. (R. p. 695).

2. Developers' Evasive Conduct Continued Between 2001 and 2005

Vince Graham, acting on behalf of the I'On Group, appointed the HOA's Board President from 2000-2005. (R. p. 640). The President worked for, and was employed by, TIC during this period. (R. pp. 640-41). Tom Graham testified that TIC, as founder, retained its veto right after turning the HOA over to the homeowners in late 2005, which continued through the date of trial in 2015. (R. p. 641). Tom Graham described the veto as being like "the Supreme Court." (R. p. 642).

In 2005, Developers and the HOA entered into a handover agreement. (R. pp. 2216-17). The agreement was signed by TIC and the HOA's President and Vice President. (R. p. 2217). That

(Substituted Opinion, pp. 20-21) (concluding that Walbeck's claims accrued no later than late 2004 and expired no later than late 2007) *with* (R. p. 686) (Vince Graham admitted that Developers did not know for 13 years that the easement was granted before Developers owned the property).

agreement required TIC to initiate the handover process as to the common areas which, as mentioned previously, included the Creekside Park and Community Dock. (R. p. 2216-17).

3. Developers Covertly Explored Their True Intention, Taking the Amenities Away From the HOA, Between 2006 and 2007

As of 2006, TIC and the I'On Group were still indicating to the HOA, the HOA's property manager, and the Board, that the Appellants still intended to turn over the boat ramp and Community Dock, now owned by I'On Club. (R. pp. 698-99); (R. p. 2922).

As of June 2007, TIC and I'On Group were unclear of what rights the HOA had over the docks and boat ramp. (R. p. 706).

However, TIC, through Tom Graham, decided to exploit the value of these Amenities further in 2007. (R. pp. 706-08). This was contrary to its manager's warning that "[t]he docks are too controversial and taking away even part of this community amenity would cause trouble." (R. p. 708).

TIC failed to disclose its revised intentions to the HOA. Instead, in September of 2007, it was agreed that Chad Besenfelder (TIC manager) and Ward Mundy (HOA Board Member) would jointly ascertain the condition of the docks to see if they were ready for turnover to the HOA. (R. pp. 1233-34) (Tom Graham admitting he had no information that contradicted Besenfelder and Mundy's inspection of the docks in advance of the promised turn over); (R. p. 3519) (Sept. 2007 Board minutes).

4. Developers' Deceptive Conduct Escalated Between 2008 and 2009

In 2008, Besenfelder, on behalf of I'On Group and TIC, wrote to the State of South Carolina that "We [TIC & I'On Group] are ready to deed this community dock and ramp to the homeowners and wish to comply with regulations." (R. pp. 1239-40); (R. p. 2300). Vince Graham was not sure which entity owned the Amenities. (R. p. 1480:24-1481:19) (circuit court ruling

Developers were amalgamated because, among other things, "Mr. Vince Graham on the stand couldn't even remember which entity an action had been taken on behalf of."); *see also* (R. pp. 680:24-687:10) (Tom Graham was also unsure which entity owned the Amenities when Developers granted the easement). Besenfelder, like his predecessor Joe Barnes, "wears many hats." (R. p. 1240). In 2008, he was the manager of both TIC and the I'On Group. (R. pp. 1240-41).

The intent to "honor" Vince's "promise"...“to hand over" the Amenities to the HOA, was confirmed many times in writing in 2008, and again, in 2009, before TIC and Group reversed themselves and decided to sell the docks to Russo in 2008, and again, in 2009. (R. pp. 709; 711; 714-16; 719; 1240-44; 1248; 1251-55; 1263-65; 1276-77; 1298); *see also* (R. p. 2078). The representations were typically made by the I'On Group, on behalf TIC, regarding the disputed property owned by the I'On Club. *Id.*

TIC, through Tom Graham, and the I'On Group, through Vince Graham, refused to amend the easement in 2008 and 2009 to make it perpetual (R. pp. 724; 1282-83) and refused to acknowledge it as perpetual prior to trial (R. pp. (R. pp. 1225-26). The I'On Club was the vehicle eventually used to sell the TIC and Realty-promised Amenities to a third-party. (R. pp. 2065-74). This transaction was negotiated by Bessenfelder. (R. p. 723:2-13). Tom Graham was not sure which company Besenfelder worked for. (R. p. 697). TIC hid the 2008 sale from the homeowners with lies that it was just a change in management. (R. pp. 1239:1-1258:14). <u>All of the I'On entities participated in the evasion of existing obligations and deception</u>; this is a poster child for single business enterprise theory.

After the buyer withdrew from the 2008 purchase contract, Tom Graham, through TIC, expressly wrote to the HOA that TIC was working on the turnover of the Amenities in March 2009. (R. p. 743). The I'On Group manager made the same representation. (R. pp. 749-50).

When the HOA's Board tried to stand up to TIC and the I'On Company, the Grahams and their manager became contemptuous, "toying" with the HOA Board; "slam[ing] the door on this foolishness;" and, putting an end to the "Mickey Mouse" issues and "Creek Park BS". (R. pp. 732; 1280-81). Notably, it was not until five months after the sale of the disputed property that the HUD Registration Statement was withdrawn. (R. p. 1283).

Even when the homeowners got wind of the new contract a few days before closing, Tom Graham lied, denied its existence, and described the transaction as a change in management. (R. pp. 752-53). At trial, Developers admitted they sold the waterfront Amenities that were promised to the homeowners. (R. pp. 653-54; 753; 1201; 1216-17) ("they sold the park"). And, the Developers sold the property to Russo knowing that the buyer could terminate the HOA's access to the amenities when the thirty-year term ran out in twenty-one years (now eleven years!). (R. p. 679).

The ultimate sale of the common areas negotiated by the I'On Group involved five sellers acting in concert: TIC, I'On Club, and the owners of TIC (one of whom owned I'On Group). (R. p. 827). As these facts demonstrate, the record supports this Court's original treatment of the I'On entities as a single enterprise. The deception (i) began when Developers' initial change in plans, not to convey the Amenities to the HOA, was not disclosed to Walbeck; (ii) continued into 2007 during turnover discussions when the Developers' failure to disclose to homeowners their changed plans; and, escalated when (iii) Developers denied the existence of the 2008 contract that did exist; and, (iv) described the 2009 contract to sell the Amenities as a change in management. Developers

were obligated to convey the Community Dock and Creekside Park to the HOA, and through using their fragmented corporate form, effectively explored how they could profit from evading their obligation and they did just that. This Court's Substituted Opinion was in error; Developers should be held accountable for their acts by application of the single business enterprise theory.

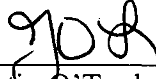
CONCLUSION

Based upon the foregoing reasons, this Court should grant rehearing and/or rehearing proceedings to correct its Substituted Opinion. In so correcting, this Court should: (1) find the 2012 Dismissal Denial is the law of the case and not preserved for appellate review; (2) hold that the Developers admitted the properness of Walbeck and Adkin's derivative claims; (3) affirm the circuit court's ruling finding Walbeck and Adkin's satisfied Rule 23's derivative requirements; (4) conclude that derivative determinations are not limited to the pleadings, and here, the JNOV standard applies to the Court's derivative analysis; (5) restate the verdicts it vacated as to the HOA's direct and non-derivative claims; (6) affirm the jury's finding and circuit court's ruling that Developers acted against the HOA's interest in breach of their fiduciary duty owed the HOA; (7) affirm the circuit court's ruling that Developers were fiduciarily obligated to convey the Creekside Park and Community Dock and failed to fulfill this obligation; (8) vacate its denial of JNOV as to Walbeck's direct and derivative claims based upon the Statute of Limitations; (9) affirm the circuit court's ruling that equitable estoppel precludes the Developers from relying on the Statute of Limitations; (10) affirm the circuit court's ruling that both Walbeck's and the HOA's claims were tolled under well-established equitable tolling principles; (11) affirm the circuit court's ruling that Developers were amalgamated; (12) reinstate Walbeck's attorney fee award under ILSA or pursuant to his purchase contract; and, (13) affirm the circuit court's decisions with respect to all

issues in this appeal; and/or alternatively, reinstate either Walbeck's and the HOA's breach of contract or negligent misrepresentation award.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.



Justin O'Toole Lucey, Esquire
Joshua F. Evans, Esquire
Dabny Lynn, Esquire
415 Mill Street
Mt. Pleasant, SC 29464
(843) 849-8400
(843) 849-8406 (fax)
jlucey@lucey-law.com
jevans@lucey-law.com
dlynn@lucey-law.com
Attorneys for the Respondents

Mt. Pleasant, South Carolina
April 15, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Case No. 2010-CP-10-10490

Appellate Case No.: 2015-001590

RECEIVED
APR 15 2019
SC Court of Appeals

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.

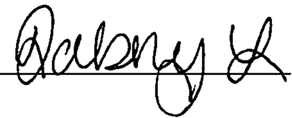
PROOF OF SERVICE

I, Dabny Lynn, hereby certify that on April 15, 2019 I served a copy of the ***Respondents' Petition for Rehearing*** on the following counsel, via United States Mail, postage pre-paid, and addressed as follows:

Brian C. Duffy
Seth W. Whitaker
Julie L. Moore
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
Attorneys for Appellants

Shawn R. Willis
Nelson Mullins
Liberty Center
151 Meeting Street, Suite 600
Charleston, SC 29401
Attorneys for I'On Assembly, Inc.

Tim W. Bouch
Yancey A. McLeod, III
Leath Bouch & Seekings
92 Broad Street
Charleston, SC 29401
Former Attorneys for I'On Assembly, Inc.

Signed: 

April 15, 2019
Mt. Pleasant, SC

JUSTIN O'TOOLE LUCEY, PA

Attorney at Law

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn
James L. Floyd, III

415 Mill Street, Mount Pleasant, SC 29464
Reply to: P.O. Box 806, Mount Pleasant, SC 29465
Phone: 843.849.8400 · Fax: 843.849.8406 · office@lucey-law.com

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

April 15, 2019

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of ***Respondents' Petition for Rehearing*** of the Court's Substituted Opinion filed on February 27, 2019 in the above-referenced matter. Also enclosed is a proof of service of this document upon counsel of record and a check in the amount of $50.00 for the filing of this Petition. Please return the additional filed copy to our courier.

Thank you for your time and attention to this matter.

Sincerely,

Dabny Lynn

DL/dl
Enclosures
cc: Brian C. Duffy, Esquire
Julie L. Moore, Esquire
Seth W. Whitaker, Esquire
Timothy W. Bouch, Esquire
Yancey A. McLeod, III, Esquire
Shawn R. Mullins, Esquire

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