THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Stephanie P. McDonald, Circuit Court Judge

Op. No. 5588 (S.C. Ct. App. refiled February 27, 2019)

Case No. 2010-CP-10-10490
Appellate Case No. 2015-001590

Brad J. Walbeck and Lea Ann Adkins, Both Individually and Derivatively on Behalf of The 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,

Petitioners.

RECORD ON APPEAL
VOL. IV
R. pp. 1501 - 2000

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that notice only applies to documents authorized to be recorded, that's authorized by the statute to be recorded. I'm pretty sure -- I mean, I haven't read the case they cite yet, but I think that's what that is saying.

THE COURT: Y'all need to pull these charges out of cases, with the actual case law, not stringing them together, or out of Ralph King Anderson's charge book. I can look for an appropriate charge if need be. I'm not going to charge this one.

All right. What's next?

MR. LUCEY: Your Honor, again number 4, it appears as though that will be addressed with how the court handles the jury verdict form.

MR. WHITAKER: If you're going to be asked when it accrued, I think we need it. I don't see how we cannot ask when the claim accrued. That's the fact they're being asked to decide. And I think the question needs to be, when the claim accrued on the verdict form. That would be our proposal.

THE COURT: That's just a strange -- I agree there needs to be a charge on when the claim accrued and when there was notice, but I need some better language than that.

MR. WHITAKER: I'll work on it, Your Honor. But

the principle that --

THE COURT: I'm fine. I'm fine up to the point where it says "not what Mr. Walbeck or what Ms. Adkins knew or should have known" -- I mean y'all --

MR. WHITAKER: We can strike that and just stop -- and just stop with what the Assembly knew or should have known.

THE COURT: I think that's an accurate statement.

MR. LUCEY: That's fine -- fine with the plaintiff, Your Honor.

THE COURT: Okay. All right.

MR. LUCEY: Charge number four -- excuse me -- five, the breach of contract merger clause, we believe it's not accurate as is stated, but what I would suggest is simply taking Mr. Whitaker's first paragraph and inserting it into the very front of plaintiff's charge number 14, where we -- we addressed contracts introduced by misrepresentation, so the court would be -- explain what a merger clause is, and then still saying if the contract was induced by misrepresentation, it may not apply.

THE COURT: Okay. Mr. Whitaker. That makes sense actually.

MR. WHITAKER: The first two paragraphs, just because -- I think it's accurate to say a merger clause

expresses their intent. Now, if they didn't know something when they express that intent, that's a different issue, that they are charged on, and 14 deals with --

THE COURT: Okay. A merger clause expresses the intention of the parties to treat the writing as a complete integration in the agreement -- I don't have a problem with that language; do you, Mr. Lucey?

MR. LUCEY: No, ma'am.

THE COURT: All right. I'll put that also in terms of sequencing, right in front of 14. Okay.

MR. LUCEY: Your Honor, plaintiffs objected to number 6. We don't believe the first paragraph is applicable to the case. It's the defendants who are claiming or asserting ambiguity in the documents, not the plaintiffs. So there's already ambiguity there. So the question is how do you take -- how do you decide the ambiguity, which we have in our charges; how do we resolve ambiguity.

MR. WHITAKER: Your Honor, I'm not so sure about that, because really the -- you know, -- I get that there is an issue of fact that -- there may be as far as ambiguity, but they get to look at the contract and say whether they think community dock, Creekside Park are ambiguous or not. And if it's not, they can't

bring the extrinsic evidence in.

THE COURT: I agree. I'll charge both, the plaintiff's charge and this charge. Okay.

MR. LUCEY: We believe seven is accurate, but let's assume then the plaintiff's charged -- eight is no longer relevant.

THE COURT: Eight through ten are no longer relevant. There was no 11.

MR. LUCEY: We believe that fraud is more accurate in ours. We have edited ours, if the court would prefer to hear the edits on theirs.

THE COURT: Okay.

MR. LUCEY: The first sentence, we believe the threshold is clear and convincing evidence, the word "cogent" should be stricken.

THE COURT: I think I might be on the wrong charge. You are on 12?

MR. LUCEY: I'm at 12, yes, ma'am.

MR. WHITAKER: Your Honor, we submitted an amended 12, and that's in -- that's in with 28 and 31 at the end of that file.

THE COURT: I don't have the amended 12.

MR. WHITAKER: It's at the end of that file.

MR. LUCEY: I'm told that I am looking at the amended.

THE COURT: I think you are, but I am not, and that's what I'm trying to do -- reach. Seth, when did -- okay, also included is an amended version of 12. I see it. Okay. I've got it.

MR. WHITAKER: I'm not concerned about the word "cogent" unless that's what your charge on what -- that standard is, is going to have that word in it. And I've heard that charge about what clear and convincing evidence is both ways. If it's going to have "cogent" in it, I just think they should match.

THE COURT: Okay. I mean, I've heard it charged both ways, clear and cogent, convincing and clear and convincing -- Mr. Lucey, you just don't like the word "cogent" or --

MR. LUCEY: I was just going with what we typically hear, Your Honor. I'm sorry.

THE COURT: I mean, I'm fine to use my standard fraud charge.

MR. WHITAKER: I'm fine with that, too, Your Honor.

MR. LUCEY: That's fine with the court's standard fraud charge, Your Honor.

MR. WHITAKER: I don't think "cogent" is going to hold anybody up.

THE COURT: We give -- we all -- you know, we

worry and worry about these charges, and that's interesting. All right. So that takes us back to the original list, I believe.

MR. LUCEY: Right to rely, Your Honor, fraud -- number 13, we believe this is simply too much in here. And -- and we would strike the second sentence of the first paragraph, the second paragraph. And after the word "relationship", to the end of the third paragraph. They then pose -- there are various questions, which we are fine with.

THE COURT: Okay. Wait after "relationship" to the end of the third paragraph. Okay.

MR. LUCEY: And then going to the last paragraph -- excuse me -- the end of the document, we would simply end where their subparagraph three, which finishes that "knowledge of the parties".

THE COURT: All right. Mr. Whitaker?

MR. WHITAKER: Well, Your Honor, I think the second sentence -- well, first of all, it is straight from Anderson's. I know he's not the gospel, but we think he's pretty reliable. And the second sentence of the first paragraph I think is very important, that there is a right to use reasonable prudence and diligence.

I also think the second paragraph is important,

because it talks about what the plaintiff's own duties are in a fraud situation. You know, I'm not too inclined to get concerned about and -- and there's an arm's length transaction part really, but it's part of the entire charge as -- as it's in Anderson's, and I see nothing wrong with it.

And I also think the last paragraph is important, because it makes clear that if there's -- even if you find fraud, but you don't find diligence or due care, then there's no claim. Those are all accurate statements of the law and I think they are all important to the defendants.

THE COURT: They are accurate statements of the law. I think it's long, and some of it is not necessary, but it is an accurate statement of law. So I will charge it. Okay.

MR. LUCEY: Yes, Your Honor. Then skipping 14 and going to 15 -- I think to make it accurate before the second -- before or in the second paragraph, we would need to insert that reliance can be justified if the defendant occupies a superior position to the plaintiff, regardless -- regarding the knowledge -- excuse me -- regarding knowledge of the truth of the statement made.

MR. WHITAKER: That's certainly accurate.

THE COURT: It is. That's right, the first sentence of paragraph 2?

MR. LUCEY: Yes.

THE COURT: Then going into, "there can be no reasonable reliance on any statement if the Plaintiff knows the truth of the matter" -- Okay. Got it.

MR. LUCEY: And on the third paragraph, we would add at the end "unless misled or hindered from doing so".

THE COURT: Unless misled or hindered from doing so?

MR. LUCEY: Yes, ma'am.

THE COURT: Okay.

MR. WHITAKER: Is he saying misled from exercising your own due diligence -- I mean, I think the duty to exercise due diligence is the key point here. And I don't see why that needs to be added.

MR. LUCEY: If one is misled by misrepresentation, and induced not to do further due diligence, it's -- you're entitled to rely without the additional due diligence.

MR. WHITAKER: It seems -- it seems to get into -- the -- also, and this is true of all the fraud claims here, some of these claims they are calling fraud, really go to the equitable tolling questions, too, and

I think that's an example of that.

THE COURT: Okay. I'm going to leave it just at due diligence, and y'all can certainly argue about the alleged misleading in closing. Okay.

MR. LUCEY: Yes, Your Honor. And the following paragraph, the one -- fourth paragraph, goes to the issue of constructive notice, which I think the court is resolving it separately, in the constructive notice charges, so we'd asked that that be stricken.

THE COURT: Yeah, I will strike that. I'm not comfortable with that sentence.

MR. LUCEY: And, lastly, Your Honor, the fifth paragraph we do not believe is applicable to the facts of the case. There's been no document asserted by the defendants for which they claim to have supplied, with an understanding that there was going to be no liability for its accuracy. They've never made that claim in this case.

MR. WHITAKER: Your Honor, isn't that what the merger clause is all about --

THE COURT: No --

MR. WHITAKER: Will you note my objection --

THE COURT: Okay. Thank you. All right. What's next?

MR. LUCEY: Interstate Land Sales Purchase Act,

16.

THE COURT: These are overly lengthy, and I can tell you, we're not charging all of that, so go ahead with 16.

MR. LUCEY: 16, Your Honor, it would be covered by plaintiff's charges if they are adopted. The middle of the second paragraph is not relevant, because there is no -- the Assembly is looking at claim --

THE COURT: Okay. I will take that out.

MR. WHITAKER: My mistake.

THE COURT: That's out. Okay. All right.

MR. LUCEY: And the third sentence is too limited, "plaintiffs do not only rely on untrue statements of fact in the Property Report, but also oral -- other oral and printed representations".

THE COURT: I could either take that whole sentence out, or add "and other alleged oral and printed misrepresentations".

MR. WHITAKER: I'm fine with taking it out.

THE COURT: Okay.

MR. LUCEY: The first sentence of the next paragraph, Your Honor, we don't believe is applicable because the Property Report itself stated that the subdivision was subject to ILSA, and that they were required by law to hand the document to the plaintiff.

THE COURT: I'm going to take out that first sentence. Okay.

MR. LUCEY: The --

MR. WHITAKER: Your Honor, actually, if I could on that -- I do think that they have got to show qualification, so I reserve our objection on that. Because especially with regard to Adkins receiving a contract, even though her contract said that we -- I understand that you don't have to comply, and I signed a list of reasons saying why.

THE COURT: Okay.

MR. LUCEY: There was no evidence presented in the case, Your Honor, oral or written, that the defendants don't have to comply with the ILSA. They're just not even made an issue of it in this case.

THE COURT: No. But they did make a point that one plaintiff received one thing, and another received another.

MR. WHITAKER: And it's their burden to establish that we have to comply.

THE COURT: Right. I frankly think y'all are crazy to send all of these causes of action to the jury, because it's going to be very confusing for them to parse it out. But if that's what's going, it's got to be fairly presented. Okay.

MR. LUCEY: Yes, Your Honor.

THE COURT: So I'm going to leave that as is unless you have a reason for me not to.

MR. LUCEY: And the second half of that paragraph, Your Honor, is a burden of proof charge that the court will already be charging separately.

THE COURT: Yeah. I do have a standard burden of proof charge, so I will take that out. All right.

MR. LUCEY: Your Honor, on 17 another ILSA charge -- a long ILSA charge by defendant. We are fine with the first page and we request the second or third page be deleted.

THE COURT: The second and third page?

MR. LUCEY: Yes, ma'am.

THE COURT: Mr. Whitaker, why do you need all of that?

MR. WHITAKER: Your Honor, in looking at it, I'd suggest leaving in the top paragraph of the second page, which is still talking about what the elements are, but then striking the exemptions part. Because I -- we haven't tried to present any evidence that we qualify for an exemption, and that's our burden. So I'm fine with taking that -- and that long list of reasons and all that can come out.

THE COURT: Perfect. All right. Well, Mr. Lucey,

what about the first paragraph of the second page?

MR. LUCEY: Your Honor, that's fine. We can leave that in, and strike the rest. Thank you, ma'am.

THE COURT: Okay. All right, sir. Y'all give me one second. I'm still moving between documents here. Okay.

MR. LUCEY: Your Honor, charge number 18, again, on ILSA -- the third ILSA charge, I believe -- we don't believe is a correct statement of the law. First of all, they are limiting it to the Property Report again, under the first. And then on the third element that they must -- that we must prove reliance to our detriment in damages, the Gibbs' case says we do not need to produce -- to prove reliance, we only need to prove it as a material issue.

And with -- with regards to damages, I mean, we have them anyway, so that's kind of academic.

THE COURT: I'm inclined to delete 18. I'm not sure that we need that in addition to everything else that we already have.

MR. WHITAKER: A couple of thoughts on that, Your Honor.

THE COURT: I mean, unless you change it to the materials contained in untrue statements, the untrue statement was material -- I mean take look at it.

Under the fraud provisions, the plaintiff do not have to show that they relied to their detriment, Mr. Lucey -- I thought under the disclosure they don't, but fraud they do.

MR. WHITAKER: Your Honor, that's our contention and we -- I'm not going to go through it, what was said about it in our brief. It was a pretty lengthy footnote. There are different cases, but we think that that's the best reason why, it says they do have to rely for part two, the antifraud provisions.

MR. LUCEY: The Gibbs case reads "plaintiff need not show reliance on defendant's statements in order to prove a violation of 1703 (a) 2, (a) or (c). Under 1703 (a) 2 (b), the Plaintiff need not show reliance to maintain a cause of action based on an omission, but may be required to show reliance to maintain a cause of action for an affirmative misrepresentation", paren, "promotional statements or material will be judged on the basis of the affirmative misrepresentations contained therein and the reasonable inferences to be drawn therefrom", closed paren.

So I do appear to be partially correct, that the omissions do not require reliance; affirmative misrepresentations do require reliance. We do believe we have both in this case.

THE COURT: I think you have both. I think that -- it's a much safer statement of the law for a fraud type claim, to show that you had to rely to your detriment, but --

MR. WHITAKER: And I'll just say here briefly, we rely on -- I think Don VaLevetts (ph) -- it's -- it's a -- I think it's Pennsylvania, but it explains why the Securities Act, fraud-on-the-market-theory, doesn't work for ILSA. And that's where that comes in 10 (b) 5 law, so there shouldn't be -- they shouldn't get to skip reliance in a real estate transaction.

THE COURT: I'm going leave to rely the -- "relied to their detriment" in there. And they both testified that they did, rely to their detriment. So I'm not really sure why we're fighting about it any way, although I did the same thing when I sat over there. I fought about every little thing. And now I understand how much it drove judges crazy. So --

All right. I've changed, first, the materials contained in an untrue statement. Second, that the untrue statement was material. Third, relied on the untrue statement to their detriment. Fourth, suffered damages.

I don't think that only the Property Report issue is accurate in light of the way the evidence came

in, in this case. In fact, I think those next two paragraphs need to come out, but --

MR. WHITAKER: Your Honor, we believe it applies to the Property Report. But I understand, yes, ma'am.

THE COURT: Okay. Mr. Lucey.

MR. LUCEY: And we would request that when the court changed a "Property Report" to "materials", that it would change it to "materials and/or representations". We agree with the court that paragraphs three and four are simply repeats of what they've already listed, and it should be stricken.

THE COURT: Materials and -- I thought it had to be either in the Property Report or the marketing materials. You're talking about the actual oral misrepresentations, as well, because of what was in the materials?

MR. LUCEY: Actually, for instance --

THE COURT: Independently?

MR. LUCEY: And when they took them down to the edge of the property and said, here's going to be -- here is the Creekside Park. Here is the dock. That is part of their scheme or artifice to market these lots.

THE COURT: Anything on that?

MR. WHITAKER: I think it's supposed to be in writing is my understanding --

THE COURT: I thought so too. I'm going to leave it as first, that the materials contained in an untrue statement. Second, that the untrue statement was material. Third, that the -- they relied to their detriment. Fourth, they suffered damages. And then I'm taking out the next two paragraphs. All right.

MR. LUCEY: We object to charge 19 as a charge on facts, Your Honor.

THE COURT: I am not going to charge 19. I will note the defendant's objection for the record. Okay.

MR. LUCEY: We object to number 20. We believe the court has already covered ILSA with the prior three or four charges.

MR. WHITAKER: Your Honor, actually, I think that that's an important point as we argued in our DV. That whether -- the rules on ambiguity are different than they are for a contract claim.

THE COURT: They are. I think 20 is an accurate statement of law. That's what the jury is going to have to find out, was it a misstatement, or was it an ambiguity. Okay. Number 21, I have a note that says, not charging, this is argument. But I'm happy to hear from y'all, 21, if y'all differ.

MR. WHITAKER: Not at all, Your Honor.

MR. LUCEY: Your Honor, it's plaintiffs

understanding that the ILSA damages for the court to decide -- the jury is only deciding a violation, in which case 21 wouldn't apply.

MR. WHITAKER: And that's why I --

THE COURT: That's what I thought. Okay. Thank you. What's next?

MR. LUCEY: Twenty- two, Your Honor, is just unnecessary. We are charging what a contract breach is. We are charging -- there is no reason to be comparing them --

MR. WHITAKER: Your Honor, I think it does make sense to make clear that this is not a contract claim -- especially because of the consequences, as you know of, of treble damages if it's found --

THE COURT: Right. The deception is critical, so I'm going to leave that charge in. Okay.

MR. LUCEY: Number 23, we believe is inaccurate. It doesn't -- we don't have to show that it must have adverse impact on the public -- we have to show that it has a potential for adverse impact upon the public.

MR. WHITAKER: Your Honor, I thought it was that -- it must have an impact on the public, and that -- it's capable of repetition or potential for repetition is a way of showing that.

THE COURT: That's my understanding as well, but I

will take a look at that during the ten minutes that we probably have for lunch. I'm not going to just give y'all ten minutes. All right. I will look at that one. Okay.

MR. LUCEY: 24 through 26, without the abuse of process.

THE COURT: All right.

MR. LUCEY: We don't object to 27, generally, as a charge. We believe that the first sentence is not necessary.

THE COURT: I won't charge the first sentence, but -- and my standard charge just starts out with that, a small sum known -- then you're welcome to argue the other part. Okay.

MR. WHITAKER: That's fine.

THE COURT: All right. Are there other objections to the supplemental charges that came in?

MR. LUCEY: Just the -- the court already struck 28, and not to -- I have up to 31 at this point.

MR. WHITAKER: We did have a 32 through 34 -- and let me see if I can't get you a copy of them, Justin.

MR. LUCEY: I have a copy now.

THE COURT: Okay, 28 through 31, I struck 28. Twenty-nine, 30 and 31, you were okay with, Mr. Lucey?

MR. LUCEY: Yes, ma'am.

THE COURT: Okay.

MR. LUCEY: Thirty-two is fine; 33 is a charge on facts.

MR. WHITAKER: Given the court's rulings, we know you're not going to give 34.

THE COURT: I haven't even gotten by -- to 33 yet, but -- let's see.

MR. WHITAKER: Or 34.

MR. LUCEY: Plaintiffs object to 34 in its entirety.

THE COURT: Okay. Hold on. Oh, yes. I'm not going to charge -- that's too -- too close to the charge on the facts; 33 and 34 I will not charge. So, Mr. Whitaker, he's starting to understand the way I roll.

MR. WHITAKER: I like to move it along. On their supplemental charges --

THE COURT: Yes.

MR. WHITAKER: -- let's see. Just going back to what page they're on, the first page --

THE COURT: Hang on one second.

MR. WHITAKER: Sure. I'm sorry.

THE COURT: That's okay. All right.

MR. LUCEY: For the clarity of the court's record, why don't we number constructive notice, that the court

already said it's going to rewrite or change as number 63 -- and the ISLA, the ILSA as 65, and the detailed provisions of the contract as 66.

THE COURT: Okay. Hold on one second. All right. So we're on chain of title.

MR. WHITAKER: Yes, Your Honor. And on -- which is now 64, I guess. That, again, the statements in the charge itself, don't really follow what the parens say. The second sentence -- well, first of all -- well, also, there is the issue of ratification we've brought up in our brief, which could deal with all of these issues if the jury finds it. And I'm sorry we didn't submit a charge on that. But I think they need to understand that it can be ratified. And if they do ratify it, these rules don't apply. The ratification would cure that.

On number two, that's not what the case it cited says -- the footnote to it, I mean. It says that "A deed from an individual with no authority to execute it, cannot cure such defects" -- but if we're going to say they're all amalgamated then, you know, one -- you know, one flip side of that is, well, they can, you know, convey property among themselves.

And then with sentence number four in footnote number four, the rule -- that's not the only rule about

what deeds convey, there is the After Required Title Doctrine, and there's also the potential for ratification. So by itself, this charge is incomplete.

MR. LUCEY: Your Honor, the only way to correct a legal conveyance of any kind that is conveyed out of order, is to file and record a corrective document. The evidence by the Grahams on the witness stand is that a corrective document has never been filed and recorded. And, therefore, there can be, as a matter of law, no ratification of that easement.

THE COURT: Is that --

MR. WHITAKER: A ratification has no -- I'm sorry -- not ratification, but recording had no effect on validity. It can affect notice to third parties, but recording has no effect of validity.

THE COURT: I don't think that's what he's arguing.

MR. WHITAKER: And if we are talking about your change of title and notice, then I'm with you. You need to record something else. I understand that.

Now there -- and, I mean, there's evidence on both sides on that. I think there is some evidence that the amended declarations may have referred back to the easement, and put it in the chain. But the point is, it's a factual issue.

THE COURT: Okay.

MR. LUCEY: I'm sorry, I didn't follow that, Your Honor, an amended declaration? May I ask what that is?

MR. WHITAKER: I -- and this is going off something, but -- and I -- my memory is there is a reference back to where the deed is -- the book and page number of the deed on a declaration somewhere, and I --

THE COURT: All right.

MR. WHITAKER: And that's not something that has come out in testimony.

THE COURT: Okay. It has not. I'm comfortable with the first three sentences, and then -- but I do think I need to add a sentence about ratification after that. All right. I'm happy to find that language, but -- or y'all are welcome to submit something.

MR. WHITAKER: I'll be glad to type it up. We have got some in our directed verdict brief on page -- I know it's toward the end -- page 33.

THE COURT: I'll type it up. Y'all have got to get ready for closing, so I don't mind. Let me look at the language though. "Thus a deed, like a contract or other" -- well, I'll take out "thus" -- but "A deed may be ratified by subsequent act of the grantor", is that --

MR. WHITAKER: That, and part of the sentence before -- you can take out "South Carolina has long recognized" -- but starting with "A deed which conveys property to the -- to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title". That's more complete.

THE COURT: Yeah.

MR. WHITAKER: Maybe that sentence is the one.

THE COURT: Yeah.

MR. LUCEY: And the Plaintiff would ask that it read "may be ratified by a corrective" --

THE COURT: Or a corrective deed?

MR. LUCEY: By a corrective deed.

MR. WHITAKER: No, Your Honor, we don't think that's what the law is.

THE COURT: That's not what the law says -- maybe "ratified by subsequent acts of the grantor, including a corrective deed or a corrective deed" -- I don't even know why you need this, but it seems important to the defense. I mean, if you want to pull some language that says the only way to ratify or correct the failure of the incompetent deed is by a corrective deed, if you'll show me that law, I'm happy to just charge that. But I don't think that's the only thing you can do to correct it. If I'm wrong, please --

MR. LUCEY: I'll find out for the court during lunch, Your Honor.

THE COURT: And I will look for it as well.

MR. WHITAKER: Your Honor, on this issue, I also referred to the next page, where we cite a case that says in the middle -- an easement doesn't need to be recorded to be a valid document -- so whether or not, you know, if -- any corrective thing doesn't have to be recorded to be valid. You don't have to record your ratification for it to be valid.

THE COURT: Right. But I mean, that wouldn't be applicable here.

MR. WHITAKER: No.

THE COURT: The easement hadn't been there long enough for it to be effective.

MR. WHITAKER: No, it wouldn't --

THE COURT: It hasn't been there long enough for it to be --

MR. WHITAKER: No, it wouldn't. I understand.

THE COURT: I don't think the jury needs to be charged on that. Okay. All right. So I will take a look at the corrective deed and ratification with respect to number 64. All right. That takes us to the next Interstate Land Sales charge, I believe that was 65, correct?

MR. LUCEY: Yes, ma'am.

THE COURT: All right. Developer obligated improvements.

MR. WHITAKER: Your Honor --

THE COURT: I don't think that's exactly what the CFR sections state.

MR. WHITAKER: And I just got this. I haven't looked at them. But my concern is that it seems to be talking about a subsection (a) 1 claim on the report itself, which is time barred. Just from looking at it, I don't see how it could be anything else.

THE COURT: I am not going to charge 65. Okay.

MR. WHITAKER: And 66 certainly seems accurate about general versus specific contract provisions.

THE COURT: Great. I appreciate it. Thank you. All right. What -- is that the end, Plaintiff's 66 through Defendant's -- did we get through the last of the defendant's charges?

MR. WHITAKER: I believe we did. The last two were the ones that were out of bounds because of Your Honor's rulings so --

THE COURT: Right. Right. I appreciate it. All right. Y'all need a break and I need a break and Sharon needs a break.

The jury is back and ready. Their food came, I

think -- I guess their food came a little while ago. But I need time to get this up to speed, and y'all need a minute. Do y'all want to start back at 2:00, does that give everybody enough time? 2:15, how do y'all -- I'm up -- y'all tell me. You have the heavy lifting from here on out really.

MR. LUCEY: Your Honor, whatever pleases the court is fine with the plaintiffs always.

THE COURT: I know. Thank you.

MR. DUFFY: How could I say anything different?

THE COURT: Y'all can come back at 2:00 or 215.

MR. LUCEY: 2:15 will be great, Your Honor.

THE COURT: All right. Y'all be back at 2:15.

MR. DUFFY: Your Honor, one question, do you -- and I know this isn't asking -- I'm just asking if you have an intent for us to have the charge or verdict form in advance or --

THE COURT: I'm glad you said that because we've got to look at the verdict form still before we get started. Do y'all want to do that at 2:15, when you get back, or do you want to do that now?

MR. LUCEY: It seems like there's adjustments that need to be made to it, whether it's the court making it or us making it, so we probably will when we get back.

THE COURT: All right. Why don't I do this, why

don't I make the adjustments that I think need to be made, and print it for all of us. And then we'll come back at 2:15 and look at it. And then I can make whatever further adjustments need to be made. So we'll come back a little bit before we bring the jury back, is that fair?

MR. LUCEY: Yes, ma'am.

MR. WHITAKER: On that, I've got a slight change to our proposal --

THE COURT: Yes. Please.

MR. WHITAKER: The only difference is the first question.

THE COURT: That's fine. Great. And I'm not, in any way, purporting to represent it -- that I'm doing this right. I'm just getting it as close as I can in light of the complexities of this case, so.

MR. LUCEY: Your Honor, if we haven't already, can we confirm that the defendant has, in fact, rested. Because I know some people have come to see closings that -- that were on the witness list --

THE COURT: Yeah, he's rested. He wouldn't tell me he's rested if he hadn't rested.

(WHEREUPON, a lunch break was taken.)

THE COURT: All right. I got some of my assignments done, I didn't do everything. But why

don't y'all take a minute to take a look at the proposed verdict form. It's basically the one that Seth gave me. I just took out the names of the individual defendants, and it should say "defendants" in the appropriate places in light of the amalgamation ruling.

I -- one thing I did notice, and I don't know if it addressed the sealing of the deed, and whether -- what the intent of the parties was with respect to that, but we can cross that bridge when we come to it. Why don't y'all just look at it now and see. And I'll work on these jury charges when y'all are ready, and we'll talk about the verdict form.

(Pause.)

THE COURT: All right. Have y'all had a chance to look at the draft verdict form?

MR. LUCEY: Yes, Your Honor.

THE COURT: All right. And Mr. Duffy, have y'all had a chance to look at it? I know y'all submitted it. Let me hear from y'all on the verdict form. It's pretty complicated, or seems more complicated than it actually is.

MR. DUFFY: Your Honor, I think this is a pretty reasonable effort to take the case to the jury.

THE COURT: Thank y'all. Thank you, Seth, and Mr.

Duffy.

MR. LUCEY: Your Honor, I'm skimming it quickly, but I don't see an interrogatory as to the gross negligence or wanton willful conduct, or am I just missing it?

THE COURT: I do not know. Let me look at that.

MR. DUFFY: I don't see it.

THE COURT: No. We do need to add that.

MR. LUCEY: And I know we had it in two questions in our proposed verdict form --

THE COURT: Yeah.

MR. LUCEY: I think it really needs to be one question, do you find they acted with gross negligence or willful recklessness regard for the rights of others, both willfully or wantonly.

THE COURT: Okay. And where would you suggest it be? At the end?

MR. LUCEY: At the end, Your Honor. Yes, ma'am.

MR. DUFFY: I think at least the preface should be if you found in favor of the plaintiffs -- or against any of the defendants --

THE COURT: Right.

MR. DUFFY: -- or something like that.

THE COURT: Right.

MR. LUCEY: And a similar question, Your Honor, I

believe might be appropriate underneath -- with intentional violation, because it's only on their factual finding that the court could have treble damages --

THE COURT: Right.

MR. LUCEY: Thank you.

THE COURT: Okay. I'm looking at what Mr. Lucey proposed with his verdict form, the last thing is "determinations of gross negligence and wanton, willful or reckless conduct". My thought, since we're talking about punitive damages, and that -- gross negligence doesn't necessarily get you to punitive damages. It's the willful and wanton conduct that does. My suggestion would be to have that one inquiry, is that what you were propounding?

MR. LUCEY: Yes, ma'am.

THE COURT: And I do think that it needs to be at the end. And then we need to have the factual finding under the Unfair Trade Practices section, so I will make those changes.

And then since we did bifurcate it, I guess, if they answer in the affirmative about the wanton, willful or reckless conduct, at that point we would give the charges on punitive damages and take extra evidence if we needed to; is that how you would --

MR. LUCEY: Yes, ma'am.

THE COURT: -- consider it to be bifurcated. However, if they did find the wanton behavior on the Unfair Trade Practices, depending on how the verdict form came down, you can't have both. So I guess we'll just cross that bridge if we get to that. We may not.

MR. LUCEY: Yes, ma'am.

THE COURT: All right. I just want to make sure we cover everything in the first phase that we need. We may be back on Monday. I don't know. But we'll get as far as we can. Okay. I'll make those. Any other changes, other than that to the verdict form?

MR. LUCEY: No, Your Honor.

THE COURT: Okay. I found some good language on constructive notice. And basically it's whether it was a reasonable reliance, and that can be the case whether or not a matter was recorded.

The best language I found is "the true test of the individual's right to rely on misrepresentations as to matters of record, is whether or not he acted with reasonable prudence in doing so", and that's whether something is recorded or not. I mean, I agree that you can input notice. But one of the cases talked about the fact that constructive notices -- the doctrine itself is inapplicable, especially when the very

representations that are made and that are relied on, induced the person who received the misrepresentations from examining the records.

And as my understanding, this is all going back to the discussion of what the easement meant, correct? Is that why we're going through all of this? I mean, what else were they on notice of, or constructively on notice of?

MR. DUFFY: They were on notice of the easement. They were on notice of it being a civic lot. They were on notice of all kinds of things through the record, Your Honor. And, in fact, the covenants that Seth was referring to earlier, withdraw CV-6 from the covenants of the homeowners association.

THE COURT: Okay. I mean, I'm still not -- I understand that. And they had notice. But I'm not sure that that's applicable in a situation like this one, when the developers were continually saying different things about -- if the jury finds the facts that way, about what CV-6 was, and what was built on CV-6.

MR. DUFFY: I don't think any of those different representations -- we're looking at a permit to the Army Corps of Engineers about something. We're looking at a deal with Olde Park, that's just describing what

the plans are. None of that is presented --

THE COURT: Okay. Well, what we need to get to is some language that's acceptable for the charge, if you indeed want a charge on constructive notice. And I'm assuming the defendants do, correct?

MR. DUFFY: Yes, ma'am.

THE COURT: Okay. Constructive notice is information imputed by law to a party, because the party could have discovered the information through proper diligence. Then what? What else do we want to say after that? The fact that something is recorded or in public records is part of the question itself. Whether a buyer's reliance on a misrepresentation was reasonable, although the falsity of the alleged misrepresentation could have been ascertained by examining the public records, is a question of fact for the jury.

I mean, they still have to find whether the reliance was reasonable or not. So, do you want me to just fashion that after what the definition of constructive notice is, or do y'all want to try to come up with something better than what was submitted to me?

MR. DUFFY: I would go with what Your Honor comes up with.

THE COURT: Okay. I appreciate it. All right.

I'll get working on that. Now, what about the corrective deed issue and ratification?

MR. LUCEY: Your Honor, perhaps the best result would be this, since we haven't been able to find a good case on a corrective deed, and they don't have a case to show you that says you can ratify an instrument that hasn't been recorded properly, that just those two issues should not be addressed and go with the rest of the charges that the court has already approved.

MR. WHITAKER: Your Honor, that's not the situation. The recording is irrelevant. The question is validity. And we have a case that says you can ratify and make it valid by your subsequent acts, as the existing language in our brief says. Notice is not an issue.

THE COURT: But what are the subsequent acts is what we're trying to figure out? What evidence of subsequent acts that ratify the prior --

MR. WHITAKER: That every year, the Board approved a budget that said that they knew about an easement. There's been testimony from Mr. Clem and others, who were on the Board, saying they were aware of the easement. They were operating under it. They were using -- there hasn't been much talk about this, but they also had the reciprocal easement to use Westlake,

which they took advantage of. The homeowners went down on the dock under the easement --

THE COURT: Okay. I really think this is not the huge issue that y'all think it is, but it's your case and it's going to be what the jury thinks. The whole point of the Joe Barnes' signature was just an example of another screw-up, to show why these companies didn't act independently, and why there was -- in the plaintiff's theme, kind of dirty dealing. I mean, whether it actually was ratified later, I don't think is going to be the big issue for this jury. I'm happy to say something could be ratified by subsequent acts. I don't know that the acts of the homeowners in recognizing certain things can ratify a bad easement granted by someone else.

MR. WHITAKER: I think it's very similar to how a minor can ratify a contract. And once they become of age -- once the homeowners take control of the Board, they can ratify the acts that were done before they --

THE COURT: You're not understanding what I'm saying, and I may not -- not be articulating it clearly.

MR. WHITAKER: I'm sorry, Your Honor.

THE COURT: That's okay.

MR. LUCEY: There is no evidence that anybody ever

timely knew that the deed was after the easement, so there could have been no ratification.

THE COURT: Yeah, I don't see that as being what the evidence is showing -- as supporting a charge such as one you're asking for. You're welcome to make one a court's exhibit, if you like. But the ratification theory that you're seeking here is just not applicable to what came in, into evidence in the trial. Okay. So submit a charge, if you got one, as a court's exhibit; or give it to me if you can find something better than I was able to find at lunch time, when I looked this up.

MR. WHITAKER: And --

THE COURT: Just by subsequent acts is not going to get you there. Okay. You have to tell me what the acts are, show me some law that says that ratifies it. Everyone acted on the easement. We know that. The jury knows that. Okay. But I don't know that the acts of the Assembly, the using the easement can ratify what was a bad document to begin with between others. All right.

MR. WHITAKER: Our position is that it can. I understand --

THE COURT: Okay. Well, find me some law that says that.

MR. WHITAKER: I've got the law in our brief. I don't have anything else right now.

THE COURT: Okay.

MR. WHITAKER: I think that is what it is.

THE COURT: All right. What else?

MR. LUCEY: Nothing from the plaintiffs, Your Honor?

THE COURT: Okay. I will continue to work on the charges while y'all close. And then we will break. We may break in between closings if they are long, because I know the jury will need a break and y'all will probably need a break to set up as well.

So that we can all look at the verdict form one more time before I charge. Okay. And that will be a good time for our afternoon break anyway. Anything else we need to take up before y'all argue?

MR. DUFFY: No, ma'am.

MR. LUCEY: No, ma'am.

THE COURT: All right. Is everybody ready for the jury?

MR. LUCEY: Yes, ma'am.

THE COURT: Okay. Brian, do you want me to just let them know that the defense has rested or do you want to stand up and say the defense rest --

MR. DUFFY: That's fine.

THE COURT: Okay.

(WHEREUPON, the jury enters the courtroom at approximately 2:38 p.m.)

THE BAILIFF: The jury is all present, Your Honor.

THE COURT: Thank you. Ladies and gentlemen, we truly appreciate your patience. The defendants have rested. And we are ready for the closing arguments of counsel, so I'll call on Mr. Lucey.

MR. LUCEY: May it please the court.

THE COURT: Yes, sir.

MR. LUCEY: They sold the park. Tom Graham and Vince Graham took a while, but they both sat here and told you, they sold the park. There wasn't much doubt at the beginning of this case that they had sold the docks, but we were still trying to confirm that they sold the park. They sold the park. You don't sell parks.

We started this case four days ago, and the plaintiff showed you probably four dozen documents on that screen, the evidence that we said would support our claim. And we took you through the documents.

The defendant started this case four days ago and they told you three or four things. They told you that there wasn't a park, they renamed some other park. They renamed Marshwalk Park.

They told you they gave them a dock. They gave them a dock on what they told the State of South Carolina was an unnamed tributary, the marshes of Hobcaw Creek. That's the second thing they told you.

The third thing they told you -- they told you too little, too late. If you had a claim, you should have brought it a long time ago. You are barred now. You can't come back. Sorry. See you later.

The fourth thing that they told you was there was some gang out to get them. There was a Free Civic Lot Gang with all these people. And that they were being unjustly hauled into court and prosecuted and whatever else, and that they were so annoyed by it, that they had brought a counterclaim against my clients, Brad and Lea Ann, for something called abuse of process.

Well, I'm pleased to tell you, that not only did you not see any evidence of abuse of process, but that claim is no longer in this case. It's gone as a matter of law. So that's four defenses they presented. One is down. And we'll look at the other three.

Well, let's revisit where we started four days ago. We started with the consternation that had arisen in the I'On neighborhood in the Fall of 2008, when there were rumors circulating about the sale of the

dock -- the sale of the Creek Club parcel.

And after showing a little bit of background, one of our first exhibits was this Exhibit 58 on the screen, which you've probably seen too many times now. But it's an important Exhibit, March 25, 2009, the defendants told the Assembly and all homeowners present at that Assembly meeting, with an update, two things: The sale is off. And, two, that they were in the process of deeding -- of deeding the community dock to the Assembly.

And as we saw during the trial, and we'll see it the next time I show this slide, not just the dock. They were subdividing a portion of the land that was needed to use the dock, to use the ramp, and to make these community amenities what they were meant to be. They made that representation unbeknownst to the homeowners, unbeknownst to the Assembly.

As it shows you, hours later on that same night, they began negotiations with Mike Russo again. They went back and forth several times on the next day, too. By April 8th, within ten days, 13 days -- by April 8th, Chad, the I'On manager, has announced to them the deal is back on. Do they tell the homeowners? Do they tell the Assembly? No. What do they do? They keep it quiet. They keep it as quiet as they can until it

accidentally leaks on August 1, 2009, when a closing attorney calls the management agent to find out what dues are due on the property, if any, because it's being sold.

And four days later -- four days after the Assembly learns, over the weekend, four days later, the property is sold. And as you saw through the exhibits that we'll revisit in just a moment, the property was sold while the Assembly director present, Mr. Kinney, was negotiating with the Grahams for a modification to the easement, to fix the fact that it wasn't perpetual as the Grahams claimed it was supposed to be.

The e-mail -- the last e-mail on the chain, you'll see again, when we go back to the July 27th chain of e-mails, is Bruce Kinney writing emails about this easement they are trying to fix. And the next e-mail is Mr. Graham's e-mail back, on about August 12th, gee, sorry, Mr. Kinney, we did sell it last week and good luck. Sorry it didn't work out. But, you know, we can't all always get what we want.

And there it went. Sold. August 5th, $1.4 million dollars. That is CV-6 only. The parcel that the docks and the ramps sit on, also sold with CV-5, the overflow parking to this amenity, $275,000, both on this day.

I've got a chronology on the screen, and y'all may already know it better than me. But I want to walk you through it. It's important to our case. I want to walk you through what happened in that first two years, that's so critical to finding out how this all unraveled at this -- at this homeowners association in this neighborhood.

1997, 1998, we had Vince Graham testify that they intended to build and deed the Creek Club dock to the Assembly. He said it here, that's the first thing he said when his attorney called him to the witness stand.

Now, when I asked him about it, it took a while, but I was able to get him to say it again. That was the intent. That was the community dock. They were going to build it and give it to the Assembly.

November 3, 1998, Exhibit 1, that's the date of the HUD Property Report, the disclosure that you've seen so many times. 1998 lot sales and house construction begin.

December 1998, Exhibit 189, the I'On Company proposed to Olde Park regarding the Creek Club overlooking the park. Overlooking the park. And represented to Olde Park, that the docks and ramps were to be conveyed to the Assembly.

Jumping to the next line, let's go to March 24, 1999, the I'On Company and the Olde Park signed a letter agreement emanating from this December 1998 proposal. Using those dates, December '98, March 24, '99, using those documents, among others, we finally got Mr. Graham -- Mr. Vince Graham to tell us when the decision must have occurred, that they were no longer going to deed the amenities to the homeowners; they were going to deed them to a club instead. He agreed. That was the time period, November 3, 1998, March 24, 1999.

Why is that important? Well, if we jump back down here, the Walbeck contract is November 27th of 1999. He was handed the 1998 Property Report. The deal had changed in March. Eight months had lapsed between March and December. The HUD Report was false at the time it was given to Mr. Walbeck.

When he was told about the Creekside Park and the docks around the bend -- you recall his words -- "around the bend" from this lot he liked, and that's one of the reasons he liked it -- when he was told about those amenities that was going to be owned by the Assembly, those representations just like the Property Report were false when made.

The Judge -- and this Court is in charge of the

law. And she will charge -- what we call charge you, instruct you on the law at the close of the case, after my argument, after the defendant's argument. But simply put, I mean, fraud had its elements you have to plead, you have to show.

Simply put, fraud is representing something like that when the representation is false when made, and it's made with the intent that the receiver, the recipient, relied on it. It's made regarding material fact and it causes damage to that recipient, that person that relies upon it, to their detriment. It causes them damage. The representations in the '98 Property Report were false by the time that report was handed to Mr. Walbeck in -- December 7, 1999.

Now, going back in time just for a moment, there's been some question as to the Creekside Park. Okay. There's a lot of correspondences about the docks, but what is the Creekside Park?

Well, for starters, let's go to Julie Hussey, the former employee of the defendants, the person that assisted them with their marketing. The person that not only helped draft the marketing documents, but got them approved by her client, QAQC. Do you remember her saying those words QAQC. Nothing goes out the door without the client approval.

That person, who not only drafted the marketing documents, got the client's approval on the marketing document -- and we'll look at some of those marketing documents, but also the person who testified she took people down to CV-6 and showed them where the community dock was going to be, or at a certain point in time actually was, and where the Creekside Park was going to be. This was part of the marketing.

And what did she tell you about Creekside Park? What did she tell you? Because that's been a source of -- an issue here. What -- Creekside Park? What could that be? Well, it seemed pretty obvious to some people, including one of the people who worked for the I'On Company. She said to you the Creekside Park, it was the park on the creek. Where else could it be?

And there was only one creek. It was Hobcaw Creek. That's where the boating facilities would be. And you know -- you know she's right. Not just because who could doubt anything she said, one of the most credible witnesses in this court, but because the I'On Company's own documents collaborate everything she says.

In August of 1999, Exhibit 86, the I'On Company made application to the State of South Carolina and to the federal government for six dock permits. Dock

number one was on Hobcaw Creek. Docks two, three, four five and six, where were they? In the permit, in the evidence, they were on quote, "an unnamed tributary of Hobcaw Creek". They didn't even call it a creek.

In fact, the older plats in evidence that you'll see -- I think you heard it during week (sic) two -- the older plats call that area the marshes of Hobcaw Creek. It's never, in history, been called a creek. There was one creek at I'On. There was one place where one would have a dock. There's been a dock there for 50 years.

The Jordan track had a dock there. There was an old seafood company that had a dock there. There was an old decrepit dock that she showed you that was on the very front page of that fold out brochure she brought with us -- with her. The old dock that people were shown, this is where the community dock would be. This is where the Creekside Park will be. So their own documents substantiate that that's where it would be.

And as to the existence -- as to this attempt to rename the Marshwalk Park Creekside Park, and say, okay, there's your Creekside Park. No. Good try. Good try. But, no, sorry. The defendant's documents do not bear that out.

What documents am I talking about? Well, why

don't we take Exhibit 189. The December, 1998, Olde Park letter from Vince Graham. He says that the Creek Club is going to be located on a park overlooking Hobcaw Creek. It's in his letter. The response from Olde Park says, we are doing this deal with you for access to Creek Club, that is located -- in the -- on the park that overlooks Hobcaw Creek.

And don't take -- don't take the first two letters word for it alone, look at what's in evidence, I believe it's Exhibit 226, the 1997 budget for the construction of I'On. It's separated out -- the costs, by phases. And certain phases would have different costs because of what was in the phase.

And when they explained the extra costs for phase two, the very first thing it says, "creek front park". Don't rely on your budget, just go to the 1999 -- the late 1999 Design Work Plans. I've got one page here. It's about 10 pages. And it's the parks of I'On. Sheet P 1, this is the first park, P 1, park one. The first primary park site plan, Creek Club at Shelmore Creek Park.

We overlaid it for you on the dock application, Plaintiff's Exhibit 5, same thing as Plaintiff's Exhibit No. 86, we overlaid it. The lay out of the two lots is identical. Everything surrounding that

building in the center was to be a park.

If that's not enough, that's what they told Tim Eble it was going to be, and where it was going to be. We already talked about Mr. Walbeck being shown that -- the location around the bend. And we heard Ms. Adkins say, she didn't need to try and buy a waterfront lot, not that she could afford it, but she didn't need to try and buy it anyway, because she was getting one. The community was getting one. It was right down the road. Community dock and Creekside Park.

So sticking with these early years just for a moment to make sure we understand this flow -- and by the way, not only was the Property Report false when it was handed to Mr. Walbeck on or about November 27, 1999, and the representations false; but, in fact, this is a pattern of false statements.

The August 12, 1999, dock application to the State of South Carolina and to the feds, that was false, too. Never disclosed they already decided that this dock number one was going to be owned by the Creek Club. Never disclosed that it was going to be available to residents from outside the neighborhood. False when filed, a pattern of reckless dissemination of incorrect information.

And down here further on the chronology, we see

December 7th, I'On contract transmittal letter to Walbeck. January, 2000, I'On letter to Walbeck. Down -- I don't think I have it up here, but if I did, I believe it would be July 2000, there is a third I'On letter to Walbeck. Three letters in eight months, not one of them -- not one of them informing Mr. Walbeck that there's been a change in what was set forth in the Property Report. There's been a change about what's going to happen to the amenities and who's going to own them.

And why does it matter? Well, it certainly sounded benign enough when Mr. Vince Graham sat on that witness stand and said, oh, we just wanted to put in a club and more people would be able to use it in the club; right? A couple of neighbors can come, too; right? Great, but not an idea -- well, it wasn't so benign when one sees that the easement they substituted for the deed, expired in 30 years.

That whole neighborhood, 760 residential lots, was going to lose their waterfront access by the time their kids got out of college or graduate school. By the time they retired, it wouldn't be there.

And it's not so benign once you decide, I'm going to go ahead and sell the parks and the docks to somebody else. They are going to have a great ole

wedding venue there. We're going to do better than Shem Creek. We're going to have lots of parties. We're going to have party buses coming down. And you start putting up signs blocking the residents' access to their own docks, and blocking the residents' access to the other facilities down there, and even the Marshwalk.

You might have noticed in those charts we put up there, the Marshwalk has no exit. It's a dead end. If there's no public access to CV-6, it's one way.

And, yes, they tried to tell you that they intended for the easement to be perpetual, because they used that word once on page three and allegedly never saw paragraph 4.2 on page 8, that says it's going to be terminated in 30 years on six months notice, without cause, for any reason.

I mean, common on, we are talking about a set of developers that just took down a piece of property larger than the South of Broad, according to what they told us. They built out to 760 odd residential lots, a dozen or more civic lots, a dozen or more -- I don't know, commercial lots, or whatever else, this is huge. They took it down in rolling phases, because they could -- you know, they could only have so much money tied up at once.

They wrote all these contracts. They did all these Property Reports. They did all this, and they never read the easement? They never saw it was a 30 year easement? That stretches credibility.

And not only does it stretch credibility, but I'm sorry, the only testimony about it from the Grahams, right here, was Vince Graham, when he was made to read his deposition for his answer from two years; ago; where he said, yes, I understand it expires in 18 years. Yes, I understand it to be a problem if something is not done about it. They both said -- Tom Graham said it was a mistake. Vince Graham said it was defective. It's easy to say. Words are easy. Oral -- oral words are easy. It's easy to say, "and I regret it". But they didn't regret it until after they got the $1.4 million for the parcel, because they were given the opportunity to fix it before it sold. They were given several opportunities to fix it.

In evidence, is an attempt by the Assembly, the Board of Directors in the Fall of 2008, to fix it. There is an attempt in the February/March timeframe to fix it. And there's Mr. Kinney still trying to fix it in August of '99. And there's no help from the Grahams. And once it goes to the buyer, 148 Civitas, it's out of the Grahams' control.

And at that point, it's easy to get up here and say, "well, I regret it". They didn't regret it when they were selling the property.

This is the HUD ordinance. This is the HUD ordinance giving the Town of Mount Pleasant sanctioning of this neighborhood, to develop this neighborhood. In that HUD ordinance, was the adoption of the Impact Statement that has the picture of the New Point dock. It looks identical to the I'On dock, that they represented would be a community dock. Read it.

But the point of it is, you had -- had the Grahams up here, kept saying at the time the Walbeck contract occurred in December of 1999, that they were still working through their vision. Their vision. But they just didn't know how it all would work out. So things were just in process and that's just the way it is. Sorry.

Town approval. Towns don't approve visions, they approve plans. You submit your plans, you stick to them unless you get town permission to change.

Not only that, as of December of '99, they had been selling lots and building for 18 months. They are way beyond the vision stage.

There is the Impact Assessment, talking about how this is going to mirror residential communities

where all residents have access to the waterfront at road endings and in established parks. There's only one way to get to the Hobcaw waterfront, that's over CV-6. What does that tell you about where the creek front park is?

Here is their grand plan, 1997, see that grand plan? It's in evidence. See all those phases? That's not a vision; that's a plan. They knew what they were doing.

And right up there, you see there's going to be a clubhouse. And you see the open area around there, on the right of the clubhouse, in front of the clubhouse, and lots of open areas to the left of the clubhouse, where the creek front park was always intended to be.

Civitas, the marketing magazine that Julie Hussey told you about is in evidence. This is where they copied the Impact Assessment language, but this is no longer saying it's going to be like neighborhoods like this, this is describing I'On's -- I'On's neighborhood. "Parks provide access to neighborhoods, lakes and the community docks along Hobcaw Creek, enabling all the residents to enjoy its beauty". There's only one way to get to Hobcaw Creek, and there's only one place to put a park to get to Hobcaw

Creek, that's CV-6, civic lot 6.

This is the Olde Park agreement where we saw in 1998, they all knew where the community dock and boat ramp were going to be, and they also knew where the Creekside Park was going to be, because they told Olde Park where the Creekside Park would be. Creek Club located on our waterfront park, fronting Hobcaw Creek.

And you recall, they keep wanting to tell you, oh, we renamed it Marshwalk. We repeatedly show you that the Marshwalk ends at the edge of lot 275. It does not touch Hobcaw Creek. It does not get anywhere close to Hobcaw Creek. And it is not overlooking Hobcaw Creek. And there is no way physically, that this park in this 1998 letter, could ever be the Marshwalk.

Here is the time period that we got Vince Graham to admit, which was when the decision was made, between the November 3, 1998, Property Report and the March 24, 1999, Olde Park deal, that they decided that the amenities would no longer go to the Assembly.

Their own Property Report that they handed to everybody says, "federal law requires that you receive this report prior to signing a contract or agreement to buy or lease a lot in this subdivision". And they are subject to this report. They needed to be accurate in

the report.

And if you recall we blew up, over Vince Graham's signature on this final page of this report, where he affirmed the accuracy of this report which we know today was, in fact, inaccurate. It was false at the time it was given to Mr. Graham (sic).

And we know that not only because of what we see in March, but the confirmation of the March 1999 transaction with Olde Park, gets reflected in the April 2000 Amended Property Report that occurred eight days after Mr. Walbeck closed on his property. Eight days after he got a deed, they file an amended report. They knew they had changed it. They never told him they changed it. They never notified anybody they changed it.

And there is where they represented to the public they were going to build those three amenities. They are responsible for the construction costs. Upon completion, they will be conveyed to the I'On Assembly by Quit Claim Deed free and clear of all monetary liens, encumbrances of any kind.

They also represented that this will be for the use of lot owners and other members of the Assembly, I'On Assembly, and their respective guests. And we know now that due to their arrangements, the residents

of Olde Park who chose to join the I'On Club, are now respective guests, too, but that wasn't disclosed.

Separately, this is where the defendants want to keep focusing. "There may be other facilities that are not listed above that will be privately owned and operated by somebody else". But that paragraph, if you go on and read it, it says, This specifically excludes the amenities listed in that above chart that we say to you right now, we are going to give you for free. You are going to own it.

And each of these Property Reports we have seen, have a receipt so that they can prove that they have given the federal -- the report out as -- the representing federal law required them. And coming to this -- this is CV-6, as represented to the State of South Carolina and the federal government, where we saw that the Design Work Park, Creek Club Park and Shelmore Park is located -- this is their public notice. They represented to everybody, not just the I'On residents, not just the state and federal government, they published notice that these six community docks were for use of the community.

It happens to be what's in evidence is not only the Army Corps of Engineers -- the original representation by the developer, that the purpose of

the proposed work is for the common private recreational use of the residents within the I'On community. Not only do they represent that one significant feature of the plan preserves the entire approximately half mile waterfront for community access, not only do they represent, again, that the purpose of the proposed structures is for the common recreational use of residents within the I'On community, they represented it on every sheet of every drawing submitted to state and federal governments, that that's what the purpose of those docks out there were going to be.

And in that representation, every one of them, they represented that CV-6, the Creek Club parcel was going to be an HOA parcel, homeowners' association. That's collaborated by several things. They might want you to believe this is a mistake. It's not, and you know it's not. And I'll tell you how you know it's not.

They put that same HOA on the Marshwalk, on the other plats. This is sheet four of 14, if you look at sheet five, six, and seven, you'll see the Marshwalk; every one of the sheets says "HOA" on the Marshwalk.

Secondly, they did call a couple of witnesses in this case, and one of them is an engineer named

Whiteside, Stuart Whiteside. And as it turns out, he wasn't involved in this application, and he was unable to give you any personal knowledge as to this HOA mistake that they wanted him to testify about.

And at the end of his examination by the defendants, he said, no, I don't know. I didn't handle this file. Sometimes we just label stuff HOA, but I don't know that that's what happened in this event.

But we went on to show that it wasn't a mistake while Mr. Whiteside was here with us, we pulled out two of the sealed 1998 and 1999 Seaman Whiteside plans. And HOA number one was how this parcel was labeled on one of those plans. And CV-5, the overflow parking, was labeled HOA number two.

And one question -- Mr. Whiteside told you several things, one of which as a typical matter -- as a matter that's typical for his business practice, before he sealed those other two plans we looked at -- and they are right here in evidence. Before we sealed these, before we seal these, we typically get client approval. They review them. In other words, the I'On Company saw how these things were labeled before they got sealed.

Secondly, we show that one of these has been revised twice. So, one of them started in '98, and one

of them was amended, I think, May of 1999; and that -- I think that was the sewer take off. And then the other one was, I believe, a 1999 plan. So we now have those parcels being referenced as HOA property in numerous different places, one -- two numerous different times, through at least several different calender years.

And -- and -- and on this application by NewKirk, a different company, so two different companies representing that this is an HOA parcel. And not only that, different types of plans.

One of these plans is a civil layout, and it calls that an HOA parcel. The other one is a septic system, subterrain, and it calls that parcel an HOA parcel. So we know that the labeling of HOA on this document was intended, at the time the document was drafted, sometime on or before August 12, 1999.

This is the allocation of some of the Olde Park money to construct the clubhouse on CV-6 that Mr. Graham testified about. They sold Olde Park residents access to the I'On future amenities, and then used some of the money to construct the clubhouse on the Creek Club parcel. And there's $100,000 right there that Mr. Tom Graham directed would be applied to Creekside costs out of the $450,000 they got on that agreement,

and the acre which they divided into four or five more residential lots.

Going back to the Army COE just a moment, the representations as to the purpose and uses of these docks and the waterfront continued. As it turns out, a number of neighbors -- y'all haven't heard a lot of testimony about this, we can only cover so much in trying to get done on Friday, but the documents are in evidence. This document, you are looking at, is in evidence.

After they made the applications, the applicant, the I'On Company, and the state and federal authorities received several objections from neighbors with regards to the proposed building, the proposed construction of these docks. And so the Army COE wrote the I'On Company and said, we want your views on these objections. Give us a response, please.

And the response to -- by the I'On Company to the state and federal governments, once again was, "it's important to note that the I'On master plan does not provide for individual docks. The six docks requested by the I'On Company are for the use and enjoyment of the I'On community, and are proposed in lieu of private docks along the approximately 26 linear feet of waterfront". All for the community.

That statement was so impressive, we'll see in just a moment, that -- I'm going to skip forward through some of these that I think you've seen enough times. I'm going to come back to that Army COE response in just a second. But right here, so I don't have to come back, I just want to, again, point out this is the signature page of the Walbeck contract.

At the top it says, "in witness whereof, the parties set their hands and seals". And when the purchaser signs above to the left, it said, "signed, sealed and delivered in the presence of". And when the seller signed, it said "signed, sealed and delivered in the presence of". And I'm just reminding you before we leave this document, and don't ever come back to it, in my statement -- of our statements during the opening, that it's the plaintiff's allegation that this is a sealed instrument.

It's sealed in three locations. You see the word "sealed" in three locations. It's plaintiff's allegation that a 20 year statute of limitations applied to plaintiffs based upon a sealed instrument. Of course, that's only our allegation. The judge will instruct you on the law that pertains to that.

So here we see that the Olde Park agreement is March 24, 1999. And that's what we established was the

end date as to when the change was made with regards to the deeding of the amenities. The Walbeck deed is March 31, 2000, over one year after the change is made. Over one year before Mr. Walbeck parts with his money, and the defendants still don't tell him that the amenities have been changed. They are going elsewhere.

These are the letters I briefly referred to earlier, we'll skip by them. This is the recreational easement we discussed several times. Again, paragraph 4.2 that terminates in 30 years, either party can give six months notice. And while the judge, again, will charge you on the law, it's the plaintiff's belief that if she so chooses, she'll charge you that if you have conflicting provisions within a document, that the more specific provision controls, or supersedes over a more general provision.

And so in this case, it will be plaintiff's allegation that the more specific provision of how you terminate and when, would have a controlling influence. It would supersede the loose use of the word "perpetual" in a -- front of the document, because this is very specific about the term, the length of the document.

Now, let's pause here for a second. Why -- why do plaintiff's raise this issue? It seems kind of

counterproductive. If we're benefiting from an easement, why wouldn't we want it to be forever, right? Why do we raise it? Because the plaintiffs do want their rights forever. They do want their rights forever. They want what they are entitled to, whatever the jury decides that happens to be.

They want their Assembly to have title. They wanted their Assembly to have title to this property. But whatever it was, they want to be protected.

And as we see back -- going forward in time, this property got sold to a wedding venue operator with this term in the easement. The plaintiffs would not be able to protect their rights. They had to bring this up now and say, look, I know you substituted an easement for our deed, but it's not even a valid easement. It's recorded after -- it's recorded before the I'On Club ever got the title to the property, for one thing.

And then secondly, it expires in 30 years. And I know you want us to think you're a nice guy and you're just going to let us stay there, but now the wedding venue is owned by a commercial operator. He's under no legal obligation to honor the word "perpetual" in the front, when you have a term like this in the back. And so it was actually in the homeowners'

interests to force this issue out, and to say this document is not what it appears to be. We are, once again, being hoodwinked.

They stuck the word "perpetual" in the front of the document in case somebody read a couple of pages. You get to page three, you'll see "perpetual". Only if you read all the way to page eight, you'll see that perpetual ain't so perpetual.

And, of course, it goes without saying this is -- this is one of those documents that is signed by an I'On Company employee for three different entities, one of them which is the Assembly. And it hardly has the appearance of an arm's length transaction.

And if you recall, we looked at this briefly during the opening, and I mentioned at that time one of -- of the plaintiff's claims was breach of fiduciary duty. And in trying to put it in layperson terms, basically in part that's saying, where one person or one company wears two hats, and they're making a transaction between each of the companies they represent, that they have -- they have to be balanced. They have to be fair.

They can't use the position of trust of both companies, take advantage of one company, or to take advantage of the other company. You need full

disclosure both ways. A fiduciary duty arises when you're in a conflict of interest.

Our claim -- one of the plaintiff's claim, and it's a fact -- it's a derivative claim on behalf of the Assembly, not on behalf of Brad or Lea Ann individually, but on behalf of the Assembly. The claim is that the developers, and these shenanigans we're showing you about these amenities, and each sub transaction therein, but in the entire pattern -- and it especially -- what gave rise to this suit, the sale to Russo, that they breached their fiduciary duty. They favored themselves over the association. And when you're in this middle position, you can't do that.

And the homeowners -- the homeowners weren't privy to some of the evidence you see, the e-mails. The homeowners aren't copied on any of those e-mails. A lot of this went on without them knowing it.

But when the transaction occurred with Russo, and they looked at it, and they -- they saw some of the other things that the developer had privately done, in some of these e-mails -- after the litigation began too, that the developer had privately done, they were able to see how they had been slowly prejudiced over time without them even being -- knowing about it. It was kind of a slope that they traveled down, and the

last piece of that slope, the one that kicked them in the face, is when the amenities were sold to a third party. And that occurred on August 5, 2009.

This particular slide just shows you, once again, the easement occurred before the Walbeck deed. We clearly know the change in amenities has occurred by now, and Mr. Walbeck wasn't told about it.

I mentioned to you we left the Department of Army Corps of Engineers document just a few minutes ago, what's important about this evidence is that when the Army Corps of Engineers inquires of the I'On Company about these objections for the neighbors, the -- I'On Company, through their agent, Newkirk -- this is in documents in evidence -- writes back and, once again, tells the federal government what the purpose of these facilities are. And the federal government thinks it's so important, they copy, they quote from the I'On Company's response right in their decision granting these docks.

And what was that response? Once again, to the federal government on February 28, 2000 -- this is now six months after the initial application -- "It's important to note that the I'On's master plan does not provide for individual docks. The six docks requested by the I'On Company are for the use and enjoyment of

the I'On community, and are proposed in lieu of individual and private docks along approximately 2600 linear feet of marsh front". The same representation.

Let's look at these two words, too, while we're here, "master plan". In evidence, Defendant's Exhibit 4, 1997 Dock Master Plan. All the docks are in the same location. Yeah, they may be a foot larger. They may be a foot smaller. They may have even added a staging dock to tie up to next to the boat ramp. All the docks in the 1999 application are in the 1997 dock master plan, Defendant's Exhibit 4. Why?

This vision stuff, it was just a vision. We didn't know what was going to happen. No. It was a plan, and a dock plan had been approved long ago. There was no vision -- they saw some money. A chance to make some money by selling some access and some sewer taps, and access to the I'On amenities to the neighborhood next door. They jumped on it. Just like when they saw the opportunity to sell CV-6 instead of giving it to the Assembly in 2009, they jumped on it.

This, on the screen, is the April 2000 Amended Report. There can be no uncertainty -- and especially when you read this report in conjunction with the Stubblefield e-mail -- the Joann Stubblefield e-mail, the HUD Property Report attorney from Atlanta.

If you read this April 2000 Property Report, in conjunction with her e-mail, it confirms what we got Vince Graham to admit, that a change was made. They decided not to deed it to the Assembly. They decided to deed it to the club. And that change was made, and finally reflected in April 2000 in a Property Report that was never provided to Mr. Walbeck. Those are a couple of the letters.

This screen here just shows how the easement is out of order. The I'On Club is the grantor of the easement. And on February 9th, when they granted the easement, they didn't own the property. The easement -- excuse me -- the deed to the I'On Club doesn't occur until August 15, 2000.

There is a receipt ledger. It's Plaintiff's Exhibit 115 7-A. You know how they wanted to jump up and down with Brad and Lea Ann, when they're on the witness stand because they couldn't name everybody else that got the Property Report, that's because the I'On Company had the receipts. And here is their ledger of those receipts. That's a lot of people. This is Plaintiff's Exhibit 115 A.

Also in evidence is Plaintiff's Exhibit 150. It's a stack of receipts that's about an inch and a quarter thick. That shows the number of people -- and

the minimum number of people -- the admitted -- the conceded number of people that got the April -- excuse me -- that got the November 3, 1998, Property Report that we had shown was inaccurate by March 24, 1999.

And when they took the stand, they conceded that there were at least 50 people left in the neighborhood that still owned property there, that got that same Property Report.

This is some of that community marketing that we referenced earlier. This is after Ms. Hussey's tenure. But we already heard her tell us, that the practice was QAQC. No marketing material goes out without the client's approval. This is the I'On Company's marketing material. It's a fact sheet. It's one of a number of them. I'm going to show you another one in a second.

You will consistently see the representations regarding the community docks and the boat landing being available to all the residents. Well, they want to -- they want to splice some fine hairs here. They want to say, well, these marketing materials don't say we are going to give it. And by then, we changed our mind.

Well, you know, what else none of the marketing materials ever, ever, ever, ever, ever showed? None of

the marketing materials ever referred to the waterfront access being by easement, none. And none of the marketing materials ever referred to the easement being only 30 years. None of the marketing materials ever allowed for the possibility that in the year 2020, if my math is right, 2030 -- 2030 that I'On would no longer be a waterfront neighborhood. Think about it.

2030, I'On, the easement expires. It's terminated by the other side. I'On would no longer be waterfront. It'd probably be the only neighborhood on Mathis Ferry that's not.

This is a June 2005 handover agreement we discussed during the case. We've discussed that the -- about the end of 2005, when the transition -- the full transition was taking place, from a developer Board to a homeowner Board, and this is the agreement reached between the developer and the homeowners as to how the transfer of amenities would be taking place in this community. Why do we care?

Well, because defendants have said to you in their opening, too little, too late. Y'all should have sued us a long time ago. Well, here we see, it's just 2005 when the process gets put into place for the amenities to be transferred in an orderly fashion to the community.

And you will see, in evidence, the regular transfer of amenities. And the very first requirement is that I'On Company, not the homeowners, the I'On Company will notify the I'On Assembly Board when common area property instructions are ready to be handed over to the Assembly.

Under this agreement, it was the I'On Company that was supposed to tell the homeowners when they were ready to deed over the waterfront amenities. It is only then that -- and they had to provide them information about the amenities -- they would inspect it together. And then if it was in good repair, fine. If it wasn't, the I'On Company would have to repair it and then it would be transferred. This is the orderly process.

And to jump out of order for a second in my screens, we are going to see in a moment, though, the -- excuse me -- the Fall of 2007 Board minutes, when the I'On Company says to the homeowners association, we are ready to turn over the community docks and boat ramp, the homeowners association says to them, okay, but I'm not sure they are in good repair. I hear they are not. And this is in the minutes. I hear they are not.

You get with Ward Mundy or Matt Walsh, I'm not

sure which one -- he was a Board member. You and Chad Besenfelder get with him. You all inspect them. You work through it. And when -- when y'all are ready to do it, let us have your proposal for what's being turned over and how it's being turned over. February 2007 is the first time that the I'On Company almost formally said, we are ready for a turnover of the docks.

Here's another fact sheet a year later from the one I showed you a moment ago. Not one disclosure about an easement in existence, not one disclosure that it's a 30 year easement. No disclosure that the waterfront access will be gone sometime in the future.

This is Exhibit 180 before -- apparently five months before they offer the turnover of the docks to the association, they start discussing what other options might be available to them to make some money off of these docks. The homeowners don't know this. We are not copied on this.

And, in fact, if you go to Exhibit 180, you'll see -- or one of the associated exhibits in this chain -- it may be at several numbers further along the way -- you'll actually see a response by one of these people to Mark and Kim saying, keep this on the quiet for now. It would cause a problem.

Again, July 2007, homeowners don't know it, but they are discussing alternates to what they might do with this property, besides give it to the homeowners. And eventually we'll see, they concocted this idea that they would tie the transfer of the docks and CV-6 and the Creek Club, to the Board being required to be a co-applicant with the Town of Mount Pleasant, to add 30 to 40 lots in something called phase XI.

Why do they have to go back to get more lot permits? They used up the 760 that they had been given. They didn't think they'd get approval, that's why they wanted the Board of Directors to make the application.

We saw the grand plan. The grand plan used all of the real estate in I'On. It used it. So how is there five acres left over? How is there five acres for 40 more permits? And is that why you need the Board to take care of it for you, and then you link the transfer of our amenities to us, based upon us getting you 30 to 40 more building permits; that's not -- that's not right.

More marketing brochures. On the screen is Exhibit 51, it's called Celebrating Ten Years in I'On. You heard me discuss this with Vince Graham. They keep wanting to say that those two docks down on the unnamed

tributary, those are the community docks. That's what was in the Property Report. That's what we promised to give you. Well, that's not what -- that's not what their own marketing materials say. They kept wanting to not call them crabbing docks during the whole trial.

Even when we put this on the screen, and I asked Mr. Graham three, four, five times, tell us which docks are the crabbing docks. He wouldn't do. He wouldn't do it. So, finally, I said, "well, okay, are there three docks on the unnamed tributary?" He said, "Yes". And so right here, if there's one main dock on Hobcaw Creek, and there's three crabbing docks and there's three docks on the unnamed tributary, it's not hard to figure out which one is the community dock.

This is the Exhibit 111, the Fall 2007 amenity turnover proposal, where Chad was told to get with a certain Board member, to look into the condition of the property. This is -- this is Besenfelder's e-mail to South Carolina DNR, the State of South Carolina, April 2008, where he's saying, we are ready to turn over the docks and boat ramps to the Assembly, to the homeowners association. We are checking with you on a couple of details to make sure we're handling it right.

This is followed by the confirmation of the deal to Russo -- again, this is always 2008, before the

homeowners or the Assembly know that there's even discussions to sell this amenity. This is followed by a confirmation of the deal between the I'On Company and the buyer, the proposed buyer, where the I'On Company confirms that the boat ramp and community dock will stay with the I'On Company, because it's going to be transferred to the Assembly.

So we see in April of 2008, they're telling the State of South Carolina they are about to transfer these amenities to the Assembly. In August of 2008, they're telling a proposed buyer they are about to transfer these amenities to the Assembly.

September 2008, the I'On Company tells Russo the docks were promised handovers to the homeowners and Vince would like to honor that some day, couldn't be much more clear.

Until October of 2008. And right there -- right there, 209 -- Exhibit 209, that's where it happened. And, of course, you'll notice that the Assembly and the homeowners are not copied on this e-mail. This is where it happened, right here. Exhibit 209. They were going into a Town of Mount Pleasant meeting to get approval of the continued use of the Creek Club as a wedding facility on civic parcel 6. And the buyer was requiring this to go through with the deal.

And they figured if they separated the docks, they would put their civic zoning at risk, the civic use at risk. And so Chad writes to Vince Graham and Tom Graham -- you see up there -- and he gives them the idea, here's the proposal. If we want the sale of the wedding event facility to go through, do not separate the docks from the Creek Club. You'll recall when we saw in August 11th, in the deal, the I'On Company is going to keep the docks and give them to the Assembly.

Here, we see they've realized to make their money on this parcel, they need to break the deal. They need to keep the docks as part of the sale to get town approval.

February 2009, one homeowner puts the Board on notice of the Property Report claims, and sends the Board a copy of the Property Report. March 11, 2009, that Board president, Bruce Kinney, writes to the I'On Company and says, "I've recently provided information that those amenities, those boating facility amenities, they belong -- they are supposed to belong to us; given to us, included with the other amenities that you are transferring.

And as you'll see, if you look at this letter, there is actually other amenities being transferred right now. This is an on-going process. And Mr.

Kinney just politely says, include the docks with it. But he goes on to say, by the way, the HUD Property Report mentions a Creekside Park. Did it ever get built? Where is it? Explain this to me.

That's when, shortly after that, is when we find this explanation that the Marshwalk Park was a renamed Creekside Park, the first time. First time that that was in an e-mail, ever.

Here in March 14, 2009, there's more dialogue about what's going to happen to these docks. And to save time, we're going to skip forward to March 24, 2009, which is an e-mail -- number -- Exhibit Number 218, where they're discussing the deeding of land to the Assembly, to go with the docks. The deal -- the Russo deal is starting to go back off now. They are about to tell the association they are going to give them the docks.

They send this e-mail. Chad sends this e-mail to Vince and Tom that says, "We've got several options here. We've got to give them the docks. It's causing too much of a problem. We can give them an easement or a little bit of land right here, or we can give them a deed to this right here, how much land there is" -- in this e-mail, read it yourself -- "how much land we give them depends on a few things. We can fight about it.

They are going to be complaining anyway, give them just a little bit, an amount now, and let's just see what we can get away with."

And, by the way, one of pros -- one of the pros of giving them some land with those docks, is that if we need to, we'll be able to call it the Creekside Park. The Creekside Park.

Now, if you overlay the design, the 1999 park design with Chad's drawing about the land that's supposed to go to the Assembly with these docks now, it's a perfect match, isn't it? In fact, he's just suggesting we give part of the original park. We'll keep this area here, the lawn that Tom Graham testified was the original park.

Again, March 25th, 2009, we're back to the start of the story, the I'On Company tells the Assembly the deal is off. We are not selling it and we're in the process of deeding, not only the community dock to the Assembly, but subdividing a parcel to be recorded and deeded. Because implicit always with the docks and the boat ramp, you can't launch a boat on a ramp, if you can't pull up to it in your car. Implicit always with the amenities of a dock and a boat ramp, is a way to get to them. That's called real estate. There always had to be a piece of land that went with those

amenities. It happens to be, in 1998 it was called a Creekside Park.

But we see, again, within hours, the Grahams start negotiating again with the buyer. And we have seen some of this, so we are going to fast forward. This is something you may not have seen.

This is the June 18, 2009, contract that they eventually entered, to sell this property to the buyer. They entered it without the Assembly's knowledge -- without the association's knowledge. And if you look at paragraph 26 of that contract, we know that both the seller and the buyer are cooperating in this claim -- in -- excuse me -- in this transaction with full knowledge of the very claims you are here to hear today.

It says right there, "Buyer also acknowledges that seller has disclosed to buyer that certain owners in the I'On neighborhood have alleged certain rights and interests in the real property and dock facilities located thereon, with a HUD Property Report prepared and issued by TIC as a developer of the I'On neighborhood." With full knowledge of this problem, they proceeded to contract to sell the property.

The homeowners learned of it on August 1st. It went out -- and it was not until December 15, 2009,

five months after the sale on August 5, 2009, that Vince Graham withdrew the HUD property registration with the Department of Urban Housing, December 2009. And there's his signature.

And marketing, again -- back to marketing -- if you had gone to the I'On web page as of 2010, as of December, 2013, perhaps today -- I don't know -- but this, I believe, is from November, 2013, it's in evidence. What would you see? You'd see a printout of their web page. And you would see a representation about the community access to the deep water. And what you would not see -- and you'd see it several times.

And what you would not see, you would not see the word "easement". And you would not see the word "30 years". You would just see the I'On as a waterfront community.

So the plaintiffs, as the defendants informed you, the plaintiffs did also sue the buyer. They sued the buyer. They sued the I'On Company. And they did what they had to do, the Assembly and the plaintiffs cooperated in getting done what had to be done to get back CV-6; to get back the boat docks; to get back the ramp; to get back the parking; to get back the access; to get back the overflow parking. They bought it from the only person, the only entity that could sell it,

the buyer, 148 Civitas.

Obviously, it goes without saying, we were a bit of -- when we went to buy it, we were, to some extent, a captive buyer. He's the only seller and we are looking to get our -- the only waterfront, the only deep water parcel in I'On back.

And so, yes, the homeowners association paid a half million dollars in cash, gave Russo a 20 year lease at a dollar a year for his wedding events, his venue. And that leaves us two, five year options, where they do start to get some of the rent that they should be getting, so it's potentially a 30 year lease.

But the Assembly and the plaintiffs were able to build in an option where they could buy out that last ten years for a half million dollars per option, or a million dollars total. And they get the overflow parking lot back in 20 years. And they were able to reach some agreement about limiting the activities on the property. I think they are limited -- I think I heard Mr. Evans ask the appraiser about it. I think they are limited to 128 weddings a year, something like that, and no more than three a day -- or three a week. So there's some -- some tangential benefit there. And that's -- that's what the plaintiff had to do to put themselves back into the position of being a waterfront

community.

I've mention a couple of plaintiff's claims to -- as we've been through the evidence, when a particular piece of evidence came up to help me explain it, but let me -- let me go through it in just a little more detail for a moment. I want to first talk about the plaintiff's claims for breach of contract.

All three plaintiffs -- I'm going to speak of three, even though there's only two people. You know that Brad and Lea Ann are representing the Assembly in what's called a derivative action, and we explained that in the opening statement. When an entity and association or corporation doesn't do something its members or shareholders thinks it should do, a member or shareholder may sometimes bring what's called a derivative action. They bring that suit on behalf of the entity that's not acting. And Brad and Lee Ann have done that on behalf of the Assembly, because after the Assembly -- after the transaction with Russo took place, it appears as though the Assembly figured the horse was out of the barn, and there was nothing that could be done about it.

And Brad originally, and later Lea Ann joined him, Brad took it upon himself -- he wasn't going to stand for that, he took it upon himself to bring the

claim individually and derivatively.

And the breach of contract cause of action, Brad's contract is Plaintiff's Exhibit No. 2. And you recall, it's specifically in paragraph -- I think it's 10 -- maybe eight -- incorporates by reference the Property Report. It also has the same recreational facility list, chart, that's in the Property Report.

And Mr. Walbeck has brought a claim saying by failing to transfer the community docks to us -- the community dock, and by failing to transfer the Creekside Park, you have, in fact, breached my contract, and I'm entitled to damages for that.

And you heard Mr. Walbeck testify that he would have paid less for his lot -- he would have paid less if he wasn't getting his share of access, his share of ownership in the community deep water facility that's supposed to be there.

And basically a breach of contract, it might go without saying, but it's basically where two parties have reached a deal. One party ignores the deal and does something else; the other party says, breach of contract. I paid you money -- and in Brad's case, I think it was $69,000 -- I paid you money for you to do what you said you would do. You took my money and you didn't do it. And that, in the simplest sense, is the

breach of contract. And, again, the judge will give you the law at the close of the case.

Lea Ann also has a breach of contract claim, as does the Assembly, but it's different than Brad's. Their breach of contract claim is a breach of third party beneficiary. In other words, they are suing on Brad's contract and on every other contract that was in that list that you saw, that got the Property Report that had the same chart of amenities in it.

They are saying, the contract, on the very face of it, by its own terms, the contract provided that these amenities would be deeded to the Assembly. So the Assembly was an intended beneficiary of that contract. It was to get a deed. And the other homeowners were also an intended beneficiary of that contract, they would be able to use the amenity. And so they have brought what are called third party beneficiary claims based upon what was supposed to be done in those hundred or so contracts that you will see in Plaintiff's Exhibit -- referenced in Plaintiff's Exhibit 115 A.

And the second cause -- we have discussed breach of fiduciary duty briefly, that cause of action is actually a little bit broader than what I already explained to you. It's plaintiff's belief and

allegation that besides the two party thing that I explained to you, besides the conflict of interest, besides that, that actually a developer of a neighborhood owes a fiduciary duty to the ensuing neighborhood, the ensuing homeowners association; to do it properly; to develop it properly; to treat it fairly until -- until they are no longer together again.

MR. DUFFY: Your Honor, may we approach, please?

THE COURT: You may.

(Whereupon, a side bar was held.)

THE COURT: Objection is sustained. Ladies and gentlemen, the attorneys are zealous advocates and they argue vigorously on behalf of their client, but any definition as to what the law is, will come from the court. Okay.

MR. LUCEY: Additional claims by the plaintiff include negligent misrepresentation, and you already heard fraud. I've explained fraud. The court will explain the law on fraud. The difference in negligent misrepresentation for simplistic purposes, is simply that the misrepresentation, the false representation was negligently made. In other words, you didn't mean to. It was false, but perhaps you didn't intentionally do it. And that's the difference between those two claims. And -- and those are simply alternative

claims.

And, again, the judge will instruct you on the law, but we believe in a situation -- the plaintiff alleges that in a situation where one party has superior knowledge, or superior ability, or superior access to information, that they have a duty to provide accurate information.

And just for clarity purposes, and while the judge will instruct you on the law, it's the plaintiff's allegation that a material omission -- omission, silence, failure to state, is the same as a material misrepresentation. But, again, the judge will instruct you on the law.

The plaintiff has brought a claim under the Interstate Land Sales Act. The fact -- the factual components overlap the other claims. The factual basis of the -- and the claim basis is that misrepresentations were made in marketing materials or the HUD report -- and/or the HUD report regarding the facilities, the amenities that the developer said he would -- he would provide to the neighborhood.

The other cause of action is the Unfair Trade Practices Act. It's, again, the judge will provide you the law, but plaintiffs believe that the defendants are engaged in commerce, engaged in business. They are

engaged in activities that affect the public, and that those activities have been unfair or deceptive. And that the individual plaintiffs, Brad and Lea Ann, have been damaged by those unfair or deceptive claims.

I mentioned to you at opening, and just briefly reiterate again, plaintiffs also have a claim that the defendant's conduct was made with willful or reckless disregard of the rights of others, and with wanton conduct. And the plaintiffs are asking you for a finding that, in fact, the conduct was reckless, willful and wanton.

With regards to the plaintiffs -- I'm going to skip through here quickly, there is docks two and three. There we saw that the dock they said they gave us in lieu of the community dock at low tide, I want to just get through here to damages.

Ms. Lea Ann Adkins testified about the plaintiff's damages, the derivative damages, and Mr. Walbeck substantiated that. The Assembly has paid a half million dollars as a down payment to buy back the property. And they gave a 20 year lease on a lease that's valued at $2 million dollars.

You heard from appraiser, Michael White by video regarding his appraisal of the value of that dollar a year lease. And he defined that value as the

difference between what the tenant had to pay by contract, and what the market value would be on that property if it was rented full market value.

He multiplied out what those damages were, and then he reduced it to what's called "present value". In other words, rather than you getting this whole rent over 20 years, if you got it all today, you would accept less. And so he reduced that whole rent to a present day value using a discount rate of six percent, and he valued that 20 year lease at roughly $2 million dollars. You see it on the screen.

And it will cost the Assembly, it will cost the Association a million dollars to buy out the last two, five year terms on that lease. They don't have a right to buy out the first 20 years, or any part of it, but they do have a right to buy out the last five years. That is a million dollars. The total damages that the plaintiffs have calculated are $3.5 million dollars.

Lea Ann Adkins, when she testified, told you she was only asking on behalf of the Assembly, for $2.5 million. And she explained that to you. She said the defendants claim that in this transaction, we got some things they say we're not entitled to. She said, we believe we are entitled to them. It's not our responsibility that you built that building on our

park. And by the way, it's supposed to be a clubhouse anyway.

But to be fair to you, and to give you the complete benefit of the doubt, I'm reducing the damages by a million dollars. Because you say I'm -- I -- I wasn't entitled to the building, and you also say I'm not entitled to the overflow parking and a few other things, so I'm reducing it to $2.5 million dollars. And so the net damages would be two point -- just under $2.5 million dollars -- 2.470 if you agree with her million dollar deduction.

The verdict form in this matter is complicated and the judge will give you some guidance on it. It has each of those causes of action that the plaintiff has brought and has talked to you about, and they are separated out.

And under each cause of action, there's an opportunity either to rule in favor of the defendants, or rule in favor of the plaintiffs. And on certain causes of action, there's a spot for a monetary figure.

And before they even get to those causes of action, they are asking you to set forth when plaintiffs knew or should have known that they had a claim to bring, that they should sue the developer. When they knew or should have known that they should

sue the developer.

And it's the plaintiff's position that they knew they should have known on August 5th -- actually August 11th, when they learned -- but use the deed date, August 5, 2009, is when they knew or should have known that they should sue developer.

And in considering that answer, I would like you to -- to please remember, I asked Mr. Graham, Mr. Tom Graham, when we looked at Exhibit 58 together, the March 25, 2009, e-mail, saying we're in the process of deeding over the docks, the ramp and a parcel of land. I said to him, sir, was it reasonable for the Assembly to rely on that representation with Chad Besenfelder? Yes. Would you have expected them to sue you after getting that e-mail from you? He said, I don't know why they would sue us anyway, no. And, so, we see that the course of conduct is such that the plaintiffs were entitled to rely on the representation of the transfer. It was not until the amenities were sold out from underneath them at midnight, closing on August 5, 2009, that their causes of action arose.

So as to the Assembly, and as to each plaintiff, the plaintiffs request that you find that the date they knew or should have known that they should sue the I'On Company was August 5, 2009. And we ask you to put that

date into each of those questions.

And with regards to the -- the other causes of action and the other damages, we ask that you award -- whatever the jury decides the damages -- and that is completely in your province. You are the fact finder. Whatever the jury decides those damages are, we ask that you award the full amount of those damages on any cause of action, negligent misrepresentation, fraud, yada yada, whatever it is, every cause of action that you think applies, that you think we have proved in our case -- and let's keep in mind, the judge will instruct you on this -- but in almost all of these claims but one, which I'll talk to you about in a second, the plaintiff's burden of proof is by a preponderance of the evidence.

So if my arms represent the scales of justice, if the plaintiffs tip it like this, they have proven their case. Every question but one, this -- we believe the judge will instruct you -- is our burden.

There is one question where the burden is this -- and that's the final question on the claims on the verdict form -- that's the question as to whether or not we've proven that the defendant's conduct was reckless, willful or wanton. If you read that question carefully, you will see that the judge has probably

written it, that we must prove that by clear and convincing evidence. And we believe we have. And we ask you for a finding that we have proved that by clear and convincing evidence.

THE COURT: Mr. Lucey, just one second. Was there an objection?

MR. DUFFY: Yes, thank you.

(Whereupon, there was a side bar held.)

THE COURT: Ladies and gentlemen, these -- everybody has been working hard all week. There are a few other things about the burden of proof that I will instruct you on. So, again, listen to the lawyers' arguments, but you'll need to rely on what the court tells you regarding the burden of proof and the legal theories. Okay. Thank you.

MR. LUCEY: And, frankly, I have to clarify -- and the judge will again instruct you on the burdens of proof, but I'll clarify. The burden of prove as to fraud is also like this, it is clear and convincing evidence. And we believe we have shown that.

It can't be much more clearer, that as of December -- November 27, 1999, at the time the Property Report and contract was given to Brad Walbeck, that the deal had already changed and the amenities were no longer going to the Assembly. And the representations

to the contrary, in both of those -- both of those documents constitute clear and convincing evidence of fraud.

And -- and -- and that's -- that's something that's -- it's important to us to be clear with here, we are not just saying there was a willie nillie future promise, oh, I might do something. We are saying that there was a clear, cogent, cement like representation in November 27, 1999, that was false when made, and that the maker of the representation knew it was false when made.

And there's one other interrogatory that the court will likely submit to you, and that's relating to the Unfair Trade Practice cause of action, and that -- she'll ask you for a finding as to whether or not the violation of the Unfair Trade Practice Act -- in other words, whether or not the unfair or deceptive conduct in the commerce trade or business was an intentional violation; an intentional violation. And the plaintiffs would ask that you find that it was an intentional violation.

And we ask that -- we ask that you make -- you make the Brad and Lea Anns of the neighborhood and the Assembly whole. We ask that you award every penny of damages that we have proved this week. We ask that we

be awarded under every cause of action. The judge will make sure that the Plaintiff only recovers once. But we ask you to complete the damage award on every claim, full damages for any claim we've proven. Thank you.

THE COURT: Thank you, sir. Okay. Ladies and gentlemen, I need to let the lawyers switch up so that Mr. Duffy can give his closing. Y'all take about a ten minute break. Please don't discuss the case yet. I know y'all are tired of hearing me say that every time you leave the room, and we'll get you back in here as quickly as we can. Thank you very much.

(WHEREUPON, the jury leaves the courtroom at 4:03 p.m.)

THE COURT: All right. I just wanted to make sure I've got everybody here. We are getting ready to hear Mr. Duffy's closing. There's a lot of information in this case, then Mr. Lucey gets to talk again. We've still got some things we want to -- we need to hammer out on the charge. Seth, I'm sorry, if I was snappy with you, I know I'm getting tired. I think y'all probably are, but I won't speak for you.

I have never charged a jury on a Friday as late as we will be charging this one. I am probably going to ask them, after the last closing arguments, what they want to do as far as whether they want to come

back tomorrow, whether they want to come back Monday, or whether they just want to charge on thru.

My daughter is with her dad and stepmom tonight, I can stay as late as possible. But when I make the decision to do that, all these other people have to, too.

How would y'all prefer, although I'm not necessarily going to do what y'all suggest, what do you -- how do you want to do it?

MR. LUCEY: Plaintiffs prefer to push through tonight, Your Honor, but we're good with whatever the court is good with.

THE COURT: Any strong feeling one way or the other on this?

MR. DUFFY: Only that I prefer Saturday to Monday, but...

THE COURT: Okay. All right. Well, here's our other problem. This has been a great jury and they're paying great attention. There is one lady on the jury that let me know on Monday that she had a husband going into surgery on Monday. Nobody else has given me any indication that they've got a problem coming back either tomorrow or Monday.

So if we do choose to come back Monday, we'll be subbing in the alternate, so y'all keep that in mind.

But always what I don't want to do, is push through until midnight tonight, and they say, we want to go home. And then all of a sudden that lady says, I can't come back and freaks out. So that's why I'm telling y'all now, not to stress anybody out, but just -- I'm going to ask the jury what they want to do. And, quite frankly, defer to them. And that's what I normally do. And they say something different every time. Sometimes they want to come back on a Saturday; sometimes they want to come back on a Monday; sometimes they want to just stay here until they are done, so they never have to come back again. But anyway. Y'all take five and we'll get set up for Mr. Duffy's closing. Y'all probably saw this conversation coming, but I just -- I don't want to mess up the charge or anything else because we've tried to rush things too much. That's my issue. So okay. We'll be at ease.

(WHEREUPON, a brief recess was taken.)

THE COURT: I had our clerk do a little informal poll of the jury, they want to stay and keep working. So I'm all for that while their minds are fresh. We'll just bring in food for everybody. All right. Y'all ready for the jury? Everybody?

MR. EVANS: Yes, ma'am.

THE COURT: All right. Let's bring them on in,

please, sir.

(WHEREUPON, the jury enters the courtroom at approximately 4:22 p.m.)

THE BAILIFF: All the jurors are present, Your Honor.

THE COURT: All right. Thank you, sir. Thank you, ladies and gentlemen. Please give your attention to Mr. Duffy for his closing argument.

MR. DUFFY: Thank you, Your Honor. May it please the court.

Ladies and gentlemen, it's a tough duty, as I said when we started. Tough duty. It was going to boil down to some simple questions. A tough duty because we're going to have to unravel a lot of things that have been packed in from 1998 through the history of the development, before the property was purchased, all the way to the 2009, and subsequent timeframe we've seen on the documents. Fortunately, though, Mr. Lucey has already cut some of the straggling things that have started unraveling already.

The claim to CV-5, we understand that they don't think we're entitled to that, see we will give that up. Oh, the Creek Club, okay, okay, we understand they don't think we're entitled to that, so we'll give that up. Really? Or is it because they all swore that

nobody told them they were getting the Creek Club. They never had any chance for a claim for CV-5. But, like I told you, they had that one claim to talk about, about a community dock from the 1998 report, to get their foot in the door, and they started grabbing.

When they realized, oh, that looks like we're reaching a little too high, I'll leave that alone. They swore to it, though, they're entitled to it, but now they're going to leave it alone. That's what you ought to think about when they're asking you for other things.

Credibility of what they really thought they were supposed to get and what they were entitled to. What they really could rely on and what they are entitled to, what you decide they are entitled to.

They never -- they didn't give up those claims until they were here and realized how it was going to come out. They swore they were entitled to it before. They had been promised CV-5, that that was supposed to be conveyed by the defendants. That the other civic lot -- by the way, civic lots as you have seen, have never been intended to be sold or to -- to the Assembly -- given over free and clear to the Assembly.

They wanted another civic lot, there's no -- that's down the road, not near what they claim to be a

Creekside Park or any of the community docks, but it's gone now. That's the straggler -- those things are unraveling already. You don't have to unpack that part. But we do have to unpack a lot more.

So what I ask you to do, I won't go through every document -- and one of the disadvantages of being on the defense side, is that Mr. Lucey gets to get back up and he's going to show you more things anyway, so I don't get to respond to every document that's going to come up. But I'll ask you to do the unpacking as part of your oath, as jurors.

When a document comes -- is presented to you, and it's suggested that it represents a promise to the plaintiffs that they relied on, ask yourself the who, what, where, when, why, how questions about the document.

Who was it presented to? You know, the -- the -- we'll look at the details a little bit. I am going to show some things that -- it used to be that the Impact Assessment was their favorite document to show what the Creekside Park is -- we're going to look at a lot of references to that. Until they realized, oh, that picture isn't Alhambra Hall. Let's find something else.

Now, my favorite document is the permit for a --

what was it -- a sewer or -- whatever it was -- where permits were being submitted for an entirely different purpose, had nothing to do with indicating who is going to be getting the recreational facilities. And it was prepared by people who say they use those designations all the time.

But that's what they are using to say, ah ha, we were supposed to get this. They never saw it, mind you, until well after they bought their property -- more than -- certainly with Mr. Walbeck, more than ten years. I don't know, eight years or so for Ms. Adkins, but they claim that that is going to that -- they are going to be entitled to it for that reason.

Now, I do think it's interesting that one document you've seen a lot of, that says "HOA", it says "Creek Club HOA", yet they do recognize they're not supposed to have the Creek Club, but that must mean we get the whole parcel. Or, wait a minute, is it just this part where you're talking to Olde Park, you said there might be something in between.

And then you got Vince Graham to say, yeah, that Shelmore Point Park is represented -- they -- the drawings often had the ends of Marshwalk little -- you know, Hope Town Point Park would get named that. And yeah, that one park, they said -- yeah, that part of

the Marshwalk is named that at one point, not this whole CV-6. And yeah, yeah, that was sold. They say that's right.

And you know what, we can argue about that all along, whether Shelmore Point Park -- you never see -- you never see another reference to Creekside Park, except pointing to the Marshwalk, in Defendant's Exhibit 3.

But let's say -- let's say, okay, if you want to say there was a little park there, that was going to be Creekside Park because it was on the creek, now we looked at 20 -- this is low tide -- Mr. Lucey got it. We can look at plenty of pictures. But where I come from, that's called a creek, too. They call that a river out West. But in any event, we'll leave -- we'll leave that part alone, and just look back at those -- the documents that they are referring to.

The homeowners association reference is -- is not made to anyone there. The only thing that says Creekside Park are the plats in Defendant's Exhibit 4, pointing to the Marshwalk.

Now, they suggest later on, this -- oh, you know, Mr. Lucey just showed there's a 2009 e-mail and that is the first time they told anybody that's -- the Creekside Park is the Marshwalk, suggesting it's a

made-up story, when there's a claim later.

Well, Defendant's Exhibit 4 answers that. It's not made up. You know what he likes to show, though, is to show that that, oh, okay, this -- this must be some, you know, they are just coming up with this to explain things away. They looked at Tom Graham's e-mails when this came up, because he asked Vince what it was. That's -- that's the big deal. Ah ha, we've caught them. They didn't even know what it was.

Tom was in Atlanta the whole time back and forth, he wasn't involved in the details. We -- that's been claimed from the beginning. He asked Vince. Vince told him exactly what it was, and went on.

The e-mails that you see describing those things, they like to show as, oh, they're being callous to the people who are asking. Well, the truth of it is, I think it dispels any suggestion that this was some fraud.

They are indignant. How in the world are people saying they we're trying to take these things from people. You are looking on the inside. The curtain is up. You got all the internal e-mails from all of this. Nobody is saying, oh, I think they got us. You know, we -- no, it's like, what, I can't believe that I'm dealing with this foolishness, this Mickey Mouse stuff

that is being claimed against us here. That's not that we've defrauded people all along. It's that I can't believe this.

And it's being used to say, oh, they're being callous. Well, first of all, they never said that to anybody. If you're looking at -- 15 years or more of internal e-mails. And, sure, you know, there are things that people say in e-mails that don't look pretty when you look at them in the light of day, but those are the discussions that are being had internally in the business about some claims that are being made.

And did Vince say in the e-mail that, I'm going -- you know, I'm toying with them and the opponents of I'On -- you know, it was an e-mail with Matt Walsh. And Mr. Lucey likes to say, he says he's toying with the Board. You know what, Vince knew -- it wasn't even disclosed yet to Vince that that was Ms. Adkins' writings, and that she had been protesting all along. That -- but he knew that he was right. That is who was doing it and he did tell them what the things were. He explained it all along. Every single time it was presented to him, he said, this is what it is.

So, what I ask you to do is look at the documents like the Impact Assessment. Think about what it was. It was something submitted in 1997. We all

know that's before -- well before they owned the phase II property. That's at the beginning of saying, here's what we're going to try to do. This is what the impact on the environment is going to be. And they say all of the plans in the vision. Yeah, they were plans. There's no doubt about it.

And we look at the dock master plan, Defendant's Exhibit 4. They submitted those. Those were plans absolutely. And that is different and distinct from a promise that you are making under the Interstate Land Sales Act of what you're going to deliver free and clear. A very basic chart, this is what we're going to deliver.

And you'll hear the legal instructions of what you do under the Interstate Land Sales Act. Do you look at what it says, or do you bring in other things to try and figure it out. Listen for that.

Now, the other things I'd like for you to listen to -- listen for, not just the -- who was it represented to? What was it saying? What was its purpose? Was its purpose to identify property that was going to be handed over, or was its purpose the sewer that Mr. Whiteside's group was putting together.

And, sure, they sent something back to them. But do you think if they sent it back, and Geoff

Graham, who was dealing with it said, well, sir, actually, we have a new concept here and there's a civic lot. And that civic lot is going to be -- he says, thank you. It's not a road. It's not a parcel. It's HOA. That's what the purpose of those things were for and they weren't sent to anyone else.

And certainly what -- the ultimately, what I want you to ask, is how in the world does it relate to the purchases Mr. Walbeck and Ms Adkins made. They didn't see any of it. It wasn't intended for them anyway. The purpose of it was not suggesting what was being deeded over to them.

What they have for that, the foot in the door, is the 1998 Property Report. And what they want that Property Report to mean, four words, "Creekside Park, community dock" should mean -- this particular one down here, pavilion dock, staging dock, boat ramp, park over here. This crab dock as it's been referred to. That other crab dock that they referred to. They are not -- these are things that are deeded over in phase II when the Property Report said it's going to be done. They are not giving them credit or giving that back. They want that, too. They are not saying it was, oh, you switched it on me. Oh, you -- yeah, that too. But here it is, the part, we want that. We want the

boating facilities; all of that stems from here.

Listen to the law on the Interstate Land Sales Act where it says what's represented, and how you decide what it means. And I was asked -- one of the questions that I presented at the beginning was, is the Property Report specific in detail, or is it a basic outline.

And I think that's coming through clearly, yes, there were plans for a whole lot more. If this is what they are trying to do, to get people to buy and rely on getting a whole lot of recreational facilities, they would have described it. There's no reference in the Property Report to tennis courts, to pools, to the gazebo on the dock, none of that. It says "community dock, Creekside Park". That's what's coming.

And on the next page, it says "upon completion of construction" which, you know, is April 10, 2001, is when the certificate of occupancy for the Creek Club was issued, and the docks were finished before that.

And which, by the way, when you're talking about when -- you'll see in the -- in the verdict form, there will be a question of when the claims accrue. Now, the Property Report that they are relying on, says that upon completion of construction. April 10, 2001, the Creek Club is finished, started to be used as a private

rental facility from the start.

Now, I don't know if you remember, Ms. Adkins tried to rescue that a little bit to say, well, completion of construction could mean when they're done in the whole neighborhood. That's what she swore to.

But she relied on this, but she thought maybe that's going to be -- and through the whole -- you know, this was 1998 -- we're in 2014, they're still not finished. So, you know, maybe later on, they'll give them to us. That was her testimony. Maybe that's what it means. But she's telling you she relied on it at first. Maybe that's what it will be.

If that's what it meant, look -- that's one of the reasons I went through with Vince and say, hey, let's look at the back of these Property Reports. What -- who gets them, what do they apply to, specific phases, specific lots. If it doesn't mean -- as I think you'll read on page 22 of the Property Report -- if it doesn't mean when you're finished completing these facilities that are referred to, certainly the last date would mean when you're finished with those particular phases, and not whenever you decide. I mean, you know, we are talking about a potential phase XI that they're trying to build, so you know -- for -- if by that construction, then there's no -- maybe this

is a reason yet to turn them over.

One other point on this -- is it specific and detailed promises, or is it a basic outline. I think if you look at Ms. Adkins' contract that we pointed out, where it discloses what you're saying under the Interstate Land Sales Act once they're exempt from it, that it's basically not swamp land in Florida, that's the point as a basic outline.

Now, another question I have for you to consider, on whether this is -- these are specific promises or basic outlines of things. If these were so specific, why did we have to listen to all these things unravel? Why are we looking at the Impact Assessment? Why are we looking at the Army Corps permit? Why are we looking at an Olde Park plan?

If this is so specific, why are we looking at all these things to determine what it is? Because it's not. The Creekside Park and community dock that were, as you know, the evidence will be with you, Defendant's Exhibit 1 has several pictures of the Marshwalk. And then Defendant's Exhibit 5 has plenty. And there are others of the docks along the Marshwalk, which Defendant's Exhibit 140 and 41 show you were deeded, just like they said they were going to do, at the same time they said they were going to do it.

And rather than take the time to pull up all of the -- the indications to show you that, look at the second Property Report, and compare the chart as to how much was completed at that point. When was it planned to be deeded over? All that is just in line with what happened.

If it were some great fraud in hiding things, why in the world would they have come out with a second report to describe their further plans in the development?

The next question I had for you, if you remember, even if you find this specific and detailed, did the plaintiffs rely on it. Y'all remember the letter from Ms. Adkins, in March of 2009, to the lawyer for the Assembly, Mr. Bouch. Next to the last paragraph, please, Lea Ann -- to define what these terms are, "community dock and Creekside Park requires the examination of the Impact Assessment", which she acknowledges she never saw before she bought her property, clearly didn't rely on that. And if she didn't know what those things were, how could she rely on it, meaning what she says it is now.

She called it -- agreed with me finally that she had called it "vagued" before. If it's vague, how are you relying on exactly what it is that you say it is

now?

Mr. Walbeck agreed, you had to look at other things, and he cited the Impact Assessment and the -- the plans with the stamp HOA, which he hadn't seen until more than a decade after he bought the property, but they're telling you they relied on it when they bought their property.

Let's look at Plaintiff's 59, please. Now, you see these are the e-mails that were going around, Plaintiff's 59 is Lea Ann Adkins and Matt Walsh, which ultimately gets forwarded to Vince, which he knew it was somebody who was a detractor of I'On -- let's put it that way. And let's look at where it says the Impact Assessment reference -- yeah, there we go.

Okay. Impact Assessment references: A park in Middle Street, in the Old Village of Mount Pleasant, and even includes a photograph of this park. In fact, this Middle Street Park is the home to Alhambra Hall. Special event venue strikingly similar to our own Creek Club, and it goes on and on to say, but it's not. It's a different park. Oops, I don't know why then the Impact Assessment references -- I don't know how it references the -- our Creekside Park that Ms. Adkins contends is there, because the whole basis for it -- of analyzing the Impact Assessment is wrong. Okay.

Let's look at the Impact Assessment, Lea Ann. It's Plaintiff's 3. Let's look at page 7 of the document, page 9 of the PDF. Okay. Now, if pictures are so important to Ms. Adkins, when she's reverse engineering what Creekside Park is, why not look at the two pictures of the clubhouse that are there.

She's trying to determine that the Middle Street Park, that she thinks is Alhambra Hall, was an event venue similar to the Creek Club, to make that the Creekside Park that's on the water -- well, this one is the Sea Island Yacht Club on the water, right near a linear park that's along the water. That's a private club. This was the plan from the start. If pictures are so important, why aren't these better than the one that's mistaken. This is what was intended from the start.

Let's look at Defendant's 98, please, Lea Ann. Second page, and blow it up, please. Not only is it an Impact Assessment, it's in the advertisements that Ms. Hussey told you she worked on right here. But she didn't know for sure one way or the other, whether Sea Island Yacht Club was private. Well, it is, Ms. Hussey. And here's the Marshwalk, that she acknowledged was planned from the beginning, a described linear park. And it's along the marsh, and

it leads to the private club right there at the end.

While we are having this one up, let's look at the first page, please, Lea Ann. Now, here is a point about the references saying there's no private docks. That the distinction, first of all, all the community docks are private docks. They are owned by an incorporated entity. They are owned -- these -- the community docks that are on -- that we saw on Shelmore Creek are private docks. They are owned by the I'On Assembly.

Now, they've always been private docks. The I'On Club owned them, 148 Civitas owned them, and now the I'On Assembly owns them again. The distinction between -- in the references between -- and you'll see if you read the documents more completely, when it says "there will be no private docks", it's saying there are no individual owner docks that are going to be going out into the marsh, because all of that part is owned for -- by the Assembly for common access. And you see it there, "community docks" plural, always planned, not only provide the opportunity to gather, et cetera, et cetera, but they minimize the impact of individual docks. Okay. Again, planned from the start in Ms. Hussey's own words.

Now, the one question I asked you -- or the

third question was whether the effort by this gang that -- yes, I came up with that name, but I didn't come up with the facts -- and I'll show you more of the facts later -- is the effort to reverse engineer and manufacture this claim for Creekside Park, too little. Well, the basis of that is the effort in the Impact Assessment. Well, the Impact Assessment, the reason they got that is because they thought it was Alhambra Hall, but it's not. So, now, they like this document, that is the general HOA stamp. And we know that that's -- that's the who, what, when, where, why, about that document. It has nothing to do with their purchase and was never intended to, and it's a generic stamp.

And the other point about Alhambra Hall is why -- why don't the pictures of Sea Island Yacht Club matter? They are -- they are the actual pictures that are of what we're saying, that have been there from the start, just like the advertisements. It's too little to reverse engineer the Creekside Park efforts.

Now, let's see -- let's go back to that one that was the e-mail from Ms. Adkins, P 159, please. That's another point I want to make about that, whether it's too little. Sorry, is that -- P 59, I'm sorry.

Okay. Let's look at the bottom paragraph there.

Okay. This is what Ms. Adkins is saying in -- April 1st of 2009, the burden is on the Grahams to prove what the Creekside Park is. Now, again, here we go. Where Alhambra Hall is located, et cetera, et cetera, again we're -- we're working on this Alhambra Hall Park, which we know is false. But here we go, in the absence of the map, with it stamped on the Marshwalk, we have to look to other proof. Again, you don't know by looking at the reference in the Property Report. But here we go now, in absence of a map, let's look at Defendant's Exhibit 3, please.

Okay. Okay. Here's a map. Right here, please, Lea Ann. Let's highlight that portion, Creekside Park. Now, Defendant's Exhibit 3 here, I believe it is, has several pages. I keep going and showing you the same reference to Creekside. Okay. Two little to try to reverse engineer it now.

And let's look back -- just as a reminder, one of the points is it's a civic lot. It's always been a civic lot. In fact, despite what Mr. -- I mean, when Mr. Walbeck was testifying, he did at least say, yes, I thought that was going to be the Creekside Park because of the maps that were given do me by Mr. Orange that said it was a civic lot. We all know, and anyone familiar with I'On knows, a civic lot does not mean a

two way ownership. You cannot rely on a map of the civic lot to think that that is going to be given to the homeowners association.

So let's look, please, Lea Ann, at Defendant's Exhibit 14, we'll go through a couple of these quickly just as reminder -- two civic lots shown here, never ever owned or intended to be owned by the homeowners association. That's where the school was built, swim and tennis center here, owned by I'On Club. Let's look again at 18, please, Lea Ann.

The church building, land donated to the church through the Holy Ascension, never intended to be owned by the homeowners association. And, Lea Ann, let's look at 167.

There is civic lot six, the Creek Club building which Mr. Walbeck acknowledged even Mr. Orange didn't tell him they were going to own it, he just said it was going to be there.

Now, while we're on to Mr. Orange's point, that's something that, you know, is -- which Mr. Graham -- Vince Graham made clear, you can't control what everybody is going to say, and you can't control what everybody is going to say was said.

Now, Mr. Walbeck was here and he told you that when he was buying his property in 1999, the thing that

really struck out -- stuck out with him, is right around the corner, I'm going to have a boat ramp, deep water and launch my boat -- or launch a boat in deep water, and he thought that was the biggest attraction for him to buy the lot in 1998.

Now, I'm not going do math on the years, but I bet Mr. Walbeck was a relatively young man at the time he bought his home in 1998. And I asked him, Mr. Walbeck, you don't own a boat; you've never owned a boat. And he said, oh, but I have friends who use it. I said, when you testified before at a deposition, you still hadn't used it with your friends, so maybe you have since then. Okay. His answer was, yeah, but when I retire, I'm going to get a boat, and that's what I was thinking. Maybe.

Now, I want to walk through some exhibits with you for the question of whether this effort is too late. You're going to be asked on the verdict form to answer these questions about each plaintiff, Mr. Walbeck, Ms. Adkins and the homeowners association, when did they know, or with reasonable diligence, or reasonably should have known that they weren't going to get the Creek Club or the CV-6 for whatever -- whatever the verdict form says it says, but it involves the two different claims that are at issue here, the dock issue

and the park issue.

All right. I apologize to you, because I missed something, I do want to go back to, which is Plaintiff's Exhibit 56, please, Lea Ann.

Now, you may recall that testimony of Ms. Bedell that she says now that it's absolutely clear that the reference in the Property Report meant the two docks down in the boating facility by the Creek Club. And Mr. Kinney, even in 2009 when he has a demand -- the top paragraph, please, Lea Ann -- when he has a demand about this community dock and Creek Club, at the bottom, you'll see he says, I don't know -- I don't know where this Creekside Park is.

But -- but anyway -- so the creek -- the community dock, he says after looking at the description of the photographs, and the proposed docks and the Impact Statement -- now, he's going back to the Impact Statement to -- not by the Property Report, and reading that there would be no private docks -- we discussed that.

It seems clear, okay -- it seems clear -- now, this is hindsight of what does everybody consider everything is in 2009 -- this hindsight is a bit flawed. It seems clear that what is in the HUD list as community dock, everybody agrees that's singular,

contemplated the multiple docks at the Creek Club. That's just another grab. No, it didn't. How does community dock -- one plus zero, doesn't equal two.

And that's what Ms. Bedell said to the Assembly meeting in January of 2013, remember? Before the settlement agreement, where she has -- the Assembly has to support the plaintiffs, she said in the Property Report, they don't promise any particular docks. They don't promise any deep water dock and they don't promise the Creek Club. But now it's absolutely clear that they promised both of the docks, just like Mr. Kinney said, community dock. One plus zero, equals two. Clear. Okay.

Now, let's look at the question of whether it's too late, when did these claims accrue? When should somebody have known about these claims. Okay. Exhibit 49, please, Lea Ann. Just to be clear, here is the certificate of occupancy, construction is complete with this recreational facility, that is the Creek Club.

And let's look at 50 A, please, Lea Ann; 50 A -- okay. You'll see when the payments of the last invoices for these -- the Creek Club dock construction costs were -- it looks there -- anyway, mid two thousand -- my point for you guys is, I think it's easy to just look at it and say, all right. The time the

Creek Club was finished, all this stuff down here was done, look at the certificate of occupancy. It's April 10, 2001. That's when the recreational facilities were complete.

Okay. Let's start with what the Assembly knew, what did they know and when. And to start that off, let's look at 61 A, please, Lea Ann. And we've been through some of these. But just in case there's any doubt, here's Mr. Ed Clem, who was in here, getting a Property Report, a 1998 report in April of '99. He was a Board member. He was finance committee member. He chaired both the Board and the finance committee. Let's look -- so he knew -- anything you were supposed to know from the Property Report, he knew or should have known about in the Property Report.

Let's look at 63, please, Lea Ann. In case there is any question about Mr. Clem -- let me stop there for just a second. Mr. Clem came in and said, I don't know if I read the Property Report then. You might remember Mr. Clem met with the plaintiff's counsel before he testified. And what he said was, I don't know if I got the Property Report. I don't know if I read it when I got it, which frankly -- that's probably true with everybody, but we'll leave it at that. So I don't know if I read it when I got it.

But when Mr. Young -- Rutledge was asking him, well, when all of you were doing all these things with the easement -- which I'll get into -- did it occur to you that they weren't going to give them to you, when the club owned it and you were paying for it -- and he said, no, I always thought they were going to honor their promise and give me what was in the Property Report. But he didn't read it until that -- it was during that time he claims he had never read it, though he says he relied -- they were going to give it to him even though he hadn't read it. He was relying on it at the time. He didn't get it until 2009, early 2009, when all the zoning stuff was going on.

And who did he get it from? Steve Brock invited him over to meet with him and talk to him about it. And now Mr. Clem is telling you, he was relying on it all along. You can add him to the gang if you want to.

Okay, 63 is Andy Gowder, the Board minutes, he got a '98 report. He knew, or with the exercise of reasonable diligence would have known the same thing that anybody who read this report -- which says to read it on the front -- would have known.

Okay. 67, please, Lea Ann. We'll do a few of these. Anne Bonk, you'll see her name. She's on the finance committee. 69, please, Lea Ann. John White,

you'll see his name. And I don't have it in front of me, it's in the hundreds, but you'll recall seeing Libby Eble's receipt.

Now, Mr. Eble came in here. He didn't sign for the report. In fact, he didn't buy the property either. But Ms. Eble did sign the report. She wasn't in here to describe what she thought was represented to her when she bought the property. Because you'll see, she's been on the Board and run the finance committee and paid the bills for use of the dock and for rental of the facility all along. This is no secret. Everybody knew all along, that that was a private civic lot run by the club.

Now, you're going to hear a lot of argument, oh, well, Chad was e-mailing from here and a fax went from here to there, so really, they are the same companies. The reason they wanted it to be the same company is to suggest that I always thought they were going to give it to us, even though the club was running it as a civic lot private facility. They are really the same, so I still thought they were going to give it to us. That's the effort -- that's why you're hearing those arguments, is to suggest they didn't know that paying for it made it known they didn't own it, paying for the use and renting the facility.

Okay. So let's -- I apologize it's a little bit painful. I didn't do it at opening, but there are a lot of minutes that really just paint the story of how apparent this situation was, and how everybody knew it, and certainly the people that you'll see highlighted from the Board, who received the '98 report, just like Mr. Walbeck did, and just like Ms. Adkins' claims that she did.

Okay. Lea Ann, let's look at Defendant's Exhibit 107, please. There's another allegation that's about whether the I'On Company still controlled the Board at a certain time, that it somehow kept them from raising these issues. And we'll talk about that as we go through these.

But you'll see it at the top, this is December 3, 2003. And you'll see the people who were there, who -- including Andy Gowder, who's her, you just saw. Libby Eble, whose name you just saw. Gaye Joyner's is in there, too. I don't know if I put it up, but it's in evidence. In any event, they all got the '98 report.

But the important thing is Vince told you, look, it was me, and one other guy at this time, from the I'On Company, who were on the Board. The majority of Board members, who were not employed by the I'On

Company, who have their own fiduciary duties to the Assembly and to the Board and everything else. So when you're thinking about a claim that the Assembly didn't control their own Board, the suggestion is that these people weren't voting pursuant to their fiduciary duties to the Assembly.

Let's look at the second page of that, please, Lea Ann, just to make clear from the very start, let's look at the top of the finance committee and see who's on that. All right. Chairman Libby Eble. There's Ed Clem, Anne Bonk, Andy Gowder, all who got the '98 report. They are all responsible for the payments that are being made to the Club for the use of the docks and renting the Creek Club.

Let's look at 108, please, Lea Ann. All right. Here's February 12, 2004, highlight that, please, Lea Ann, and who is on it. Okay. And you see Ed Clem and Anne Bonk, again Gaye Joyner, Andy Gowder, Libby Eble. Now, let's look at page three of this, at the bottom where it says: New business".

Now all those people were there, who got the '98 Property Report that I showed you. And under "new business", it says Vince Graham clarified that the I'On Club owns the dock at the club, and there's an easement agreement with the Assembly. If anybody had any

concerns of what was going on, this is telling -- this isn't hiding anything. They're not hiding the easement. It's not -- it's telling everybody, look, this is what's happening. Here it is. If anyone didn't know, Assembly, club owns it and there's an easement agreement that allows your use. That's the easement agreement. Then it delineates a lot of things, and we'll look into that. But by February 12th of 2004, Exhibit 108, shows you there, no question, what is going on. Anybody with reasonable diligence would understand that.

Okay. Let's look at 109, please, Lea Ann. August 5, 2004, let's highlight again, who is up here. There's Gaye Joyner. There's Annie Bonk, Ed Clem, Libby Eble, all the people who got the '98 report. And let's look at the last page. 109, "old business" right here. "Old business: Ed Clem updated the Board of Directors regarding the status of the new agreement." Now, it's already been going on, it's old business. You've seen this with Mr. Clem. They hired a lawyer to address it.

Now, you can argue about a lot of things of who knew what, when. Did they know all these people -- I mean, Vince told them, here's what it is. But not only did they know it, they had their own lawyer looking

into it before -- but we'll give them this date -- but before August 5, 2004. Defendant's 109; hired your own lawyer to look into it. You knew or should have known, if you thought you had a claim, by then for the Assembly.

One ten, please, Lea Ann -- we'll skip through that. It's another exhibit about paying for the use of the Creek Club.

Let's look at 113, please. All right. Let's look right here at the top, again, February 9, 2005, Ed Clem is there. John White is there. Let's look at the first sentence, please. All right. Mr. Clem is no longer just on the finance committee, he's on the seat of the Board of Directors. And let's look at the last page again. The last page of this one, please.

You see the other business and old business -- other two, please. Thank you. Okay. Other business, wants to talk about purchasing the Creek Club. Purchasing the Creek Club. This is February 9, 2005, Ed Clem is there. John White is there. Libby Eble is there. People who had the '98 report, talking about buying the Creek Club. That's CV-6. That's the Creek Club, the property.

Okay. Now, guess what else it says, "old business" again -- it's still going on about an

easement. And now that the lawyer drafted a new -- a new easement that they just didn't like any better. Okay. I won't go through all of these, but let's look at 115. I think this is important, too.

March 23, 2005, Ed Clem, Annie Bonk, John White are there. Let's look at the second page, please, Lee Ann, the second full paragraph of it. All right. There is the big secret. They are telling them, look, yeah, Olde Park has been a part of the club. They have access rights through the club from the very beginning. Everybody knows that in 2005, if they didn't know it before.

All right. You'll remember -- you may remember from opening, I read one where the president of the Board reminded the Board of Directors that if the Creek Club is sold, the boat ramp agreement still holds. Everybody knows CV-6 doesn't belong and should not belong to the homeowners association. I mean, the minutes go on and on.

There's another one, July 2005, is exhibit 118, where there's discussion about that. A request in February of 2007, if the -- if the I'On Company would sell it to the Assembly. Somebody actually said they were interested in buying it.

Okay. Now, let's get to the actual no --

question, clearly, to -- there's pretty much no question already that the Assembly is aware of it, by this point knows what the deal is. But let's look at 124, please, Lea Ann. Okay. The date is April 25, 2007. All right. You see Mr. Clem is there. You see Ms. Eble is there. They all got the same Property Report.

But on the -- at the bottom paragraph, the first page, Lea Ann, please, this is where the discussion begins in 2007 about selling. And what it tells you, it is selling the building, Creek Club building, boat dock, ramp, parking lot, and overflow lot. That sale is being proposed to the Assembly. Obviously, we are not giving it to you if we are telling you we might sell it to you for $1.5 million. It didn't ultimately become the terms as you have seen, but that was what was represented by Mr. Besenfelder at that time to the Assembly, which was April 25, 2007. If I'm going to sale it to you for a million and a half, I'm not going to give it to you. Certainly, a fair characterization on Defendant's 124.

Defendant's 137, please, Lea Ann. This you've seen before. This is a -- there were -- before this, there was -- the deal was presented by -- not just Chad, but by Vince at the Assembly meeting of what the

-- you know, the effort that -- give support for phase VI, and the sale of these properties. Here is the actual date of the proposal.

And you'll recall the donations that were going to be provided by I'On Company up to almost $3 million dollars. They were donating -- these are the people that are being characterized as -- anytime they got a chance to get something from the Assembly, they took it. Yeah, this deal was going to be good for them, as Vince described. He tried to do a win-win for everybody. They are donating $3 million dollars that would be associated with this.

Now, you'll recall that the budgets are mailed out every year to every homeowner. They are Defendant's Exhibits 39 through 42, were at least the ones from -- beginning in late 2004 to go through 2008. Mr. Walbeck acknowledged he saw the budgets. He even looked at the line item and knew some that were on there. If he had read what was in front of them, there is no denying he knew they were paying for the use of the dock -- the use of the Creek Club. They went to the annual meetings where budgets were approved. They had the same thing.

What's interesting is they all acknowledge that they were aware of this 2007 sale -- do you remember

that? I mean, that's a big neighborhood deal. Ward Mundy had put out a suggestion box and there were five questions that were related to this phase XI, and should we buy the Creek Club. And that was in -- beginning in -- April 25, 2007. Everybody knew it then.

Now, Ms. Adkins told you, well, I still thought that that wasn't really what it was going to be. They would end up giving it to us. Well, that was her testimony, that she thought that these sale proposals didn't matter. They were still going to give it to them for free.

Okay. Anybody in the neighborhood -- certainly by the time that the proposal -- and we can look through the minutes of the community meetings held, and all that, everybody acknowledges that they were aware of this. And the formal letter, I believe, it may have been August 2007; but in any event, we'll give them that. Sometime in this timeframe, everybody understood the property was being offered for sale to the Assembly.

Now, let's see. One other point to make about what was known. If you look through the public records, Mr. Walbeck acknowledged that what he was given by Mr. Orange, saying it was a civic lot, all the

plats say it's a civic lot. Everything filed that gives purchasers notice of what is being bought, says it's a civic lot.

A stamp by Seaman Whiteside, when sewer is getting approved, has a generic HOA stamp. Anybody -- any buyer relying on documents of record to purchase property, saw that it was a civic lot. That's Defendant's 35 and 36. At the time you bought, you knew it was a civic lot.

I want to look at Defendant's 27 for a minute, please. This is the easement. And it's -- you heard a lot of talk about it, but here it is, February 2000 easement, which every -- you know, people have said, oh, well, you had, you know, different people sign it or you didn't own your property yet -- well, the -- the three entities that are on here operated under this thing the entire time. So the suggestion that it doesn't -- a mistake made it invalid, and that was somehow an improper act, I think you can judge for yourself, that everybody had operated under it the whole time.

Okay. Let's look at the second page at the bottom, then up to the third. Okay. Here's -- now Mr. Lucey just kept showing you, once you get back to, you know, whatever page eight -- if you read to page eight

and then the term, you'll understand that there's this -- this ambiguity. It says it's going to expire. Fair enough.

Well, let's look at what it says right here about easements. "Easement for use and enjoyment of boating facilities". Okay, "hereby grants" -- and it carries over to the top of the next page, Lea Ann -- "hereby grants perpetual, nonexclusive easement" and it talks about the boating facilities.

Now, if you page through the document -- I won't take the time to do it now -- but you'll see there are other easements granted about the common areas by the Westlake and the soccer fields and all of that. And there is then this cost sharing agreement of, okay, this number of people -- and you heard Mr. Graham talk through this. This is how it's worked out. And then it says in the term part, "this agreement shall expire" -- it talks about the, you know, this amount of time unless -- you can see it -- or something about the Queen of England.

Now, does this suggest to you that the people -- Mr. Graham -- you know, Mr. Graham thought they were hiding a term from somebody, or that when they looked at easements, and it said we're granting a perpetual easement, they understood that it was a perpetual

easement. If you -- so, if you have any question about that, then my -- my suggestion or my request is, please, look through the document and you'll get an understanding of why they acknowledge the mistake. Because this term part says the agreement -- it might mean the whole agreement expires, and they intend it to be perpetual. But the granting language of the real -- of the real property interest says it's a perpetual easement. So I just need to make that point.

Another point that relates to this timing issue, is you heard Mr. Lucey say, well, these documents were sealed. And that is going -- that's -- that, as Mr. Lucey told you in the beginning, is likely to have some impact on whether a breach of contract claim -- how long you get to bring that claim. And so because it says "seal" on it, he says that everybody knew they were signing a sealed instrument.

Well, it's for you to use common sense. Do you think when somebody is signing that document, that they thought they were doing like Mr. Lucey said, when the King of England is stamping on it as a seal, to mean it is a different document, or they were signing it as a regular document. But that's for you guys to decide.

Let's see. How about please look at 131, please, Lea Ann. Okay. Now, at the top here, you'll

see this is October 30, 2008. These are the minutes where there's a discussion -- Lea Ann, please move down. You'll see, there's a start of the talk about the Creek Club sale. Okay. And this is where -- blow it up for you here, October 30, 2008, talking about the Creek Club sale. Catherine Templeton, Lee Ann Adkins and Brad Walbeck all speak, October 30, 2008. They all raise voting issues. We'll come back to that later. I think that's an important point. When they found out -- when they found out that the property that they sat here and testified was the most important part of their decision, and they knew this going to be theirs, and it was going to be the waterfront park.

When they found out it was being sold, they said -- you can see what they say -- I wonder if that lot next to it is going to need to have the zoning change; or I wonder if this is going to require -- the Creek Club sale is going to require a planned development amendment. Nobody said, what? They are selling that? That's ours. They promised me that in the Property Report. No. They said, hey, maybe there's a zoning issue with what they are trying to do.

Okay. Now, one thing that I have to do as a defendant, again, is a disadvantage, is to address the claims for damages at -- to the extent you are to get

to that point. I need to at least have given you our side of what they are trying to claim here.

Now, the one point they have -- let's see -- they have the 20 year free lease at a $2 million dollar value. And that was Michael White saying, hey, this is what the lease value would be for a business like Mike Russo's running, what he's doing at the Creek Club. So, that's a $1,975,000 lease. As Mike White said, this lease is about the use that is being given to it, that is being proposed by Mike Russo.

I asked Ms. Adkins, that means the Creek Club, right? She said, oh, yeah. That's -- that's the business, running the weddings out of the Creek Club, until then she realized -- then I said, well, you acknowledge then that a lease of subbing out the Creek Club is not going to be $2 million dollars. She said, oh, well, he holds weddings on it. He can do it on the lawn, too, so it would still be the value.

They acknowledged they were reaching too high for the Creek Club. So, you know what that does with this? That's the use value of running the Creek Club facility. That's what the lease value is for Mike White. If you don't get the Creek Club, you don't get to run the business that Mike Russo is doing, but that is a suggested value of the lease.

Now, you heard about the two options they claim. Well, an option from year '20 to '30, there are two options. And that's basically a million dollars we would have to buy out. Well, I asked Ms. Bedell, you don't know what the Assembly is going to do at that time, do you? No, there's no way I could tell. That's what you call speculative damages. No way you can tell that this is going to happen.

In fact, you heard Mike Robinson say that would be a pretty bad decision for somebody to make, spending a million dollars for that money -- for that value. You know what happens, even if they were to do that, then you have to increase Mike Robinson's analysis of what their present value rights are to CV-6, because they get the property -- see, but they didn't want to get -- nobody is paying a million dollars for that. And they -- Ms. Bedell, do you acknowledge -- she had no idea. And Mr. Robinson just testified about it would be a pretty bad business decision. I can't imagine anybody would do it.

Okay. Now, as far as the Olde Park agreement, I just want to make another point. I don't want to take too much time going through the documents, but the Olde Park agreement, if you look at it, a draft was put up. But if you look at the full agreement, which is

Defendant's 149, you'll see there is a pay back schedule. You'll see what the deal was really about. One, sewer connection. Two, roads. Three, facilities. There's a pay back schedule that says, okay, if you don't get the Creek Club, here's what the value is. It's $50,000, something like that, you'll see it. It's less than $10,000 for the boating facilities for Olde Park.

But another point is they're making a big deal out of that, Olde Park is going to be, you know, made a -- using these rights that you said -- that's, of course, if you buy their suggestion of what the Creek Side and community dock is, you're getting boating facilities, which Mr. Walbeck said -- which is it, the Creekside Park or the community dock that gets you the boat ramp. He said, I don't know.

But if you said that you do get that, and Old Park people are using it, and that is some damage to you, six Olde Park people are allowed to use the boat ramp. Six. There has never been more than ten. And we heard all of this about Olde Park.

Now, that's another point, is the Property Report receipts that Mr. Lucey showed you, the Plaintiff's Exhibit 150, and I think maybe 151 A. That's the list -- here, look at all these people that

got the '98 Property Report. Fair enough. Those people that bought in that timeframe got the '98 report.

Ms. Adkins' name isn't on here. And just to give you an idea of the people who got that '98 report, which you had to buy directly -- you know, there are limitations on who would be -- who would come underneath this Interstate Land Sales Act at that time, which ended in 2002 sometime.

So, in any event, of the 150 or so, you heard Vince Graham tell you, they looked at it -- how many people were there. He said not more than 50 who were still there, so it's less than three percent of the people who live in I'On. There were 2,000 people in I'On, less than three percent of people would have even gotten this report.

Now, they're talking -- they're saying, well, I knew there were others who got it -- no, the swearing that they did in -- that I brought out the verification of the complaint, the swearing that they did, was that they knew that other people relied on it. Yet I said, well, who did you ask? I asked somebody down the road, and they said they couldn't remember getting it. You swore to the court that other people relied on it.

You also swore to the court that other people

beyond the timeframe when they were regularly giving these out, got the original report, like Mr. Walbeck or Ms. Adkins claims to have done. Oh, really, who is that? I don't know. Pretty cavalier swearing to the court that that's what happened to keep the lawsuit going.

They said, well -- I asked Mr. Walbeck. Well, you know, you didn't know anything else -- I was asking about the original report -- who -- who got that report later on. And he said, well, Mr. Eble relied on it. I know. I know you like Mr. Eble. He's your surrogate relier because he'll -- he came in here and said that.

He also said, I don't trust anything realtors tell me. And I know that I got the specifics in writing, yet he is saying that he understood those things because of what Mr. Orange told him. So that's the surrogate relier who didn't buy the property anyway. And, obviously, who did buy the property wasn't coming in here, because she's known all along -- all along what the situation is.

In fact, I don't know if this came in -- so I won't mention. Okay. Let's see.

Now, a couple things again on the damages point that I have to raise. If you're talking about the amount of the sale of CV-6, then just put up a number

of $1.4 million dollars. That was a part of the sale of CV-6 -- well, look at Defendant's 50 A and 51. It tells you how much it cost to build that stuff. And you'll have an understanding at least, that the million four is not -- you know, found money for the I'On Club. And they acknowledge that $600,000 of that is the -- is roughly speaking -- that you'll see in 51 is the Creek Club building cost. And the rest of it being the boating facilities and those docks. And, again, that's boating facilities never mentioned in the Property Report. But, you know, they contend all of that was supposed to belong to them, too.

One other number to remember -- I won't go through all the details of it -- but Mr. Mike Robinson came in here and he analyzed that -- by the way, he didn't even give -- talk about a conservative valuation? You heard Mike White's testimony about how he valued the properties in 2009 from the bank. Mike Robinson valued CV-6 vacant lot value, this year, as less than Mike White did in 2009.

So, in any event, he -- Mike Robinson also used a higher discount rate, which means a lower number. So, in any event, the point is, as was suggested that he's here trying to boost up the numbers. It's not accurate, but his value of what the Assembly owns is

that. Now, they paid the $495,000 for it out of their reserves of $1.3 million. It didn't cause a -- it didn't cause an increase in fees.

Now, what they are trying to do is say, oh, well, we had to lease it to them. Well, that's the Creek Club. They still own -- you can look at -- look at -- Plaintiff's 200, please, Lea Ann -- all right. Well, the point is, here it is, the part they've leased. Here's the rest of it that they own. They made money off the dock closures and the agreement that they have made with 148 Civitas. And those numbers are factored into Mr. Robinson's valuation of what we have.

Now, a couple of important documents that I blew up for your special consideration. You'll remember Defendant's 32, March 2009, Ms. Adkins writing Mr. Bouch about the Property Report being Creekside Park, of course requires you to look at the Impact Assessment. Here's some others.

Defendant's 146, Plaintiff's 71, these are the communications at that time that start about the Property Report. Matt Walsh from -- this is the excerpt that, as we understood, was copied from Ms. Adkins, saying the Impact Assessment refers to Alhambra Hall, all that. That's April 2009.

Mr. Walbeck writes in August 2009. Ms.

Templeton writes February 26, 2009, referencing the Property Report in Exhibit 53.

Ms. Adkins and Mr. Bouch, Defendant's 32, talking about the Property Report. Lots of discussion about the Property Report. The first one you'll see here, is February 26, 2009. That's the first discussion you see of anybody talking about the Property Report.

Now, that's what I -- I thought this was important about -- I mentioned here talking about selling the Creek Club. Ms. Templeton is there. Ms. Adkins is there and Mr. Walbeck is there. Discussing zoning, not the promises allegedly made to them in the 1998 Property Report or any promise made to them to own that property. Nothing.

Now, I can't believe they took the one piece of property that they sold me on it. I can't believe anything they told me. Oh, hey, maybe that zoning should change. Really?

Let me explain that. February 24, 2009, right before Ms. Templeton -- right here, lawyer number one I told you about -- in an e-mail by Ward Mundy, lawyer number two -- talking about -- talking about a zoning challenge Ms. Catherine Templeton, in Defendant's 132 in January, talks about, hey, we can do this zoning

battle and either make money by having it commercial, or we can lessen the value of the Creek Club for the Graham family, and get it for a dollar. All right.

It's not a free civic lot; it's a dollar. That starts it, here we are. You'll see this reference, hey, everybody, it's -- February 23rd is when this zoning hearing is -- February 24th, in the morning, "Last night was disappointing, but not unexpected. Where do we go from here?" One approach is to lay low.

Now, this is the property that we've heard so much about, that is so important to these plaintiffs. And they are considering a first approach to lay low, and wait for a sale to a commercial -- a real hospitality business with no connection to the neighborhood.

Another option is for someone, who -- of that group, who purchased directly from the I'On Company to talk about -- to talk about the HUD report. Ward Mundy, Catherine Templeton, Steve Brock, Lea Ann Adkins. Laurie Thornhill, we've heard, is who supposedly gave Ms. Adkins the '98 Property Report. We've also heard she didn't work for I'On Realty any more at this point. And you saw the other people -- you heard David Thompson, who bought in there -- bought in I'On, very happy. Laurie Thornhill is who

represented the purchaser or the seller in his transaction. He didn't get an old Property Report when he bought from Laurie Thornhill.

Everett Wilcox was the president. His receipt is in evidence. He didn't get an old Property Report. It says, he got a receipt of the 2000 Property Report from Laurie Thornhill.

Okay. One approach is lay low. Another option is to find some group that purchased directly from the I'On Company, that had a HUD report. Not, oh, hey, Lea Ann, now it is your turn to step up because you have that '98 Property Report. No, let's find somebody -- get someone or some group that bought.

All right. The last resort, the very end -- the very end of the letter, the last report is I'On residents that purchased directly from the I'On Company, also might have a civil claim for damages because of the HUD report. The last resort of the gang.

Ladies and gentlemen, another disadvantage of being a defendant is there's always some underdog side from the plaintiff, they're fighting for something and telling you that they have been wronged. The simple question that I think you have before you is, do you want to believe the plaintiffs, or do you actually

believe the plaintiffs?

Defendant's 173, Wednesday, September 19, 2007. Your vote on the PD Amendment. Remember, Ward Mundy sends out this thing of, hey, what does everybody want to do. Number five was, should we purchase the Creek Club. Ms. Adkins responds -- first of all, she says -- she's considering it, not without a lot more information. She's considering purchasing -- Now, she's still said at this time, I thought they were going to give it to us any way. I didn't think that PD Amendment would work out, and they were still going to honor their promise. She says, yeah, maybe we will buy it, but just not without more information.

And then she said, "I heard someone jokingly say once that they should give it to us". She heard it "jokingly" that they should give it to us. She's still thinking about maybe we should buy it, but tells you she still -- she told you right there, I still thought they were going to give it to us and honor that promise in the '98 report that I received in 2003 when I bought in phase V, and -- from phase II.

I heard someone jokingly say once, that they should give it to us. I laughed thinking it wasn't a serious consideration. After thinking about it, it began to sink in that perhaps they should. Perhaps

they should. I relied on a '98 property report that tells me I'm getting all this. And now maybe -- I thought about it, maybe they should give it to us; yeah; you know what, in lieu of the other mega donations to various causes.

There is, I believe, big opposition to the churches receiving such large donations. That's why. Did I make up the Free CV Lot? Did I? That's the beginning of it, 2007 still telling me she thinks that it was coming to her. She laughed when somebody said they might give it to you. But she was considering buying it, just needed some more information.

Ladies and gentlemen, the law requires more than wanting to believe. You've heard a lot and you've seen a lot of e-mails that look ugly, that you put together for all this time; all of them consistent with -- all of them consistent with a basic outline in the '98 report. Plans were there at the time. Yes, promises not made; plans developed.

Ask yourself, do you want to believe or do you actually believe? Because I don't think you reasonably can. And if you don't, then on the verdict form you have to check for the defendants. Thank you.

THE COURT: Thank you, sir. Everybody okay? Anybody need to stretch before we hear the last closing

argument? All right. We'll let Mr. Duffy get his stuff.

MR. LUCEY: May it please the court.

THE COURT: Yes.

MR. LUCEY: The unrefuted evidence in this case is that prior to the sale to Mike Russo, prior to the sale of CV-6 on August 5th, 2009, the homeowners enjoyed unimpeded access to the water park, unimpeded access. That was all open space. It looked like a park and it had a path on it. And that path we talked about a number of times in this case. And that path ran from the boat ramps, on the one side of the property, across the front of the property, to the community dock; and then up the side of the property to the real Marshwalk.

It was, for all intents and purposes, identical to the Marshwalk that flowed into it. It was open space. It was greenery. It was nature. It was a river. It was unimpeded access.

The homeowners were never blocked before August 5, 2009. They had no reason to ever know that the developer was eventually going to claim that he was selling the property. No reason. It was theirs. It was their waterfront. No signs. No blockage.

To submit the idea to the jury that because the association shared maintenance costs for the docks with

the club, who was also entitled to use the docks at times, is somehow evidence that the association should know they will never, ever own the facility, is frankly preposterous. Anybody who uses something, pays maintenance for it, whether you're an owner or not.

Look at those financial statements. Look at the dozens and dozens of financial statements you -- they want you to look at. The only dock fees ever paid -- paid by anybody -- was the $25 ramp fee. Because to keep the ramps from being abused, everybody agreed there would be a $25 key fee, so that other people couldn't use the ramp that weren't authorized. If you are a ramp user, you pay $25.

The association -- the association shared in the maintenance costs -- the maintenance costs of those facilities. It did so pursuant to the easement that had been fostered upon them by the developer, and they did so willingly. But you can see from the minutes they want you to look at, the association came to realize they were paying too much money. That the formula in this easement that had been executed on all three sides, by Joe Barnes, was unfair. And they sought to rewrite the easement. They did. They sought to rewrite the cost sharing of the easement.

And, apparently, as Mr. Tom Graham claims he

never knew the easement wasn't perpetual, none of the Board members did either. All they knew that the cost sharing was unfair.

And, yes, those Board members -- minutes do show an effort to try and rewrite that easement, and to try and rewrite it with the -- the Club, and with Vince Graham, who is sitting on the Board. The developer representative and these other people on the Board. And, yes, he agreed to pay half of it.

But you'll see in the minutes, that authorized that, that he conditioned everything upon -- guess what? The Club approval. His other company. It was like, sure, I'm going to help you over here. But guess what, you still got to pass go. So draft all these things you want. And what did you hear happened? Nothing happened. So you've got this cost thing going on. And they want to say because the homeowners paid part of the costs, that they should have known they would never own it.

2005 -- 2005 is a amenity transfer agreement that they are a party to. Did you hear anything about the amenity transfer agreement in anything that the defense just said? No. They want you to think all the amenities were transferred way back when. The only amenity transfer agreement in evidence in this case is

in 2005. What are we talking about 2004 for? They weren't transferring any amenities back then. Yeah, they deeded a couple over, but there was no process.

The only evidence about discussion of the transfer of the docks was 2007, board minutes in the Fall of 2007, when Chad was told to meet with Ward Mundy or Matt Walsh, whichever one it was, the Board representative, and check the conditions of the docks.

And then you get to 2008, all the e-mails in 2008 say the docks and boat ramp are going to be transferred to the homeowners association. All the e-mails. Why are you going to sue somebody that says they're giving it to you. That's preposterous.

You know what's really preposterous, all the zoning nonsense we're hearing. And I'm here to tell you why, all are a complete red herring. Absolutely a red herring. In evidence is the draft, Summer 1998 sales contract. We were never able to get the original, but the draft one is in there. And it's in evidence as Exhibit 127.

And you'll see that in the draft first sales contract, the docks and the boat ramp weren't included. Okay. They are not included. And, remember, up here I showed you -- I'm moving this along, so I'm not bothering with the screen right now -- I showed you up

here, that exhibit from -- I think it's October 1998, when Chad says, we're meeting with the Town of Mt. Pleasant on Thursday to get this passed. We need to keep the docks.

That's when the decision was made to keep the docks, but the homeowners don't know that yet. Because the first or so agreement is in place, it's in evidence. The draft of it is in evidence, and all the e-mails regarding how it's going to work is in evidence.

At that time, in the Fall of 2008, all the homeowners knew that they were fighting was that this event facility, the building, would no longer be managed by an affiliate of their developer, which they considered safe; but would be managed by an outside, independent, commercial making operation. And it was going to be a professional wedding event place. It was going to go from being -- ah, not so great, but you know, we can live with it, to a full scale commercial operation -- there was no objection to transferring the docks, because the docks weren't getting transferred --

And you don't -- if you don't believe all the 2008 e-mails that say the I'On Company is going to keep the docks and give them to the Assembly, and you don't believe the draft agreement, go to the next agreement,

Exhibit 146. It is the 18th of December, 2008, agreement that's in evidence.

And do you recall the e-mails that said -- that we showed you -- both through their witnesses and some of them during our closing, that said -- actually it was through the witnesses. They are writing back and forth, Chad and Mike are writing back and forth. We need a new contract. It needs to provide this. Okay. The contract will be ready tomorrow. Let's look at it. No, you need to improve the language of that contract. Every one of those e-mails in evidence show that they were changing the deal.

And on December 18, 2008, they changed the deal pursuant to that October 2008 e-mail, about the meeting with the Town of Mount Pleasant. And now they are going to sell the docks and the ramp, too, because they know they won't get the zoning without them. At that point in time, though, the zoning issue regarding going commercial is already gone to the Town of Mount Pleasant.

So in February, you see the continuation of the zoning of the building becoming from an affiliate of the developer, to a full scale commercial operation. You see the zoning issue that has now risen to the town level, and the dock issue and the ramp issue, which is

now brand new -- they don't even know about it when it's executed in December -- there's no evidence they knew about. That starts to rise in the late Winter, early Spring of 2009, behind the zoning issue.

And the dock and ramp issue caused so many problems, separate from the zoning issue -- a completely separate issue, second issue, second problem -- caused so many problems that on March 25, 2009 -- I've shown it to you a hundred times -- Plaintiff's Exhibit 58, the defendant said to my clients, we are subdividing the land and we are deeding it and the docks to you.

And why shouldn't they rely on that representation when Tom Graham says they can rely on that representation, That zoning stuff, y'all just is a complete, complete, complete red herring. And the documents are in evidence that show it. And we showed the preliminary e-mails yesterday through Vince Graham, and a couple of days ago through Tom Graham.

And speaking of red herrings, why -- why did Lea Ann do some research about, okay, let's research community dock, Creekside Park. Why? Because when they raised the -- the developer said, hey, you see that little crab dock down there on the tributary, there you go. There's your community dock.

And by the way, do you see Marshwalk that isn't on the creek? There you go. There's your Creekside Park. You can't -- you can't look at our dock and believe what the words mean, because we've given them new meanings. And there you go.

And so my client, Lea Ann, my client, Brad, they scratched their heads and they said, where we crazy? Let's go look at a few other documents and see what they said to everybody else.

And they want to keep bringing up Defendant's Exhibit 3, the surveys. Those surveys are May of 2000 and later. There's no e-mail before 2009 that says anything about the Marshwalk being Creekside Park. And the only survey that ever said it, is after the amended Property Report; after these claims. It never said it in 2008 and didn't say it when my client bought the property in 2009.

And why go to the other engineers -- material -- why do we care about sewers? We don't, initially. But when they send the dock plat to the State of South Carolina and to the federal government, and they put our name on it, HOA, to get their approvals; and then say, oh, HOA doesn't mean what it says. Then we scratch our head. And, say, okay, well, let's look at some of the other plats. Let's see where else they say

HOA. Oh, by the way, there it is. And do -- it means HOA there. So, yeah, it's get a little relevant.

And why do they keep talking about Alhambra Hall and the Impact Assessment, because they don't want you to look at the dock. There's a picture of the dock that they say the community dock is going to look like at I'On. They don't want you to look at the dock and the caption. There's the community dock. They don't want you to look at the description of the crabbing docks, all of which you saw again in 1997, Celebrating Ten Years in I'On, Exhibit 51 in evidence. Three crab docks, one community dock, and a boat ramp. Nothing changed.

All this nonsense about vision here, vision there, this is just a vision; this is just a plan, it matured. Nonsense. The 1997 Impact Assessment, crabbing docks, community dock. Ten years later, celebrating ten years in I'On, three crabbing docks, one community dock, one boat ramp. Nothing changed.

And if you have any doubt about what the Property Report meant, Tom Graham, himself, up here, testified under cross examination, he didn't want to say it -- I had to get his deposition out -- he did not want to say it.

Sir, do you agree -- do you deny telling me in

your deposition that the community dock, listed in the 1998 Property Report, is probably the community dock, the main dock that's located at the Creek Club parcel -- I can't remember.

We go to the deposition. We read it. He -- three times said "probably" in that answer. Three times. He said "probably". Okay. So then we took a step back.

We then said, Mr. Graham, not only did you testify that you probably -- that it probably means that, you actually testified that you believed that that's the dock that's being referenced. Went back -- he couldn't recall again. We went back to the deposition. Question was, do you believe that the dock at the Creek Club is the one in the Property Report? The answer was, yes.

And let me ask you, if they really believed that they were doing the right thing, if they really believed they had the right to do this thing, if they really believed all this, why did they hide it from the association during 2009? Tell them they're giving it to them on March 25th. They continue negotiating the night of the 25th. They reach a deal ten days later. They hide from the Assembly. They continue to negotiate the easement with Kinney, not telling them

they're under contract.

They have communications with my clients during that time period. They have communications with the Assembly during that time period, all those communications are in evidence. And not once do they say, by the way, we're under contract because we have a right to sell.

Not once do they say, by the way, don't rely on our March 25th e-mail, Exhibit 58, because it's wrong. Not once do they say anything. They arranged a midnight closing to avoid -- as Tom Graham described it -- the brew hah hah.

Reverse engineering? There's been a lot of reversals in this case, but I'm not sure that they're really on this side of the courtroom. There's been six reversals on these amenities if you recall. They testified they planned to deed it to the Assembly to begin with, in 1997. They changed their mind between '98 and March 24th of 1999. They changed the Property Report to reflect this.

Somehow, we don't really know how, but -- but a light bulb went off in their head in 2007, after the 2005 transfer agreement, they offer to transfer -- to start the transfer process on the docks; 2008, they're honoring the transfer of the docks. December of 2008,

they change their mind, and they contract, right here in evidence, to sell it to Russo, March of 2009. They changed their mind and they said they're giving it to us.

April 8th, 2009, they changed their mind and they sell it, again, to Russo. And August 5th it goes. It's been a lot of flip flopping, but it's not on the plaintiff's side of the room.

They say Tom was in Atlanta. They want to try to minimize his testimony -- Tom was in Atlanta. He wasn't really involved. He testified he was here once a week or so, several times a month, and that he sat in and it was -- it was management by consensus, and he's the majority owner. Is it credible he's not involved?

And if you look at the e-mails -- and we don't have early e-mails -- or at least not many of them in this case. Most of the e-mails we were able to obtain, that are in evidence, are 2008 -- mostly 2008 and 2009. There are a lot of e-mails.

If look at though e-mails, you tell me whether or not Tom Graham is in charge. He was very much on top of it, and knew everything that was going on.

You know, what the real tragedy is? The real tragedy is, this was never supposed to be a discussion about whether it should be a private facility that has

weddings sometimes; or a commercial facility that has weddings sometimes, this was supposed to be a park. It was supposed to be a park with a nice -- really nice dock, and a nice boat ramp, and some parking, and the overflow parking up the street.

We never should have gotten this far down the road. Never. But I can't ask you to give that park back. I can't take the drunken drivers -- you can't take away the drunken drivers. You can't take away the congestion. You can't take away the party bus, the delivery trucks in the middle of the night.

This -- this problem the defense has created has gone too far down the road. The only way to get the property back was to allow that commercial operator to continue to operate, to get the property back and give him the 20 years; 30, if we can't buy it back with the options.

And on that point, the quotation regarding Mrs. Bedell's testimony was inaccurate. Her testimony was the plan was to buy back those last two options; that the association wants them back. They just don't know if they will be able to afford it when the time comes. She didn't say something about it being speculative, having enough money to do it might be speculative, but the intent -- the Assembly wants --

the Assembly wants their park back.

The Assembly wants back the 20 years, what we can't give them today. All we can give them is an equivalent, the compensation of what it would be or what they gave to get this park back. And that's why it's been presented to you by the plaintiffs. That's why it's been presented to you by them in the monetary fashion of, what's the value of the 20 year lease. They never wanted a 20 year lease. They wanted a park and boating facilities, but we can't give it back. So we are left with measuring it in some economic fashion, to put them in the place that they should have been.

And keep in mind, they are not asking for something for free. They are trying to simply get back, one, what they were promised; and, two, what they've already paid for. What every one of the 760 lot purchasers in I'On have already paid for, which was their -- their unencumbered, uninhibited, undivided ownership and use in this park and this boating facility, that should have been on the banks of the Hobcaw Creek.

And I want to come back to that in one second. I first want to ask you -- I want to ask about those two other purchasers you heard from this week, the two witnesses called by the defense. They think we are

putting on a show. They told you the Property Report only goes to lot purchases, right? Right? Why did they call two homeowners that were not lot purchasers, who never would have received the report? What was the point of that?

And why didn't they call their current manager as a witness, Chad Besenfelder, to refute the 2008 e-mails that Vince Graham says he doesn't know whether or not that was his company's position or not in 2008. Where is Chad Besenfelder? Where is -- where is the other manager, Joe? Where is Bill Orange to tell us that he didn't tell everything -- that the Creekside Park was there on CV-6, and that the Assembly would own the boating facilities and the dock.

Where is Laurie Thornhill, their other realtor who handed out these reports? Where is the rest of the people? We were the sales people? We were just two buyers. Where are all these witnesses?

And on the issue of the Property Reports, the unrefuted evidence in this case, is that Lea Ann Adkins got the 1998 report. There's no evidence otherwise. That is the unrefuted evidence, because they didn't call any of their employees to say they didn't give it to her, or any of their sales agents to say they didn't give it to her.

And if you look at Plaintiff's Exhibit 150, the last six or eight property receipts, you'll see postdate, the amended Property Report, April 9, 2010, or early April 2010. She's not the only one that got a copy of the original Property Report after the original one was replaced with an amended one, as evidenced by at least six of the receipts at the back of Plaintiff's Exhibit 150.

With regards to appraisers, and with regards to that value that we've been discussing, I would like you to keep in mind a couple of things. One, Plaintiff's appraiser was not working for the Plaintiff. Plaintiff's appraiser was working for Tidelands Bank. He was not our agent. He was not doing our bidding. That was a completely independent third party appraisal.

The defendant's appraiser got paid $10,000. And I'm going to tell you, you can appraise half of I'On for $10,000. He got appraised -- $10,000 -- and then he was beholding to one set of entities, and that is the defendants in this case. And if that's not biased, I don't know what is.

You know, when you talk about that there was supposed to be a park there, and you talk about the concept, you can't help but go back to Julie Hussey,

who believed in them. Who believed in the concept. Who worked for free for so long just to get in. Who came back and bought back in.

Their employee, the person who did the marketing, the person who took people down and showed them where the amenities would be, she so believed it herself she bought back in, and persuaded her boat loving husband to buy back in with her, even though he wanted to go to other neighborhoods.

After calling Vince, and him not telling her anything changed about the boats, in 2010 after the sale, at least six months after the sale. And what were Julie Hussey's -- what were her final words to you? She said, "I'm heart broken".

And she got off the stand, she didn't know the microphone was still on, but we all heard her. She said, "it sucks". This whole -- this whole CV-6 boating facility, wedding facility conflict, it all sucks. And who created it all? How did we get here?

If they wanted to write the Property Report that those might be amenities, the word "might" is in the English dictionary. They could have used it. They didn't use it. You can't give them back the park, but you can give them the economic equivalent of what they had to pay to get back those boating facilities and the

park, and we ask that you do that.

THE COURT: All right. Thank you. Ladies and gentlemen, I'm going to let y'all return to your jury room just briefly. I need the attorneys to look at two documents to get ready for the charge on the law. So if anybody needs a cup of coffee or anything, we can get that working. And we'll bring you back in and give you the charge on the law, and then you will receive the case. Please don't discuss anything yet. And I'm going go print these last two documents.

(WHEREUPON, the jury leaves the courtroom at 6:07 p.m.)

THE COURT: Anybody have anything they need put on the record before I go print this stuff?

MR. DUFFY: No, ma'am.

MR. LUCEY: No, ma'am.

THE COURT: All right. Can I get somebody -- either Seth or Yancey or somebody to come with me, so I can give you the verdict forms to bring back to look while I print the jury charges for y'all. I have the drafts ready. They are only three changes to the verdict form. It's the two questions at the end. And then at the end of the statute of limitations section, it asks did the parties intend to create a sealed instrument.

If anybody doesn't like that, we'll tinker with it. But I'll just give it to you while I print the charges, and then I'll bring them out. And I do have coffee in my office. If anybody wants any, you're welcome to it. I'll fix it. So just let me know.

(WHEREUPON, a brief recess was taken.)

THE COURT: All right. I -- I don't want to rehash what we've argued before, but I do want to make sure that anything we didn't address in the proposed charges, we do. And if there are any problems with the order of the charge, or the way I blended the various ones from the plaintiff to the defense, some of the charges you all submitted were almost identical, so that was helpful. And I did try to trim it down some, just because I think you lose effectiveness as they get tired of me talking.

How about the verdict form? Any problems with the verdict form as printed?

MR. DUFFY: It looks good, Your Honor.

MR. LUCEY: Your Honor, the only thing that jumped out at us, is that the statute of limitations questions all say "potential claim". And I think more accurate is simply "claim".

THE COURT: Okay. I have no strong feelings about it either way; do you?

MR. DUFFY: I don't think that's right. I think whether you should investigate is your point, not whether you actually have a claim. Whether you know you have a claim, or whether you should investigate whether you have a claim or not is the duty.

MR. LUCEY: The quote I have from Martin vs. Companion Health Care Corp is that "thus the statute of limitations starts ticking on the date the injured party either knows or should have known by his exercise of reasonable diligence, that a cause of action arises from the wrongful conduct."

THE COURT: Okay. Well, I'll change it to either existence of a claim or existence of a cause of action. So -- and I'll just note the defendant's objection. I think just existence of a claim -- you do have to have the actual claim to be able to start the clock ticking. It's just not -- not the potential for one, but the actual -- you don't have to know how big it is, or how full blown it is, you don't have to know how bad the crack in the ceiling is, but -- but the claim itself is there, so I will take that out before we send that to the jury in those six questions. All right.

MR. DUFFY: For what it's worth, Your Honor, if you're making that change, I do think -- I prefer claim to cause of action.

THE COURT: All right. I'll leave claim. I think claim is fine. Okay. What about the charges? Are we ready to talk about those?

MR. LUCEY: I'm on page 11.

THE COURT: All right. Y'all keep looking at that while I go print this for the jury.

(Pause.)

THE COURT: All right. Then let's see. I guess the easiest way to do it, what I would propose would be -- to make number 12 says, "Do you find in favor of the I'On Assembly as to its claim for breach of contract". If yes, then you answer the damages section. And then it's that way as for the Assembly, Ms. Adkins and Mr. Walbeck.

My suggestion would be just to put a question under each section, if you answered, yes, was the breach accompanied -- was the breach of contract established accomplished with fraudulent -- accompanied by fraudulent intent is the way it reads in the complaint. I'm open to suggestions as to how anybody would like it.

MR. DUFFY: I think that would be a fraudulent act, not a --

THE COURT: Upon accompanied by a fraudulent act.

MR. LUCEY: We're fine with that language, Your

Honor. And we'd also be fine with appending it to 13, so that if they don't give damages, they don't answer it. They move on. But it certainly can be a separate question, too.

THE COURT: Oh, okay. That's easier, just to make it just part of that same inquiry. If you answered yes -- does it matter to the defendants, one way or another?

MR. DUFFY: I just want to make sure I understand where it would be in that --

THE COURT: I think it would just be -- I'll put a space just so we can read it. But under -- right underneath, it would say -- of the yes, if you answered yes -- was the breach of contract accompanied by a fraudulent act. They wouldn't even get to that question if they answered no.

MR. DUFFY: So underneath the 13 currently?

THE COURT: Yes.

MR. DUFFY: Or part of this?

THE COURT: It would be the next line after I'On Assembly, then space -- are you okay with that?

MR. DUFFY: Yes, ma'am.

THE COURT: And then I would do that for each of the three plaintiffs. All right. Anything else before I print that, and I'll just wait and do that after --

if y'all are finished looking at the charges.

(Pause.)

THE COURT: All right. Are we ready?

MR. LUCEY: Yes, ma'am.

THE COURT: Okay. I have the charge on my screen, so tell me which page -- I'll start with Mr. Lucey. And just so you know, if the jury does ask for a copy of the charge, I will have made all of the font look alike at that point, so they can't tell what got put together. It's easier for me to leave it for y'all a little bit different, so you can tell what yours were.

MR. WHITAKER: Will the headings be in there or no?

THE COURT: You know, I'll just see how y'all want to do it. I'll probably take the headings out.

MR. WHITAKER: I think I might prefer that.

THE COURT: I don't leave headings, I think the headings need to come out. If it goes back, it's supposed to go back exactly like I said it. So, it makes it hard for them to find things. But, you know -- so, yes, I'll take the headings out, after I read it. They help me not lose my place.

MR. LUCEY: Ma'am, page 18, middle paragraph, "there is no right to rely".

THE COURT: Okay.

MR. LUCEY: I think that that's a correct statement, except for when the reliance is induced.

THE COURT: Okay. Let me --

MR. LUCEY: I think that might go under, "after educated people".

THE COURT: All right. Mr. Whitaker, I agree that that is an accurate statement of the law, that there is a right to rely if it's induced. We just need to figure out where to put it. There is no right to rely, as required to establish fraud -- I mean, I could just start this sentence, "unless such reliance is induced, comma, there is no right to rely", but...

MR. WHITAKER: I think I prefer it at the end of the sentence, but that's -- either way.

THE COURT: Well, let me read to you the way the -- "there is no right to rely as required to establish fraud, where there is no confidential or fiduciary relationship, and there is an arm's length transaction between mature, educated people, unless such reliance is induced" -- that's how y'all want it?

MR. LUCEY: Induced by the defendant.

THE COURT: Okay.

MR. LUCEY: That would be clearer.

THE COURT: I got that one.

MR. LUCEY: Your Honor, on page 22, middle charge,

constructive notice.

THE COURT: Yeah. Yes, I'm sorry.

MR. LUCEY: The second sentence is -- I'm not really sure what this sentence is -- I'm trying to -- maybe I'm just missing one word.

THE COURT: Okay. Let me look at it. Oh, that was a note to myself. Okay. That looks like an old draft. There is a word missing.

MR. LUCEY: Well, it appears it wouldn't even go with the constructive notice, perhaps it was like a left over from something else.

THE COURT: One, it was. It was part of what we were talking about in the two charges, one dealt with constructive notice, and one dealt with the ratification issue that we were struggling with.

And one of the cases that -- I can't remember, Justin, if y'all cited it in your proposed charge, or if the defendants have, but when the falsity of an alleged misrepresentation could have been ascertained by examining public records, the reliance is not proper. However, just the fact that there are public records doesn't vitiate or establish constructive notice de facto, I guess.

I mean, there was no case that had great -- you're not always imputed constructive notice just

because there's a public record. When there's an inducement, it's a problem. So we -- that was one of the things we were looking at to try to fix.

MR. WHITAKER: Your Honor, and I'm going off of memory slash -- maybe even just trying to figure it out. But it sounds as though -- if I remember the cases, they say that you have a duty to inquire -- if you would have to inquire anyway, then you are -- in other words, if it's your property, and it's in -- and you look back because you're looking up your property, you are on notice of what's in your chain of title. But I'm not on notice of what somebody recorded on the other side of the county, you know --

THE COURT: I've got the case right here, so. I can't remember whose objection it was, and I apologize.

MR. LUCEY: Are you looking at the Reed case? I've got it on the screen.

THE COURT: Yes. If you could give me the cite, that would be great. That's exactly what I'm looking up.

MR. LUCEY: 285 SC 557.

THE COURT: Thanks.

MR. LUCEY: And it's at page 561.

THE COURT: "The person committing the fraud cannot defeat a claim for misrepresentation simply

because the person defrauded is charged with notice under a recording statute, particularly where the misrepresented facts are peculiarly within the representer's knowledge." Mr. Whitaker, I didn't figure you wanted me to put in the charge, the person committing the fraud, so I was trying to -- we need find a way to say that, or we need to pull that constructive notice charge.

The case says, "the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, even though he might have ascertained the falsity of the representation had he made an investigation". I'm fine to put that in the charge, but...

MR. WHITAKER: You're asking if I just want to pull the whole constructive notice charge?

THE COURT: Yeah. I mean, those are your options. You can't just have your charge for constructive notice --

MR. WHITAKER: I understand. Then -- we'll withdraw it then.

THE COURT: Any objection to that, Mr. Lucey?

MR. LUCEY: No, Your Honor.

THE COURT: All right. Then that whole strangely -- whatever that weird font is -- section

started with constructive notice, and ending with public records, will be out. Great. Anything that makes it shorter for the jury, I'm all for it. All right. What's next?

MR. LUCEY: Page 25, last sentence.

THE COURT: Uh-huh.

MR. LUCEY: In this case, the defendants contend et cetera. At this point, we believe that last sentence should be stricken as a charge on facts, -- they've either put it in evidence or not --

MR. WHITAKER: He's right. Yeah, we withdraw the --

THE COURT: All right. Thank you. But the first sentence, "generally the reporting requirements apply" is okay to leave? That was the first paragraph on page two that we left in charge 17, but we can take that whole paragraph out. I mean, that whole section.

MR. LUCEY: I'm fine either way, Your Honor.

THE COURT: I think whole -- nobody ever put any --

MR. WHITAKER: Yeah, it doesn't add anything to leave it in there. They all know there lots in I'On so --

THE COURT: All right. I'll take it out. Great. Okay.

MR. LUCEY: That's all from the plaintiff, Your Honor.

THE COURT: Mr. Whitaker?

MR. WHITAKER: Your Honor, I've just got one on page 22, under gross negligence. Our number 31, which I think was agreed to, was just the language that as it -- failure to exercise even the slightest care -- as I'm sure it's a rule of law Your Honor knows well from tort claim act cases, so.

THE COURT: I'm familiar with it and with the existence of gross negligence. But that is a correct statement of the law, so is what the plaintiffs submitted. I'm fine either way. It's the failure to exercise even the slightest of care.

MR. LUCEY: I'm fine with 31, if they prefer that.

THE COURT: Okay. Gross negligence is the failure to exercise even the slightest of care.

MR. LUCEY: Yes.

THE COURT: Okay. That was really the only one?

MR. WHITAKER: Yes, ma'am.

THE COURT: I'm very proud. Mr. McLeod, anything else?

MR. MCLEOD: No, ma'am.

THE COURT: Let me go print this, because it just helps me to have a hard copy when the charge is this

long, and I will get that change made to the verdict form. I already changed it. I just need to print it. Then we'll be ready to charge. So if anybody needs a quick five minute restroom break or anything, it's about 40 page charge. All right.

(Pause.)

THE COURT: Everybody ready for the jury?

MR. DUFFY: Yes, ma'am.

THE COURT: Okay.

(WHEREUPON, the jury enters the courtroom at approximately 7:04 p.m.)

THE BAILIFF: All jurors are present, Your Honor.

THE COURT: Thank you, sir. Thank you, ladies and gentlemen. Thank you for your patience. I think we have ordered food, or we're getting ready to.

Ladies and gentlemen, you have heard the evidence and the arguments of both parties. I'll now explain to you the law that applies to this matter.

The plaintiffs claim that they have been damaged by the actions of the defendants. In bringing this lawsuit, the plaintiffs claim that the defendant should compensate them for their damages. South Carolina law allows for such a civil claim.

Under our constitution and code of laws, only you, the jury, can make the findings of the fact in

this case. I am not permitted to tell you how I feel about the evidence that has been presented. And throughout the trial, I have intended to be fair and impartial toward each of the parties involved.

As previously stated, I think I told y'all this the first day, to determine the facts in the case, you will need to evaluate the credibility or believability of the witnesses that we've heard from.

In determining the facts you, the jurors, may believe as much or as little of each witness' testimony as you think proper. You may believe the testimony of a single witness against that of many witnesses, or just the opposite. You may believe part of a witness' testimony, and disbelieve the rest. The fact that certain testimony may be uncontroverted, does not mean that you must automatically accept it as true. You must first gauge the credibility and believability of the witness from whom such testimony comes.

You should consider any expert witness opinion given by a witness like any other evidence, and give it the weight that you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other

evidence, you may disregard the opinion entirely.

An expert witness' testimony is to be given no greater weight than that of other witnesses simply because we designate that witness as an expert. And you do not have to accept an expert's opinion even if it is uncontradicted. Throughout this process, you have but one objective, and that's to seek the truth regardless of its source.

Evidence may be direct or circumstantial. Direct evidence is testimony by a witness about what that witness personally saw, or heard, or did. Circumstantial evidence is indirect evidence. That is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any of the evidence.

The same constitution and laws which designate and make you the finders of fact, also make me the instructor of the law. You must accept the law as the court gives it to you. If I'm wrong, there is another place and time for them to consider that error. And if necessary, to correct it. But for now, you must accept the law as the court gives it to you. And this means that you should not be concerned with what you think

the law should be, but only with what I charge you the law is.

Generally, the mere fact that a dispute has arisen between parties does not automatically mean that the plaintiffs are entitled to a verdict, rather the plaintiffs have a burden of proving their claims.

As to the majority of the causes of action, the plaintiffs must meet this burden by proving their case by a preponderance of the evidence. We also call that the greater weight of the evidence.

The preponderance of the evidence means that the facts sought to be proved is more likely than not. The greater weight of the evidence means the same thing. Imagine a traditional set of scales. When the case begins, the scales are even. After all of the evidence has been presented, if the scales remain even, or if they should tip ever so slightly in favor of the defendants, then the plaintiffs will have failed to meet their burden of proof, and your verdict should be for the defendant.

If, on the other hand, those scales should tip ever so sightly in favor of the plaintiffs, then they will have met their burden of proof, and your verdict should be for the plaintiffs.

The plaintiff's fraud cause of action carries a

higher burden of proof than the preponderance of the evidence standard. A fraud claim requires proof by clear and convincing evidence. Clear and convincing is more than just a preponderance, or greater weight of the evidence, which requires only proof which persuades you that a party's claim is more likely than not true.

Clear and convincing proof is not as a high of a standard as the burden of proof in criminal cases. You've heard of that, beyond a reasonable doubt. Clear and convincing isn't that high, but it's proof that leaves no substantial doubt in your mind.

It means that the evidence is not ambiguous, doubtful, equivocal or contradictory. Convincing means persuading by proof or argument, causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind, not only that the fact is probable, but that it is highly probable.

Of course, ladies and gentlemen, there is no way -- no good way to weigh evidence other than through the exercise of your good common sense and judgment. It's entirely a mental process. And the evidence that you should give the most weight is that which convinces you of its truth, regardless of the source from which the evidence comes.

The plaintiffs, Lea Ann Adkins and Brad Walbeck,

have alleged causes of action for breach of contract; fraud; negligent misrepresentation; breach of fiduciary duty; violation of the Interstate Land Sales Act; and violation of the South Carolina Unfair Trade Practices Act.

On behalf of the I'On Assembly, plaintiffs Adkins and Watkins (ph) have asserted derivative claims for breach of contract; fraud; negligent misrepresentation and breach of fiduciary duty. A derivative action is a lawsuit that is brought on behalf of a corporation or association by one or more of its shareholders or members, to enforce a right of the corporation or association.

A plaintiff who brings a derivative action claims -- excuse me -- a plaintiff who brings derivative claims on behalf of a corporation may also bring individual claims in one action.

Plaintiff's claims are subject to the discovery rule, which means that a claim against a defendant accrues when that plaintiff knew or should have known by the exercise of reasonable diligence of the existence of a claim. Thus, the statute of limitations starts ticking on that date that the injured party either knows or should have known by the exercise of reasonable diligence, that a cause of action arises

from wrongful conduct. This determination is an objective -- is objective rather than subjective.

As such, the questions are not whether the particular plaintiff in the case actually knew he or she had a claim, instead the jury must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his or 174s had been invaded or that some claim against another party might exist.

The statute of limitations is triggered, not merely by knowledge of an injury, but by knowledge of facts diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. The burden of establishing a statute of limitations bar lies on the defendants.

Plaintiffs have brought claims individually and on behalf of the I'On Assembly. As to the claims brought by or on behalf of the I'On Assembly, you must base your finding as to when any claim accrued based on what the I'On Assembly knew or should have known.

In an action involving a sealed instrument such as a sealed contract, the statute of limitations extends 20 years from the date said instrument was executed. An instrument is considered sealed whenever it clearly appears from the attestation clause or some

other part of an instrument, by way of a sealed designation or otherwise, that such instrument should be a sealed instrument.

When the owner of land on which an easement exists, purchases and becomes the owner of the land for which the easement was in place to serve, the land is merged and the easement is terminated.

A contract is an obligation which arises from an actual agreement of the parties, manifested by words, oral, or written, or by conduct. If the agreement is manifested by words, the contract is said to be express. In either case, the parties must manifest a mutual intent to be bound by the terms of the contract. Without the actual agreement of the parties, there is no contract.

Quite simply, a contract exists where there is an agreement between two or more persons, upon sufficient consideration, either to do or not to do a particular act. Common sense and good faith are the leading touchstones of construction of the provisions of a contract. Where one construction makes the provisions unusual or extraordinary, and another construction which is equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction must prevail.

When a term in a contract is ambiguous, the trier of fact -- that's y'all -- must determine the true intention of the parties in the light of the subject matter. The relations of the parties to each other, and the circumstances surrounding the parties when they entered into the agreement. Ambiguities or conflicts in documents constituting a contract must be construed against the party who prepared the contract.

A party cannot use extrinsic evidence to create an ambiguity which does not exist within the four corners of the contract. A party cannot use extrinsic evidence to read additional terms into a contract, which are not present.

If you find that the terms of the contracts are unambiguous, clear, and explicit, extrinsic evidence of statements made contemporaneously with or prior to the contract's execution, cannot be used to contradict, vary, or explain its terms. A promise is incapable of becoming the subject of an action unless it is supported by consideration.

If a party did not give valuable consideration in return for a particular promise, that promise is not enforceable as a contract. Where general and specific terms of a contract are inconsistent, the inconsistency is resolved in favor of the more specific term of the

contract. In other words, the specific terms control, and the meaning of the general terms are restrained or superseded by the specific.

A third party who directly benefits from a valid contract may bring an action to enforce that contract, even if the third party is incidental to the contract formation itself. Only parties intended to be directly benefited by a contract can bring an action to enforce the contract as third party beneficiaries.

In the absence of a clear intent to benefit a third person, he cannot sue on a contract as a third party beneficiary -- excuse me -- beneficiary.

A merger clause is a contractual provision stating that the contract represents the parties complete and final agreement, and supersedes all informal understandings and oral agreements relating to the subject matter of the contract. A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.

When a contract is induced by misrepresentation, neither the merger nor the integration clause contained in the contract negates the misrepresentation. In other words, the merger or integration clause contained in a contract, does not prevent a party from claiming and presenting evidence, that the party was misled when

entering the contract.

There is in every contract in South Carolina an implied covenant of good faith and fair dealing. The implied covenant of good faith and fair dealing means that the parties will work together to further the goals and purpose of the contract. Similarly, neither party will take actions that will frustrate the purpose of the contract.

The phrase "good faith" is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency, with justified expectations of the party. It excludes a variety of types of conduct characterized as involving bad faith, because they violate community standards of decency, fairness or reasonableness. The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.

Bad faith is the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or

sinister motive.

If plaintiff proved that there has been a breach of contract, you may consider whether the breach was accompanied by fraudulent intent. Plaintiff must prove both fraudulent intent related to the breach and a fraudulent act directly connected to the breach.

A fraudulent act is of like character to fraudulent intent, but imports some definite act looking to the perpetration of the fraud. A fraudulent act can be characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

A misrepresentation made in reckless disregard of the truth will support an action for breach of contract accompanied by fraudulent act. The fraudulent act may be prior to, contemporaneous with or subsequent to the breach of contract, but it must be connected with the breach itself, and cannot be too remote in time or character.

Agency is a consensual relationship whereby a person, the agent, acts on behalf of another, the principal, subject to the principal's control, and in such a manner as to effect the legal relationship of the principal with third parties.

The test to determine agency is whether the

purported principal has the right to control the conduct of his alleged agent. A party asserting agency is a basis of liability, must prove the existence of the agency by the greater weight of the evidence. And the agency may be established by the facts or by circumstantial evidence showing a course of dealing between the parties.

The relationship of agency need not depend upon express appointment by the alleged principal and acceptance by the purported agent. Agency may be implied from words and conduct of the parties, and the circumstances of the particular case. Conduct of the purported agent, exhibiting a pretense of authority, with the knowledge of the alleged principal, is called apparent authority.

Apparent authority means that a principal is bound by the acts of its agent when the principal has placed the agent in such a position, that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe that the agent has certain authority. And they, in turn, deal with the agent based on that assumption.

Apparent authority to do an act is created as to a third person by written or spoken words, or any other conduct of the principal which reasonably interpreted,

causes the third person to believe the purported principal consents to have the act done on his behalf by the alleged agent. Either the principal's right must intend to cause the third person to believe the alleged agent is authorized to act for the principal, or the principal should realize his conduct is likely to create such a belief.

A principal is liable to third persons for fraud, deceit, concealment, misrepresentation, negligence and other malfeasances and omissions of the duty of the agent, acting within the scope of the agency, even though the principal did not authorize, participate in, or know of such conduct, misconduct; or even if he forbade the acts or disapproved of them.

A principal is also liable for the ratified acts of his agent. Ratification is the express or implied adoption of an act or contract performed or entered into on one's behalf by another, who at the time assumed to act as that person's agent.

Ratification consists of the following elements: Acceptance by the principal of the benefit of the agent's acts; full knowledge of the facts; and circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangement.

Under South Carolina law, the master is

generally liable for the wrongful acts of his servant, while acting within the scope of the servant's employment. The words master and servant are generally synonomous with the words "employer" and "employee" respectively. Thus an employer is liable to third parties for injuries caused by the negligence of an employee, committed within the scope of that employee's employment.

Where a master/servant relationship exists, the tort of the employee is imputed to the employer by law, without any requirement of fault on the part of the employer.

The plaintiffs have always asserted a cause of action for fraud. Fraud is defined as an intentional perversion of the truth, for the purpose of inducing another in reliance upon to part with some valuable thing belonging to him or her, or to surrender a legal right.

Fraud is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another, so that he shall act upon it to his legal injury.

Fraud is -- in its general sense, comprises

anything calculated to deceive, including all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidences, justly reposed and resulting in damage to another.

To establish actionable fraud, there must first be a false representation. The representation must be a statement or a set of actions which concerns an existing or preexisting fact. The false representation must be one of fact as distinguished from the mere expression of an opinion.

The false representation must be predicated upon misstatements of fact, rather than upon an expression of opinion, an expression of intention, or an expression of confidence that a bargain will be satisfactory. The distinction between a matter of fact and a matter of opinion is generally characterized by what is susceptible of exact knowledge when the statement is made.

Statements of opinion, predictions of future events, mere puffing, sales talk, and broken promises normally do not amount to fraud. As a general rule, fraud cannot be predicated on a statement that constitutes an expression of an intention. An exception to the general rule is recognized for unfulfilled promises, which were made by a party who

never intended to fulfill the promise, and only made it to induce the performance of another party.

An actionable representation cannot consist of a mere broken promise, even if a party acts in reliance on the promise. An action in fraud, however, can be based on an unfulfilled promise to perform in the future, made with the present undisclosed intention not to perform, which is made made for the purpose of inducing one to sign a paper or do some other act.

The representation must be false. A fraudulent act is characterized by dishonesty in fact, unfair dealing, or intending to deceive.

Bad faith is the test of fraud. Nondisclosure or silence becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to another. The truth or falsity of a representation must be determined as of the time it was made or acted on, and not at some later date.

The false representation must be material. If an objective, reasonable person using the misrepresentation would have viewed the representation as sufficiently important and significant, that it would have played a role in the decision to enter into a contractual relationship, the representation may be deemed material.

The matter is material if a reasonable person would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question. Or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important, in determining his choice of action, although a reasonable man would not so regard it.

The knowledge of falsity extends to statements made in reckless disregard to the truth. Reckless disregard exists where one makes a statement and knows he lacks the knowledge necessary to be confident that that statement is true.

A defendant may be held liable for misrepresentations made to the persons or class of persons whom he intends or has reason to expect to act, or to refrain from action in reliance upon the fraudulent misrepresentation.

To recover for fraud, the plaintiff must have relied on the misrepresentation. If the plaintiff knew the misrepresentation was false, there is no cause of action because there could not have been any reliance on the truth of the statement.

A victim of fraud has a right to rely on a misrepresentation so long as his own reliance is not

reckless or grossly negligent. The legitimacy of the plaintiff's reliance on the misrepresentation is an issue to be decided by you, the jury. There is no cause of action for a fraudulent statement unless the plaintiff is injured.

The right to rely on a representation is a necessary element that must be proved in a fraud action. The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances, in ascertaining the truth with respect to the representations made to him or her.

The principle of the right of reliance upon representations is closely bound up with the duty on the part of the plaintiff to use some measure of protection and precaution to safeguard his or her own interests. With respect to the right to rely upon representations, every person must use reasonable diligence for his or her own protection.

There is no right to rely as required to establish fraud, where there is no confidential or fiduciary relationship, and there is an arm's length transaction between mature, educated people, unless such reliance is induced by the defendant. That is especially true in circumstances where one should have

utilized precaution and protection to safeguard one's interests.

If you find that the plaintiff relied upon statements, you must determine whether reliance upon the representation was justifiable or excusable, what constitutes reasonable prudence and diligence with respect to such reliance; and what conduct constitutes as reckless or conscious failure to exercise such prudence.

In making these determinations, you may take into consideration the form and materiality of representation; the respective intelligence, experience; age; mental and physical conditions of the parties; and the relation and respective knowledge and means of knowledge of the parties.

If you find from the testimony that the defendant committed fraud, but then you also find that the plaintiff failed to exercise ordinary diligence and or due care in protecting himself, the plaintiff would not be permitted to recover. Every person must use reasonable prudence and diligence for his or her own protection.

To establish, the plaintiff must prove by clear, cogent and convincing evidence the following nine elements: A representation; the falsity of the

representation; the materiality of the representation; the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity; the speaker's intent that the representation be acted upon by the person hearing the representation; the hearer's ignorance of its falsity; the hearer's reliance on its truth; the hearer's right to rely thereon; and the hearer's consequent and proximate injury.

Ordinarily, a fraudulent representation must relate to a present or preexisting fact, and cannot be based on unfulfilled promises or statements about future events. However, a fraudulent misrepresentation of a fact occurs when a promise is to do a certain thing, and at that time has no intention of keeping the promise. Accordingly, a promise made with an existing intention not to perform for the purpose of inducing another to perform an act, may institute actionable fraud.

A future promise is not fraudulent unless such future promise was part of a general design or plan existing at the time, made as a part of a general scheme to induce the signing of a paper or to make one act as he otherwise would not have acted to his injury.

A mere breach of contract does not normally constitute fraud. In order to raise to a failure to

perform under the terms of a contract as an element of actionable fraud, there must be a clear showing that the party had no intent to perform and induced the contract on that basis.

Constructive fraud is a breach of a legal or equitable duty, which irrespective of the moral guilt of the person committing fraud, the law declares fraudulent, because it -- because of its tendency to deceive others, to violate public or private confidence or to injure public interest.

To establish constructive fraud, all elements of actual fraud, except the element of intent, must be established. Thus constructive fraud is distinguished from fraud by the absence of the element of intent to deceive. Unlike actual fraud, neither actual dishonesty of purpose, nor intent to deceive, is an element of constructive fraud. Instead it is sufficient that it be alleged, that the defendant ought to have known the falsity of the misrepresentation.

To recover in a negligent misrepresentation action, a plaintiff must prove the defendant made a false representation to the plaintiff; that the defendant had a pecuniary interest in making the statement; that the defendant owed a duty of care that he communicate truthful information -- to see that he

communicated truthful information to the plaintiff; that the defendant breached that duty by failing to exercise due care; that the plaintiff justifiably relied on the representation; and that the plaintiff suffered a pecuniary loss as the result of his reliance on the defendant's representation. Pecuniary interest is defined as a direct interest related to money in an action or case.

One, who in the course of his business profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

This liability is limited to loss suffered by the person, or one of a limited group of persons for whose benefiting guidance he intends to supply the information, or knows that the recipient intends to supply it. And through reliance upon it in a transaction that he intends the information to influence, or knows that the recipient so intends or is a substantially similar transaction.

The plaintiff's reliance upon a negligently made misrepresentation must be justifiable under the circumstances. Accordingly, the plaintiff must establish that his or her reliance on the misrepresentation was reasonable.

A determination of justifiable reliance involves the evaluation of the totality of the circumstances, including the position and the relationship of the parties. Reliance is justified if the defendant occupies a superior position to the plaintiff regarding knowledge of the truth of the statement made.

Reliance can be justified if the defendant occupies a position superior to that of the plaintiff regarding knowledge of the truth of the statement made. There can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.

There is no liability for negligent misrepresentation which involves casual statements, representations as to matters of law, or matters which the plaintiff could ascertain on his or her -- on his or her own in the exercise of due diligence. Gross negligence is the failure to exercise even the slightest of care.

The plaintiffs have asserted a claim for beach 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 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.

The plaintiff's claim that the defendants violated the Interstate Land Sales Full Disclosure Act. This act is designed to protect purchasers from fraud and deception in the sale of land. The act requires developers to inform purchasers, prior to purchase, of facts which would enable a reasonably prudent individual to make an informed decision about purchasing a piece of real property.

Specifically, the Act requires a developer to file a statement of record outlining property specifics, and to furnish a printed Property Report to the purchaser in advance of the signing of any contract by such purchaser for said property. Both the statement of record and the Property Report must detail the nature of any improvements to be installed by the developer, and his estimated schedule for completion.

In order to prove an ILSA claim, the plaintiffs

must first show that they qualify for ILSA protection. If successful, plaintiffs must then show that the defendants violated the ILSA.

To demonstrate the plaintiffs qualify for ILSA protection, they must show, first, that one or more defendants was a developer or a developer's agent as defined by the Interstate Land Sales Act. Second, that the plaintiffs are purchasers as defined by the Act. And, third, that the I'On development was subject to the acts reporting requirements.

To qualify for ILSA protection, a plaintiff must first show that he or she purchased a lot from a defendant who qualifies as a developer, or developer's agent under ILSA. ILSA defines a developer as any person who directly or indirectly sells, or offers to sell, or advertises for sale any lot in a subdivision; and defines an agent as a person who represents, or acts for, or on behalf of a developer in selling or offering to sell any lot or lots in a subdivision.

When deciding if an entity or an individual is a developer or a developer's agent for purposes of the act, the determining factor is whether each defendant participated in sales, or could be considered a controlling person in an organization that participated in sales.

If you find that the Interstate Land Sales Act applies to the plaintiff's lot purchases, the plaintiffs, Walbeck and Adkins must then prove the following four elements by the preponderance of the evidence: First, that the materials that they provided contained an untrue statement. Second, that the untrue statement was material. Third, that the plaintiffs relied on the untrue statement to their detriment. And, fourth, that the plaintiffs suffered damages.

You must also determine whether the plaintiffs actually relied on such statement to their detriment. I've already instructed you regarding the legal definition of reliance in the instructions regarding fraud.

If plaintiffs did not actually rely on an untrue statement in the Property Report, or other provided materials to their detriment, they cannot recover from defendants under the Interstate Land Sales Act.

Under the Act, plaintiffs cannot construe ambiguities in a Property Report or provided materials as material misstatements or omissions. Where a term is not defined by a Property Report, or other written materials, allegations that such term was ambiguous and intended to encompass a specific meaning beyond their liberal reading, do not constitute violations of the

Act so long as the developer is satisfied the terms of the provided documents as written.

The Act makes it unlawful for a developer to sell any nonexempt property, where any part of the statement of record, Property Report, or associated marketing materials for said property, contains an untrue statement of a material fact, or omits to state a material fact required by the Act.

The test of materiality is whether a reasonable investor might have considered the omitted fact or erroneous statement as important in making a decision. Thus, the developer's intent to deceive or defraud is not a required element where the provided materials contain an untrue statement of a material fact, or omit a material fact required to be stated therein.

Further, a purchaser does not need to prove the purchaser relied on the Property Report or associated materials. The purchaser needs only to show that the omission or misrepresentation existed in the report at the time the property was sold.

The South Carolina Unfair Trade Practices Act makes unfair methods of competition and unfair or deceptive trade practices in the conduct of any trade or commerce. unlawful. Trade and commerce are defined to include the advertising, offering for sale or

distribution of any services and any property tangible or intangible, real, personal, or mixed; and any other article, commodity or thing of value, wherever situated, and to include any trade or commerce directly or indirectly affecting the people of this state.

The Act of practice must be one that affects the public to be actionable under the Unfair Trade Practices Act.

One test for whether an act or practice has an impact on the public, is whether it has the potential for repetition. Even if facts are unfair or deceptive, if they affect only the parties to the transaction, they are beyond the scope of the Act.

Proof of common law fraud is not necessary to establish violation of the Unfair Trade Practices Act, as the Act creates new substantive rights. In other words, the intention to deceive need not be proved, only that the practice had -- complained of had the capacity to deceive.

A practice is unfair when it offends public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. A trade practice is deceptive when it has a tendency to deceive.

Even a truthful statement may be deceptive if it

has the capacity or tendency to deceive. A deliberate or intentional breach of a valid contract is not in and of itself a violation of the South Carolina Unfair Trade Practices Act. The act complained of must be deceptive or actually approach deception. Whether an act is unfair or deceptive, is a question of fact for you, the jury, to determine.

Where plaintiffs have proven a cause of action, your next step would be to determine the amount of money to which plaintiffs are entitled. We call such a monetary award damages.

The term compensatory damages or actual damages means that amount of money and damages as will compensate the plaintiff justly and fairly for all injuries and losses that he or she had sustained as a result of the complained act of the defendants.

The measure of damages for breach of contract is the loss actually suffered as a result of the breach. The proper method for calculation for damages in a fraud action is the benefit of the bargain approach, according to which the plaintiff is entitled to the difference between the value he would have received if the defendant's representations had been true; and the value he actually received, together with any proximately caused consequential or special damages.

A property owner, although not an expert, may give his or her estimate as to the value of the real or personal property in question. The finder of fact must then determine the probative value of the testimony.

A plaintiff cannot recover conjectural or speculative damages. However, if you find the plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any damages that the evidence shows will be reasonably certain to occur in the future.

Future damages need not be proved to a mathematical certainty, and often must be approximated. These future damages must be the result of the defendant's acts.

Any future damages that you award, must be reduced to their present day value. Under South Carolina law, the guiding light for future damages is that they need not be exact, as long as they have a reasonable basis.

A small sum, known as nominal damages may be awarded when a plaintiff has proved no substantial loss or injury, but when the law recognizes the violation or invasion of a legal right, or the breach of a duty, or when the plaintiff's evidence shows the existence, but not the amount of an actual injury.

Nominal damages are a trivial or trifling sum awarded to a plaintiff in an action, where there is not substantial loss or injury to be compensated, but still the law recognizes a technical invasion of the plaintiff's rights or a breach of the defendant's duty.

Nominal damages are awarded for the vindication of a right where no real loss or injury can be proved. If no actual damages capable of pecuniary estimation have been sustained, but some legal right of a plaintiff has been thereby violated through the defendant's acts, you may award only nominal damages such as one dollar, one cent, or other inconsiderable amount to vindicate plaintiff's legal right.

A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages. The burden of proving lack of due diligence in minimizing damages is on the party claiming a failure to mitigate.

Ladies and gentlemen, if you find that the plaintiffs have proved their right to recover on multiple causes of action, then the plaintiffs are entitled to receive a full set of damages on each individual cause of action so proven. The court will

then ensure that the plaintiffs do not receive a double recovery.

In other words, although the plaintiffs are only entitled to receive a full set of damages for each individual claim that you find that they have proven, the plaintiffs will only recover once.

The existence or amount of damages cannot be left to conjecture, guess work or speculation. However, proof of the amount of loss with absolute or mathematical certainty is not required.

Damages must be susceptible of ascertainment with a reasonable degree of certainty. A plaintiff cannot recover conjectural or speculative damages. The evidence presented by the particular plaintiff must enable you, the jury, to determine what amount is fair, just and reasonable.

A plaintiff bears the burden of proving, by the preponderance of the evidence, that he or she is entitled to compensatory damages, unless as I have explained to you before, there is a different level of proof applicable to a cause of action.

Ladies and gentlemen of the jury, as you begin your deliberation shortly -- I promise -- I want to thank you for the time and attention and consideration that you have given this case. I have watched y'all

paying attention and taking notes the whole time, and this has been a complicated case. We all know that, and we appreciate it. I just want you to know that we appreciate that, and to recognize the importance of your responsibility.

Everybody is entitled to justice in this case, both the plaintiffs and the defendants. All are entitled to justice, nothing more and nothing less. You owe no support or sympathy to anyone. And I'm confident that whatever verdict you reach, will represent truth and justice for all of the parties that have been involved in this case.

Please remember your verdict must be unanimous. I'm now going to explain the verdict form and the possible verdicts that you can reach. The parties have done a great job working with the Court to get a verdict form prepared, and it's a long verdict form, but it's pretty self explanatory.

The first several questions, one through seven, deal with the statute of limitation questions and on what date the respective parties knew or reasonably should have known of the existence of a claim. And you can read through that. I'm not going read through each one for you. Y'all can read. And we've given the charge.

The last question in that section for the statute of limitation asks, did the parties intend to create a sealed instrument. You heard the charge on the law on that, and you'll answer that question yes or no.

The following questions are grouped according to the cause of action. We went through the causes of action and what the law was for those. The first, as it happens to be in the verdict form, is the Interstate Land Sales Act. Remember that cause of action is only on behalf of the individual plaintiffs, Ms. Adkins and Mr. Walbeck, not derivatively on behalf of the Assembly.

And just to give you an example, question eight, do you find in favor of Lea Ann Adkins as to her claim for violation of the Interstate Land Sales Act. You check yes or no. If you check no, you don't have to answer the next question. But if you check yes, you write in the amount of damages that you have awarded because you find that violation. You then do that as to Mr. Walbeck.

The next cause of action listed on the form is breach of contract. And it has a few more questions. And that also covers the derivative claim that the individual plaintiffs have asserted on behalf of the

Assembly.

The first question, number 12, do you find in favor of the I'On Assembly as to its claim for breach of contract. You answer yes or no. If you answer yes, you write the amount of damages to be awarded to the Assembly. If you answer yes, you then answer, was the breach of contract accompanied by a fraudulent intent. If you answer no, you obviously don't have to answer either of those questions, because you have to reach the answer yes in 12, to even get to 13 and 14. There's then a set of questions under breach of contract for Ms. Adkins and for Mr. Walbeck.

The next question, breach of fiduciary duty, just as an example, do you find in favor of the I'On Assembly as to its claim for breach of fiduciary. The choices are no and yes. If you answer no, you move on to the next part. If you answer yes, you write in the amount of damages that you find on that cause of action, if any.

The next section deals with fraud, a similar analysis. The same thing under negligent misrepresentation.

We then go to the South Carolina Unfair Trade Practices Act. Again, this is asserted only on behalf of the individual defendants, it's not a derivative

claim on behalf of the Assembly. So you'll answer, for example, question 32, do you find in favor of Lea Ann Adkins as to her claim for violation of the South Carolina Unfair Trade Practices Act. You answer no, you move on to consider the cause of action for Mr. Walbeck. If you answer yes, you write the amount of damages to be awarded to Ms. Adkins. Then you answer the next question, was the violation willful or knowing, because that's an additional element that you'll need to consider. You then do that with Mr. Walbeck.

Finally, ladies and gentlemen, if you found for one or more of the plaintiffs on any of the causes of action set forth above, the question is, was defendant's conduct -- I have a typo that I need to fix -- reckless, willful and/or wanton. If you answer yes, you check yes. If you answer no, you check no. If you didn't find in favor of the plaintiffs on any of the previous sections, you obviously don't have to answer that question. But it sets it out in pretty good detail.

And one of the jobs of your foreperson will be to write notes to me if you have any questions about the verdict form or as you deliberate. Y'all have been paying good attention, and taking notes. So I don't

think you'll have too many questions. But if you do, the proper way to have that addressed is to tell it to your foreperson. She writes it down, knocks on the door. They bring it to me.

I bring everybody in here and read them the question, because I have to let them chime in on any question that I answer mostly. Some of the basic ones I can handle. Then I either come back and tell you what the answer is that we've all worked on and agreed to, or if it's something that we need to protect in case there's another court looking at this one day, I'll bring you back in here, so that we can answer the question on the record.

Okay. You still can't quite deliberate yet. I have to check with the parties and get them to look through the exhibits to make sure we get the exhibits together for you. Any exhibits that came into evidence, that were admitted, either when you heard me say "that's admitted without objection" or "with objection", and any exhibits that they stipulated to. Because believe it or not, these lawyers worked together hugely to stipulate to a number of the evidence, materials that probably saved a week of stuff y'all had to listen to. So give everybody credit on that. That comes back to you.

There may be some things that were referred to in here that you don't get back there. That just means it didn't come into evidence. Until you get that evidence and the verdict form, you are not allowed to start deliberating. But as soon as you get it, you can start working on the case and working through this 38 -- 34.

So I'm going to let you return to your jury room. I do not know if the food is here yet, but it should be on the way. Hopefully -- we didn't want to order it too early. Because if you're still sitting in here, it just gets cold. So, hopefully, when it gets here, it will be hot. Thank you very much for you kind attention. And thank y'all for staying. I think that was an efficient way to do things.

(WHEREUPON, the jury leaves the courtroom at 7:52 p.m.)

THE COURT: Anything anybody needs to put on the record at this point regarding the charge as given? I know we've got all the prior objections. Once I get the typos fixed, I'm going to make it a court's exhibit. But anything new?

MR. DUFFY: Your Honor, I just -- the verdict form, I thought, we were changing fraudulent act associated with the -- I think it was read as intent.

I don't know if it's --

MR. LUCEY: It was. But, Your Honor, both words are in the following sentence, so it really should make no difference.

THE COURT: I honestly thought you said accompanied by fraudulent act, but either act or intent is proper, and I'm happy to do it anyway y'all agree to.

MR. DUFFY: Okay.

THE COURT: It just says, was the breach accompanied by a fraudulent act.

MR. DUFFY: I heard it -- I heard it as intent.

THE COURT: Did I say intent out loud.

MR. DUFFY: That's my only point.

THE COURT: I may have. If I said that, I apologize.

MR. DUFFY: I don't think it needs to be corrected.

THE COURT: The verdict form says act. Y'all want to come take a look at it. I am sorry. That's what happens when I try to talk off the cuff. But they will see this. I appreciate that. Anything else y'all need to put on the record?

MR. LUCEY: No, Your Honor.

THE COURT: All right. Then if y'all would come

and take a look at the exhibits.

MR. DUFFY: We've done that.

THE COURT: Okay. Great. Thank you. Then I will fix this one typo. There's just an extra "was" on the last page of the verdict form, but I don't want there to be anything confusing in it. And I don't want to look bad on the record in appeal when it goes up. So I'm going go fix that and then we'll be at ease.

(WHEREUPON, a brief recess was taken.)

MR. YOUNG: If they ask for the charge, are you going to bring us back in here or --

MR. DUFFY: We have no objection --

THE COURT: If anybody needs to preserve an objection, go ahead and put it on the record now, but I will give it to them with the font corrected, if they ask for it.

MR. MCLEOD: I imagine they are going to.

THE COURT: Anybody who wants to object, go ahead. It won't hurt my feelings, but it will protect --

MR. MCLEOD: No.

MR. LUCEY: No.

MR. MCLEOD: We all think it was a good decision last time --

THE COURT: I'm stunned. But I really am appreciative of everything y'all did stipulate to.

They don't realize it, but this could have take a lot -- a lot longer. It really did.

Y'all did a great job, everybody did. This is a complicated case. I am sure I got a number of things wrong, hopefully it wasn't too prejudicial to anybody, but I guess we'll see. But y'all may still want to talk. I was watching them even while I was talking about when they were talking notes. So, you know, put your heads together. All right. Let me fix this, and then we'll be ready to send it back.

(WHEREUPON, the case was sent to the jury.)

THE COURT: All right. We have a question, which at first I did not understand until I looked at it again. "With respect to question number seven, what instrument is this in reference to?" Which is a really good question now that I think about it.

As y'all know, that's the question that says, "does this involve a sealed instrument, but was there an intent to create a sealed instrument". I'm happy to hear thoughts on how you would like me to respond to that.

MR. LUCEY: Your Honor, I think it applies -- with the evidence in this case, it applies to the purchase contracts.

THE COURT: The purchase contracts.

MR. LUCEY: Yes, ma'am. Contracts, plural.

THE COURT: Contracts or one?

MR. LUCEY: Both -- both Brad Walbeck's and Lea Ann's purchase contracts.

THE COURT: Do you agree?

MR. DUFFY: I agree.

THE COURT: Do y'all want me to bring them back in here to tell them this, or just tell them that? Do you mind me just saying telling them that?

MR. LUCEY: Yes, ma'am. That's fine.

MR. DUFFY: Yes.

THE COURT: All right. Then that's responsive to the question, and I'll just keep you posted. But they are working. We let them prop the door open a little bit because no one else is back there. The air conditioner cuts off, which I forgot about but.

MR. LUCEY: So, Your Honor, those contracts are exhibits 2 and 45, Plaintiff's 2 and 45.

THE COURT: Okay. Great. Thank you. All right. We'll be at ease. Thank you.

(Court's Exhibit No. 7, jury charge, marked.)

(WHEREUPON, a recess was taken.)

THE COURT: The question is damages. "Can plaintiff be paid out on multiple claims? Example, if plaintiff is awarded a dollar for an ILSA violation and

a dollar for negligent representation, would the verdict the plaintiff receives be $2 dollars".

Well, no, but we had a charge about that, dealing with the multiple claims. But obviously it did not cover it. I can bring them back and just read that part to them, again. You know, obviously the plaintiff would have to elect remedies between what's awarded. I don't know how much we want to get into that beyond saying the court sorts that out, like we did in the charge. But I'm happy to hear any suggestions.

MR. DUFFY: I'm fine with Your Honor's suggestion, whatever -- whatever you believe you can tell them to make that work.

THE COURT: Justin?

MR. LUCEY: Your Honor, I think that our charge 59, that the court essentially charged, is very much on point. And I might suggest this this charge be sent in response to their question. It's very neutral, and it even takes the law off if it --

THE COURT: Can you show it to Brian?

MR. DUFFY: I don't like the idea of handing one charge back.

THE COURT: I'm not allowed to do it that way anyway. But I can certainly get our charge back and read it to them, again, what we charged. I don't think

it's that different than what y'all turned in. We took that charge almost verbatim from what I recall. But I don't know if just recharging them is going to answer the question. I can bring them out, recharge them, and then say does that address the question. The foreman, they'll nod or not. But then they are going to need to know about the answer if it doesn't.

MR. LUCEY: I would suggest a more direct route, if they ask a question, then I think we should answer it. The answer is no, the court takes care of that later. And that's exactly what the charge says.

THE COURT: The charge does say that. I'm happy to just say that. That's fine with me. I just --

MR. DUFFY: I don't have any objection.

THE COURT: Okay. Do you want me to bring them out here and tell them that, or do you want me to just tell them that?

MR. DUFFY: Just put on the record what you're telling them and --

THE COURT: Okay. I'm going to have them hand me the charge back, so that I can read to them that one charge. And the answer will be no, the court takes care of that later. Is that -- everybody satisfied to do that?

MR. DUFFY: Yes, ma'am.

MR. LUCEY: Yes, ma'am.

THE COURT: Okay. I don't even think that was a proper sentence or I'm getting tired. All right. I'm going to go answer their question, and we'll get this marked, thank you.

(Court's Exhibit No. 8, note from jury, marked.)

(WHEREUPON, a recess was taken.)

THE COURT: Okay. They found the answer before I got back there. But I said the the answer to the question is no. The court sorts that out later. There is a charge -- if y'all hand me the charge -- they said, oh, we found it. All right. This will be court's 9, and we'll be at ease until we get another question. Thank y'all.

(Court's Exhibit No. 9, note from jury, marked.)

(WHEREUPON, a recess was taken.)

THE COURT: We have a verdict. I am told that they are proofreading it, and running to the restroom, and then we will have it. And while we wait, I just have to tell y'all again, what a good job everybody did. I mean, it was a pleasure working for y'all. I know this was complex and difficult, but y'all did a good job. It's so much better working with lawyers -- well -- I've seen some stuff in the last years.

MR. DUFFY: Thank you.

MR. LUCEY: Thank you.

(WHEREUPON, the jury entered the courtroom at 11:35 p.m.)

THE BAILIFF: All the jurors are present, Your Honor.

THE COURT: Thank you, sir. And thank you, ladies and gentlemen. Madam Foreperson, it's my understanding that the jury has reached a verdict; is that correct?

MADAM FOREPERSON: That's correct.

THE COURT: Okay. If you would share it with my bailiff, we will get ready to publish it. Thank you, sir.

(Pause.)

THE CLERK: The state of South Carolina, County of Charleston, in the Court of Common Pleas for the 9th Judicial Circuit, case 2010-CP-10-10490. I'On Assembly, Incorporated and Brad J. Walbeck, Lea Adkins, individually and derivatively on behalf of I'On Assembly, Incorporated, Plaintiffs versus the I'On Company, LLC, The I'On Club, LLC, the I'On Group, LLC, formerly known as Civitas, LLC, and I'On Realty LLC, defendants.

"We, the jury, unanimously find as follows:"

Statute of Limitations. Question number one: "What is the date that the I'On Assembly knew or

reasonably should have known of the existence of a claim against the defendants regarding ownership of the community dock?" Answer: "August 5, 2009."

Question number two: "What is the date that the I'On Assembly knew or reasonably should have known of the existence of a claim against the defendants regarding ownership of a Creekside Park?" Answer: "August 5, 2009."

Question number three: "What is the date that Lee Ann Adkins knew or reasonably should have known of the existence of a claim against the defendants regarding ownership of the community dock? August 5, 2009."

Question number 4: "What is the date that Lee Ann Adkins knew or reasonably should have known of the existence of a claim against the defendants regarding ownership of a Creekside Park? August 5, 2009."

Question number five: "What is the date that Brad Walbeck knew or reasonably should have known of the existence of a claim against the defendants regarding ownership of community dock? August 5, 2009."

Question number six: "What is the date that Brad Walbeck knew or reasonably should have known of the existence of a claim against the defendants

regarding ownership of the Creekside Park? August 5, 2009."

Question number seven: "Did the parties intend to create a sealed instrument? Yes."

As to the Interstate Land Sales Act, Question number eight: "Do you find in favor of Lea Ann Adkins as to her claim of violation of the Interstate Land Sales Act? No."

Question number ten: "Do you find in favor of Brad Walbeck as to his claim for violation of the Interstate Land Sales Act? Yes."

Question number 11: "If you answered yes, write the amount of damages to be award to Brad Walbeck. One dollar."

Question number 12: "Do you find in favor of the I'On Assembly as to its claim for breach of contract? Yes."

Question number 13: If you answered yes, write the amount of damages to be awarded to the I'On Assembly. $1,000,000."

"Was the breach of contract accompanied by a fraudulent act? No."

"Do you find -- excuse me -- question number 14: "Do you find in favor of Lea Ann Adkins as to her claim for breach of contract? No."

Question number 16: "Do you find in favor of Brad Walbeck as to his claim for breach of contract? Yes."

Question number 17: "If you answered yes, write the amount of damages to be awarded to Brad Walbeck. $10,000."

"Was the breach of contract accompanied by a fraudulent act? No".

Question number 18: "Do you find in favor of the I'On Assembly as to its claim for breach of fiduciary duty? Yes."

Question number 19: "If you answered yes, write the amount of damages to be awarded to the I'On Assembly. $1,750,000".

As to fraud, question number 20: "Do you find in favor of the I'On Assembly as to its claim for fraud? No."

Question number 22: "Do you find in favor of Lee Ann Adkins as to her claim for fraud? No."

Question number 24: "Do you find in favor of Brad Walbeck as to his claim for fraud? No".

As to the negligent misrepresentation, question number 26: "Do you find in favor of the I'On Assembly as to its claim for negligent misrepresentation? Yes."

Question number 27: "If you answered yes, write

the amount of damages to be awarded to the I'On Assembly. $1,000,000."

Question number 28: "Do you find in favor of Lee Adkins as to her claim for negligent misrepresentation? No."

Question number 30: Do you find in favor of Brad Walbeck as to his claim for negligent misrepresentation? Yes."

Question number 31: "If you answered yes, write the amount of damages to be awarded to Brad Walbeck. $20,000."

As to the South Carolina Unfair Trade Practices Act, question number 32: Do you find in favor of Lea Ann Adkins, as to her claim for violation of the South Carolina Unfair Trade Practices Act? No."

Question number 35: "Do you find in favor of Brad Walbeck as to his claim for violation of the South Carolina Unfair Trade Practices Act? No."

Question number 38: "If you found in favor of one or more of the plaintiffs as to any cause of action set forth above, please address the following question: Was defendant's conduct reckless, willful and/or wanton? Yes". Signed Elizabeth Shaw, Foreperson of the Jury, dated August 1st, 2014.

Mrs. Foreperson, ladies and gentlemen of the

jury, if this is your verdict, please raise your right hand.

(All hands are raised.)

THE COURT: Thank you. Anything further from the plaintiffs or defendants as this stage while in the presence of the jury?

MR. LUCEY: No, Your Honor.

MR. DUFFY: No, ma'am.

THE COURT: All right. Ladies and gentlemen, I have a few matters that I need to take up with the attorneys, and then I will have you back in here to explain what the next step is. Okay. So please return to your jury room and we will be with you shortly. Okay. Thank you.

(WHEREUPON, the jury leaves the courtroom at 11:40 p.m.)

THE COURT: Okay. Any motions at this point before we move to the bifurcated portion of the trial? I know that there was a need to put up additional evidence, I think; is that correct, Mr. Lucey?

MR. LUCEY: Yes, Your Honor. Very brief, very, very, very brief.

THE COURT: Okay. You know, quite frankly, I thought they would be a whole lot later on this. I think they wanted to keep going forward. Are y'all

prepared to keep going forward at this point; everybody?

MR. DUFFY: Yeah, as far as the motions, Your Honor, I think some of them -- I suppose we can address them later, as far as the election and what the inconsistencies are in the verdict.

THE COURT: Yeah. I'm happy for anything you want to put on the record now, you certainly may. I'm also going to give you the ten days obviously. I mean, this is complicated. But I think we have to deal with some things while we've got the jury here. But if any of that puts you in a disadvantaged position, please put on the record now what you need to put.

MR. DUFFY: Well, Your Honor, I'll just say, that I think that there's -- I think we can take it up afterwards. There are inconsistencies in the findings that that --

THE COURT: Okay.

MR. LUCEY: I think if he's asserting there's inconsistencies, he needs to put them on the record, because we need to know while the jury is present.

THE COURT: I think that we have to give them the chance to correct their verdict, if indeed there is an inconsistency, before we even move to the next stage is my understanding. I just -- I don't want to -- I know

we are all tired, but I don't want to cause any kind of waiver issue. I -- I am quite frankly fascinated with how well they handled this verdict form, but I'm happy to hear from you.

MR. DUFFY: Well, Your Honor, I think the question of willful or knowing was answered -- it's a slightly different question, but it's the same factual findings essentially, and they answered differently in the Unfair Trade Practices vs. the -- vs. question 38.

THE COURT: Okay. I respect your point, but it's a different analysis and different elements for the Unfair Trade Practices claim for them to even get to that point, I don't think they found the elements of the Unfair Trade Practices claim were satisfied, so they never reached the willful or wanton analysis there, but I'm happy to hear what y'all want to put on the record about that.

MR. DUFFY: Your Honor, I was just checking through -- I was just checking through as I was going down -- I may have missed something. I'll just leave it where it is.

THE COURT: All right. Mr. Lucey, is there anything you want to put on the record to protect yourself on that? I do not find that to be inconsistent because I think they had to find that --

looking at question 32 and question 35, regarding the violation of the South Carolina Unfair Trade Practices Act, there are distinct elements that they would have had to find to answer yes to those questions before they could even get to a consideration of willfulness or knowing, as far as the UTPA violation. But if I'm incorrect, please, Mr. Lucey anything you want to put on the record?

MR. LUCEY: No, I don't see any inconsistency or anything to put on the record, Your Honor.

THE COURT: Okay. All right. Then what we have left -- I'm sorry, Mr. Duffy, anything else?

MR. DUFFY: No, ma'am.

THE COURT: Okay. With respect to the first cause of action, the Interstate Land Sales Act violation, the one dollar in favor of Mr. Walbeck, you know there's law back and forth whether a dollar can support a punitive damages verdict when it's nominal. We are now under the ratio, the -- probably within ten, would you even want that to go on punitive damages, Mr. Lucey?

MR. LUCEY: Your Honor, respectfully, plaintiff believes that there should simply be one punitive damage question to the jury. And as part of our election, we should be able to chose which it goes with.

THE COURT: Okay.

MR. LUCEY: The only other option is -- if I'm absorbing this quickly enough, the only other option or opportunity for punitive damages that I'm seeing -- I hope any of the other attorneys at the table can correct me if I'm wrong -- but it's the breach of fiduciary duty, given the various findings.

The fraud is out fraud. The negligent misrepresentation, it wouldn't give rise to that, I don't believe. So that's the way I see it. It's probably simply the breach of fiduciary duty anyway. But to the extent that we would be entitled to it under there, I think it can be a single question.

THE COURT: Any objection to that, Mr. Duffy?

MR. DUFFY: Yeah, Your Honor. I think it needs to be -- if you're asking for punitive damages on your claim, I think it needs to be what claim that's it being asked --

THE COURT: Well, I think what Mr. Lucey is saying, is that he only wants to go on the breach of fiduciary duty claim. He's electing his remedy on that claim. My -- it appears that there was an award under breach of fiduciary duty to the Assembly, and the 1.75 award. And then what about the negligent misrepresentation award that Mr. Walbeck of $20,000, or

is it your position that negligent misrepresent would not support the punitive award?

MR. LUCEY: Well, actually, now that I see question 38, Your Honor, it would, because they found the conduct to be reckless. So that would rise above simple negligent misrepresentation to recklessness. So I believe he would have a claim for punitive damages. And that, of course, would be separate from the Assembly's claim.

THE COURT: I agree. At this point, do you want to elect your remedies -- you obviously have to choose on behalf of the Assembly, between breach of fiduciary and negligent misrepresentation. You can't recover for both. Would now be the time to elect, or would we send it back on both of those -- or, Mr. Duffy, do you -- I don't want to prejudice the defendants in doing this verdict form.

MR. DUFFY: I think he needs to elect.

THE COURT: Okay. I think he's going to elect --

MR. LUCEY: The plaintiffs are going to elect breach of fiduciary duty for the Assembly.

THE COURT: So it would be breach of fiduciary duty for the Assembly, and negligent misrepresentation for Mr. Walbeck. I have already started a draft jury charge based what y'all submitted earlier; and a draft

verdict form in case this happened. I need to make some changes to it. That will take me about five minutes. And then I'll print it for y'all to review. Does anyone object to my letting the jury know that we have another phase that we need to have them here. We'll be ready for them in five or ten minutes.

MR. DUFFY: Suits me fine.

MR. LUCEY: No objection.

THE COURT: I just don't want them to think I'm leaving them, but I won't talk with them about anything else.

MR. LUCEY: I do have several questions for the court -- if you would like to hear them now.

THE COURT: Yeah, I'm happy -- tell me whatever we need to know before.

MR. LUCEY: First of all, Your Honor, two of the financial exhibits I'm going to rely on are already in evidence, in redacted form, and all we have to do is unredact them, and we can have that.

THE COURT: Okay.

MR. LUCEY: Secondly, there's two more financial exhibits I want to put into evidence, the day that -- they can stipulate to or put their witness up -- it's one years tax returns from the I'On Company, and it's a listing of their lot sales in the neighborhood. And

they were produced to us in discovery. So that would be their election, whether they want --

THE COURT: Why don't you talk to Mr. Duffy about that while I print this for y'all. Obviously I'm not going to make them waive anything, but he needs to talk to his clients about whether they prefer to put the exhibits in or be questioned about them.

MR. LUCEY: And then the second thing, Your Honor, is this: That portion of the Tom Graham deposition that we were all very careful about during the trial, is now very relevant.

THE COURT: Why?

MR. LUCEY: Because the question that had been posed to Mr. Graham was, when did you change your mind about transferring the amenities -- and I can get the exact wording -- but when did you change your mind. Now, we have proven that they did change their mind, so -- yes, ma'am, it's --

THE COURT: No, you don't have to tell me, I remember the question. Just if anybody needs it, there it is right there.

MR. LUCEY: Yes, ma'am. Now, that we have proven that they did change their mind, the obnoxiousness of that answer, Your Honor, we believe is very relevant to the matter at hand.

THE COURT: Okay.

MR. DUFFY: Mr. Evans doesn't have a claim here. If there was any defense that was directed at Mr. Evans, it was straightened out later in the deposition. That's a side show, Your Honor, if we get into that. It has nothing to do with the actions involved in this case that are being -- that the punitive damages are being determined.

THE COURT: Okay. I agree that it's side showish, and I don't -- I don't like things like that. I do think that Mr. Lucey can ask Mr. Graham, in light of the jury's finding, when did you change your mind about it. Depending on how he answers that, that might open the door to him being cross examined on that deposition. Otherwise, I'm not going to allow it. It's not proper cross examination with the deposition. Makes sense? I know you don't agree, Mr. Lucey, but --

MR. LUCEY: I was only proposing to publish it, Your Honor, publish it as a statement by a party or omission by a party opponent. That's all I was going to do with it.

THE COURT: The problem is, it doesn't answer the question of when did you change your mind. They -- they found somebody willfully changed their mind or did something willful and knowing, to get us to this stage;

or without the slightest care. But him saying, well, that's like asking me when did I stop beating my wife, or whatever the exact her was -- is not probative to the response.

And I understand that at the punitive stage, we want to show culpability and reprehensibility, but it's the reprehensibility of the actions that led to the harm that the jury has found. And, respectfully, I find that that response, unless the door is open to it by his own behavior, is barred by Rule 403. It's substantially more prejudicial than it is probative to the extent that it is even probative at all. And it's not probative unless he opens the door for it by being obnoxious and not answering your questions. Okay. I'm not going to let you publish it. You ask him some questions on the stand. But if we get to that point, we'll publish it. And I note your objection for the record. Okay.

MR. DUFFY: Can I ask Your Honor what you're admitting for the proceeding, or if he's just stipulating in the exhibits, or if we have additional right argument? How long do you intend for that?

THE COURT: You know, I think y'all are going to need to argue about punitives. And I will give y'all some time for it. I think they are tired and I would

heartily suggest that y'all keep it short. But, again, let me give y'all this snippet of law, so y'all can look at the charge and decide what you want to do. And then, quite frankly, I'm happy to handle it however y'all would like to do it. Okay.

MR. LUCEY: Thank you.

THE COURT: Y'all talk about exhibits. I think if y'all can submit matters, then submit away. I think it might make things easier for the jury, if there's some testimony put in, so that they don't have to parse through a bunch of documents. I mean, I think they at least need to be directed to what it is -- y'all are wanting them to look at, or if y'all just agreed about the exhibits, you can argue about it in your argument once it's in evidence. Okay.

All right. Let me print this for y'all. I will let the jury know that we will have them back shortly, and we'll be at ease. This will probably take me about five or ten minutes.

(WHEREUPON, a brief recess was taken.)

(Plaintiff's Exhibit No. 232 and 233 received into evidence.)

THE COURT: Y'all ready to get back on the record?

MR. LUCEY: Sure.

THE COURT: Okay. Before we look at the proposed

jury charge and the proposed verdict form, what -- how did we decide to deal with the exhibits and the testimony?

MR. LUCEY: Mr. Duffy has agreed stipulate into evidence the tax return marked as 232, and lot sales chart marked as 233.

THE COURT: Okay.

MR. LUCEY: And plaintiff is simply moving into evidence now unredacted copies of 226, so now it's marked 226 A.

THE COURT: Okay.

MR. LUCEY: And an unredacted copy of nine, which we have marked 9 A, both of which were already evidence, and the foundations has been completely laid and admitted.

(Plaintiff's Exhibits 9 A and 226 A received into evidence.)

THE COURT: Okay. Will there be a need for any testimony, or y'all just going to argue?

MR. DUFFY: If they are stipulating, Your Honor, I'm going to argue.

THE COURT: Okay. And that is your stipulation as well?

MR. DUFFY: Yes, Your Honor.

THE COURT: Okay. Then what I'll do, is bring the

jury back in. Let them know that the attorneys have kindly stipulated to documentary evidence. I'll tell them that 9 A, 226 A, 232 and 233 have been admitted into evidence pursuant to stipulation, and that they will listen to argument, and then I'll just let y'all argue. How about that?

MR. DUFFY: Yes, ma'am.

THE COURT: All right, sir.

MR. LUCEY: Yes, ma'am.

THE COURT: All right. Now, since we're moving along, on the verdict form, obviously the page numbers will be gone. And it's too wordy, but I changed it and then y'all tell me how you want it.

With regard to the claim -- on the Assembly's claim for punitive damages on its breach of the fiduciary duty cause of action, "we, the jury, by clear and convincing evidence unanimously find that plaintiff is" -- then the chart would remain the same -- then on number two, the same change with Mr. Walbeck's claim for punitive damages on his negligent misrepresentation cause of action, "we, the jury, by clear and convincing evidence unanimously find"; and then I set forth that as follows. Anybody have heartache with that or have an alternative way that they would like to do it?

MR. LUCEY: The plaintiffs are good, Your Honor.

MR. DUFFY: That's fine, Your Honor.

THE COURT: All right. Y'all had time to look at the proposed jury charge?

MR. DUFFY: Yes, we have and I think it's fine.

MR. LUCEY: It's fine, Your Honor.

THE COURT: All right. Then let's bring them back in and y'all can argue. I'll give them the charge. I'll fix the verdict form after that, and then we'll get going from there. Thank you everybody. I know it's late. And I know y'all will be considerate of the court reporter and jury, thorough but succinct.

(WHEREUPON, the jury enters the courtroom at approximately 12:15 a.m.)

THE COURT: Thank you, ladies and gentlemen. Thank you for your kind attention at this late hour. To their credit, the attorneys have stipulated as to the additional evidence that will come in during this phase. Exhibits 9 A, 226 A, 232 and 233 are admitted pursuant to that stipulation. So you will not need to hear additional testimony, we will hear the arguments of the attorneys; the much shorter charge on the law, and then we will send you back to deliberate. Okay. So I will call on Mr. Lucey on behalf of the plaintiffs.

MR. LUCEY: May it please the court.

THE COURT: Yes, sir.

MR. LUCEY: The plaintiffs are humbled by your verdict. They are appreciative of your attention. We are going to ask for it for 15 more minutes. I'll ask Mr. Evans to tell me when my 15 minutes is up. We need to revisit several issues that you started to consider, but haven't been fully presented to you, and that's the economics of this case.

That is why the defendants did what they did, and what the plaintiffs are going to ask the jury to do to ensure that these developers and the other developers in Mount Pleasant, and the other developers in Charleston County, and the other developers in the State of South Carolina don't play with the amenities in a neighborhood.

You saw -- you saw that this sale, the decision to sell these amenities instead of turning them over, took place in 2008. And that is during a down time. That was during an economic recession. That was when I'On only hit a small part of its sales for that year.

But what you didn't see, is what the larger picture was when I'On made that decision to squeeze this last million and a half dollars out of their homeowners, out of that neighborhood. The bigger picture is now in evidence in Plaintiff's Exhibit 233.

It's the lot sales. The lot sales that these defendants did in that 10, 12 year run in I'On.

The lot sales. That -- we're going to talk about all those parks that they did, that -- all those charitable parks. Well, they weren't charitable. They were part of the program. They got paid for by these homeowners, just like this dock and this boat ramp and Creekside Park, got paid for by these homeowners.

$93 million dollars -- $95 million dollars, $95 million dollars. And they had to squeeze $1 million more out of their homeowners. And before they get up and tell you that, oh, that's just a gross sales price, it costs us $90 million dollars to do it, we only made three. Mr. Lucey is wrong.

I'm going to point you out to page 851, 8-5-1 on this document, Plaintiff's Exhibit 9 A. It's the fifth from last page in the document, if my math is good, and it has a list of the lot sales by -- by dollar volume, by year, and the expenses by year and the profits by year.

And if you add up, in the top half, if you just focus on lot sales, not other income, just the lot sales, and you add up every year, it is $38.8 million dollars. $38.39 -- $39 million dollars, and they had to squeeze an extra million dollars out of these

homeowners, out of this neighborhood.

And if you don't think they weren't continuing to go back to the well, to go back to the well, go back to the well, to get more money out of the neighborhood, take a look at Plaintiff's Exhibit 226 A, which you previously saw all the financial stuff on page one. It was unredacted. And you saw that Creekside Park was the biggest amenity that they had to provide for in phase II.

Now, we are able to show you the money. And what it will show you, is that they took their proforma for profit when they started this development. They did a proforma and they rejected $24 million dollars. And by making a lot of adjustments along the way, they brought that up to $39 million dollars. Little adjustments, little adjustments here, little adjustments there. Each one hurting the neighborhood.

The judge, once again, will instruct you on the law as to punitive damages. We believe we will instruct her -- she will instruct you that they are also called exemplary damages. They serve as a punishment to a wrong doer for several reasons. One is for the obvious, to punishment somebody for what they did that was wrong.

The other is, is to set an example out of them,

so that the other developers in this neighborhood and in this state don't do the same thing. They don't need repeat it -- punish them for what they did, make sure they don't repeat it, and make an example out of them to make sure it doesn't get repeated by others in the same industry.

And the fourth or fifth reason for punitive damages is, in fact, to vindicate a private wrong, to vindicate a private wrong and make it right. And in this case, it's the one in the I'On neighborhood, to vindicate them from what was done to them.

And one of reasons we're talking about the repetition is because that's one of the factors we believe the judge will charge you in deciding the extent to which punitive damages are appropriate and how much.

And to that issue, I would again call out Plaintiff's Exhibit 115 A. Pages and pages of Property Report receipts listings of people. All kinds of other people that got the same representation. Plaintiff's Exhibit 150, collections of Property Report receipts for people who received the same representation and lost the same amenity.

But another factor that we believe the judge will charge you about is perhaps concealed subterfuge,

or how the matters have been handled by the defendant, then and now. What did they conceal?

Well, and -- and whether -- and to the extent to which they keep repeating it. I'm showing repetition right here in a small sense, on each one of these transactions, do -- as I've argued to you, do they repeat this in the neighborhood? Have they repeated this time and time again? Well, let's go back to phase XI.

The entire neighborhood, 253 odd acres was permitted and platted into 760 residential lots. Here we are, 15 years later, they have used up the 760 permits, and they got five acres left over. How does that happen? There's only one way. They shrank the rest of the lots. And now there's a phase in that neighborhood that never existed.

And why did I bring up that? It's just another example of them keeping -- going back to the well, going back to the well. But there's another reason I bring that up, just like here in the court, they tried to make fun of Mr. Walbeck for saving up so that he would be able to buy a boat for retirement and he would have deep water just like that mirage.

They came to you in closing and they said, hey, look, we are the greatest people in the world. See all

those -- all those charitable deductions we have over there? See all those people we are giving to? We're giving to the churches. We're giving a quarter million to the churches. We're giving a quarter million to the schools. We're giving a quarter million to -- to everybody else on this beautiful list.

On Defense Exhibit 127, page two -- and by the way, when they showed it to you, they redacted in black all over parts of the document, so that you couldn't see it. You know that when these plaintiffs have shown you a document, through me -- throughout this court proceeding -- we may enlarge what we want you to see, but we never black out what's around it that we don't want you to see. We don't engage in that practice. They engaged in that practice. They blacked out on this exhibit what they did not want you to see --

MR. DUFFY: Objection --

THE COURT: Sustained. The objection is sustained. Keep going.

MR. LUCEY: If you read the document, you will see that each of these other organizations, just like the Assembly, to get their money, had to co-sponsor and testify on behalf of the developers to get the extra 48 lot permits. These weren't charitable donations. It was a developer going back to the till one more time,

just like he did with CV-6.

Another fact that we believe the judge will charge you on, in the evaluation of the appropriateness and the amount of punitive damages, is the duration of the conduct; how long did it go on? This conduct that we've been showing you in court this week, went on for ten years; 11 -- 12 if you bring it up through today, but 10 years. Eleven years before we actually even filed suit; 10 years before the property got sold. Around and around, they went with the homeowners amenities.

The conduct occurred -- the conduct kind of climaxed in March of 1999, when they told the association, we are going to give it to, then started negotiating behind the Association's back. While the Association thinks they're negotiating on a revision of the easement that might make it acceptable, the defendants are selling the property again.

They arrange this midnight sale. And it's in evidence. I think it's Exhibit 197, the e-mail that shows that the Association was completely duped by them in this process. Never knew it was happening and it was sold out from underneath them.

The likelihood that the award will deter future conduct, well, that's one of the reasons we show you

the profits they made off of this -- this neighborhood, $39 million dollars.

What size award would it take to catch their attention? What size award would it take to make sure these defendants, let alone other developers, to make sure that these defendants, that make almost $40 million dollars on a single neighborhood, don't do it again?

We've also put in the tax returns because we don't want you to just trust Plaintiff's Exhibit Number 9 A, which is their internal listing of all the profits, we went ahead and put in a year of tax returns. It shows 2005 -- 2005, alone, $11 million dollars. What sort of an award does it take to affect a company that's taking in $11 million dollars a year.

We showed you some of the more obvious e-mails where they show their ignorance. They show their arrogance and their contempt of the Assembly as they toy with them; as they set them up; as they get ready to slam the door on them. But if you get a chance to look through those e-mails, and most of them are located -- most of the ones that would be on this issue, are located between numbers 179 and 225, 179 and 225.

You will see that these e-mails, the developer

e-mails, about how they are dealing with the association, how they are going to treat these people, they are permeated with contempt. Permeated.

The Association meant nothing to them. It should have meant everything. They are the ones that created it. It should have been their baby. It was supposed to be their baby. And who is this Association, who are these people who they are going to slam the door on? Well, they're represented by their Board, right?

They are Joe, Joe anybody, next door, Joe America. The Association Board are blue collar, white collar, they are workers. They have full time jobs. They are not professional developers. They are not professional property managers. They work a full time job. They still have to carry on these Board duties like a night a week -- or two nights a month on behalf of the neighborhood. They don't get paid for it. They are not educated in it. They serve on the Board for a year and they rotate off for two years, and they rotate off. They are not professionals.

And these seasoned -- these seasoned 30 and 25 year real estate developers professionals took advantage of these amateurs. They took advantage of them. And it the jury's role -- it's the jury's role

to be the conscience of the community. You are the only people that can prevent this from being repeated with the message you send in this verdict.

And the plaintiffs ask you to award punitive damages in an amount equal to four times what you awarded in actual damages, four times. And if you recall, you awarded the Assembly $1.75 million dollars on the breach of fiduciary cause of action, and you awarded Brad Walbeck $20,000 on his negligent misrepresentation. And you have already found that the conduct was reckless, willful and wanton. And that is the conduct we are talking about. That needs to be stopped with an award of punitive damages. Thank you.

THE COURT: Okay. Thank you. Mr. Duffy.

MR. DUFFY: Thank you, Your Honor.

THE COURT: Yes, sir. I know it's hot in here everybody. I'm sorry.

MR. DUFFY: Ladies and gentlemen, I have to say I'm sorry I'm here addressing you again, but here we are. And I want to tell you that you have made your point in your jury verdict. There's several points including some decisions you made that there wasn't a fraud, that there -- that the Assembly has this claim for the amount that you determined, and that's what's you've spoken. That's the verdict.

Now, there's being -- there's a reach to try to take back the entire development of I'On, to take that down and try to punish the developers of I'On as though they've -- they've gone through decades of ripping people off.

I think you can see what was developed, and how happy everyone is with it; that the one transaction should not subject them to some punishment that is going to take down the I'On Company, or risk that for the I'On Company.

It is a decades long project. It is -- let's start with that, the numbers. Now, you might imagine that 2005 was the best year for the I'On Company, so that's the one you're going to see from Mr. Lucey.

A couple of points I want to revisit with you in case it had some impact on your decision, and I wasn't clear enough and didn't do well earlier on. But the one issue that was addressing -- you know -- the timing of these things with Mr. Walbeck and saying, well, his contract was in November, and they had already made a decision to change -- well, if you'll remember they didn't even have docks permitted until after that, so they lose either way under Mr. Lucey's theory.

If they changed it and promised that to Mr. Walbeck, and then get them permitted, then they are

out. If they don't change them, then they are out as well, and it's a misrepresentation according to Mr. Lucey.

What I'd like to do is -- of the sales report, it is a gross figure. It doesn't include any costs. It's all the sales. And it's -- it's something that's designed to startle you, because this is a large development that has taken place over a number of years. I don't think that is worth your consideration. I won't go through the details of it.

Another point to consider is what I really -- I think the main point here is the damages are for the Assembly. And so you look to see, okay, well, what is it is -- the private wrong to the Assembly? What are we remedying here for the breach of fiduciary duty claim?

And I won't pull up any more exhibits and I won't point you any of -- point you to any one in particular, I just ask you to recall the description of what was delivered in I'On? What all was given to the Assembly? I understand you found something wasn't that was supposed to be, but what all else was given? I think it's pretty unique. I think it's pretty incredible. And I think it's wrong to try to take down, to suggest that 20 years of development was all

wrong, because it wasn't. And the way you can tell it wasn't, is to ask every single one who came in here, nobody wants to leave. They're all happy with it.

Mr. Eble, I thought, was the most interesting one. He's their star witness. And I asked him, well, would you leave? You know, would you have not bought? And he says, well, I thought, you know, the effort would be to have it the reverse. He said, well, now in hindsight, because it worked out so well, and these things were so much of it turned out as I had hoped, I know I wouldn't have moved now, but I can't say what I would have done then. That's the answer, everybody there is happy.

The Assembly, you see, has gotten $2 million dollars worth of value for whatever you decide they exchanged for it, the dollar figure was $495,000. But the Assembly has done well and good for them.

I think if you ask Mr. Thompson, who was in here, you ask all of them who came, Julie O'Connor, everybody -- they're all happy to be there and staying there.

And the small family company that risked everything and made something work, shouldn't be -- you can say what you want about where they made their money, they gave away a lot of money. They established

a charity, that -- this is unique in how people do business and we are trying -- Mr. Lucey wants to suggest that this is the worst kind of developer. We don't want these people in Charleston County, show everybody. Give -- give a bunch of money to show everybody. I think that's wrong.

I think that this is the type of development that's good. I think their residents say it is. I don't know any other -- any other place where the residents have dedicated their own heart and built a monument to the person who developed it. Avant Garden dedicated to Vince Graham.

I think if you look back -- and we are talking about what the Assembly got, well, do you need to punish the I'On Company? Look at their -- look at the their favorite document, which was the Impact Assessment. This is all about the sale of the -- to the plaintiffs. It's all about how important the waterfront is, that plan, which they rely on the most, says over 75 percent of the marsh and waterfront will be accessible to residents.

You remember Mr. Graham testifying, Vince Graham -- it's 97 -- maybe it was 98 -- but 97 percent not accessible, owned -- given to the homeowners association. Don't put them -- don't put the I'On

Company up here and tell everybody in Charleston County not to be like them. That's what they're asking you to do, and I ask you not to. Thank you.

THE COURT: Thank you, sir. Anything further, Mr. Lucey?

MR. LUCEY: No, Your Honor.

THE COURT: Okay. Thank you. Ladies and gentlemen, punitive damages, also known as exemplary damages are imposed as punishment. Punitive damages are allowed in the interests of society in the nature of punishment, and as a warning and example -- and example to deter the wrong doer and others from committing like offenses in the future.

Moreover, they serve to vindicate a private right by requiring the wrong doer to pay money to the injured party. The Plaintiff has the burden of proving punitive damages by clear and convincing evidence.

The following factors are relevant in deciding whether you should award punitive damages: The defendant's degree of culpability; the duration of the conduct; defendant's awareness for concealment; the existence of similar past conduct; likelihood that the award will deter the defendant or others from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; defendant's

ability to pay; and other factors that you deem appropriate.

Where a defendant's actions are grossly negligent, punitive damages may be awarded. Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do, or the doing of the thing intentionally that one ought not to do.

Gross negligence is a relative term and means the absence of care that is necessary under the circumstances. It is the failure to exercise the slightest degree of care, or that a person is so indifferent to the consequences of his conduct, as not to give a slight care to what he is doing.

Before awarding punitive damages, you must consider and weigh certain elements, which may be pertinent to the facts of this case. You must first consider the relationship between any punitive damages award and the harm caused. Any penalty imposed should take into account the re -- excuse me -- the reprehensibility of the conduct; the harm caused; the defendant's awareness of the conduct's wrongfulness; the duration of the conduct and any concealment. Thus any penalty imposed should bear a relationship to the nature and extent of the conduct, and the harm caused,

including the compensatory damage award made by you.

Next, any penalty imposed should take into account as a mitigating factor, any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty arising from the same conduct.

Finally, any award of punitive damages must be limited to punishment, and thus must not affect an economic bankruptcy. To this event, the defendant's ability to pay any punitive damages award should be considered. However, the economic bankruptcy factors are not an absolute bar to an award of punitive damages.

Ladies and gentlemen, I've got another verdict form for you. It is much shorter than the one you handled earlier. It only has two questions. The -- I know, the first, with regard to the Plaintiff, I'On Assembly's claim for punitive damages on its breach of fiduciary duty cause of action, "we, the jury, by clear and convincing evidence, unanimously find that the plaintiff is", and then you find whether the plaintiff is entitled or is not entitled to punitive damages.

If you find that the plaintiff is entitled, you then fill in your amount. And, again, the burden of proof is clear and convincing evidence.

The second question with regard to plaintiff, Brad Walbeck's claim for punitive damages on his negligent misrepresentation cause of action. "We, the jury, by clear and convincing evidence unanimously find that the plaintiff is" -- entitled to either entitled to punitive damages or not entitled. And then you do the analysis, just the same way you did the first question according to the law that the court just charged you.

I need to ask the lawyers if they have anything further to put on the record before I get the verdict form to you, but we will do it quickly. And I thank you for your consideration. Please don't start discussing anything until you get these last exhibits and the verdict form. Okay.

(WHEREUPON, the jury leaves the courtroom at 12:43 a.m.)

THE COURT: Thank you. Okay. Anything we need to put on the record before I print a clean copy of the verdict form and give y'all a last look at the exhibits?

MR. DUFFY: No.

MR. LUCEY: Nothing from the plaintiff, Your Honor.

THE COURT: Okay. All right. Thank you. We'll

be at ease. This won't take me but a minute. I tried to send it already and then I'll bring it back. So if y'all will just gather those last few exhibits, I'll bring it back, send it back. Thank you.

(Whereupon, the case was sent to the jury.)

THE COURT: Okay. We've got a verdict. Whenever they are ready. Yes, sir.

(WHEREUPON, the jury enters the courtroom at approximately 1:00 a.m.)

THE BAILIFF: The jurors are all present, Your Honor.

THE COURT: Thank you, sir. Thank you, ladies and gentlemen, Madam Foreperson, it's my understanding that the jury has reached a verdict; isn't that correct?

MADAM FORELADY: That's correct.

THE COURT: Okay.

THE CLERK: The State of South Carolina, County of Charleston in the Court of Common Pleas for the Ninth Judicial Circuit, case number, 2010-CP-10-10490, I'On Assembly, Incorporated and Brad J. Walbeck and Lee Ann Adkins, individually and derivatively on behalf of I'On Assembly, Incorporated, plaintiffs vs. The I'On Company, LLC, the I'On Club, LLC, The I'On Group, LLC, formerly known as Civitas, LLC, and I'On Realty, LLC, Defendants.

Number one. "With regard to plaintiff I'On Assembly's claim for punitive damages on its breach of fiduciary duty cause of action, we, the jury, by clear and convincing evidence unanimously find that the plaintiff is not entitled to punitive damages."

Number two. "With regard to plaintiff, Brad Walbeck's claim for punitive damage on his negligent misrepresentation cause of action, we, the jury, by clear and convincing evidence, unanimously find that plaintiff is not entitled to punitive damages." Signed Elizabeth Shaw, foreperson of the jury, dated August 2, 2014. Ms. Foreperson, ladies and gentlemen of the jury, if this is your verdict, please raise your right hand.

(All hands are raised.)

THE COURT: Anything further from the plaintiff or the defendants?

MR. LUCEY: No, Your Honor.

MR. DUFFY: No, ma'am.

THE COURT: Okay. Ladies and gentlemen, I certainly thank you for your service. I'm going come and thank you briefly because I know y'all are ready to go home. I know. I know. But your service is complete. You're off the hook for three years of jury duty here, at least, in circuit court, and so I really

do thank you. And I know that the parties do as well. Thank you. I'll be right there.

Folks, while they get situated in the jury room, I'm just going to go thank them briefly, but I don't want to make y'all stay here. Ten days for anything else we need to consider, and we can get another -- I know I have a court reporter the last week of August, so I'll go ahead and say good night to y'all now, so that you don't feel like you have to wait around.

MR. LUCEY: Thank you.

MR. DUFFY: Thank you.

THE COURT: Good job everybody. It was pleasure to the extent that combat can be, so thank you.

(Court's Exhibit No. 10, jury charge, marked.)

(Whereupon, the trial was concluded.)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

BRAD J. WALBECK,

Plaintiff,

v.

THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; 148 CIVITAS, LLC; I'ON REAL ESTATE, LLC; MIKE RUSSO,

Defendants.

MOTION TO DISMISS OF DEFENDANTS THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; AND I'ON REAL ESTATE, LLC

FILED
2011 MAY 27 AM 9:
JULIE J. ARMSTRONG
CLERK OF COURT

YOU WILL PLEASE TAKE NOTICE that after the tenth day following service hereof, or as soon thereafter as counsel may be heard, Defendants The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; Vince Graham; Tom Graham; and I'On Realty, LLC (collectively, the "I'On Defendants"), by and through counsel, will move this Court for an order dismissing the claims of breach of contract, breach of fiduciary duty, and fraud/constructive fraud against the I'On Defendants pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The Amended Complaint in this action reveals that each of these claims is barred by the statute of limitations. In addition, the claim for breach of fiduciary duty is not cognizable under the facts alleged.

The Plaintiff also fails to satisfy the pleading requirements of Rule 23(b)(1) for his claim that this action is brought as a derivative action on behalf of the I'On Assembly. The derivative claims, therefore, should be dismissed pursuant to Rule 12(b)(6) or 12(b)(1), and the language to that effect stricken from the Complaint pursuant to Rule 12(b)(f).

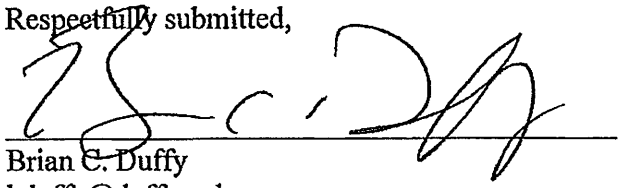
In support of their motion, the I'On Defendants are filing a memorandum of law contemporaneously herewith.

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above and in the accompanying memorandum of law, and such further materials as may be properly submitted to the Court, the I'On Defendants respectfully pray this Honorable Court to enter an order as follows:

1. Dismissing with prejudice the Plaintiff's claims against the I'On Defendants for breach of contract, breach of fiduciary duty, and fraud/constructive fraud;
2. Dismissing the Plaintiff's purported derivative claims and striking the allegations regarding the derivative nature of the claims;
3. Taxing the costs of this motion against Plaintiff; and
4. Awarding Defendants such further relief as it may deem just and proper.

This 26th day of May, 2011 at Charleston, South Carolina.

Respectfully submitted,



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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, 148 CIVITAS, LLC, I'ON REAL ESTATE, LLC, MIKE RUSSO, and I'ON ASSEMBLY, INC.,

Defendants.

MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; AND I'ON REAL ESTATE, LLC

JULIE J. ARMSTRONG
CLERK OF COURT
2012 MAY 31 AM 10: 11
FILED

YOU WILL PLEASE TAKE NOTICE that after the tenth day following service hereof, or as soon thereafter as counsel may be heard, Defendants The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; Vince Graham; Tom Graham; and I'On Realty, LLC (collectively, the "I'On Defendants"), by and through counsel, will move this Court for summary judgment in their favor pursuant to Rule 56, SCRCP. I'On Defendants' motion is based on the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other documents on file, together with the facts and arguments they shall present to the Court at the hearing on this motion, which establish that no genuine issues of material fact exist and that the I'On Defendants are entitled judgment as a matter of law. The grounds for the I'On Defendants' motion include, without limitation, the following:

1. that Plaintiffs' claims are barred by the applicable statutes of limitations;

2. that Plaintiffs Walbeck and Adkins lack standing to bring this action against the I'On Defendants in their individual capacity because it is an action to recover real property which Plaintiffs allege should belong to the I'On Assembly;

3. that Plaintiffs may not maintain this action derivatively because they do not fairly and adequately represent the interests of the other members of the I'On Assembly;

4. that the I'On Assembly explicitly waived any right, title and interest in the conveyance of the property at issue to it; and

5. that Plaintiffs have no factual basis for claiming that individual Defendants Tom Graham and Vince Graham are the alter egos of the other I'On Defendants or are otherwise liable for their acts.

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, the I'On Defendants respectfully pray this Honorable Court to enter an order as follows:

1. Dismissing Plaintiff's claims against Defendants with prejudice;

2. Taxing the costs of defending this action against Plaintiff; and

3. Awarding Defendants such further relief as it may deem just and proper.

[*signature on following page*]

This 31st day of May, 2012 at Charleston, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, 148 CIVITAS, LLC, I'ON REAL ESTATE, LLC, MIKE RUSSO, and I'ON ASSEMBLY, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; AND I'ON REAL ESTATE, LLC

COME NOW Defendants The I'On Company, LLC; The I'On Club, LLC; The I'On Group, LLC f/k/a Civitas, LLC; Vince Graham; Tom Graham; and I'On Realty, LLC (collectively, the "I'On Defendants"), by and through counsel, and submit this memorandum in support of their motion for summary judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

INTRODUCTION

Plaintiffs' Second Amended Complaint alleges that, in 2000 and 2003, respectively, they purchased lots in I'On. Second Am. Compl. ¶¶ 25-27. They further allege that they received a 1998 Property Report from the I'On Defendants which represented that a "Creekside Park" and "Community Dock" would be transferred to the I'On Assembly by the developers of I'On. Id. ¶ 32. Plaintiffs contend that these amenities were to be located on the property which now comprises the I'On Creek Club. Although the ability of I'On residents to use the dock and

boating facilities of the Creek Club is protected by a perpetual easement, and although numerous other docks and marsh walks are present throughout I'On for residents' use, Plaintiffs nonetheless contend that they have been damaged because the I'On Creek Club was never given to the I'On Assembly.

As Defendants' brief, along with the brief of their co-Defendants, 148 Civitas, LLC and Mike Russo, will demonstrate, Plaintiffs' action fails for a number of reasons. Plaintiffs cannot maintain their claim as a shareholder derivative action on behalf of the I'On Assembly because they do not fairly and adequately represent the interests of their fellow homeowners, the other members of the Assembly. Plaintiffs do not seek any recovery personal to them, and therefore lack standing to bring this action as individuals. Even if they somehow overcome their burden to demonstrate that they adequately represent the Assembly, Plaintiffs' claims are barred by the statute of limitations because of the overwhelming, uncontested evidence that the Assembly board knew about any potential claim more than three years before Plaintiffs filed suit. Lastly, even if claims against the I'On Defendants are permitted to proceed, Plaintiffs have come forward with no evidence whatsoever justifying this Court in piercing the corporate veil on an alter ego theory and maintaining an action directly against Defendants Tom and Vince Graham as individuals. For all these reasons, this Court should grant summary judgment for the Defendants.

ARGUMENT

A party is entitled to summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of

cases which do not require the services of a fact finder." Gauld v. O'Shaugnessy Realty Co., 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). On a motion for summary judgment, a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Gauld, 380 S.C. at 559, 671 S.E.2d at 85.

I. Plaintiffs cannot maintain a shareholder derivative action because they do not fairly and adequately represent the interests of the other members of the I'On Assembly.

Plaintiffs seek to maintain this action as a shareholder derivative action on behalf of the I'On Assembly pursuant to Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Rule 23(b)(1) states in pertinent part that "[t]he derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Because Plaintiffs, by their own admission, do not represent the interests of any of the other 700-plus members of the I'On Assembly, and are in fact actively antagonistic to the Assembly, they cannot maintain the present action derivatively and all such derivative claims should be dismissed.

Significantly, South Carolina courts have acted prior to trial to dismiss cases for failure to meet the requirements to properly plead and maintain a derivative action. Clearwater Trust v. Bunting, 367 S.C. 340, 351, 626 S.E.2d 334, 340 (2006). This is in keeping with the language of the rule which states that the derivative action may not be "maintained" if the plaintiffs do not fairly and adequately represent similarly situated shareholders. S.C.R. Civ. P. 23(b)(1) (emphasis added). To require that the plaintiffs demonstrate compliance with the shareholder derivative action requirements before trial also prevents parties from using common shareholder interests as a way to avoid the pre-trial class certification required in other representative actions. See S.C.R. Civ. P. 23(a). Summary judgment is therefore an appropriate mechanism for resolving improper shareholder derivative claims.

A. Plaintiffs have produced no evidence that they "represent" any I'On Assembly members other than themselves.

In Waller v. Seabrook Island Property Owners Ass'n, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990), the South Carolina Supreme Court held that the mere fact that the plaintiffs were property owners in a large or populous development did not, in and of itself, qualify them to fairly and adequately represent the interests of the other property owners. Rather, the plaintiffs "must demonstrate they have no interest antagonistic to or in conflict with the interest of the unnamed members of the class such that they are fairly and adequately able to protect the interest of the purported class." Id. Though Waller was decided in the class certification context, the requirement of fair and adequate representation of the interests of the unnamed plaintiffs is common to class actions and shareholder derivative actions. Compare S.C.R. Civ. P. 23(a)(4) with S.C.R. Civ. P. 23(b)(1).

The federal rule is identical to the South Carolina rule on this point. See Fed. R. Civ. P. 23.1(a). The South Carolina Supreme Court has looked to federal courts for guidance on class certification and shareholder derivative issues. See Waller, 300 S.C. at 468, 388 S.E.2d at 801 (1990) (citing Runion v. U.S. Shelter, 98 F.R.D. 313 (D.S.C. 1983) and other federal precedents).

In Kuzmickey v. Dunmore Corp., 420 F. Supp. 226, 230-31 (E.D. Penn. 1976), a court interpreting the fair and adequate representation requirement held that where a single shareholder owning 16 percent of the stock in a corporation had no support from other shareholders, she could not claim to fairly and adequately represent the interests of any "similarly situated" shareholders. Accord Rothenberg v. Security Management Co., Inc., 667 F.2d 958, 962 (11th Cir. 1982) (dismissing derivative action and noting that named plaintiff owned only 2.04% of outstanding stock). To construe the rule otherwise, and allow a plaintiff to bring an action based

solely on his own interest, would be to render unnecessary the language of the rule concerning representation of similarly situated shareholders. Kuzmickey, 420 F. Supp. at 230-31.[1]

Plaintiffs in this case are two of over 700 property owners in I'On. Despite the nearly four years since they became active in the issues at the center of this litigation in early 2009, they are unable to name a single other similarly situated member of the I'On Assembly who supports them.[2] Walbeck Dep. 38:19-22; 99:24-100:1.[3] Walbeck has never even spoken with any current or former I'On Assembly board member about the issues in this lawsuit, nor with any other I'On property owner save "cursory" conversations with his next-door neighbors. Walbeck Dep. 114:6-25; 125:13-126:6. Neither Walbeck nor Adkins can identify any other homeowner who received a copy of the 1998 Property Report containing the representations on which this lawsuit is purportedly based. Walbeck Dep. 126:7-19; Adkins Dep. 80:10-81:5.[4] Adkins testified that she does not know of any other homeowner who relied on the 1998 Property Report. Adkins Dep. 113:4-11. This lack of evidence for the existence of "similarly situated" plaintiffs, as required by Rule 23(b)(1), is fatal to the Plaintiffs' claim. Defendants are therefore entitled to summary judgment.

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[1] As the Kuzmickey court noted, the finding that a minority shareholder cannot maintain a derivative action on the company's behalf does not preclude him from pursuing any of his other remedies available as a minority or dissenting shareholder under the applicable corporate laws of the state. 420 F. Supp. at 231 n.12.

[2] Plaintiffs have testified that one other I'On resident, Catherine Templeton, was interested in trying to stop the sale of the I'On Creek Club to the group that later became 148 Civitas, LLC. Walbeck Dep. 38:19-22; 95:4-16. Plaintiffs have not presented any evidence, however, that Templeton supports their attempt to force conveyance of the Creek Club property to the I'On Assembly by this lawsuit. Walbeck has never spoken with Templeton on this issue. Walbeck Dep. 99:20-13.

[3] Cited excerpts from the Deposition of Brad Walbeck are attached hereto as Exhibit A.

[4] Cited excerpts from the Deposition of Lea Ann Adkins are attached hereto as Exhibit B.

B. Plaintiffs' interests are antagonistic to the Assembly and their fellow homeowners.

Plaintiffs' deposition testimony shows that their interest is, in fact, adverse to that of their fellow I'On homeowners. Walbeck's claimed violation of his property rights is that the Creek Club facility is sometimes closed for brief periods on weekends to allow for private functions. Walbeck Dep. 31:25-32:6. But even if the I'On Assembly did own the land, Walbeck would still claim that his rights were being violated if the Creek Club facility was closed on weekends to allow for private functions. Walbeck Dep. 33:15-34:5. In other words, Walbeck's interests are antagonistic not just to the current owners of the Creek Club, but to anyone, including the I'On Assembly itself or fellow I'On homeowners, who might seek to make the Creek Club available for such functions. Because of this conflict, Walbeck cannot claim to fairly and adequately represent the interests of other members of the I'On Assembly, because even if this lawsuit is successful in forcing transfer of the property to the Assembly, his claim would still exist against the Assembly.

Furthermore, Plaintiffs have named the I'On Assembly as a defendant in their Second Amended Complaint. Courts have held that Plaintiffs cannot generally maintain a derivative action on behalf of a corporation while simultaneously pursuing individual claims against the corporation, as this violates the requirement that the plaintiffs fairly and adequately represent the interests of similarly situated shareholders. See, e.g., Ryan v. Aetna Life Ins. Co., 765 F. Supp. 133, 135-37 (S.D.N.Y. 1991).

Because Plaintiffs' claims are antagonistic to the I'On Assembly and its members, they cannot proceed with a derivative action on the Assembly's behalf.

II. Plaintiffs lack standing to bring their claims as individuals, or in the alternative, have failed to establish any individual damages.

Despite the eleven separate causes of action they allege, the relief the Plaintiffs seek in this case is simple: conveyance of the Creekside Park and Community Dock to the I'On Assembly. Ms. Adkins plainly stated in her deposition that she is "bringing [this lawsuit] on behalf of the Assembly." Adkins Dep. 157:20-23 (emphasis added). When asked what she wants from the lawsuit, Adkins testified that "[w]hat I'm looking for is for the Assembly to have the property that it was to own." Adkins Dep. 152:18-25. Mr. Walbeck also recognizes that the claims are being advanced on the Assembly's behalf, not his own: "I want the property. I want the Assembly to get what they were promised." Walbeck Dep. 88:18-19; accord id. 89:2-7; 164:21-165:1. Walbeck went on say:

> Q. Would there be any way that any cash should be paid directly to you, other than the attorneys' fees and costs that you've talked about, as a result of this lawsuit?
>
> A. That is not my intent at all.
>
> Q. All right.
>
> A. I do not expect to receive, me personally, receive anything from this.

Walbeck Dep. 165:14-21; accord id. 88:20-23; 166:3-6.

An action seeking to remedy a loss to a corporation is generally a derivative action. Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." Id. (emphasis added). Thus, to the extent

that Plaintiffs are seeking either money damages or specific performance on behalf of the I'On Assembly, they lack standing to do so, and their individual claims must be dismissed.[5]

Plaintiffs' Second Amended Complaint may be read to suggest that Plaintiffs also seek to recover, as individuals, money damages for diminution in value of their individual lots based on their supposedly encumbered access to the I'On Creekside Park and Community Dock. Such claims are not "separate and distinct" from the claims of the Assembly to ownership of the Creekside Park and Community Dock, and thus must be maintained as derivative claims. Id.

Even presuming arguendo that Plaintiffs may maintain such claims individually, however, they still must put forth proof as to their damages. While mathematical certainty of damages for diminution in value is not required, the evidence "should be such that a court or jury can reasonably determine an appropriate amount. . . . Neither the existence, causation nor amount of damages can be left to the judge's or jury's conjecture, guess or speculation. . . . Bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution." Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000). When asked about the amount of the diminution in value of their properties, neither of the Plaintiffs could state any amount or any reasonable method for determining one, acknowledging that it would be "very difficult to come up with an accurate amount." Walbeck Dep. 80:24:81-13; 135:2-11; accord

[5] Despite allegations in the Complaint that Plaintiffs seek money damages in lieu of specific performance, Plaintiffs also testified repeatedly that they are not interested in money damages for the Assembly. When asked about the potential for money damages in lieu of reconveyance of the property, Walbeck testified that "I haven't thought of that" and that "I don't think it's appropriate for me to put a monetary value on it. I think it's—it's important for me and the homeowners association to get the property." Walbeck Dep. 142:16-19; 143:11-16. Likewise, Adkins testified when asked about monetary damages that despite spending "a lot of time thinking about this," she does not know what money damages she would claim on the Assembly's behalf. Adkins Dep. 158:2-9.

Adkins Dep. 114:21-115:17 (stating that she "ha[s] no way of knowing personally how [her property value] has been affected"). Nor do Plaintiffs offer the testimony of any expert witness regarding any such diminution in value. Walbeck Dep. 81:10-13. Any individual claim for damages by either Plaintiff is therefore purely speculative—thus, lacking even a "scintilla of evidence" supporting it—and Defendants are therefore entitled to summary judgment thereon.

III. Plaintiffs' claims are barred by the applicable statute of limitations.

Plaintiff Walbeck filed suit in this action on December 22, 2010. Thus, under the three-year statute of limitations which governs all his claims, any claim arising before December 22, 2007 is time-barred. In their depositions, both Plaintiffs testified that they believed the transfer of the Creekside Park and Community Dock to the Assembly should have taken place in 2003 or earlier. See Walbeck Dep. 128:24-129:10; Adkins Dep. 135:20-136:9. Plaintiffs therefore have an insurmountable problem: they must explain why, despite their belief that the subject property should have been transferred to the Assembly more than seven years before they filed suit, their claim should not be rejected on limitations grounds. Because Plaintiffs cannot bridge this gap, their claims must be dismissed.

All actions "upon a contract, obligation, or liability, express or implied," and all actions for "any injury to the person or rights of another, not arising on contract," are subject to the three-year statute of limitations prescribed by S.C. Code § 15-3-530(1) and (5). A key purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights. McKinney v. CSX Transp., Inc., 298 S.C. 47, 49-50, 378 S.E.2d 69, 70 (Ct. App. 1989). The statute of limitations begins to run at the time the cause of action accrues. Matthews v. City of Greenwood, 305 S.C. 267, 269, 407 S.E.2d 668, 669 (Ct. App. 1991). In analyzing a limitations defense, "[t]he fundamental test for determining whether a cause of action has accrued is whether the party asserting the claim can maintain an action to

enforce it." Id. The test is whether the injured party "knew or should have known" about the existence of the cause of action, and is therefore objective, not subjective. Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004).

A shareholder derivative action is brought by one or more shareholders to enforce a corporate right. Am. Jur. 2d Corporations § 1944. In a derivative action, the real party in interest is the corporation; the claim is brought in the corporation's name; and any recovery goes to the corporation. Id.; accord Brown, 348 S.C. at 49, 557 S.E.2d at 684. Under South Carolina law, the statute of limitations applies to the claim itself, not to the party bringing the action. Murphy v. Jefferson Pilot Communications Co., 657 F. Supp. 2d 683, 692 (D.S.C. 2008). Thus the issue before the Court is not when these particular Plaintiffs may have known or not known about a potential claim, but when the claim accrued.

The undisputed evidence shows that the following events took place on dates before December 22, 2007, the combination of which plainly placed both the individual Plaintiffs here and the I'On Assembly board on notice that the I'On Defendants did not intend to give the subject property to the Assembly:

- February 9, 2000: The I'On Assembly entered into and recorded a Recreational Easement and Agreement to Share Costs (the "Easement") which granted Assembly members the right to use the dock and boating facilities at the Creek Club.[6] The existence and terms of this Easement were sufficient notice to the I'On Assembly that the I'On Defendants did not intend to give the dock and boating facilities to the Assembly outright. In particular, I'On Assembly members' access was not free, but was granted in consideration of certain fees and costs to be borne by the Assembly.

[6] A true and complete copy of the Recreational Easement and Agreement to Share Costs is attached hereto as Exhibit C.

- March 15, 2000: Plaintiff Walbeck purchased his lot.[7] Under the terms of the deed, the conveyance of the lot is explicitly subject to the terms of the I'On Declaration of Covenants. The Easement was also a matter of public record at the time of his purchase.
- April 8, 2000: Lot CV-6, the property which Plaintiffs claim was intended to be the "Creekside Park" and "Community Dock" but which is now the site of the I'On Creek Club, was withdrawn from the coverage of the I'On Declaration of Covenants.[8]
- August 15, 2000: The I'On Company, LLC recorded a deed transferring Lot CV-6 to the I'On Club, LLC.[9] This change in ownership again put the I'On Assembly on notice that the I'On Defendants did not intend to give the dock and boating facilities to the Assembly. Of particular note, the I'On Club is a private club whose membership includes non-residents of I'On.
- April 10, 2001: Certificate of Occupancy issued for the I'On Creek Club building on Lot CV-6.[10] The construction of a clubhouse building on the property was further notice to the I'On Assembly that the I'On Defendants did not intend to construct a "Creekside Park" there.
- June 4, 2003: Plaintiff Adkins purchased her lot.[11] Under the terms of the deed, the conveyance of the lot is explicitly subject to the terms of the I'On Declaration of Covenants and the Amendment cited above. The Easement was also a matter of public

[7] A true and complete copy of the Walbeck Deed is attached hereto as Exhibit D.
[8] A true and complete copy of the First Amendment to the Declaration of Covenants, Conditions and Restrictions is attached hereto as Exhibit E.
[9] A true and complete copy of the August 15, 2000 Deed is attached hereto as Exhibit F.
[10] A true and complete copy of the Creek Club Certificate of Occupancy is attached hereto as Exhibit G.
[11] A true and complete copy of the Adkins Deed is attached hereto as Exhibit H.

record at the time of her purchase. Thus, Adkins was on notice immediately upon purchase of the existence of a potential claim regarding ownership of Lot CV-6.

- December 7, 2005: The I'On Assembly board's last developer-appointed member left the board. From this date forward, the I'On Assembly is fully under homeowner control, and the homeowners are therefore fully responsible for the Assembly's actions. Minutes at Bates No. I'On Assembly 000222.[12]

Plaintiffs are expected to contend that they are not responsible for knowledge of events that took place before the Assembly was under homeowner control. All of the relevant recorded real estate documents are publicly available, however, and the Assembly's own meeting minutes and prior records have always been available to the Assembly board, making this argument fatuous under the objective "knew or should have known" standard.

Furthermore, the meeting minutes of the I'On Assembly board contain numerous references to discussions about the terms of the Easement and their effect on Assembly members' use of the dock and boating facilities after homeowner control. One of the clearest and most pertinent is in the April 25, 2007 minutes, in which the I'On Company's Chad Besenfelder offered to permit the I'On Assembly to purchase the Creek Club for roughly $1.5 million as one solution to the Assembly's desire to own its own community center. Minutes at Bates No. I'On Assembly 000335. Plainly, if the I'On Defendants were offering to sell the property to the Assembly, they had no intention of giving it to the Assembly, contrary to the alleged promise which forms the basis of Plaintiffs' suit. On October 24, 2007, the Assembly chartered a Boating Committee, one of whose responsibilities was "utilization and interpretation" of the Easement. Id. at 000393. Plaintiff Adkins was a member of this committee. Id. Thus the

[12] True and complete copies of all cited I'On Assembly meeting minutes are attached hereto as Exhibit I.

evidence is clear that the Assembly was both deliberating and taking action based on full knowledge that it did not own the Creek Club or its boating facilities, and that the I'On Defendants did not intend to give such facilities to the Assembly, more than three years before the present suit was filed.[13]

The evidence that the Assembly knew or should have known before December 22, 2007 that the I'On Defendants did not intend to give the Creek Club property to the I'On Assembly is both uncontested and overwhelming. As a result, this Court should grant summary judgment for Plaintiffs on statute of limitations grounds.[14]

IV. Plaintiffs have not established any genuine issue of fact that Tom and Vince Graham are the alter egos of, or otherwise liable for, the I'On Defendants' acts.

The Plaintiffs allege in Paragraph 109 of their Second Amended Complaint that they "believe the I'On Defendants to be alter egos of each other and the Grahams and to be one and the same; therefore, Defendants Grahams [sic] are personally liable for any damages to the Plaintiffs and The Assembly caused by these corporate entities." This allegation misconstrues both the facts and the law. Plaintiffs' mere belief that the I'On Defendants are alter egos of the Grahams does not make it so, and there is no evidence in the record to support such an assertion. As such, Defendants Tom and Vince Graham are entitled to summary judgment on the claims against them.

The doctrine of piercing the corporate veil "is not to be applied without substantial reflection." Sturkie v. Sifly, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984). The "alter

[13] The issue of ownership of the Creek Club property also arose several times during the handover of the Assembly board to developer control and at prior board meetings at which numerous homeowners were in attendance. See id. at 000250, 000263 (discussions in handover context); 000184, 000235 (prior discussions in board meetings regarding ownership of the docks and Creek Club and the Easement). These meeting records have always been available to the Assembly.

[14] The I'On Defendants adopt by reference the arguments of their co-Defendants 148 Civitas, LLC and Mike Russo regarding the related issues of laches, waiver, and estoppel.

ego" theory is a theory of procedural relief which is a means of piercing the corporate veil. Jones ex rel. Jones v. Enterprise Leasing Company—Southeast, 383 S.C. 259, 267, 678 S.E.2d 819, 823 (Ct. App. 2009). The control required for the alter ego theory to apply "amounts to total domination of the subsidiary to the extent that the subsidiary manifested no separate corporate interests and functioned solely to achieve the purpose of the dominant [shareholder]." Id. In addition, a plaintiff "must also show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy" in order to justify application of the alter ego theory. Id. at 268, 678 S.E.2d at 824; accord Colleton County Taxpayers Ass'n. v. School Dist. of Colleton County, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). Factors to be considered as to whether a corporation is under the total domination of its owner include undercapitalization; failure to observe corporate formalities; failure to pay dividends; insolvency; non-functioning of other officers or directors; lack of corporate records; siphoning of corporate funds by the dominant stockholders; and use as a façade for the operations of the dominant stockholders. Sturkie, 280 S.C. at 457, 313 S.E.2d at 318. Even if sufficient evidence under these factors is present to suggest total domination by the owner, the alter ego theory will not be applied unless there is also "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals." Id., 457-58, 313 S.E.2d at 318.

The Plaintiffs, despite extensive discovery, have been unable to come forward with evidence on any of the Sturkie factors which would justify a finding of "total domination." Defendants Tom and Vince Graham testified at length about the ownership and operation of the I'On Company, I'On Club, I'On Group, and I'On Real Estate. The testimony reveals extensive evidence of:

- proper capitalization though both capital contributions and loans, Vince Graham Dep. 36:16-40:3;[15]
- careful (if not painstaking) observation of corporate formalities, Vince Graham Dep. 5:23-16:13; 47:12-18;
- clearly defined roles for officers and other employees, Vince Graham Dep. 41:14-44:3, 45:16-22; and
- solvency, including careful valuation of each of the separate entities, Vince Graham Dep. 52:19-54:12.

What the record does not contain is evidence of any improper conduct justifying an overthrow of their owners' limited liability. See generally Vince Graham Dep. 5:23-16:13; 36:16-49:25; 52:19-54:12; 247:15-250:12; Tom Graham Dep. 14:24-15:24.[16] Furthermore, there is no indication anywhere in the record of this case that any injustice or unfairness would result if the acts of the I'On Defendants are not imputed to Tom and Vince Graham.

Plaintiffs cannot, therefore, maintain an action against Tom or Vince Graham as individuals.[17] In such circumstances, the South Carolina appellate courts have upheld trial courts in granting summary judgment for the individual defendants. See, e.g., Jones, 383 S.C. at 268, 678 S.E.2d at 824 (holding that where a motion for summary judgment on alter ego is made and

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[15] Cited excerpts from the Deposition of Vince Graham are attached hereto as Exhibit J.

[16] Cited excerpts from the Deposition of Tom Graham are attached hereto as Exhibit K.

[17] Defendant Tom Graham is not actually an owner of any of the I'On Defendants. Rather, he is the sole owner of Graham Development, LLC, which in turn owns interests in the various I'On Defendants. Tom Graham Dep. 13:21-15:4. Graham Development, LLC is not a party to this action. If Plaintiffs have any claim for piercing the corporate veil, such claim is against Graham Development, LLC, not against Tom Graham individually; however, although they have known of the existence and holdings of Graham Development, LLC since Mr. Graham's deposition on May 23, 2012, they have taken no action to add it as a party or to discover whether it might in turn be disregarded under an alter ego theory. Tom Graham is therefore entitled to summary judgment based on this failure to name the actual party in interest or come forward with evidence to sustain an alter ego claim.

properly supported, the adverse party must come forward with specific facts to show that there is a genuine issue for trial). The Grahams are therefore entitled to summary judgment.

WHEREFORE, on the grounds set forth herein, the I'On Defendants respectfully pray this Court to grant summary judgment in their favor on Plaintiff's claims, and to grant such other and further relief as it may deem just and proper.

This 22nd day of October, 2012 at Charleston, South Carolina.

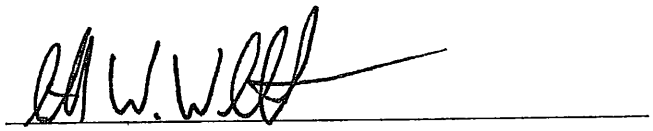

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Exhibit A

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. I believe that upon closing, everything in the Property Report was the same, that nothing had changed between the time I was issued this and the time that I closed.

Q. Was that specifically represented to you in any way, that the Property Report and nothing in it would have changed between the time you received it and the time you closed? Did anyone ever say that to you?

A. I think that's common sense, that if you're handed a document that's referenced in your Purchase Agreement, you can't change things and not tell the purchaser. You can't take something away. So not only was it changing it, but it took it away.

Q. What if you were given notice that there had been a change?

A. I would have expected to be compensated.

Q. In what way?

A. Monetarily. My property -- I purchased the property based upon deep water access, creek water -- Creekside Park boat ramp, having access to that. That was taken away.

Q. Let's talk about that for a minute. Do you

today have access to the dock, the boat ramp, the Creekside Park, as you define it?

A. Limited access.

Q. How is that access limited?

A. When there are functions at the privately-owned Creek Club.

Q. Is it your contention that if the Assembly owned those facilities, it could never close them off for a private function, under any circumstances?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. The Assembly was promised the land, so I can't necessarily speak on -- when you say "property," are you referring to the building?

Q. Well, I'm referring to the Creekside Park and Community Dock, as you define them. And I'm asking, if the Assembly owned those properties, is it your contention that the Assembly would never have the right to close those off for a private function, under any circumstances?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. I don't know why there would be a private function on Assembly property that would need to have that closed, so I guess it's theoretical.

Q. So you don't understand why anyone would ever want to have a private function at the Creekside Park and Community Dock facilities?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. No, I could see them having a -- if it was an Assembly member having a private function, I could see that happening.

Q. And would you feel that your property rights were violated by those facilities being closed to other members for a few hours so that the person having the private function could have it?

A. My rights were violated in that the land was not given to the Assembly, as promised.

Q. What I'm asking is, if the Assembly had received the land and they closed the facilities temporary for a private function for a few hours, is that a violation of -- would that be a violation of your rights, as you see them?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. Yes, because when the -- when the property -- when the -- when the privately-held property is closed, it's on the weekends. At least that's -- you know, it may be closed during the week, as well. But the

weekends are when the boat ramps, the community docks are going to be used. I wouldn't think it would be in the Assembly's best interest to close down the boat ramps and the community docks on weekends, on holidays, when people want to use the amenities.

Q. So you believe the Assembly would set up different rules, is what you're saying, than the ones that the Creek Club actually has in place?

A. Yes.

Q. All right. But would you agree with me that whoever is administering the boat ramp and dock has to have some ability to set up, you know, reasonable rules for their use?

A. Yes.

Q. We've been going for about an hour. Why don't we take a little break and we'll start back up in five or ten minutes, if that's all right with you?

A. That's fine.

Q. I should have mentioned before, we can take a break any time you'd like. Be glad to do that. If I have a question that's pending, I'll ask that you answer it before we break.

A. Sure.

Q. Once that's done, we can certainly break at any time you'd like, or anyone else, for that matter.

Report?

MR. EVANS: Object to form.

BY MR. WHITAKER:

Q. To be able to show that, one of the elements is that there is reliance on a specific statement. And I'm ask what people who've owned property in I'On, other than yourself, you're aware of who specifically relied on this 1998 Property Report?

MR. EVANS: Object to form.

BY MR. WHITAKER:

Q. I understand that you believe that many others did, but do you actually know of other people who have either told you or written to you or said in some way that they relied on this document and the statements about the Creekside Park and the Community Dock in it?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. Lea Ann Adkins is the only one that I have spoken to about this, and I guess what Catherine Templeton had -- it's my belief, from what she was saying, that she was aware of this.

Q. All right. Do you have any knowledge as to whether she was given a copy of this report before she purchased her property in I'On?

Q. Okay. Have you ever hosted an event there?

A. No.

Q. I think you alluded to this earlier, but I just wanted to make sure I'm clear on it. If you had understood at the time that you purchased that the property that you regard as the Creekside Park and Community Dock would be privately owned and that there would be an easement such as there is now, that you would have wanted to negotiate the price of your purchase of the lot based on that information?

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. I -- I feel I should have been notified after my contract was ratified that a change had been made. And I would have expected to be compensated for that. But the homeowners association is who was promised the land, and I'm a member of the homeowners association, so...

Q. Well, let's unpack that a little bit.

A. Okay.

Q. There are a couple of different things there. One is that you should personally have been compensated because of the fact that -- actually, explain to me why -- let me -- let me ask this as a question. Why should you personally have been compensated as apart

from the issue with the Assembly?

A. Because the value of my property with deep water access and with -- it is much higher than one with limited use, whenever the third-party owner wishes -- it's much higher if I have unlimited access to deep water.

Q. You say it's much higher. Do you have any information on how much higher?

A. No. I'm not...

Q. Have you ever asked any Realtor or other market analyst or expert to look at what the difference in values would be?

A. No.

Q. We talked some earlier about the idea that if the Assembly did own the Creekside Park and Community Dock, as you've defined them, that there would have to be some restrictions on their use, just for liability reasons and simply because of the number of people who live in I'On that would have access those kinds of things; is that fair?

A. That's tough for me to answer because I'm not -- I'm not in the position to make that call. I'm trying to think of the soccer field, for instance, if it's regulated, times when you can and can't go. I don't think there are. I don't think it is.

BY MR. WHITAKER:

A. I can't say for sure exactly which claims they didn't pursue and did pursue.

Q. Are you aware of the Assembly filing a lawsuit regarding any of the claims that you've asserted in your lawsuit?

A. Not to my knowledge. They were put on notice, however.

Q. So if I understand your discussion of the compensation that you expect to receive personally correctly, you assert that you should personally be compensated for the fact that the Creekside Park and Community Dock, as you define them, were never conveyed to the Assembly?

A. No.

MR. EVANS: Object to form.

BY MR. WHITAKER:

A. I want the property. I want the Assembly to get what they were promised.

Q. Do you personally -- are you personally seeking compensation, money for the fact that was never done?

A. Me personally, no.

Q. So there's no compensation element to this?

MR. EVANS: Object to form.

BY MR. WHITAKER:

Q. As far as money being paid to you?

A. To me, no. No.

Q. Okay. So your claim is to have the Creekside Park and Community Dock, as you understand them, conveyed to the I'On Assembly?

A. Exactly.

Q. As you've said, free and clear of encumbrances?

A. Right.

Q. Or whatever the language in the Property Report is?

A. Right.

Q. All right. When did the Assembly -- strike that.

Do you believe that the Assembly was not aware that it did not own the property that you define as the Creekside Park and Community Dock, at any point in time?

A. I'm sorry, say that again. I apologize.

Q. The question was whether you believe that the Assembly was ever not aware that it did not own the Creekside Park and Community Dock, as you've defined them?

A. I don't believe we knew or the Assembly knew,

Q. All right. I want to ask you for a little bit more detail about that.

A. Okay.

Q. You said Catherine Templeton spoke at length. And I know you can't remember verbatim, but what, in general, did she say?

A. That the board needed to do something.

Q. To do something to accomplish what?

A. To act to stop the sale, I believe, is what her -- they need to act. They shouldn't just let this go by as -- I don't know if easement is the best word -- what we're going to get.

Q. Was the focus more on preventing the sale to -- was the buyer at that time also Mr. Russo, 148 Civitas?

A. I believe.

Q. Okay. So there wasn't a different buyer then than the eventual buyer?

A. Right. I don't know if it was Civitas, 148 Civitas. But I believe it was that same group of people or maybe one more than what originally...

Q. Understood. A similar group?

A. Exactly.

Q. Was the focus of Ms. Templeton's comments more about preventing the sale or was it more about the

A. No.

Q. It was just you?

A. Just me.

Q. Without any prompting of that from you?

A. Right. Now, I believe Ms. Adkins was with me. And I don't know if she was speaking with him during the meeting about it. And he may have said, you know, We've consulted with the board's attorney, whatever, but I have seen Brad Walbeck's contract and he may have a case.

Q. Had you started talking with Ms. Adkins about this issue before the meeting where Mr. Kinney made that statement?

A. Yes.

Q. All right. Did you start talking with her as soon as the meeting where Ms. Templeton made her comments?

A. It was a little -- a couple -- I would say approximately a month after that meeting.

Q. Did the two of you work with Ms. Templeton at all?

A. I never spoke with Ms. Templeton about it directly. Ms. Adkins may have.

Q. Did you discuss these issues with any other residents, besides Ms. Adkins?

A. Not to my knowledge.

Q. When did you first begin looking for an attorney to think about filing a lawsuit regarding these issues?

A. Sometime in 2009.

Q. Did you talk to more than one attorney?

A. Yes.

Q. And you eventually, at one point, had retained Tom Tisdale at Nexsen Pruet; is that correct?

A. Define "retain." Yeah, just be specific with "retained."

Q. Sure.

A. We consulted with him.

Q. And he actually prepared a draft Complaint on your behalf, correct?

A. Correct.

Q. All right and sent that to the -- I guess to -- I have a copy of it, so let me get that out.

MR. WHITAKER: Actually, that's one of the documents from yesterday, isn't it? It's Number --

MS. COKER: Four, maybe?

MR. WHITAKER: Four sounds right. Yes, it's Number 4.

BY MR. WHITAKER:

can picture them, but I don't know.

Q. That's fair. It's not meant to be a memory test.

How many board members are there?

A. I believe, five.

Q. Have you spoken to anyone who is a current board member about this lawsuit?

A. No.

Q. Who were the board members in 2009?

A. Bruce Kinney, Matt Walsh, Sherry Cooper. I don't recall who else.

Q. Have you spoken -- have you ever spoken to Mr. Kinney with regard to this lawsuit?

A. No.

Q. Have you ever spoken to Mr. Walsh with regard to this lawsuit?

A. No.

Q. Have you ever spoke spoken to the lady whose name I've already forgotten about this lawsuit?

A. Sherry Cooper?

Q. Yes.

A. No.

Q. Have you ever spoken to anyone who served as a board member about this lawsuit?

A. No.

strike that. With regard to your lot in I'On, have you ever had a closing attorney that wasn't Lisa?

A. I've refinanced and I've used Lynn McCants as my closing attorney.

Q. When did you refinance?

A. A couple of times. I want to say '03, '08, last year.

Q. And Lynn McCants was your closing attorney for those re-fis?

A. At least the last two. I don't remember the one from 2003. That might have -- still might have been Lisa. I'm not sure.

Q. Other than your attorney, and I'm including Mr. Evans' firm, Mr. Tisdale, and any other attorneys you may have directly consulted with regard to legal representation, okay, other than legal representation, who have you discussed this lawsuit with?

A. My father, my brother, my best friend and very cursory with the next-door neighbor.

Q. Other than the next-door neighbor, do any of those folks live in I'On?

A. No.

Q. What's the next-door neighbor's name?

A. Joe McDonald.

Q. Again, excluding any legal representation,

and this time I'm going to limit it to folks that live in I'On, have you discussed the issues relating with Civic Lot 6 with anyone?

A. My other next-door neighbor.

Q. What's that person's name?

A. Again, cursory. Mike Smith.

Q. Have you inquired of any other homeowners whether they received the 19198 Property Report?

A. No.

Q. Do you know if Ms. Adkins has?

A. She -- yes, I know she has said -- I saw the letter that she wrote to Mr. Graham stating that she received this.

Q. And that was a badly worded question.

A. Okay.

Q. I guess my question is, do you know if Ms. Adkins has asked anyone else in the neighborhood if they received the Property Report?

A. Oh. I don't know for sure.

Q. Was the dock that you're referring to as the Community Dock, was that dock completed before your house was completed?

A. I don't know.

Q. Do you recall when the Creek Club -- strike that.

clear to the Assembly.

Q. When you say "they," do you mean the I'On defendants or all of the defendants, or some combination thereof?

A. Define the I'On defendants.

Q. When you say "they," do you include the folks with the last name Graham who are named in the Complaint and any party with the word "I'On" in its name?

A. If you'll tell me the first part of that question again, I'm sorry.

Q. Sure. My question originally was, what actions did the defendants take to harm the Assembly? Then I asked you to narrow or let me know what your definition of "they" is. Who are "they"?

A. The developer, I guess, is what...

Q. Is it your understanding that the developer is the I'On Company?

A. Oh, boy.

Q. Or do you have a different understanding?

A. I don't know if it's the -- I don't know group, if it's I'On Company, if it's I'On Realty. I don't know.

Q. When do you think the developer should have transferred Civic Lot 6 to the Assembly?

A. I believe in here it has at the end of or at the completion of Phase 2. Recreational facilities listed above shall, upon completion of construction, be conveyed to the I'On Assembly.

Q. Was construction on what you're calling Creekside Park and the dock, or the Community Dock, was construction on those completed in 2006?

A. Yes.

Q. 2003?

A. I believe so.

Q. Have you ever seen the annual budget of the Assembly?

A. Yes.

Q. How did you access a copy of that?

A. At the annual meetings, they hand out a report. Or maybe they mail it. I don't know, but...

Q. But the homeowners in -- the homeowner members of the Assembly are given those numbers each year?

A. Correct. Correct.

Q. And for how many years have you gotten those budgets? Since you moved in?

A. Yes. I can't say that it was every year, but I believe they mailed them, so most years.

Q. Do you know when the homeowners took control

of.

Q. And do you know what the diminution of value of your lot or any other homeowners' lots in I'On is, due to the acts alleged this case?

A. No, I do not.

Q. Do you know how to figure that out?

A. I mean, a very basic would be to divide 2.4 by however many lots there are. But that's -- the land is an ongoing thing, whereas making a payment -- it could be very difficult to come up with an accurate amount.

Q. I'm having trouble myself, that's why I'm asking questions. Is there a procedure through which a homeowner can protest the amount of their assessment?

A. Their assessment, their dues or their property assessment?

Q. That's a fair question. Regular assessments, regular dues and any special assessments charged by the Assembly?

A. There's only ever been dues.

Q. Okay. To your knowledge, has anyone ever complained about the amount of the dues?

A. I have. Yes.

Q. Is there a formal process --

A. No.

A. Yes.

Q. I apologize for saying "uh-huh."

What are your damages for the conspiracy you allege between and among the defendants?

MR. EVANS: Object to form.

BY MS. COKER:

A. I can't speak to that legal terminology.

Q. You've already -- okay. You've testified today that you believe that Civic Lot 6 should be given to or conveyed to the Assembly?

A. Correct.

Q. We've discussed, or you and Mr. Whitaker discussed a number value that was 2.4 million earlier. Are you claiming that 2.4 million as damages in this case?

A. I don't think it's appropriate for me to put a monetary value on it. I think it's -- it's important for me and the homeowners association to get the property.

Q. You have brought several claims in addition to or in the alternative to getting the property back. My questions have to do with whether or not you get the property back. And maybe that changes things. But aside from a reconveyance of the property, what are your damages?

MR. EVANS: Object to form.
BY MS. COKER:
A. What are the damages I'm seeking or what are the damages to my property?
Q. Let's start generally. What are the damages that you're seeking?
A. I mean --
Q. Aside from the conveyance of the property?
A. That's what needs to be -- that's my damage, conveyance of the property.
Q. Assuming that for whatever reasons, practical, legal or otherwise there may be not to reconvey the property, what are your damages?
MR. EVANS: Object to form.
BY MS. COKER:
A. I haven't thought of that.
Q. Do you believe you're entitled as a plaintiff in this lawsuit to any money damages whatsoever?
MR. EVANS: Object to form.
BY MS. COKER:
A. In lieu of --
Q. In lieu of --
A. -- Civic Lot 6?
Q. In lieu of, in addition to, just cause. I mean, I'm not trying to limit you, so I'm entitled to

A. No.

Q. Do you know if any of the homeowners obtained that e-mail prior to purchasing their residences?

A. I don't know that.

Q. I don't think I have anything else.

MR. WHITAKER: Got anything?

MR. MANN: That's my lawyer, right there.

MR. WHITAKER: All right. I just have -- Josh, did you have anything? I have a couple of very brief follow-ups that will only take a minute or two.

MR. EVANS: Go ahead.

REDIRECT EXAMINATION BY MR. WHITAKER:

Q. In responding to Ms. Coker's questions, you mentioned that the relief you were seeking was primarily either to have the land return or its equivalent cash value; is that correct?

A. What I'm seeking is the land.

Q. Right.

A. So at this point, that's what the homeowners should receive, is the land.

Q. All right. When you say "the homeowners," you mean the Assembly?

A. The Assembly.

Q. Should be the title holder for that land, correct?

A. Correct.

Q. If for some reason the land cannot be reconveyed and cash is the way that the compensation is done instead, would that cash be given to the Assembly?

A. Yes.

Q. All right. And as a member of the Assembly, along with all the others, I guess, you could be entitled to a share of that cash. But there would be no -- you wouldn't be guaranteed that, right? It would be up to the Assembly what to do with the money once it got it, correct?

A. Correct.

Q. Would there be any way that any cash should be paid directly to you, other than the attorneys' fees and costs that you've talked about, as a result of this lawsuit?

A. That is not my intent at all.

Q. All right.

A. I do not expect to receive, me personally, receive anything from this.

Q. All right. So you one expect to receive a parcel of land, either. The land is supposed to go back to the Assembly, not to be held in the name of Brad Walbeck, like this is just my land, nobody else

owns it?

A. That would be cool, but, no.

Q. Is there anything else that you would expect to receive in your own name as a result of this lawsuit?

A. No.

Q. In being asked about what documents constituted the promises upon which you're relying of conveyance to the Assembly, you mentioned the Stubblefield e-mail. That e-mail wasn't even written until well after you purchased your property, correct?

A. Right.

Q. So that's not something you relied on at the time you made your purchase?

A. That is correct. I mean, you are correct.

Q. All right. I believe that's all I have. Your attorney may have some questions for you, as well.

MR. EVANS: I've got a couple of follow-ups here.

CROSS-EXAMINATION BY MR. EVANS:

Q. You were asked some questions this morning, I think, about the easement that was marked as Exhibit 5. Do you recall discussing the easement with Mr. Whitaker, I think?

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, 148 CIVITAS, LLC, I'ON REAL ESTATE, LLC, MIKE RUSSO, and I'ON ASSEMBLY, INC.,

Defendants.

I'ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING THE PERPETUITY OF THE RECREATIONAL EASEMENT AND AGREEMENT TO SHARE COSTS

TO: JUSTIN O. LUCEY, ESQ., COUNSEL FOR THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that, as soon as counsel may be lawfully heard, Defendants The I'On Company, LLC, The I'On Club, LLC, the I'On Group, LLC f/k/a Civitas, LLC, I'On Real Estate, LLC, Vince Graham, and Tom Graham (the "I'On Defendants") will move the Court for an order granting partial summary judgment and holding that the access easement granted by Section 1.1 of the Recreational Easement and Agreement to Share Costs at issue in this action is perpetual as a matter of law, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. In support of their motion, I'On Defendants show the Court as follows:

1. Plaintiffs are expected to contend that the easement in favor of the I'On Assembly for access to the dock and boating facilities in I'On in Section 1.1 of the document entitled "Recreational Easement and Agreement to Share Costs," a true and complete copy of which is

attached hereto as Exhibit A (the "Recreational Easement"), is subject to a 30-year time limitation.

2. All parties to the Recreational Easement, and their successors in interest, are parties to this action: the I'On Company, the I'On Assembly, the I'On Club, and 148 Civitas, LLC, as successor owner of the I'On Creek Club.

3. All parties to the Recreational Easement have at some point testified or otherwise indicated the intent and belief that the access easement granted to the I'On Assembly by Section 1.1 of the Recreational Easement is perpetual.

4. In its corporate deposition, the representative for the I'On Company stated that the I'On Company intended the Recreational Easement to be perpetual. (See I'On Company Rule 30(b)(6) Dep. 215:18-216:2). Relevant portions of cited depositions are attached hereto as Exhibit B.

5. Past President of the I'On Assembly Board of Trustees, Bruce Kinney testified in his deposition that he understood the Recreational Easement to be perpetual. (See Kinney Dep. 103:7-18). In the corporate deposition of the I'On Assembly, its corporate representative, Deborah Bedell, did not dispute Mr. Kinney's understanding, and stated that although the easement was ambiguous, she had seen representations from Tom Graham that easement was intended to be perpetual. (I'On Assembly Rule 30(b)(6) Dep. 85:14-86:12)

6. It is plainly in the interest of the I'On Assembly that its access to the dock and boating facilities under the Recreational Easement be perpetual rather than limited to 30 years.

7. Even the corporate representative for 148 Civitas, as purchaser of the the I'On Creek Club, has operated with the assumption that the Recreational Easement is perpetual. (See 148 Civitas Rule 30(b)(6) Dep. 127:5-24).

8. The "Assignment of Certain Club Owners Rights and Obligations Under the Recreational Easement and Agreement to Share Costs" (the "Assignment") entered into between the I'On Club and 148 Civitas on August 5th, 2009 assigned the I'On Club's rights under the Recreational Easement to 148 Civitas following its purchase of the I'On Creek Club. A copy of the Assignment was offered as Plaintiffs' Proposed Exhibit 68 and is attached hereto as Exhibit C. The Assignment describes the Recreational Agreement as "a perpetual, nonexclusive easement over and on certain portions of the Club Property, identified therein as the "Boating Facilities." (Assignment at p. 1).

9. Plaintiffs, who are not themselves parties to the Recreational Easement, should not be permitted to advance an interpretation of the Recreational Easement which is plainly contrary to both the interest of the party on whose behalf they have brought this shareholder derivative action and the understanding of all parties to the Recreational Easement. For Plaintiffs to take such a position would violate their fiduciary duty to the I'On Assembly as derivative plaintiffs and defeat the commonality of interest between them and the I'On Assembly required for them to maintain this action. See e.g. South Carolina Rule of Civil Procedure 23(b)(1) ("derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association"); 7C Fed. Prac. & Proc. Civ. § 1833 (3d ed.) (interpreting identical language of Federal Rule of Civil Procedure 23(b)(1) to make "the most important element to be considered [in determining whether a plaintiff's positions constitute "adequate representation" sufficient to bring a derivative action] is whether plaintiff's interests are antagonistic to those plaintiff is seeking to represent. If there is a conflict of interest, the representation may well be deemed inadequate and the suit dismissed").

10. Furthermore, as a matter of law, courts must construe deeds and easements as a whole and to give effect to all provisions thereof if possible. Millvale Plantation, LLC v. Carrison Family Ltd. P'ship, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. October 31, 2012); K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). Likewise, Section 4.3 of the Recreational Easement states that "each provision of this Agreement shall be interpreted in such a manner as to be effective and valid." The only construction of the Recreational Easement that gives effect to all its provisions is the construction that regards the access easement as perpetual.

11. If, as Plaintiffs contend, the 30-year term in Section 4.1 of the Recreational Easement applies to the easements created by Sections 1.1 and 1.2, such interpretation renders the word "perpetual" in those sections of no effect.

12. It is both possible and reasonable to interpret the term prescribed in Section 4.1 as applying to the provisions of Sections 2 and 3 regarding the ongoing allocation of maintenance and insurance costs between the Club Owner and the Assembly, such that those allocations of costs may be renegotiated from time to time.

13. The obligation for the Assembly to contribute to the costs of maintaining the boating facilities is, pursuant to Section 3.1, "a separate and independent covenant on the part of the Assembly." It is therefore not a part of the access easement granted by Section 1.1 and may have its own term.

14. Determination whether a deed or contract is ambiguous and construction of unambiguous contracts, or potentially ambiguous terms only capable of one "reasonable" interpretation, are matters of law for the court. Proctor v. Steedley, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012); see also Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585,

591, 658 S.E.2d 539, 542 (Ct. App. 2008); Stribling v. Stribling, 369 S.C. 400, 403-404, 632 S.E.2d 291, 293 (Ct. App. 2006). Furthermore, the terms of the Recreational Easement specifically contemplate and require judicial interpretation of potentially ambiguous provisions as a matter of law. (Recreational Easement, Art. IV, Sect. 4.3 (providing for the severability of inconsistent provisions)).

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, the I'On Defendants respectfully pray this Honorable Court to order:

1. that the access easement granted by Section 1.1 of the Recreational Easement and Agreement to Share Costs at issue in this action is perpetual as a matter of law;

2. that neither Plaintiffs nor any other party be permitted to offer any evidence or argument that the term of the access easement granted by Section 1.1 of the Recreational Easement and Agreement to Share Costs is not perpetual; and

3. that the Court order such other and further relief as it may deem just and proper.

This 8th day of January, 2014 at Charleston, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, and I'ON REALTY, LLC,

Defendants.

DEFENDANTS I'ON COMPANY, LLC AND I'ON CLUB, LLC'S MOTION TO AMEND THEIR ANSWER TO THIRD AMENDED COMPLAINT AND COUNTERCLAIMS

2014 JUN -6 PM 2:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that Defendants the I'On Company, LLC ("Company") and the I'On Club, LLC ("Club"), by and through counsel, will before move this Court, ten days from the date hereof or as soon as this matter can be heard, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure for an Order granting the Company and the Club leave to amend their Answer to the Third Amended Complaint and Counterclaims in the above-captioned matter. The proposed Amended Answer to the Third Amended Complaint and Counterclaims is attached hereto as Exhibit A.

The remaining defendants are not party to the declaratory judgment claims that would be added by this amended filing and, therefore, do not join the motion and instead maintain the responses and allegations of their latest filed Answer and Counterclaim.

Rule 15(a) of the South Carolina Rules of Civil Procedure states that leave of the Court to amend pleadings "shall be freely given when justice so requires and does not prejudice any other party." "It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." Foggie v. CSX Trasp., Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993).

The proposed Amended Answer and Counterclaims of the Company and the Club contains counterclaims for declaratory judgment regarding interpretation of the Recreational Easement and Agreement to Share Costs entered by the I'On Company, the I'On Club, and the I'On Assembly (the "Recreational Easement"). On May 12, 2014, the I'On Company and the I'On Club filed a separate action against the I'On Assembly and Plaintiffs Walbeck and Adkins seeking declaratory judgment with respect to the validity and the duration of the Recreational Easement. A true and correct copy of the Summons and Complaint in that action, I'On Company, LLC et al. v. I'On Assembly, Inc. et al., Charleston County Court of Common Pleas, Case No. 2014-CP-2984 (the "Declaratory Judgment Action"), is attached hereto as Exhibit B.

In response, the I'On Assembly filed a motion to dismiss the Declaratory Judgment Action pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure stating that the above-captioned action "involves the same parties and claims" as the Declaratory Judgment Action. I'On Assembly Motion to Dismiss, p. 1 (attached hereto as Exhibit C). To the extent the I'On Assembly's assertions are correct, this Court should allow the proposed amendment in the above-captioned action to include the declaratory judgment claims which are not currently pending in this action.

The declaratory judgment counterclaims raised by this amendment involve "matters which have been litigated by these parties for the past several years this action has been pending" and thus "[u]nder these circumstances, Plaintiff[s are] not prejudiced by such amendment." Babb v. Estate of Eatson, 2008 WL 9841508 at *5 (Ct. App. May 2, 2008) (upholding order to amend answer and counterclaims to include declaratory judgment counterclaim); see also Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 542, 524 S.E.2d 115, 117-118 (Ct. App. 1999) (holding "[t]he prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried and a lack of opportunity to refute it") (internal citations omitted).

The Company and the Club have in good faith requested consent from counsel for Plaintiffs prior to filing this Motion. In light of the schedule set for this case, however, these defendants are filing this motion before receiving a response. Should the Plaintiffs consent, these Defendants will promptly notify the Court.

WHEREFORE, the I'On Company and the I'On Club respectfully pray this Court grant leave to amend their Answer to Third Amended Complaint and Counterclaims.

This 6th day of June, 2014 at Charleston, South Carolina.

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Attorneys for the I'On Defendants

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

v.

THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, TOM GRAHAM, and I'ON REALTY, LLC,

Defendants.

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

2014 JUN 10 AM 9:24
CLERK OF COURT
FILED

DEFENDANTS' MOTION IN LIMINE REGARDING ADMISSIBILITY OF DEED AND MEMORANDUM IN SUPPORT THEREOF
AND
IN FURTHER SUPPORT OF MOTION IN LIMINE TO EXCLUDE EVIDENCE OF SETTLEMENT

COMES NOW Defendants I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, Vince Graham, Tom Graham and I'On Realty (collectively the "I'On Defendants") by and through counsel, move for an order of this Court declaring Limited Warranty Deed recorded on February 20, 2014 by 148 Civitas, LLC transferring lot CV-6 to the I'On Assembly ("Assembly Deed") admissible in the trial of the above captioned action. A true and correct copy of the Assembly Deed is attached to this motion as Exhibit 1. In addition, at a recent hearing, the Court requested additional briefing on the Defendants' Motion in Limine to Exclude Evidence of Settlement. Counsel intends for the analysis set forth for this motion to further articulate their positions in support of that motion.

Pursuant to South Carolina Rules of Evidence 401 and 402, the Assembly Deed is clearly relevant as it evidences the I'On Assembly's present ownership of Lot CV-6, including the improvements thereon such as the disputed dock and the Creek Club. Pursuant to South Carolina Rule of Evidence 803(14), recorded documents, such as the Assembly Deed, are admissible for the purpose of evidencing an interest in property. The Assembly Deed is a recorded, publicly available document.

The fact that Lot CV-6 was transferred from 148 Civitas to the I'On Assembly following a settlement between the Plaintiffs and former defendants in this action should neither impact the admissibility of the Assembly Deed nor render admissible the otherwise inadmissible settlement agreement. The Deed does not itself constitute evidence of the settlement, and is not subject to Rule 408. See Peoples Fed. Savings and Loan Ass'n of S.C. v. Resources Planning Group, 358 S.C. 460, 473-74, 596 S.E.2d 51, 58 (2004) (upholding admission of appraisal although related to settlement as it was "not evidence of an offer or settlement"). Although the Assembly Deed will indicate a change of ownership between the Assembly and a former defendant and make *the fact of settlement* apparent – as would testimony, if permitted, that a settlement is how the property was obtained – admission of *the terms of the settlement* would be improper.

The terms of settlement should be excluded pursuant to Rules 403 and 408 of the South Carolina Rules of Evidence. Admission of the terms of the settlement that involve property and consideration that has never been a part of any claim in this lawsuit would confuse the jury and unfairly prejudice the Defendants and should be excluded under Rule 403. Admission of the terms of the settlement would center the lawsuit on the recent partial settlement rather than on the claims theretofore alleged in the case.

Presumably, such confusion, distraction and unfair prejudice to a litigant are reasons that settlement agreements are inadmissible pursuant to South Carolina Rule of Evidence 408. South Carolina Rule of Evidence 408 forbids the admission of settlements if offered "to prove or disprove the validity or amount of a disputed claim." S.C.R. Evid. 408; see also S.C.R. Evid. 408 notes (stating S.C. Rule of Evidence 408 is identical to Federal Rule of Evidence 408). Indeed, the Plaintiffs have indicated their intent to use the settlement agreement to seek damages, that is, to prove elements of their damages. The terms of the settlement should be excluded under both Rule 408 and Rule 403.

Disclosure of the *fact* that a settlement exists as addressed above, however, is a different issue than the admissibility of the terms and content of such a settlement agreement. Several courts have held that even where the terms of a settlement are inadmissible, the fact that a settlement has been reached by some of the original parties to an action may still be admissible if offered for a purpose other than demonstrating the validity or amount of a disputed claim. For example, in Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069 (5th Cir. 1986), the Fifth Circuit held that "disclosure of the fact of settlement" was admissible for the purpose of explaining the absence of settling defendants and avoiding jury confusion while "disclosure of the amount of settlement, however, is a different matter" and was properly excluded pursuant to Rule 408. See also Arhart v. Micro Switch Mfg. Co., 798 F.2d 291 (8th Cir. 1986) (holding the fact that some defendants had entered into a settlement with Plaintiff was admissible to explain changed alignment of parties, but that the terms and amount of the settlement remained inadmissible); United States Aviation Underwriters, Inc. v. Olympia Wings, 869 F.2d 949 (5th Cir. 1990) (holding fact, but not amount, of settlement properly admissible to explain realignment of parties following settlement); Glaze v. G & B Marine, Inc., 1997 WL 35221 at *1 (Jan. 27, 1997 E.D.

La.) (holding "existence of a settlement agreement between the plaintiff and [defendant]" was admissible while "the specific terms of the settlement including the dollar amount are not admissible in that this information would tend to confuse the jury or is otherwise not admissible" under both Rules 408 and 403).

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, the I'On Defendants respectfully request this Court to order:

1. that the Assembly Deed is admissible evidence at the trial of this case;
2. that the terms of the Settlement Agreement entered between Plaintiffs and 148 Civitas, LLC and Mike Russo be excluded from evidence at the trial of this case; and
3. that the Court order such other and further relief as it may deem just and proper.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

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,

Defendants.

2014 JUL 31 AM 8:42
JULIE J. ... CLERK OF ...
BY

DEFENDANTS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR DIRECTED VERDICT

COME NOW Defendants, I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, and I'On Realty, LLC (collectively the "I'On Defendants"), by and through counsel, and submit the following legal authorities in support of their motion for directed verdict, pursuant to Rule 50 of the South Carolina Rules of Civil Procedure.

I. Plaintiffs' claims are barred by the applicable statutes of limitations.

Plaintiffs' claims are subject to a three-year limitations period. See S.C. Code § 15-3-530(1), (2) and (5) (state-law claims); 15 U.S.C. § 1711(a)(2) (ILSA). (Plaintiffs' argument regarding the twenty-year period for contracts under seal is addressed below.) The statute of limitations had run years before Plaintiffs instituted their action, as follows.

A. Walbeck's Claims

Plaintiff Walbeck's initial summons and complaint was filed on December 22, 2010, but was never served on any party. Walbeck's amended summons and complaint was filed on

March 8, 2011, and was served on Defendants I'On Company, I'On Club, I'On Group, and I'On Realty on March 11, 2011.

Pursuant to Rule 3, SCRCP, the action commences on the date of filing of the summons and complaint, but only provided that they are served within 120 days of filing. See also Mims v. Babcock Center, Inc., 399 S.C. 341, 346, 732 S.E.2d 395, 397-98 (2012) (holding that if an action is filed but not served within the statute of limitations, then service must be made within 120 days of filing).

Therefore, Walbeck's individual claims are time-barred:

1. As to Defendants I'On Company, I'On Club, I'On Group, because they accrued before **December 22, 2007.**
2. As to Defendant I'On Realty (which was not named in the initial action), because they accrued before **March 8, 2008.**

B. Adkins' Claims

Plaintiff Adkins was added to this action by a second amended complaint filed and served February 7, 2012. Her individual claims are thus time-barred because they accrued before **February 7, 2009.**

C. Assembly's Claims

Walbeck never, even arguably, made proper demand on the I'On Assembly, nor did he ever properly plead any such demand with particularity as required by Rule 23(b)(1). Further, the initial complaint was not verified pursuant to Rule 23(b)(1)'s requirements. See Carolina First Corp. v. Whittle, 343 S.C. 176, 188-89, 539 S.E.2d 402, 409-10 (Ct. App. 2000). Thus, even assuming Adkins made proper demand—which she did not, as described below—any derivative claim was only properly commenced, at the earliest, at the time Adkins was added as a Plaintiff on February 7, 2012. Therefore, the derivative claims are time-barred because they accrued before **February 7, 2009.**

If the derivative claims are dismissed, the Assembly's only remaining claims are those it has brought at a Plaintiff in its own right. The Assembly was made a Plaintiff in this case and deemed to have adopted the derivative Plaintiffs' claims by this Court's order dated February 26, 2014. As such, the Assembly's own action is time-barred because its claims accrued before **February 26, 2011.**

D. Discovery Rule

All of Plaintiffs' state-law claims and ILSA anti-fraud provision claims[1] are subject to a discovery rule. S.C. Code § 15-3-535; 15 U.S.C. § 1711(a). Under both these versions of the discovery rule, a claim accrues when the injured party knew or should have known by the exercise of "reasonable diligence" of the existence of a cause of action. Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). This test is objective, not subjective. Id. The claim accrues not when advice of counsel is sought or a full-blown theory of recovery is developed. Id. at 576, 593 S.E.2d at 628 (emphasis added). Rather, a claim arises when the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 395, 593 S.E.2d 183, 187 (Ct. App. 2004). Thus, the legal issue with respect to each Plaintiff is whether and when each Plaintiff knew or should have known of the existence of any cause of action.

(1) Application of Discovery Rule to Individual Claims

Plaintiffs' individual claims are based on the contention that, pursuant to the 1998 Property Report, the I'On Company was supposed to convey the "Creekside Park" and "Community Dock" "upon completion of construction." Although Plaintiffs attempt to argue

[1] The discovery rule does not apply to claims brought pursuant to ILSA reporting requirements.

that they think that I'On's amenities are still not complete—in which case their claim would not yet have accrued, even today—Plaintiffs plainly knew or should have known that the Creek Club building and the docks in I'On were completed by April 10, 2001. Thus, any claim which the individual Plaintiffs have accrued at the latest on April 10, 2001, for Walbeck, and immediately upon purchase, or June 4, 2003, for Adkins. Because neither Walbeck nor Adkins filed suit within three years of the date such claims accrued, their individual claims are plainly barred by the applicable statutes of limitations and should be dismissed on directed verdict.[2]

(2) Application of Discovery Rule to Assembly's Claims

The Assembly's claims must be analyzed separately. Under South Carolina law a statute of limitations applies to the claim itself, not to the party bringing the action. Murphy v. Jefferson Pilot Communications Co., 657 F. Supp. 2d 683, 692 (D.S.C. 2008). Thus, the question is not when the purported derivative Plaintiffs became aware of the Assembly's potential claim, but when the Assembly itself knew or had reason to know of its claim. South Carolina courts have

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[2] Plaintiffs had sufficient notice of completion of construction of the Creekside Park and Community Dock even without any knowledge of the recorded Recreational Easement. Nonetheless, the public record for the properties the Plaintiffs purchased put them on notice of the existence of the Recreational Easement, and thus provided additional notice of their potential claims. On February 15, 2000, the Recreational Easement was recorded and indexed to the Declaration of Covenants, Conditions and Restrictions of I'On. Walbeck's deed was executed on March 31, 2000; Adkins' deed was executed on June 4, 2003. Both deeds expressly reference the Declaration of Covenants, Conditions and Restrictions for I'On and expressly reference "all documents referenced [in the Declaration]." Further, Adkins' deed expressly references "Book M342, Page 051" which is the first page of the recorded Recreational Easement.

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

held that knowledge held by an agent of a corporation is imputed to shareholders for limitations purposes if the shareholders later attempt to bring a derivative action. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 395-96, 593 S.E.2d 183, 187-88 (Ct. App. 2004).

The many events which reasonably placed the Assembly on notice of a potential claim for ownership of the Creek Club or docks more than three years before this action was commenced include:

- The Assembly Board has operated under the February 9, 2000 Recreational Easement and Agreement to Share Costs since the docks were completed, which was itself sufficient notice to the I'On Assembly that the I'On Company did not intend to give the dock and boating facilities to the Assembly outright.

- On August 15, 2000, Lot CV-6 was conveyed of record from the Company to the Club.

- On April 10, 2001, a Certificate of Occupancy was issued for the I'On Creek Club building on Lot CV-6, indicating construction was complete. All docks in I'On were likewise complete by this date.

- By December 3, 2003, non-developer homeowners constituted a majority of the Assembly Board and the entire Finance Committee, which analyzed expenses including payments to I'On Club for rental of the Creek Club and for dock maintenance at the Creek Club. Moreover, the Finance Committee included Andy Gowder, Ed Clem, and Annie Bonk, all of whom received the 1998 Property Report prior to purchasing their lots.

- On February 12, 2004, at an Assembly Board meeting (with non-developer homeowners constituting a majority of the Assembly Board), Vince Graham told those in attendance that the I'On Club owned the dock at the Creek Club and referenced the easement agreement. Attendees included Andy Gowder, Gaye Joyner (both members), Ed Clem, and Annie Bonk (both guests and later members of the Board or its committees), all of whom received the 1998 Property Report prior to purchasing their lots.

- On August 5, 2004, Ed Clem gave the Board an update on the status of efforts to draft a new agreement between the Assembly and the Club regarding access. The same persons were in attendance.

- On December 7, 2005, the last member of the Assembly Board affiliated with the I'On Company left the Board. As of this date, all documents described above were in the Assembly's records and available to the new Board on December 7, 2005.

- Each year, both before and over the handover of control, when it budgeted, the Assembly budgeted funds to pay for the Creek Club dock usage fee and for rental of the Creek Club for Assembly meetings and events. The dock payment was required by and made pursuant to the 2000 Recreational Easement. These two budget line items put every member of the Assembly on notice each year that it did not own the docks.

- Notices of annual meetings, including draft budgets, were provided to all I'On homeowners each year as required by law. Each year's draft budget includes the Creek Club dock maintenance fee and Creek Club rental fee. Thus, on an annual basis, all homeowners in I'On, including Walbeck and Adkins, were made aware that they did not own the docks or Creek Club.

- From April until October 2007, the I'On Company and the Board had a series of discussions about the Assembly buying the Creek Club or acquiring the Creek Club docks in return for the Assembly's support of the proposed Phase 11 of I'On or other plans.

E. Application of Twenty-Year Statute for Instruments Under Seal

Walbeck is expected to argue that his I'On Lot Purchase Agreement was executed as a contract under seal and subject to a twenty year statute of limitations pursuant to Section 15-3-520(2) of the South Carolina Code. The Agreement lacks sufficient language indicating it was the parties' intent that the Agreement be treated as a sealed instrument. See Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548, 550 (Ct. App. 2005); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); S.C. Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984).

Even if Walbeck's contract is under seal, the twenty-year statute applies to no other claims in this action. Actions under the ILSA are governed by a three-year federal statute of limitations which preempts the operation of any state limitations period. See City of Cayce v. Norfolk S. Ry. Co., 391 S.C. 395, 401, 706 S.E.2d 6, 9 (2011) (holding that where state and federal law actually conflict, federal law preempts). Likewise, none of Plaintiffs' other state-law claims are actions on instruments under seal. The three-year statute of limitations in Section 15-3-530(1) of the South Carolina Code applies to all other contracts. but makes an explicit

exception for those governed by the twenty-year statute provided in Section 15-3-520. The three-year period also applies to all actions "upon a liability created by statute" and for "any injury to the person or rights of another, not arising on contract and not enumerated by law." S.C. Code § 15-3-530(2), (5). These provisions do not contain an exception for cases governed by the twenty-year statute. Nor does any South Carolina case apply the twenty-year statute to any claim other than breach of contract. See Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548, 550 (Ct. App. 2005) (breach of contract action); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996) (breach of contract action); Clifton, LLC v. Tadlock, 4:11-CV-01234-RBH, 2012 WL 909826 (D.S.C. Mar. 16, 2012) aff'd, 513 F. App'x 255 (4th Cir. 2013) (breach of contract action for specific performance); Midwest Dredge & Excavating, Inc. v. Bay Pointe Homeowner's Assoc., Inc., C/A2:06-2021-DCN, 2007 WL 7141921 (D.S.C. May 15, 2007) (breach of contract action). Further, in rejecting a claim that parties to a commercial lease intended to execute their contract under seal, the Court of Appeals expressly described the twenty-year statute as applying only to contract claims. Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005) (discussing concern for "transform[ing] the twenty-year statute of limitations into the standard period of limitations for contract actions in this state" (emphasis added)). For all these reasons, the three-year statute of limitations applies to all Plaintiffs' claims.

F. Equitable Estoppel

Plaintiffs are expected to assert that they are entitled to equitable estoppel or equitable tolling of the limitations period. A defendant may be estopped from claiming a limitations defense where the plaintiff was aware he might have a claim within the statutory period, but the defendant's conduct induced a delay that would otherwise bar the plaintiff's claim. See Dillon

Cty. School Dist No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 218, 332 S.E.2d 555, 561 (Ct. App. 1985), overruled on other grounds, Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Division, 319 S.C. 556 (1995). Equitable estoppel is a question of fact, but is an equitable question for the Court's determination. Black v. Lexington School Dist. No. 2, 327 S.C. 55, 62 n.1, 488 S.E.2d 327, 330-31 n.1 (1997).

"For equitable estoppel to apply, a plaintiff must be aware that a claim might exist prior to the expiration of the statute of limitations, but due to 'some conduct or representation by the defendant,' the plaintiff [must be] 'induced . . . to delay in filing suit.'" Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 639, 682 S.E.2d 1, 8 (Ct. App. 2009) (emphasis in original) (quoting Hedgepath v. Am. Tel. & Tel. Co., 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)). In other words, the Plaintiffs must actually and reasonably rely on the words and conduct of the person to be estopped in allowing the limitations period to expire. Dillon, 286 S.C. 207, 218, 332 S.E.2d at 561.

Representations made before the Plaintiffs were subjectively aware that they had a claim cannot induce an estoppel. South Carolina distinguishes between conduct before the plaintiff subjectively recognizes the existence of his claim—which cannot induce an estoppel—and conduct which lulls a party, already aware of the existence of its claim, into a false sense of security regarding the claim—which may be a ground for an estoppel. Republic Contracting Corp. v. South Carolina Dept. of Highways, 332 S.C. 197, 211, 503 S.E.2d 761, 768-69 (Ct. App. 1998).

By their own admission, Plaintiffs were not aware of the existence of any potential claim until rumors began of the proposed Creek Club sale in late 2008. Adkins testified that she first learned about the sale on the I'On message board around that time. Walbeck likewise testified

he was unaware of any sale until that time. Based on the date of accrual discussed above, the statute had already run before that date, defeating the reliance necessary to create an estoppel.

Equitable estoppel has elements both with respect to the party claiming estoppel and with respect to the party to be estopped. The party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question, and (2) relied upon the conduct of the party to be estopped. Kelly, 383 S.C. at 638, 682 S.E.2d at 7.

The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts. Id.

Because of the timing issues discussed above, the only representations by Defendants which can even arguably form the basis of an estoppel are those Chad Besenfelder made to the Assembly by e-mail in March 2009 regarding conveyance of the docks and boat ramp (but no other portion of Lot CV-6, Lot 275, Lot CV-5, or the Creek Club building). As discussed above, the limitations period had already run by that point, so no estoppel can arise. (If the Court finds that it had not run, however, any estoppel created thereby pertained only to the docks and boat ramp.) Any such estoppel period definitively ended when the sale of the Creek Club to 148 Civitas became public on August 5, 2009.

Mrs. Adkins testified that she did not rely on any representation by the Defendants regarding possible conveyance of the properties she sought to the Assembly. After the Defendants' March 2009 representations, she testified that she "was not completely at ease" and "still had concerns." Her concerns prompted her to write two letters to the Defendants regarding these issues, and to engage Thomas S. Tisdale, Jr., Esq., to prepare a draft complaint and send it

to the Defendants, all before Assembly members learned of the subsequent Creek Club sale planned in August 2009. She therefore did not rely on the conduct of Defendants in choosing to delay filing suit, and is not entitled to any equitable estoppel of the limitations period. Likewise, there is no evidence in the record that Mr. Walbeck actually relied on (or even read) any representation by the Defendants in choosing to forbear filing suit between March and August 2009.

After the August 5, 2009 conveyance to 148 Civitas, there could be no doubt by any I'On homeowner that the I'On Company had neither intent nor ability to convey the docks or boat ramp to the Assembly. Plaintiff Walbeck filed his suit as an individual sixteen months later, on December 22, 2010. Plaintiff Adkins was added, and the suit was asserted as a derivative action for the Assembly for the first time, two and a half years later, on February 7, 2012. Plaintiffs elected to sleep on their rights rather than file suit promptly after learning the true facts of the matter. They cannot rely on equity to excuse such a delay. Equity aids the vigilant, not those who sleep on their rights. Eldridge v. Eldridge, 398 S.C. 113, 121, 728 S.E.2d 24, 28 (2012). Plaintiffs' lack of vigilance is fatal to any equitable relief from the limitations periods here.

G. Equitable Tolling

Equitable tolling "refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping and then restarting." Hooper v. Ebenezer Sr. Services and Rehab. Center, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 51 Am. Jur. 2d Limitation of Actions § 169 (2000). "Tolling may either temporarily suspend the running of the limitations period or delay the start of the limitations period." Id. The "doctrine [is] rarely applied in South Carolina to stop the running of statute of limitations. . . . [and] 'is reserved for extraordinary circumstances.'" Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008)

(citations omitted). That is, the doctrine "is typically available only if the claimant was prevent[ed] in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." Id. at 521, 662 S.E.2d at 620. Plaintiffs bear the burden of "establishing sufficient facts to justify its use." Ross v. Ross, 394 S.C. 261, 265, 725 S.E.2d 359, 361 (Ct. App. 2011). Equitable tolling is judicially created, and is thus a legal issue for the Court's determination. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115 (2009).

In Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), the Court of Appeals equitably tolled a limitations period for a POA to bring a lawsuit because the POA was composed entirely of officers of the developer until eight months before suit was commenced. The Court focused on when "the property owners gained control" over the POA. 397 S.C. 348, 725 S.E.2d 112.

In the present case, property owners gained control over the Assembly board on or about December 3, 2003. By that time, there were only two developer representatives serving; the majority of the board consisted of homeowners. Further, as of 2003, there were no developer representatives on the Assembly's finance committee—the group responsible for reviewing and proposing budgetary funds for rental use of the Creek Club and for payments for the Creek Club docks pursuant to the easement agreement. The veto power which the developer had retained over the Assembly's actions has, by the uncontradicted testimony of Tom Graham, is very limited and has never been exercised. Nor is there any evidence that the existence of the developer's veto power has ever had any influence on any decision made by the Assembly.

In Magnolia, the court noted the diligence of the POA in filing suit just eight months after property owners gained control. Here, no action was filed on behalf of the Assembly until after

more than eight years of homeowner control. Further, unlike Magnolia, this action was not brought by the Assembly. Here, long after the homeowners took control of the Board, the Assembly chose not to bring a claim or to support the derivative claim until the eve of the mistrial. This Court should therefore hold on directed verdict that equitable tolling does not apply.

II. Because the I'On Assembly is now a Plaintiff in this action, the relief sought has changed fundamentally since the Assembly became a Plaintiff, and the individual Plaintiffs have never properly met the demand requirements of Rule 23(b), the derivative claims should be dismissed.

The Assembly's board should be in control of the maintenance of the claims which it has now made its own by becoming a Plaintiff in this action. The rule governing derivative actions, Rule 23(b), "seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." Carolina First Corp. v. Whittle, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000) There is no need for the individual Plaintiffs, who have unique interests in the maintenance of this suit not shared by the Assembly or its other members, to maintain the same claims on behalf of the Assembly derivatively that it is now pursuing of its own accord. Nor have the derivative Plaintiffs ever properly met the strict requirements of alleging demand and refusal or futility of demand as required by Rule 23(b).

The derivative Plaintiffs have, despite an initial and four amended complaints, never properly initiated and maintained a derivative action, as Defendants have repeatedly pointed out in the course of this litigation. Specifically, the derivative Plaintiffs have failed to make or allege with verification and particularity proper demand and refusal on the Assembly; have likewise failed properly to plead the futility of demand; and have acknowledged by their most recent,

unverified complaint that the facts pleaded in their prior verified complaints to support their derivative claims are no longer true.

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

Plaintiffs have attempted to plead, and are expected to argue, that two demands were made on the Board, but neither is sufficient in law. The first—Plaintiffs' Exhibit 53—was made by a person other than the Plaintiffs, Catherine Templeton. The uncontradicted evidence shows that Mrs. Templeton subsequently settled her claims with the Defendants. In fact, Plaintiffs asked Tom Graham to confirm that he has no evidence this lawsuit was in any way filed on behalf of Mrs. Templeton, which he did. No other witness testified on this issue. For these reasons, Mrs. Templeton's letter of February 26, 2009 is not a derivative demand on which these Plaintiffs can base their derivative claims.

Although Plaintiff Walbeck brought this suit initially, he has never claimed to have made any demand on the Assembly Board, and he should be dismissed as a derivative Plaintiff. Plaintiffs make a poor effort to rescue their claims by asserting what they call the "Adkins Demand," Plaintiffs' Exhibits 54 and 57. In these letters to the Board's attorney, Adkins never

goes further than to request that he give an opinion as to the Assembly's rights. The allegations of the complaint, at all stages, have been equally vague regarding these demands. Both fail to describe specific wrongful acts, to identify the specific harm caused to the corporation, and to request any relief. These "demands" are therefore an improper basis for a derivative suit.

Knowing their demands are insufficient, Plaintiffs have also pleaded and are expected to argue that demand was futile. If alleging futility, the shareholder must demonstrate "why the Board of Directors should not be allowed to decide whether to institute litigation." Id. at 188, 539 S.E.2d at 409. At no time have Plaintiffs offered more than the most conclusory explanation as to why the Board was not qualified to make that decision.

In prior versions of their complaint, up through the Third Amended Complaint filed January 2, 2014, Plaintiffs alleged and verified that additional demands on the Assembly "would now be futile as The Assembly has failed to act to protect the rights of The Assembly and its members...." (emphasis added). This contentless and wholly conclusory allegation falls far short of a demonstration specific facts showing why the Assembly Board should not have been allowed to make the litigation decision.

In the Fourth (unverified) Amended Complaint, the words "would now be futile" have become "would have been futile." By making this change, derivative Plaintiffs admit that demand is no longer futile—and, in truth, never was—because the Assembly accepted their claims on the eve of the mistrial of this case in January 2014. Immediately thereafter, the Assembly gained ownership of the property which the individual Plaintiffs claimed. As a result, the nature of the relief sought against the Defendants has changed substantially—substantially enough that the Plaintiffs' claims are now new claims, requiring a new demand, which the Assembly has accepted by its conduct.

Under South Carolina law, the purpose of these strict demand requirements for derivative suits is to ensure that boards of directors retain control of the acts taken on their corporations' behalf. Carolina First, 343 S.C. 176, 185-87, 539 S.E.2d at 407-08. The Assembly has now accepted the derivative Plaintiffs' demand by agreeing to support their new, post-settlement claims and consenting to align itself as a Plaintiff in this suit. This Court should therefore implement South Carolina's sound public policy by giving the Assembly full control of the prosecution of its own lawsuit, rather than making it beholden to the specific interests of the derivative Plaintiffs.

The Assembly Board is infinitely better placed to balance the interests of all its members than derivative Plaintiffs, who have repeatedly made clear that they represent only one among many points of view with respect to the claims at issue here. A plaintiff bringing a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRCP. If the plaintiff does not, "[t]he derivative action may not be maintained." Id.

In Waller v. Seabrook Island Property Owners Association, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990), the South Carolina Supreme Court held that the mere fact that the plaintiffs were property owners in a large or populous development did not, in and of itself, qualify them to fairly and adequately represent the interests of the other property owners. Rather, the plaintiffs "must demonstrate they have no interest antagonistic to or in conflict with the interest of the unnamed members of the class such that they are fairly and adequately able to protect the interest of the purported class." Id.

The federal rule is identical to the South Carolina rule on this point. See Fed. R. Civ. P. 23.1(a). In Kuzmickey v. Dunmore Corp., 420 F. Supp. 226, 230-31 (E.D. Penn. 1976), a court

interpreting the fair and adequate representation requirement held that where a single shareholder owning 16 percent of the stock in a corporation could not claim to fairly and adequately represent the interests of any "similarly situated" shareholders. Accord Rothenberg v. Security Management Co., Inc., 667 F.2d 958, 962 (11th Cir. 1982) (dismissing derivative action and noting that named plaintiff owned only 2.04% of outstanding stock). To construe the rule otherwise would be to render unnecessary the language of the rule concerning representation of similarly situated shareholders. Kuzmickey, 420 F. Supp. at 230-31.

The derivative Plaintiffs cannot adequately represent all of the homeowners' legal interests, which require careful balancing, not just an assumption that it is best for the Assembly to own property. Prior Assembly boards determined that easement access would be superior to outright ownership because of liability and maintenance concerns. To maintain their derivative action, Plaintiffs must meet their burden of proof to establish a lack of antagonistic or conflicting interests. Waller, 300 S.C. at 468, 388 S.E.2d at 801. Derivative Plaintiffs' particular interests are protected by the Assembly's fiduciary duties to them, for breach of which they can bring an action against the Assembly.

The derivative Plaintiffs have taken positions in this litigation clearly contrary to the Assembly's interests. They have repeatedly argued to this Court that the easement in favor of the Assembly granting perpetual access to the Creek Club docks and boating facilities was invalid or that it was not perpetual—despite the stipulation by the Assembly's attorney at the inception of the mistrial of this case, and by counsel for 148 Civitas in prior motion filings, that the easement was perpetual and that it was in the Assembly's interests for it to be so.

In addition to its power to dismiss cases under Rules 12(b), 50, and 56, this Court also has equitable power under Rule 21 to dismiss a party from this action "on such terms as are just."

Defendants respectfully pray that the Court exercise such powers to dismiss derivative Plaintiffs' claims on behalf of the Assembly and permit the Assembly full control of its own claims.

III. The individual Plaintiffs lack standing and individualized damages because all losses they seek to remedy are losses to the Assembly.

The individual Plaintiffs' testimony reveals that they have no standing to recover the relief they seek. The individual Plaintiffs say that they seek a litany of money damages, along with purely speculative and unsupported personal damages.

However artfully they may argue, Walbeck and Adkins seek to remedy a perceived loss to the Assembly, not to themselves. As a result, they have no damages as individual plaintiffs. An action seeking to remedy a loss to a corporation is a derivative action. Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." Id. The latter sentence describes the individual Plaintiffs' claim exactly; the gravamen of their suit is a perceived injury to the Assembly, not to Plaintiffs.

South Carolina courts have further recognized sound reasons for this rule, all of which apply here: "(1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in corporations; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares." Id. at 51, 557 S.E.2d at 685.

According to their own testimony, the individual Plaintiffs seek to recover money damages for diminution in value of their individual lots based solely on the extent and terms of the Assembly's ownership of the Creek Club and docks, which they find unsatisfactory. Such claims are not "separate and distinct" from the claims of the Assembly, because if and to the extent the Assembly succeeds here, any diminution in value would be immediately rectified through an increase in the value of Walbeck and Adkins' shares in the Assembly. Walbeck and Adkins therefore lack standing to bring such claims as individuals. To the extent that Plaintiffs are seeking either money damages for claims based on their membership of the I'On Assembly, they lack standing to bring such claims individually, and these individual claims must be dismissed.

Plaintiffs' own witnesses acknowledge this point readily. Tim Eble testified that the amenities which the Plaintiffs claim do not benefit him directly at all, but benefit the Assembly. Lea Ann Adkins testified that she seeks $50,000 in damages personally, but never cited any injury which she has suffered separate and distinct from that she believes the Assembly suffered. Brad Walbeck testified that he wants $50,000 in individual damages because that is the amount by which he would have reduced his purchase price had he known that the Creekside Park and Community Dock, as he claims to have understood those terms, would not be deeded to the Assembly as promised—in other words, that is the value he places on his share of the Assembly's ownership of the amenities he claims.

Even presuming arguendo that Plaintiffs may maintain such claims individually, they still must put forth proof as to their damages. While mathematical certainty of damages for diminution in value is not required, the evidence "should be such that a court or jury can reasonably determine an appropriate amount. . . . Neither the existence, causation nor amount of

damages can be left to the judge's or jury's conjecture, guess or speculation. . . . Bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution." Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000). Plaintiffs have no evidence, expert or otherwise, supporting a claim of diminution in value of their lots, except their own purely speculative guesses which have no basis in fact or logic. Any such individual claim should therefore be dismissed on directed verdict.

IV. Plaintiffs' claim under the ILSA fails as a matter of law.

Homeowners associations lack standing to bring ILSA claims. Thus, the ILSA claims brought by and on behalf of the I'On Assembly fail as a matter of law. See Terre Du Lac Ass'n, Inc. v. Terre Du Lac, Inc., 772 F.2d 467 (8th Cir. 1985) and Board of Managers of Mason Fisk Condominium v. 72 Berry Street, LLC, 801 F. Supp. 2d 30, 35-36 (E.D.N.Y. 2011). Any ILSA claim belongs only to Walbeck and Adkins individually.

Likewise, Adkins' contract states that ILSA does not apply to her purchase and has a merger clause. Thus, her individual ILSA claim should likewise be dismissed as a matter of law.

South Carolina law recognizes that a plaintiff must come forward with more than a "mere scintilla of evidence" to withstand directed verdict on a claim applying federal law. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009); see also Russell v. Wachovia Bank, 353 S.C. 208, 218-19, 578 S.E.2d 329, 334-35 (2003) (recognizing that standard for directed verdict mirrors that on summary judgment).

ILSA provides for two basic types of violations: (1) failure to follow the disclosure requirements under § 1703(a)(1), and (2) general anti-fraud provisions under § 1703(a)(2)(A)-(C). Plaintiff plainly cannot pursue claims of the first type, which are subject to a limitations period of three years from the date of the contract. A discovery rule for limitations purposes is

only included for the anti-fraud provision, not for the disclosure requirements. 15 U.S.C. § 1711(a). Plaintiffs' claims under the anti-fraud provisions are also time-barred for the reasons set forth in Part I above.

ILSA permits suits against "developers" and their "agents." It defines a "developer" as "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lot or lots in a subdivision." It defines an "agent" as "any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision." 15 U.S.C. § 1701(5), (6). The determining factor as to whether a party is a "developer" is whether that defendant participated in sales or could be considered a controlling person in an organization that participated in sales. Gibbes v. Rose Hill Plantation Development Co., 794 F. Supp. 1327, 1333 (D.S.C. 1992). Defendants I'On Group and I'On Club never participated in sales, and therefore cannot be liable under the ILSA.

The anti-fraud provisions of the ILSA require proof of reliance by the plaintiff, as with a common-law fraud claim. See Ivar v. Elk River Partners, LLC, 705 F. Supp. 2d 1220 (D. Colo. 2010); Dongelewicz v. First Eastern Bank, 80 F. Supp. 2d 339 (E.D. Pa. 1999). The Dongelewicz opinion resolves a split among prior authorities by holding that claims under the reporting requirements of ILSA—which have no discovery rule and are thus indisputably time-barred here—do not require reliance, but that the anti-fraud provisions do.[3]

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

Plaintiffs could not have relied on the documents which now form the basis of their interpretation of the meanings of the terms "Creekside Park" and "Community Dock" in making their purchases, because by their own admission, they had never seen them at that time. Plaintiffs now want these words in the 1998 Property Report to mean that they get something more than the words themselves promise.

This is not a cognizable ILSA claim. A South Carolina federal district court addressed a similar issue in Gibbes v. Rose Hill Plantation Development Co., 794 F. Supp. 1327 (D.S.C. 1992). In that case, Plaintiffs contended a violation of the ILSA on the ground that the "stables" and "docks," which had been promised conveyance to their homeowners' association in two ILSA property reports, were supposed to be a fifty-two acre "Equestrian Center" including a polo field and floating docks. Id. at 1335. Developer actually conveyed a 17.24 acre stable complex, without a polo field, and non-floating docks. Id. at 1331, 1335. The Gibbes court granted summary judgment to the defendants as to plaintiffs' claims under the property report

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Under both Rule 10b-5 and Taplett, a rebuttable presumption of reliance arises "where a duty to disclose material information has been breached." Thus, in modern securities law, a material omission calls forth a presumption of reliance, but a material misrepresentation does not. The justification for the presumption of reliance in Rule 10b-5 cases is set forth in the Supreme Court's opinion in Basic, Inc. v. Levinson, 485 U.S. 224 (1988), which modified and clairifed prior conflicting law. Its basis is the so-called "fraud-on-the-market" theory, which rests on the notion that in a modern, highly liquid securities market, the market price of a stock reflects the public information available about it in a way very different from face-to-face transactions contemplated by common-law fraud cases.

The "fraud-on-the-market" theory has no application to sales of real estate. There is precedent specifically refusing to deviate from common-law fraud principles by applying the "fraud-on-the-market" to consumer fraud cases outside the securities context. Brinker v. Chicago Title Ins. Co., ___ F. Supp. 2d. ___ (M.D. Fla. 2012); Sikes v. Teleline, Inc., 281 F.3d 1350 (11th Cir. 2002). A district court in this Circuit has likewise recognized that the rationale for the fraud-on-the-market theory does not readily extend to general fraud claims. Chisolm v. TranSouth Financial Corp. 194 F.R.D. 538, 560 (E.D. Va. 2000).

Defendants therefore assert that a careful review of the cases compels the conclusion that under § 1703(a)(2) of ILSA, reliance is not presumed for either misstatements or omissions, and must be proved in all cases.

because the property report in question did not define the terms "docks" or "stables" or specify their size or configuration, and the developer did in fact transfer docks and stables to the homeowners' association; therefore, the property reports at issue neither misstated nor omitted any material fact on such points. Id. at 1335-36.

Plaintiffs are not entitled to "benefit of the bargain" damages for an ILSA violation; rather, if the value of their property has increased to offset any loss, they have suffered no cognizable damages. Fitzgerald v. Century Park, Inc., 642 F.2d 356 (9th Cir. 1981).

V. Plaintiffs' claims for breach of contract and breach of contract accompanied by a fraudulent act fail as a matter of law.

Any breach of contract claim by or on behalf of the I'On Assembly against the I'On Defendants fails. Except for the Recreational Easement, which Plaintiffs contend is not even valid, much less breached, the I'On Assembly was never party to any contract with the I'On Company, nor in privity with any such party, and cannot therefore sustain an action for breach of contract. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997).

Likewise, Plaintiff Adkins' contract contains no representation or covenant regarding the contents of any property report; rather, it expressly disclaims that any property report need be provided. Thus, any contract claim in this case belongs to Plaintiff Walbeck in his individual capacity only.

Neither Adkins nor the Assembly are intended third-party beneficiaries of Walbeck's contract or any other purchase contract in I'On. The South Carolina courts have repeatedly held that only parties intended to be directly benefitted by a contract can bring an action to enforce it as third-party beneficiaries. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "In the absence of a clear intent to benefit the third person, he cannot

sue on the contract." TC X, Inc. v. Commonwealth Land Title Ins. Co., 928 F. Supp. 618, 623 (D.S.C. 1995). Plaintiff has the burden to prove that the parties entered into their contract to directly benefit the Assembly. Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 425, 440 S.E.2d 890, 892 (Ct. App. 1994); see also Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 446, 494 S.E.2d 827, 833 (Ct. App. 1997). The language of the contract fails to support such any conclusion of a direct intent by the parties to benefit the Assembly in entering into it, and Plaintiffs have introduced no evidence that any party intended to confer any specific benefit on the Assembly by entering into the purchase contracts.

A party cannot use extrinsic evidence to create an ambiguity which does not exist within the four corners of the instrument. Silver v. Aabstract Pools and Spas, 376 S.C. 585, 591 (Ct. App. 2008); Davis v. Davis, 372 S.C. 64, 75 (Ct. App. 2006). Nor can a party use extrinsic evidence to read additional terms into a contract which are not present. See ESA, 392 S.C. at 20 (refusing to read an additional term into the contract that does not exist); Davis, 372 S.C at 76 (refusing to imply additional conditions when contract's plain language suggested no such intent). Parol evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument may not be used to contradict, vary, or explain the written instrument. Gilliland v. Elmwood Properties, 301 S.C. 295, 302 (1990).

Tim Eble testified that the language of the Property Report had "no ambiguity" about what the homeowners were supposed to get. Lea Ann Adkins likewise testified that to her, there is no doubt what "Creekside Park" and "Community Dock" refer to. It is thus improper for the Plaintiffs to ask the finder of fact to apply extrinsic evidence to create an ambiguity to allow them to alter the plain meaning of the contract language.

Adkins' contract explicitly states that the ILSA did not apply to the sale of her lot, does not reference any property report, and explicitly states that she did not rely on any information other than that specified therein. The contract therefore unambiguously does not incorporate any of the representations in the 1998 Property Report as a matter of law. The I'On Company, therefore, cannot have breached any provision of such contract, even viewing the evidence in the light most favorable to Adkins, and Defendants are entitled to a directed verdict on her claim.

In addition to failing to prove a breach of contract, Plaintiffs cannot demonstrate either fraudulent intent relating to the alleged breach or an independent fraudulent act accompanying the alleged breach. D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 556, 730 S.E.2d 340, 355 (Ct. App. 2012). The Property Report provision which Plaintiffs claim Defendants breached promised conveyance of certain amenities upon completion of construction, which occurred no later than April 2001. There is no evidence of any fraudulent act or intent in connection with any failure to convey any of the promised amenities. Thus, the evidence is wholly insufficient to submit issue of punitive damages to the jury as to this claim. See Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53, 336 S.E.2d 502, 503 (Ct. App. 1985) ("[M]ere breach of a contract, even if willful or with fraudulent purpose, is not sufficient to entitle a plaintiff to go to the jury on the issue of punitive damages.").

VI. Plaintiffs have no breach of fiduciary duty claim recognized under South Carolina law.

South Carolina courts have been very restrictive in recognizing the existence of fiduciary duties. See Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.")

The fiduciary duty of a developer to a homeowners' association is limited to that recognized in the line of cases including Concerned Dunes West Residents v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002) and Goddard v. Fairways Development G.P., 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). These cases recognize a very limited duty of developers that, when they convey common areas to a property owners' association, they must either convey such areas in good repair or provide sufficient funds to perform any needed repairs.

The facts of Goddard and Concerned Dunes West demonstrate the narrow scope of the recognized developer fiduciary duty. In Goddard, the developer of a 90-unit PUD "unload[ed]" control of all common areas to the HOA after selling just five residential units. Goddard, 310 S.C. at 414-16, 426 S.E.2d at 832-33. This small number of homeowners was left to bear the costs of maintaining all common areas without a plan to establish a reserve or fund the Association until assessments were adequate to cover maintenance costs. The Goddard court, finding evidence that the common areas were substandard at the time of transfer, recognized a fiduciary duty in that context and found the developer liable for the cost of repairs.

In Concerned Dunes West, the transfer of common areas to the HOA was made within a week of the developer discovering that the PUD's roads were in need of repairs. No repairs were made at the time of transfer; pursuant to the POA's covenants, the POA was responsible for maintenance and repairs. Concerned Dunes West, 349 S.C. at 255, 562 S.E.2d at 635-36. The Supreme Court confirmed the narrow duty it recognized in Goddard: "The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." Id. at 257, 562 S.E.2d at 637.

The limited duty that may exist between a developer and a homeowners association should not be extended here. Plaintiffs are expected to contend that the duty recognized by Concerned Dunes West is to be construed as a blanket fiduciary duty of a developer to homeowners in all aspects of real estate development. There is no precedent for such an extension of current law, which is plainly contrary to the rule that no fiduciary duty or right to rely can exist absent a special confidence in another. See Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 645-46, 677 S.E.2d 892, 898 (Ct. App. 2008). Without trotting out the litany of problems this would create, suffice it to say that recognition of a blanket fiduciary duty would drastically alter the economic realities of real estate development. This Court should decline to extend the developer fiduciary duty beyond that recognized in Concerned Dunes West.

VII. Plaintiffs' claims for actual and constructive fraud and for negligent misrepresentation fail as a matter of law.

A plaintiff must prove all nine of the following elements of fraud by clear, cogent, and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted on; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011); Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 385-86, 339 S.E.2d 112, 113-14 (1985).

Likewise, a plaintiff must prove the following elements to establish a claim for negligent misrepresentation: (1) defendant's false representation to the plaintiff; (2) defendant's pecuniary interest in the representation; (3) defendant's duty of care to communicate truthful information to the plaintiff; (4) breach of the duty; (5) Plaintiff's justifiable reliance on the representation; and

(6) plaintiff's pecuniary loss as a proximate result of his reliance on the representation. Turner, 392 S.C. at 123, 708 S.E.2d at 770.

A plaintiff which has a clear and convincing burden of proof on a claim, such as fraud, must come forward with more than a "mere scintilla of evidence" to withstand directed verdict on such claim. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009); Russell v. Wachovia Bank, 353 S.C. 208, 218-19, 578 S.E.2d 329, 334-35 (2003) (holding that standard for directed verdict mirrors that on summary judgment).

A forward-looking statement is not ordinarily actionable as a fraudulent or negligent misrepresentation, unless the plaintiff can prove that the defendant promised to do a thing with no intention at the time of keeping such promise. A mere breach of contract does not constitute fraud. Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 770-71 (2011). There is no evidence that Defendants did not intend to convey a "Community Dock" and a "Creekside Park" to the Assembly, as part of Phase 2 of I'On, either at the time of the preparation of the Property Report, or at the time of its presentation to Walbeck, or at the time of its claimed presentation to Adkins. Indeed, Plaintiffs' version of the evidence is consistent with the notion that Defendants intended to convey the properties Plaintiffs seek at the time the representations were made.

Constructive fraud differs from actual fraud in that there is no requirement for the plaintiff to prove an intent to deceive. Ardis v. Cox, 314 S.C. 512, 516-17, 431 S.E.2d 267, 269-270 (Ct. App. 1993). Constructive fraud only lies, however, where the defendant has a confidential or fiduciary relationship to the plaintiffs. Id. Even if the Court finds that the Defendants owed a fiduciary duty to the Assembly, contrary to Part VI above, there is no basis in South Carolina law for a duty from the developer of real property to individual homeowners in an arms-length transaction such as those involved here.

In an arms-length transaction between mature, educated people there is no right to rely. Id.; Florentine Corp., Inc. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). Therefore, none of these Plaintiffs have established a right to rely, and their misrepresentation claims fail.

"While issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" See McLaughlin v. Williams, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (internal citations omitted). Nor is there a right to rely when a plaintiff could have ascertained the truth by reviewing publicly available documents. In Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 240-41, 692 S.E.2d 499, 508-09 (2010), the Supreme Court found no genuine issue of fact as to reliance when the party claiming reliance could have reviewed public documents to ascertain the truth. Id. (citing AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992) ("There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.")).

The Assembly cannot establish a claim for fraud or negligent misrepresentation as a matter of law because it cannot show that the Assembly actually relied on any false representation of the I'On Defendants. The individual Plaintiffs could not as a matter of law have relied on the documents which now form the basis of their interpretation of the meanings of the terms "Creekside Park" and "Community Dock," because they never saw any of those documents until many years after they made their purchases. Furthermore, the deed transferring CV-6 to the I'On Club and the Recreational Easement were of record and known to the Assembly, making the fact that the I'On Company had not conveyed Lot CV-6 to the Assembly ascertainable by the exercise of Plaintiffs' due diligence.

VIII. Civil Conspiracy

The gravamen of a civil conspiracy is the special damages resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. Pye v. Estate of Fox, 369 S.C. 555, 567-68 (2006). The damages alleged must go beyond the damages alleged in other causes of action. Id. Civil conspiracy cannot be an "embellishment" of a breach of contract action and cannot simply incorporate or demonstrate other allegations to prove a conspiracy. Vaught v. Waites, 300 S.C. 201, 209-210, 387 S.E.2d 91, 95 (Ct. App. 1989).

To prove special damages, a plaintiff must show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in complaint. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-168, 708 S.E.2d 218, 222-223 (Ct. App. 2011). Plaintiffs have failed to demonstrate any special damages arising from a conspiracy in addition to those damages alleged in their other causes of action.

IX. South Carolina Unfair Trade Practices Act

The South Carolina Supreme Court has recently made very plain that the Unfair Trade Practices Act is not available to address private wrongs. Even if acts are unfair or deceptive, if they affect only the parties to the transaction, they are beyond the scope of the Act. Woodson v. DLI Properties, 406 S.C. 517, 753 S.E.2d 428, 435 (January 8, 2014). Woodson, like the present case, involved a suit by a prospective purchaser of real property alleging that the seller committed an unfair trade practice by selling the property to another purchaser.

Stated differently, to be actionable, an unfair or deceptive act or practice in the conduct of trade or commerce must have an impact on the public interest. Noack Enterprises, Inc. v. Country Corner Interiors, 290 S.C. 475, 478, 351 S.E.2d 347, 349 (Ct. App. 1986). Plaintiffs cannot demonstrate that the actions of any Defendant "caused public harm." Hennes v. Shaw, 397 S.C. 391, 401, 725 S.E.2d 501, 507 (Ct. App. 2012) (directing a verdict in a private breach

of contract dispute where plaintiff failed to present evidence that defendant's actions caused "public harm" as required by UTPA). Here, the reverse is the case; Plaintiffs seek to make the property which they have sued to recover less available to the public, not more.

Furthermore, SCUTPA does not provide for derivative or representative actions; thus the claims by and on behalf of the I'On Assembly should be dismissed. Under S.C. Code § 39-5-140(a), a civil action for damages for an unfair trade practice may only be brought to recover actual damages to an individual plaintiff; no action is permitted in a representative capacity.

X. Unjust Enrichment

The elements of a claim for unjust enrichment are (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616-17, 703 S.E.2d 221, 225 (2010).

The Plaintiffs have conferred no gratuitous benefit on the Defendants. The individual Plaintiffs purchased property in I'On, for which they received consideration in the form of a lot in the neighborhood and membership in the Assembly. The Assembly entered into the Recreational Easement, which involved the reciprocal exchange of easement rights between the parties and a cost-sharing arrangement for fair consideration. There is no evidence that the terms of that document are in any way unfair or unjust to the Assembly; furthermore, now that the Assembly owns Lot CV-6, the easement for use of the docks has been merged into its deed. Plaintiffs cannot, therefore, maintain an unjust enrichment claim on the Assembly's behalf.

XI. Promissory Estoppel

Because contracts between the I'On Company and the individual Plaintiffs govern this dispute, their promissory estoppel claims should be dismissed. Where express contracts govern a

controversy, a party cannot seek equitable relief under a theory of promissory estoppel. Charleston Cty. School Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 425-6, 559 S.E.2d 362, 364-5 (Ct. App. 2001) (holding equitable claims unavailable "because there was a specific contract between the parties and they were limited to that contract"). This is in keeping with the universal prerequisite to equitable relief that the party seeking it lack an adequate remedy at law—such as an action for breach of contract. Nutt Corp. d/b/a TNC Engineering v. Howell Road, LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449. Because no party disputes the existence of contracts between the individual Plaintiffs and the I'On Company which govern the present controversy, Plaintiffs' promissory estoppel claim should be dismissed before trial or on directed verdict.

As argued below, the Recreational Easement is likewise a valid contract governing the relationship between the Assembly and the I'On Company, precluding any promissory estoppel claim.

In order to recover under a theory of promissory estoppel, a claimant must demonstrate: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance on the promise; (3) the reliance was expected and foreseeable; and (4) injury in reliance on the promise. Craft v. S. C. Comm'n for Blind, 385 S.C. 560, 565, 685 S.E.2d 625, 627 (Ct. App. 2009). The Assembly has failed to demonstrate specific, foreseeable acts it took in reliance on any promise by Defendants which have resulted in injury to it. (If the acts in reliance are failing to file a lawsuit, the proper doctrine is equitable estoppel of the limitations period, as discussed above.) No claim for promissory estoppel, therefore, will lie.

XII. Alter Ego/Veil Piercing

Piercing the corporate veil is not to be applied without substantial reflection; the corporate form may be disregarded only where equity requires. Hunting v. Elders, 359 S.C. 217, 223-24, 597 S.E.2d 803, 806 (Ct. App. 2004).

The two-pronged test for piercing the corporate veil first described in Sturkie v. Sifly, 280 S.C. 453 457-59, 313 S.E.2d 316, 318-19 (Ct. App. 1984), first requires a failure to observe corporate formalities by the dominant shareholders in an eight-factor test, and then requires an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individuals. Plaintiffs cannot present any evidence that the various I'On entity Defendants have been undercapitalized, been victims of siphoning of funds, not maintained proper records, or otherwise failed to observe any corporate formalities. The evidence on these issues is Tom Graham's testimony that these various entities are separately and properly formed pursuant to South Carolina law, have separate governing documents, maintain separate books and records, have different purposes, and perform different activities. Mr. Graham also testified that the I'On Group is not his company, but Vince Graham's.

Nor do grounds for alter ego exist:

> An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby. Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. However, this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice. . . . [C]ontrol, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one; one must show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy.

Mid-South Mgmt. Co. v. Sherwood Development Corp., 374 S.C. 588, 603, 649 S.E.2d 135, 143 (Ct. App. 2007) (internal citations omitted). There is no evidence of total domination and

control, or of inequities that would result from permitting the Defendants to maintain their separate corporate forms.[4]

XIII. The 2000 Recreational Easement and Agreement to Share Costs was both valid and perpetual as a matter of law.

Plaintiffs assert the invalidity of the Recreational Easement on the ground that at the time it was granted, the grantor did not own the property at issue. But South Carolina has long recognized that a deed which conveys property to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title. Nettles v. Cummings, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857). Thus a deed, like a contract or other instrument, may be ratified by subsequent act of the grantor. Tolar v. Marion Cty. Lumber Co., 93 S.C. 274, 75 S.E. 545 (1912). Furthermore, under the doctrine of after-acquired title, when a grantor conveys land to which he does not have title, but afterwards acquires such title, he is estopped from claiming that he did not have title at the time of conveyance, and the after-acquired title inures to the grantee's benefit. Corbin v. Carlin, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) (citing Richardson v. Atlantic Coast Lumber Corp., 93 S.C. 254, 75 S.E. 371, 372 (1912)).

The evidence at trial shows that the parties to the Recreational Easement, including both the I'On Club and the I'On Assembly, acted in accordance with it consistently for many years

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[4] Plaintiffs appear to assert that they are entitled to hold all Defendants liable for their claims under an "amalgamation" theory having different requirements than either a Sturkie or an alter ego analysis. There is no clear authority defining this as an alternative theory for ignoring the corporate form under South Carolina law. The existing cases trace back to a single opinion, Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986), which cites no authority, but which exhibits facts equally consistent with a claim for alter ego. Of the cases which cite Kincaid, one of them, Pope v. Heritage Communities, Inc., 395 S.C. 404, 418, 717 S.E.2d 765, 772 (Ct. App. 2011), did not squarely present this problem because the question of whether the trial court erred by not using a Sturkie analysis was not preserved for appeal. In the other, Mid-South Mgmt. Co. v. Sherwood Development Corp., 374 S.C. 588, 605, 649 S.E.2d 135, 144 (Ct. App. 2007), the Court found no shared liability under any theory. There is thus no basis for believing that "amalgamation" is a separate legal theory from veil-piercing or alter ego under South Carolina law.

after the date of conveyance of the Lot CV-6 and the docks to the I'On Club, including after control of the I'On Assembly was turned over to the homeowners, by budgeting and paying dock usage and rental fees to the I'On Club. The parties thereby ratified the Recreational Easement's validity and cured any defect.

If the parties to a deed acquiesce, a third person cannot invalidate the deed by showing what might be a fraud or mistake. McCullough v. Wall, 38 S.C.L. (4 Rich.) 68 (1850). He can only raise the issue of the meaning of the deed, not its validity. Sanders v. Hartzog, 6 S.C. (6 Richardson) 479 (1876). Individual Plaintiffs here cannot, therefore, challenge the easement's validity, only its interpretation.

Whether the Recreational Easement was properly recorded has no effect its validity, as an easement need not be recorded to be valid. Frierson v. Watson, 371 S.C. 60, 636 SE.2d 872 (Ct. App. 2006).

Regarding perpetuity, as a matter of law, as well as under Section 4.3 of the Recreational Easement, courts must construe deeds and easements as a whole and to give effect to all provisions thereof if possible. Millvale Plantation, LLC v. Carrison Family Ltd. P'ship, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. 2012); K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). Defendants' proposed interpretation, unlike Plaintiffs', gives effect to both the perpetual nature of the easement and the 30-year term of the cost-sharing arrangement.

Determination whether a deed or contract is ambiguous and construction of unambiguous contracts, or potentially ambiguous terms only capable of one "reasonable" interpretation, are matters of law for the court. Proctor v. Steedley, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012); see also Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539,

542 (Ct. App. 2008); Stribling v. Stribling, 369 S.C. 400, 403-404, 632 S.E.2d 291, 293 (Ct. App. 2006).

This 21st day of July, 2014 at Charleston, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

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,

Defendants.

VERDICT FORM

WE, THE JURY, UNANIMOUSLY FIND AS FOLLOWS:

STATUTE OF LIMITATIONS

Question No. 1: What is the date that the I'On Assembly knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Community Dock?

Insert date: August 5, 2009

Question No. 2: What is the date that the I'On Assembly knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Creekside Park?

Insert date: August 5, 2009

Question No. 3: What is the date that Lea Ann Adkins knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Community Dock?

Insert date: August 5, 2009

Question No. 4: What is the date that Lea Ann Adkins knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Creekside Park?

Insert date: August 5, 2009

Question No. 5: What is the date that Brad Walbeck knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Community Dock?

Insert date: August 5, 2009

Question No. 6: What is the date that Brad Walbeck knew or reasonably should have known of the existence of a claim against the Defendants regarding ownership of a Creekside Park?

Insert date: August 5, 2009

Question No. 7: Did the parties intend to create a sealed instrument?

Yes X No_____

INTERSTATE LAND SALES ACT

Question No. 8: Do you find in favor of Lea Ann Adkins as to her claim for violation of the Interstate Land Sales Act?

Yes_____ No X

Question No. 9: If you answered "Yes," write the amount of damages to be awarded to Lea Ann Adkins: _____

Question No. 10: Do you find in favor of Brad Walbeck as to his claim for violation of the Interstate Land Sales Act?

Yes X No_____

Question No. 11: If you answered "Yes," write the amount of damages to be awarded to Brad Walbeck: $1.00

BREACH OF CONTRACT

Question No. 12: Do you find in favor of The I'On Assembly as to its claim for breach of contract?

Yes X No ____

Question No. 13: If you answered "Yes," write the amount of damages to be awarded to The I'On Assembly: $1,000,000

Was the breach of contract accompanied by a fraudulent act?
Yes ____ No X

Question No. 14: Do you find in favor of Lea Ann Adkins as to her claim for breach of contract?

Yes ____ No X

Question No. 15: If you answered "Yes," write the amount of damages to be awarded to Lea Ann Adkins: ____

Was the breach of contract accompanied by a fraudulent act?
Yes ____ No ____

Question No. 16: Do you find in favor of Brad Walbeck as to his claim for breach of contract?

Yes X No ____

Question No. 17: If you answered "Yes," write the amount of damages to be awarded to Brad Walbeck: $10,000

Was the breach of contract accompanied by a fraudulent act?
Yes ____ No X

BREACH OF FIDUCIARY DUTY

Question No. 18: Do you find in favor of The I'On Assembly as to its claim for breach of fiduciary duty?

Yes X No ____

Question No. 19: If you answered "Yes," write the amount of damages to be awarded to The I'On Assembly: $1,750,000

FRAUD

Question No. 20: Do you find in favor of The I'On Assembly as to its claim for fraud?

Yes _____ No X

Question No. 21: If you answered "Yes," write the amount of damages to be awarded to The I'On Assembly: _____

Question No. 22: Do you find in favor of Lea Ann Adkins as to her claim for fraud?

Yes _____ No X

Question No. 23: If you answered "Yes," write the amount of damages to be awarded to Lea Ann Adkins: _____

Question No. 24: Do you find in favor of Brad Walbeck as to his claim for fraud?

Yes _____ No X

Question No. 25: If you answered "Yes," write the amount of damages to be awarded to Brad Walbeck: _____

NEGLIGENT MISREPRESENTATION

Question No. 26: Do you find in favor of The I'On Assembly as to its claim for negligent misrepresentation?

Yes X No _____

Question No. 27: If you answered "Yes," write the amount of damages to be awarded to The I'On Assembly: $1,000,000

Question No. 28: Do you find in favor of Lea Ann Adkins as to her claim for negligent misrepresentation?

Yes _____ No X

Question No. 29: If you answered "Yes," write the amount of damages to be awarded to Lea Ann Adkins: _____

Question No. 30: Do you find in favor of Brad Walbeck as to his claim for negligent misrepresentation?

Yes X No _____

Question No. 31: If you answered "Yes," write the amount of damages to be awarded to Brad Walbeck: $ 20,000

SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

Question No. 32: Do you find in favor of Lea Ann Adkins as to her claim for violation of the South Carolina Unfair Trade Practices Act?

Yes _____ No X

Question No. 33: If you answered "Yes," write the amount of damages to be awarded to Lea Ann Adkins: _____

Question No. 34: Was the violation willful or knowing?

Yes _____ No _____

Question No. 35: Do you find in favor of Brad Walbeck as to his claim for violation of the South Carolina Unfair Trade Practices Act?

Yes _____ No X

Question No. 36: If you answered "Yes," write the amount of damages to be awarded to Brad Walbeck: _____

Question No. 37: Was the violation willful or knowing?

Yes_____ No_____

Question No. 38: If you found in favor of one or more of the Plaintiffs as to any cause of action set forth above, please address the following question:

Was Defendants' conduct reckless, willful and/or wanton?

Yes X No_____

Please sign and date the verdict form.

August 1, 2014
Date

Signature of Foreperson

State of South Carolina

County of Charleston

In the Court of Common Pleas
Ninth Judicial Circuit
Civil Action No. 2010-CP-10-10490

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

Plaintiffs,

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,

Defendants.

Verdict Form

1. With regard to Plaintiff I'On Assembly's claim for punitive damages on its Breach of Fiduciary Duty cause of action, we the jury, by clear and convincing evidence, unanimously find that plaintiff is:

X Not entitled to punitive damages

_____ Entitled to punitive damages in the amount of:

$_____ Punitive Damages
(Clear and Convincing Evidence)

2. With regard to Plaintiff Brad Walbeck's claim for punitive damages on his Negligent Misrepresentation cause of action, we the jury, by clear and convincing evidence, unanimously find that plaintiff is:

X Not entitled to punitive damages

_____ Entitled to punitive damages in the amount of:

$_____ Punitive Damages
(Clear and Convincing Evidence)

Please sign and date the verdict form.

August 2, 2014
Date

Signature of Foreperson

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

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,

Defendants.

DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTHANDING THE VERDICT OR, IN THE ALTNERATIVE, NEW TRIAL ABSOLUTE AND NEW TRIAL NISI REMITTITUR

FILED
AUG 11 PM 4:45
JEAN J. ARMSTRONG
CLERK OF COURT

COME NOW Defendants, I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, and I'On Realty, LLC (collectively "Defendants"), by and through counsel, and move for judgment notwithstanding the verdict or, in the alternative, for a new trial absolute or new trial nisi remittitur pursuant to Rules 50(b) and 59(a) and (e) of the South Carolina Rules of Civil Procedure. In support of this motion, Defendants rely on the grounds asserted herein, any arguments advanced or authorities submitted during the trial of the case, and any further arguments advanced or authorities submitted hereafter, including during the hearing of this motion.

BACKGROUND

This case was tried before the Court in the Charleston County Court of Common Pleas during the week of July 28 – August 1, 2014. The jury returned a verdict in favor of The I'On Assembly ("The Assembly") on its claims for breach of contract, breach of fiduciary duty and negligent misrepresentation and returned a verdict in favor of Brad Walbeck ("Walbeck") on his

claims for violation of the Interstate Land Sales Act ("ILSA"), breach of contract and negligent misrepresentation. The jury returned a verdict in favor of Defendants as to all other claims and all claims brought by Lea Ann Adkins. The jury further found that neither The Assembly nor Walbeck was entitled to punitive damages. Defendants now move for judgment notwithstanding the verdict, or in the alternative, a new trial absolute or new trial nisi remittitur.

ARGUMENT[1]

I. DEFENDANTS ARE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

Defendants move for judgment notwithstanding the verdict on the following grounds:

1. Plaintiffs failed to properly bring and maintain a derivative action on behalf of The Assembly.

2. Even if Plaintiffs originally properly brought and maintained a derivative action on behalf of The Assembly, no demand was made on The Assembly for any new claims that resulted from the settlement with Mike Russo and 148 Civitas, LLC and Plaintiffs thus failed to properly bring and maintain a derivative action on behalf of The Assembly as to these new claims.

3. Plaintiffs' claims are barred by the applicable statutes of limitations as a matter of law.

4. The evidence presented does not support the jury's findings that each Plaintiff's claims as to the Community Dock accrued on August 5, 2009.

5. The evidence presented does not support the jury's findings that each Plaintiff's claims as to the Creekside Park accrued on August 5, 2009.

6. The jury's finding that Walbeck's purchase contract with the I'On Company is a sealed instrument is erroneous as a matter of law.

7. Walbeck lacked standing to bring claims as an individual because his damages were not independent of the damages allegedly sustained by The Assembly.

8. The Court erred as a matter of law by improperly expanding Defendants' fiduciary duty to Plaintiffs beyond that recognized in South Carolina law.

[1] Defendants hereby incorporate by reference all arguments advanced during Defendants' motion for directed verdict at the close of Plaintiff's case and Defendants' renewed motion at the close of all evidence as well as the memorandum of law filed in support of those motions.

9. Because the evidence presented at trial does not support the jury's verdict as to The Assembly's fiduciary duty claim, Defendants are entitled to JNOV.

10. Because there was no evidence presented at trial of the existence of a contract between The Assembly and Defendants and because The Assembly was not a third-party beneficiary as a matter of law, Defendants are entitled to JNOV on The Assembly's breach of contract claim.

11. Because the evidence at trial does not support the jury's verdict as to Walbeck's breach of contract claim, Defendants are entitled to JNOV.

12. Because Plaintiffs offered no evidence demonstrating that ILSA applies to Walbeck's claims, Defendants are entitled to JNOV as to Walbeck's ILSA claim as a matter of law.

13. Because the evidence established that Defendants satisfied any duty under ILSA, Defendants are entitled to JNOV as to Walbeck's ILSA claim as a matter of law.

14. Because the evidence at trial does not support the jury's verdict as to Walbeck's claim for violation of ILSA, Defendants are entitled to JNOV.

15. Because The Assembly had no right to rely on representations made by Defendants as a matter of law and because there was no evidence presented demonstrating that The Assembly relied on representations made by Defendants or suffered any damages as a result of such representations, Defendants are entitled to JNOV on The Assembly's negligent misrepresentation claim.

16. Because Walbeck had no right to rely on representations made by Defendants as a matter of law and because the evidence presented does not demonstrate that Walbeck relied on representations made by Defendants, Defendants are entitled to JNOV on Walbeck's negligent misrepresentation claim.

17. The Court improperly denied Defendants' motion to find the 2000 Recreational Easement and Agreement to Share Costs valid as a matter of law.

18. The Court improperly denied Defendants' motion to find the 2000 Recreational Easement and Agreement to Share Costs perpetual as a matter of law.

19. The award of damages to Walbeck as to his claim for breach of contract was based wholly upon speculation or conjecture.

20. The award of damages to Walbeck as to his claim for negligent misrepresentation was based wholly upon speculation or conjecture.

21. The award of damages to Walbeck as to his claim for violation of ILSA was based wholly upon speculation or conjecture.

22. The award of damages to The Assembly as to its claim for breach of contract was based wholly upon speculation or conjecture.

23. The award of damages to The Assembly as to its claim for breach of fiduciary duty was based wholly upon speculation or conjecture.

24. The award of damages to The Assembly as to its claim for negligent misrepresentation was based wholly upon speculation or conjecture.

25. The Court's holding that Defendants are amalgamated was improper as a matter of law.

26. The Court improperly granted Plaintiffs' motion for directed verdict on Defendants' abuse of process counterclaim.

II. IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO A NEW TRIAL ABSOLUTE.

In the alternative, Defendants also move for a new trial based upon all grounds listed above as well as the following grounds:

1. The Court improperly admitted evidence of Defendants' marketing efforts after June 4, 2003 which was irrelevant to the claims at trial and unfairly prejudiced Defendants.

2. The Court improperly refused to take judicial notice of representations made by counsel for The Assembly regarding the perpetuity of the easement.

3. The Court improperly refused to take judicial notice of representations made by 148 Civitas, LLC regarding the perpetuity of the easement.

4. The Court improperly admitted extrinsic evidence of whether The Assembly was an intended third-party beneficiary of the Walbeck Sales Contract.

5. Plaintiffs' counsel improperly and prejudicially characterized exercise of control of The Assembly Board in front of the jury.

6. The Court refused to strike the testimony of Deborah Bedell and provide a proper curative instruction which improperly and prejudicially characterized the I'On Company's exercise of control of The Assembly Board in front of the jury.

7. The Court improperly granted Plaintiffs' motion for directed verdict on Defendants' abuse of process counterclaim.

8. The Court improperly excluded from evidence Defendants' Exhibit 106 which was offered to demonstrate evidence of Defendants' abuse of process counterclaim and general theme of their defense.

9. The jury's verdict as to The Assembly's claims for breach of fiduciary duty, breach of contract and negligent misrepresentation is inconsistent and cannot be reconciled.

10. The Court's charge to the jury on Plaintiff's claim for breach of fiduciary duty was improper and inconsistent with the law of South Carolina.

11. The Court's charge to the jury on constructive notice was improper and inconsistent with the law of South Carolina.

12. The Court's holding that Defendants are amalgamated was improper as a matter of law.

13. The Court improperly admitted into evidence the terms of the Settlement Agreement between Plaintiffs and Mike Russo and 148 Civitas, LLC.

14. The jury's verdict is based on passion and caprice and is so large that it shocks the conscience.

15. The evidence presented at trial does not justify the verdict and Defendants are entitled to a new trial pursuant to the thirteenth juror doctrine.

III. IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO A NEW TRIAL NISI REMITTITUR.

In the alternative, should the Court deny Defendants' motion for JNOV or for a new trial absolute based on any of the grounds listed above, Defendants move for a new trial nisi remittitur based on the following grounds:

1. The jury's awards to The Assembly were excessive and should be reduced as an alternative to granting a new trial.

2. The jury's awards to Walbeck were excessive and should be reduced as an alternative to granting a new trial.

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, Plaintiff respectfully prays this Honorable Court to enter an Order granting Judgment Notwithstanding the

Verdict, or in the alternative, granting a New Trial Absolute or a New Trial Nisi Remittitur pursuant to Rules 50(b) and 59(a) and (e) of the South Carolina Rules of Civil Procedure.

This 11th day of August, 2014 at Charleston, South Carolina.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2010-CP-10-10490
	)	
I'ON ASSEMBLY, INC.; BRAD J. WALBECK AND LEA ANN ADKINS, BOTH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC.,	)	**Plaintiff, Brad Walbeck's, Petition for Attorneys' Fees and Costs**
Plaintiffs,	)	
vs.	)	
THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; AND I'ON REALTY, LLC,	)	
Defendants.	)	

2014 AUG 11 PM 4:58
CLERK OF COURT
BY

COMES NOW Plaintiff, Brad Walbeck ("Walbeck"), hereby petitioning this Honorable Court for an award of attorneys' fees and costs incurred in connection with the prosecution of the above-captioned action, and pursuant thereto, states as follows:

SUMMARY OF PERTINENT FACTS AND APPLICABLE LAW

A.) Pertinent Facts

This case was tried before this Court beginning Tuesday, July 29, 2014 and ending Friday, August 1, 2014 (technically, ending the morning of Saturday, August 2, at 1:30 am). The jury returned a verdict in Plaintiffs' favor (a copy of which will be supplemented hereto as **Exhibit "A"** once posted). The jury returned a verdict and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the Interstate Land Sales Full Disclosure Act ("ILSA" or "the Act"); (b) Negligent Misrepresentation; and (c) Breach of Contract. In addition, the jury returned a verdict and awarded damages in favor of Plaintiff, I'On Assembly, Inc. ("the Assembly"), on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation; and (c) Breach of Contract. The Court required an

election before the punitive damage phase; and Walbeck elected to recover the $20,000 in actual damages awarded to him under the negligent misrepresentation claim while the Assembly elected to recover the $1,750,000 in actual damages awarded to it under the breach of fiduciary duty claim.

B.) Because the Jury Returned a Verdict in Favor of Walbeck on his ILSA Statutory Claim, Walbeck is Entitled to the Recovery of Attorneys' Fees, Costs and Prejudgment Interest

In the present case, Walbeck is entitled to receive both actual and punitive damages awarded under the common law theory of negligent misrepresentation in addition to statutory costs and attorney fees under ILSA, a separate verdict. Under prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law cause of action does not constitute double recovery. Similarly stated, a Plaintiff may recover attorneys' fees and costs under a statutory claim, such as ILSA, *in addition to* actual damages under a common law claim, such as negligent misrepresentation. Indeed, "a plaintiff who elects to receive damages awarded under a common law theory may also be entitled to recover statutory costs and attorney fees to which he is entitled under a separate verdict." Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) citing Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010). "[T]he rationale for this position is that an award for [damages] does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens . . . ." Id. at 80.

C.) ILSA Provides for the Recovery of Court Costs and Reasonable Attorneys' Fees

The Interstate Land Sales Full Disclosure Act provides for the recovery of attorneys' fees and court costs when a developer violates the disclosure or anti-fraud provisions contained therein. Specifically, the Act provides, in pertinent part, as follows:

> (a) Violations; relief recoverable
> A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title. In a suit authorized by this subsection, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable . . .
>
> ***
>
> (c) Amounts recoverable
> *The amount recoverable . . . may include, in addition* to matters specified in subsections (a) and (b) of this section, *interest, court costs, and reasonable amounts for attorneys' fees,* independent appraisers' fees, and travel to and from the lot.

15 U.S.C. § 1709(a),(c) (2012).

When determining what constitutes reasonable attorneys' fees, a trial court must consider the following six factors: (1) the nature, extent and difficulty of the case; (2) the time necessarily devoted to the case; (3) the professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. See GTR Rental, LLC v. DalCanton, 547 F. Supp. 2d 510, 523 (D.S.C. 2008); Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). Consideration should be given to all six factors, none of which is controlling.

ARGUMENT

I. Walbeck is Entitled to Recover Interest, Costs and Attorneys' Fees Under His ILSA Claim

Here, as in *Austin*, Walbeck's recovery of costs and attorneys' fees under his statutory claim, ILSA, is not duplicative of the award of actual damages under his common law claim, negligent misrepresentation. Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) citing Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) (finding that because an award of attorney's fees under plaintiff's statutory claim was not duplicative of the award of damages under plaintiff's common law claim, the

decision "in favor of [plaintiff] would not violate the election of remedies doctrine's prevention of double redress for a single wrong.") (internal citations omitted). Accordingly, Walbeck is entitled to recover costs and attorneys' fees under his ILSA claim.

II. Walbeck is Entitled to Recover All Amounts Requested Under the Common Fund Doctrine

Moreover, Walbeck is entitled to recover all of the fees and costs requested given the same facts which gave rise to Walbeck's ILSA claim are the same facts which support both Walbeck and the Assembly's common law claims. Austin v. Stokes-Craven Holding Corp., 406 S.C. at 192-93, 750 S.E.2d at 80-81 citing Austin v. Stokes-Craven Holding Corp., 387 S.C. at 64, 691 S.E.2d at 153 (noting plaintiff "was entitled to the entire amount of his request as it would have been difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud.") (internal citations omitted); see also Taylor v. Nix, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992) ("We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim. . .").

As this Court is well aware, this matter was a complex property and contract dispute lawsuit involving a building known as the Creek Club and its adjacent Community Dock, boat ramp, and Creekside Park. The original Complaint was filed on December 22, 2010, almost 3½ years ago. Four Amended Complaints were subsequently filed. As demonstrated during trial, the contract and property issues at the I'On Creek Club involved the sale and acquisition of a

substantial piece of property with an operating commercial business. Furthering the complexity of this case were the tightly woven facts that supported both the individual and derivative claims.

After 3½ years of discovery, which included prodigious document production, the depositions of numerous fact and expert witnesses and significant motion practice, and extensive amounts of time spent in mediation, the case was tried to verdict over the course of five days, which included jury selection. As noted above, the jury returned a verdict in Walbeck's favor for $20,000 in actual damages and in the Assembly's favor for $1,750,000.

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

The prosecution of this case involved voluminous discovery, the depositions of many witnesses, and a multitude of motions over numerous years argued seeking to dispose of all or part of the case, trial preparation and trial, all of which necessarily required tremendous resources of time and expenses.

The cases of this nature customarily are handled on a contingent fee basis, as was this case. Counsel has kept contemporaneous time records throughout this case. Counsel is informed and believes that the hourly rates for lead counsel, associate counsel, paralegals and legal assistants are commensurate with rates charged in the area by attorneys with the same or similar experience in complex litigation. Given the complexity of the issues involved in this case, the

mistrial, and the complex settlement agreement, Plaintiff believes that the total fee and expense award sought hereunder is reasonable, especially in light of the beneficial results obtained.

The law firm of Justin O'Toole Lucey, P.A. represented the Plaintiffs in this case. Justin O'Toole Lucey was lead counsel, Joshua F. Evans and Dabny Lynn, were associate counsel involved in the suit. Mr. Lucey has been practicing law, specifically complex litigation, for twenty-eight (28) years. Mr. Lucey is a highly regarded member of the Charleston and South Carolina bars and has tried hundreds of cases.

In prosecution of this case through trial, Mr. Lucey's office expended in excess of 4,924.45 hours of time from commencement of the lawsuit through trial. The lawsuit was taken on a contingency basis, which is customary for a case of this nature. The verdict speaks to the preparation and competency of the law firm, its lead counsel, associate counsel and support staff and the amount of time, labor and expenses exhausted prosecution the lawsuit. The Affidavit of Mr. Lucey attached hereto as Exhibit "B" further supports a finding that the time, labor, and expenses involved pursuing the instant case are reasonable.

CONCLUSION

For the reasons set forth above, Plaintiff requests that this Honorable Court award attorneys' fees and costs to Justin O'Toole Lucey, P.A. in the amount of **One Million, Seventy Thousand, Five Hundred and Fifty Dollars ($1,070,550.00).**

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

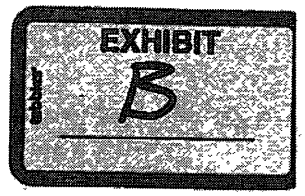
By: _____

Justin O. Lucey, Esq.
Joshua F. Evans, Esq.
415 Mill Street
Post Office Box 806
Mount Pleasant, SC 29465-0806
(843) 849-8400 phone

(843) 849-8406 fax

Charleston, South Carolina
Dated: 8/11/14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2010-CP-10-10490
	)	
I'ON ASSEMBLY, INC.; BRAD J. WALBECK AND LEA ANN ADKINS, BOTH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC.,	)	**Affidavit of Justin O'Toole Lucey in Support of Petition for Prejudgment Interest, Attorneys' Fees and Costs**
Plaintiffs,	)	
vs.	)	
THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; AND I'ON REALTY, LLC,	)	
Defendants.	)	



PERSONALLY appeared before me, Justin Lucey, who, being first duly sworn, deposes and says as follows:

1. I am an attorney practicing law in the firm of Justin O'Toole Lucey, P.A., of which I am the sole shareholder and principal attorney. I have been involved with all aspects of this litigation. This Affidavit is submitted in support of Plaintiff, Brad Walbeck's, request for an award of attorneys' fees and costs.

2. I graduated from Georgetown Law School in 1986 and have been licensed to practice law for approximately twenty-eight (28) years. I am licensed in all South Carolina Courts, Fourth Circuit Court of Appeals, Court of Federal Claims, and United States Supreme Court. I am a member of the South Carolina Bar, the South Carolina Association for Justice, and the American Association for Justice.

3. My practice is focused on litigating mid-rise and multi-family construction defect claims, construction product class action defect claims, and contract/financial/complex transaction claims. I am a member in good standing of the Charleston Bar and believe I maintain a good

professional reputation in the community.

4. I was assisted in my efforts by other attorneys in my office, including Joshua Evans and Dabny Lynn, as well as paralegals and other staff employed by my office.

5. We handled this representation on a contingency fee basis. We have a contract for a one-third (1/3) contingency fee with our clients before any appeals or mistrial, and a forty percent (40%) contingency fee after the filing of any appeals or a mistrial. Our representation in this action has included two trials of the instant case. The first trial took place in January of 2014 and resulted in a mistrial. The second trial took place in July of 2014 and resulted in an award of $20,000 for Plaintiff, Brad Walbeck, and an award of $1,750,000 for Plaintiff, I'On Assembly, Inc.

6. Plaintiff's Counsel has out-of-pocket expenses in excess of **Fifty-five Thousand, Five Hundred, and Fifty Dollars ($55,550.00).** These out-of-pocket expenses include: electronic research, deposition and related expenses (i.e., travel), mediation and related expenses, shipping, courier and copying services, and filings and miscellaneous charges. Documentation of these expenses is available for inspection.

7. Claimant seeks an attorney fee award for this firm's services of **One Million, Fifteen Thousand Dollars ($1,015,000.00)** (this figure is *after* deducting the fees paid in the 148/Russo settlement). This amount is our firm's billable time in this matter. (See Creek Club Plaintiffs' Attorney Fees to Date attached as Ex. C.) The total of the fee and expense petition is **One Million, Seventy Thousand, Five Hundred and Fifty Dollars ($1,070,550.00).**

8. I have reviewed the attorneys' fees sought in this matter in light of the six factors set forth in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). The six factors are as follows:

1. The nature, extent, and difficulty of the legal services rendered.

2. The time and labor necessarily devoted to the case.

3. The professional standing of counsel.

4. The contingency of compensation.

5. The fee customarily charged in the locality for similar legal services.

6. The beneficial results obtained.

Id. at 384-385, 377 S.E.2d at 297. "Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these six factors is controlling." Id.

9. Nature, Extent, and Difficulty of the Legal Services Rendered. The issues presented in this matter were difficult given the Defendants' denial of liability; the complex segregation of the defendants as between the club, developer, and assembly; legal issues relating to the validity of an easement, especially in light of the transfer and sale of the property; merger clauses and ambiguous contract language that needed to be overcome; and less-than-arm's-length agreements that made it difficult to assign liability. These issues required extensive research and arguments before the Court. Indeed, the dispositive and pretrial motions were extensive, complicated, voluminous, and numerous, requiring a like response.

10. Time and Labor Necessarily Devoted to the Case. The time and labor work necessarily devoted to the case is the time actually expended by Plaintiff's Counsel. The time, which was required to properly litigate this case, has precluded counsel from taking on other substantial work. Plaintiff's Counsel represents to the Court the time and expense incurred in this case were reasonable and necessary for the prosecution of this case. All of the time documented herein is supported by detailed contemporaneous time records, and are available for en camera inspection.

11. Professional Standing of Counsel. Plaintiff's Counsel enjoys a good professional reputation in the community as a financial and complex transaction litigator. Justin Lucey has served as Plaintiff's counsel in dozens of complex cases. The firm is reputed to have the three

largest verdicts and recoveries in the state of South Carolina. In September of 2011, the Lucey firm obtained a jury verdict in the amount of Twelve Million Five Hundred Thousand Dollars ($12,500,000.00), which was at the time believed to be one of the largest, if not the largest, construction verdicts in the state of South Carolina. Just two months ago, in June of 2014, the Lucey firm along with co-counsel obtained a jury verdict in the amount of Fifty-Five Million Dollars ($55,000,000.00), which is believed to be the largest construction verdict in the state of South Carolina, and in the top 100 verdicts nationally this year. The firm also recently received a multi-million dollar construction defect recovery on a nine-story, research center on behalf of the State of South Carolina, and many other multi-million dollar recoveries and/or verdicts.

12. Contingency of Compensation. This case has been litigated with no assurance that it would be able to collect the attorney fees justifiably incurred in this action. Despite this risk, Plaintiff's Counsel accepted this representation on a contingency basis with the understanding at the onset that the attorney fee recovery was an integral part of the relief sought. A week before trial, the recovery remained almost completely contingent, with only $250,000.00 having been secured from settling defendants. Only the jury's verdict brought the reality of the claims to the non-settling defendants.

13. Fee Customarily Charged in Locality for Similar Services. The firm regularly bills Justin Lucey's services out at $495 per hour. This is a standard rate for persons in this community who have commensurate experience. The firm also employs a number of other associate attorneys, paralegals, and legal assistants. The associate attorneys are billed at rates of circa $295 per hour, the paralegals and law clerks are billed at circa $75-95 per hour, the clerical staff is billed at circa $50-75 per hour. These are all typical rates for attorneys, paralegals, and other staff in this community with commensurate experience.

14. Beneficial Results Obtained. The legal representation provided by Plaintiff's Counsel in

this case produced a substantial recovery for the clients. Counsel's time and expense records are available for inspection but are not appended hereto given the confidential nature of the records and anticipated further legal activity in this matter.

The factual statements therein are true and accurate to the best of my knowledge, information and belief.

FURTHER THE AFFIANT SAYETH NOT.

JUSTIN O'TOOLE LUCEY, P.A.

Justin Lucey, Esquire
415 Mill Street
Post Office Box 806
Mount Pleasant, South Carolina 29465-0806
(843) 849-8400

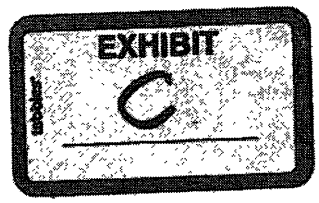
SWORN to and subscribed before me this
11th day of August 2014.

Notary Public for South Carolina
My Commission Expires: 4/12/23

Creek Club Plaintiffs' Attorney Fees to Date

	Amount	Time
Partner	$ 422,334.00	853.20
Other attorneys	$ 699,581.75	2,541.05
Paralegals	$ 105,442.25	1,123.80
Law clerks	$ 32,187.00	296.80
Clerical	$ 5,455.00	109.60
Totals	$ 1,265,000.00	4,924.45

8/8/2014



STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON I'ON ASSEMBLY, INC.; BRAD J. WALBECK, AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC., Plaintiffs, vs. THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; and I'ON REALTY, LLC, Defendants.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-10-10490 **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR ATTORNEYS' FEES AND IN REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION**

Plaintiff, Brad Walbeck (hereinafter "Plaintiff"), by and through his undersigned counsel, hereby submits this Supplemental Memorandum in Support of Plaintiff's Petition for Attorneys' Fees and Costs and in Reply to Defendants' Response in Opposition to Plaintiff's Petition, and pursuant thereto, states as follows:

INTRODUCTION

This matter is before the Court upon a Petition for Attorneys' Fees and Costs filed by Plaintiff following the trial of this case in which the jury returned a verdict and awarded damages in favor of Plaintiff on a number of causes of action, including negligent misrepresentation and violation of the Interstate Land Sales Full Disclosure Act ("ILSA" or "the Act"). As reflected by Plaintiff's Petition, Plaintiff maintains, under prevailing South Carolina jurisprudence, that he is

entitled to receive actual damages awarded to him under his negligent misrepresentation claim in addition to statutory costs and attorney fees under his ILSA claim, a separate verdict. Since filing the initial Petition, additional research revealed a substantial number of jurisdictions which, similar to South Carolina, award attorneys' fees and costs available under a statutory claim in addition to actual damages recovered under a separate, common law claim. Moreover, these jurisdictions, including the Fourth Circuit, interpret Supreme Court precedent to specifically allow for the recovery of attorneys' fees even in instances where "nominal" damages are awarded. Accordingly, Plaintiff submits this Supplemental Memorandum further detailing the law, recognized both within and around South Carolina, which supports Plaintiff's request for attorneys' fees and costs.

ARGUMENT

I. Plaintiff is Entitled to Recover Attorneys' Fees and Cost Under His ILSA Claim

Plaintiff is entitled to an award of attorneys' fees and costs under the provisions of the Interstate Land Sales Full Disclosure Act (hereinafter "ILSA") in addition to the actual damages Plaintiff elected to receive under his common law, negligent misrepresentation claim. *See* 15 U.S.C. § 1709(a),(c) (2012) (allowing statutory recovery of attorneys' fees and costs).

A.) South Carolina Precedent Permits the Recovery of Statutorily-Authorized Attorneys' Fees and Costs In Addition To Actual Damages Awarded Under a Common Law Claim.

Under prevailing South Carolina jurisprudence, the recovery of statutorily prescribed fees and the recovery of actual damages under a separate, common law course of action does not constitute double recovery. Similarly stated, a Plaintiff may recover attorneys' fees, costs and interest under a statutory claim, such as ILSA, *in addition to* actual damages under a common law claim, such as negligent misrepresentation. Indeed, "a plaintiff who elects to receive

damages awarded under a common law theory may also be entitled to recover statutory costs and attorney's fees to which he is entitled under a separate verdict." *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 193, 750 S.E.2d 78, 81 (2013) *citing Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010). "[T]he rationale for this position is that an award for [damages] does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens . . . ." *Id.* at 80. The election of remedies prevents double recovery on the same type of remedy; it does not require the plaintiff to choose only one cause of action from which he wishes to recover. *Id.* Moreover, South Carolina's decision to award attorneys' fees, in conjunction with actual damages, has been contemplated by numerous states and has shown to be the rule, rather than the exception.

B.) The Majority of States Within the Fourth Circuit Also Allow the Recovery of Statutorily-Prescribed Attorneys' Fees and Costs In Addition To Actual Damages Awarded Under a Common Law Claim

Indeed, the majority of states in the Fourth Circuit recognize a plaintiff's right to recover both damages for a common law cause of action in conjunction with statutorily-authorized attorneys' fees and costs. *See, e.g., United Labs., Inc. v. Kuykendall*, 335 N.C. 183, 191 437 S.E.2d 374, 379 (1993) (holding that a jury verdict in favor of plaintiff on a tortious interference cause of action and a NC Unfair Trade Practices Act cause of action entitled Plaintiff to recover punitive damages in tort as well as attorney's fees under the Unfair Trade Practices Act); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010); *Wilkins v. Peninsula Motor Cars, Inc.*, 266 Va. 558, 587 S.E.2d 581, 583–84 (2003) (holding that plaintiff was not required to elect between attorney's fees authorized under the Virginia Consumer Protection Act and a recovery of punitive damages for common law fraud because attorney's

fees are not duplicative of punitive damages). Like South Carolina, these jurisdictions recognize an award of attorneys' fees and costs under a statutory claim, in addition to actual damages recovered under a common law claim, does not constitute a double recovery because each individual remedy's purpose is separate and distinct. *United Labs., Inc.*, 335 N.C. at 191; *Wilkins*, 266 Va. at 587.

Not only recognized by various states within the Fourth Circuit, the Fourth Circuit, itself, also recognizes this same rule. In *Hunt v. Miller*, for example, the United States Court of Appeals for the Fourth Circuit affirmed an award of damages for breach of fiduciary duty in addition to attorneys' fees for violation of the North Carolina Securities Act. *Hunt v. Miller*, 908 F.2d 1210, 1213-14, 1216-17 (4th Cir. 1990). The jury found that an agent of Interstate, an investment company, defrauded the plaintiffs and awarded approximately $1,120,000 in actual and punitive damages. *Id.* at 1214. The trial court entered judgment on the jury's verdict and ordered that the defendants pay the plaintiffs' attorneys' fees. *Id.* On appeal, the court affirmed the award of the damages and *held that Interstate was responsible for the plaintiffs' statutorily-authorized attorney's fees*. *Id.* at 1216-17.

C.) Many Other Jurisdictions Similarly Acknowledge a Plaintiff's Right to Recover Both Statutorily-Prescribed Attorneys' Fees and Costs As Well As Common Law Damages

Similar to South Carolina and the Fourth Circuit, state and federal courts throughout this nation including, but not limited to, Illinois, New Mexico, Tennessee and the Tenth Circuit, also recognize the ability of a plaintiff to recover both common law damages and statutorily-authorized attorneys' fees and costs. *See, e.g., MidAmerica Fed. Savs. & Loan v. Shearson/American Express, Inc.*, 962 F.2d 1470, 1471 (10th Cir. 1992) (affirming an award of compensatory damages for breach of fiduciary duty and an award of attorney's fees for violation

of the Oklahoma Securities Act); *Verdonck v. Scopes*, 226 Ill. App. 3d 484, 488-89 590 N.E.2d 545, 548 (1992) (holding recovery of punitive damages does not give the trial court discretion to deny an award of attorney's fees mandatory under both state and federal statutes); *Garcia v. Coffman* 124 N.M. 12, 21 946 P.2d 216, 225 (Ct. App. 1997) (awarding attorney's fees under the Unfair Trade Practices Act and damages for fraudulent misrepresentation); *Miller v. United Automax*, 166 S.W.3d 692, 697–98 (Tenn. 2005) (holding attorney's fees, awarded under the Tennessee Consumer Protection Act, are intended to make the prosecution of claims economical and are not duplicative of punitive damages).

In *Garcia*, for example, a New Mexico court found that a plaintiff does not give up his statutory right to attorneys' fees by electing damages in tort. 124 N.M. at 21 ("Defendants contend that a plaintiff's ability to recover attorneys' fees under the Unfair Practices Act is a "remedy" that is part of what Plaintiff gave up when he elected to recover damages on the fraudulent misrepresentation claim. We disagree."). Specifically, the *Garcia* court, held the recovery of attorneys' fees is not the same as recovering punitive and treble damages for the same act; therefore, attorneys' fees are not prohibited by the rule against double recovery. *Id.*

Notably, the decisions of all the courts referenced herein recognize the same fundamental principle – an award of actual damages resulting from "common" misconduct and an award of attorney's fees and costs resulting from a "statutory violation" are two separate awards, and provide two separate remedies. Accordingly, there exists no "double-recovery" concerns, and a Plaintiff should be entitled to recover both awards when he has proven he is so entitled to both.

II. Plaintiff is Eligible for an Award of Attorneys' Fees and Costs Under His ILSA Claim Given His Recovery of Nominal Damages

Moreover, contrary to Defendants' contentions, the United States Supreme Court's decision in *Farrar* does not serve to automatically preclude attorneys' fees awards in nominal

damages case. *See Mercer v. Duke University (Mercer III),* 401 F.3d 199, 206-09 (4th Cir. 2005) *citing Mercer v. Duke University (Mercer II)*, 50 Fed. Appx. 643, 646 (4th Cir. 2002) ("[w]e have never interpreted *Farrar* as automatically precluding attorney's fee awards in all nominal-damage cases.") (unpublished); *Clark v. Sims,* 28 F.3d 420, 425 (4th Cir. 1994) (remanding fee award in nominal-damage case for reconsideration in light of plaintiff's limited success). Rather, in *Farrar,* the Supreme Court held where a prevailing party[1] recovers nominal damages, "the only reasonable fee is *usually* no fee at all." *Farrar,* 506 U.S. at 115, 113 S.Ct. at 566 (emphasis added); *Id.* at 121, 113 S.Ct. 566 (O'Connor, J., concurring) ("[n]ominal relief does not necessarily a nominal victory make."); *Id.* at 124, 113 S.Ct. 566 (White, J., dissenting) (noting that the majority did not hold "that recovery of nominal damages *never* can support the award of attorneys' fees").

Because the *Farrar* Court "provides little guidance for courts considering whether an award of attorneys' fees is warranted" in nominal damage cases,[2] the Fourth Circuit follows

[1] "[A] plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby,* 506 U.S. 103, 111–12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). This standard is satisfied by a "judgment for damages in any amount, whether compensatory or *nominal.*" *Id.* at 113, 113 S.Ct. 566 (emphasis added). Accordingly, the award of nominal damages in favor of Plaintiff on his ILSA claim suffices to qualify Plaintiff as a prevailing party. Although Plaintiff is a prevailing party, this Court has discretion to determine what constitutes a "reasonable" fee, a determination that requires the court to consider the extent of the Plaintiff's success, the significance of the legal issue involved, and the accomplishment of serving a public interest. *See Farrar,* 506 U.S. at 121–22, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (O'Connor, J., concurring) (explaining that the success of a plaintiff who recovers only nominal damages "might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client"); *see also Clark,* 28 F.3d at 425 ("[T]he degree of success represented by a nominal recovery is not something an appellate court can always assess . . .").

[2] The *Farrar* majority reasoned that where a plaintiff's recovery was nominal or minimal, the deciding court can "lawfully award low fees or no fees" without having to first calculate the lodestar amount or apply the twelve factors bearing on reasonableness. Thus, the majority created a limited exception for *calculating* attorney's fees: where a prevailing plaintiff recovers only nominal damages and the victory was merely technical or de minimis, the lower court can determine the amount of fees within its discretion, dispensing with the lodestar calculation. The *Farrar* majority (a) did not create a bright-line rule precluding fee awards in nominal damages; (b) did not define what constitutes "nominal" damages; (c) did not define what constitutes a "technical" victory; and (d) did not provide insight as to whether a fee award is warranted in a given case. Rather, the *Farrar* majority indicates the decision to award attorneys' fees, as well as the amount of fees awarded, remains within the trial's courts discretion.

Justice O'Connor's concurring opinion in *Farrar* wherein she identified three factors to be considered in determining how to assess attorney's fees to a nominally prevailing party:

(1) The difference between the amount of damages sought and recovered;

(2) The significance of the legal issue on which the plaintiff has prevailed; and

(3) Whether the litigation has accomplished some public goal other occupying the time and energy of counsel, court and client.

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

Relying on the "O'Connor factors," several courts of appeals, including the Fourth Circuit, often permit attorneys' fees awards despite the award of only nominal damages.[3] In *Mercer*, for example, the plaintiff was awarded only "nominal" damages, however, the Fourth Circuit upheld an award of $350,000 in attorneys' fees despite the de minimis compensatory relief.[4] *Mercer III*, 401 F.3d 199 at 206-09. As aptly noted by the *Mercer III* Court:

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[3] Presently, the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have explicitly adopted the O'Connor factors for determining whether a prevailing plaintiff who recovers only nominal damages will receive attorneys' fees. *See, e.g., Díaz-Rivera v. Rivera-Rodríguez*, 377 F.3d 119, 125 (1st Cir. 2004) (upholding district court's award of attorneys' fees to plaintiff based on three O'Connor factors); *Buss v. Quigg*, 91 F. App'x 759, 761 (3rd Cir. 2004) (citing O'Connor factors for assessing whether plaintiff with nominal damage award should recover attorneys' fees); *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1052-53 (5th Cir. 1998) (applying O'Connor factors in assessing whether plaintiff entitled fee award); *Cartwright v. Stamper*, 7 F.3d 106, 109-10 (7th Cir. 1993) (holding that three O'Connor factors should guide court in prevailing party inquiry); *Jones v. Lockhart*, 29 F.3d 422, 423-24 (8th Cir. 1994) (applying O'Connor factors to assess reasonableness of attorney's fees award to partially successful plaintiff); *Morales v. City of San Rafael*, 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors); *Phelps v. Hamilton*, 120 F.3d 1126, 1131-32 (10th Cir. 1997) (applying three O'Connor factors to evaluate plaintiff's success and reversing district court's holding that plaintiff should not recover any fee award). Further, the Second Circuit applies the O'Connor factors implicitly. *See Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose).

[4] The Fourth Circuit's decision in *Mercer versus Duke University* resolved a number of issues previously tried in a number of courts, all of which originated from an initial action brought by Heather Mercer, a former kicker on Duke University's Division I-A football team, under Title IX. Mercer, who enrolled at Duke University in 1994 as a full-time student, was an all-state place kicker on her high school football team and wanted to continue playing football at the collegiate level. Following several attempts by Mercer to join Duke's football team, Duke's head football coach, Mr. Goldsmith, made Mercer a playing member of the team in April of 1995. After Mercer officially became part of the team, an onslaught of media attention and publicity ensued; some of which cast Mercer's membership in a negative light. Goldsmith appeared to begin to regret making Mercer a member, fearing the attention would negatively impact the rest of the team. Subsequently, in the fall of 1996, Goldsmith officially dismissed Mercer from the team, citing "performance reasons" for Mercer's dismissal. Mercer filed suit against Duke University and Goldsmith, seeking declaratory, injunctive, and monetary relief, alleging they violated Title IX by discriminating against her on the basis of sex. The United States District Court for the Middle District of North Carolina dismissed

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

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

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

Mercer's complaint based on an interpretation of the statutory "contact-sport exception." On appeal, the Fourth Circuit reversed the decision, holding that the contact-sport exception was inapplicable in the circumstances, and remanded the issue to the district court for further proceedings. On remand to the district court, a federal jury found that Goldsmith had discriminated against Mercer in violation of Title IX, awarding Mercer two million dollars in punitive damages, one dollar in compensatory damages, and approximately $389,000 in attorneys' fees and costs. On appeal, however, the Fourth Circuit in *Mercer II* vacated the punitive damages award, finding private litigants may not recover punitive damages under Title IX based upon the United States Supreme Court decision in *Barnes v. Gorman,* 536 U.S. 181 (2002). Despite vacating Mercer's award of punitive damages, leaving her with only one dollar in compensatory damages, the *Mercer II* Court rejected Duke's claim that Mercer was no longer entitled to attorney's fees as a matter of law. Instead, the court remanded the issue to the district court to decide "in light of Mercer's now limited success at trial" whether she should recover attorney's fees and, if so, what amount.
In remanding the case, the *Mercer II* Court suggested that the Supreme Court's holding in *Farrar versus Hobby* should guide the district court in deciding attorneys' fees and costs. In particular, the *Mercer II* Court referred to Justice O'Connor's concurring opinion, in which she articulated additional grounds for a court to award attorneys' fees to a nominally-recovering plaintiff. On remand, the district court held that Mercer should still recover the attorneys' fees from her Title IX claim. Specifically, the district court utilized Justice O'Connor's three factor test from her concurring opinion in *Farrar*, and in applying these three factors, the court concluded that Mercer's victory was neither pyrrhic nor de minimis, and thus, she should recover reasonable attorneys' fees. The district court then calculated the amount that it deemed reasonable for recovery, resulting in a total award to Mercer of $349,243.96 for attorneys' fees. Following the district court's decision, Duke appealed to the Fourth Circuit again in *Mercer III,* arguing that the district court erred in awarding attorneys' fees and that the appropriate award "is an award of no fees at all." The *Mercer III* Court affirmed the district court's holding, concluding that Mercer was entitled to attorneys' fees as a prevailing party under § 1988, and upholding the amount of fees established by the district court.

Mercer III, 401 F.3d 199 at 203-04 (emphasis in original and added); *see also Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996) (referring to the O'Connor factors when analyzing the question of attorneys' fees in nominal damages cases).[5]

III. The Balance of the O'Connor Factors Weighs in Favor of Plaintiff, and thus, Plaintiff is Entitled An Award of Attorneys' Fees and Costs

A.) Plaintiff is Entitled Attorneys' Fees Even If Obtained Limited Relief

Based upon O'Connor's analysis, the first factor this Court must consider in deciding whether to award fees to Plaintiff is the extent of the relief he obtained. When considering the extent of the relief obtained, this Court "must compare the amount of the damages sought to the amount awarded." *See Mercer III,* 401 F.3d 199 at 204.

Here, even if the relief obtained by Plaintiff was limited, he is nevertheless entitled attorneys' fees. While only receiving "$1 on his ISLA claim," several courts, including the Fourth Circuit, *permit fee awards based on similar "$1" recoveries.* (Def. Memo in Opposition to Attorneys' Fees, p. 6); *Mercer III*, 401 F.3d 199 at 204 (affirming district court's award of attorneys' fees even though "Mercer obtained only limited relief" and "[t]he first factor identified by Justice O'Connor. . .weigh[ed] against an award of attorney's fees to Mercer.").

Accordingly, Defendants' argument is fundamentally flawed – it relies solely upon *one of the three* O'Connor factors this Court must consider in deciding whether to award attorneys' fees in nominal damages cases. Moreover, Defendants' argument completely ignores *Mercer* and

[5] Similarly, in *Jama v. Esmor Correctional Services, Inc.*, the Third Circuit noted no case was found in which a court of appeals had interpreted *Farrar* to require the automatic denial of fees when only nominal damages are awarded. The *Jama* court agreed with their sister courts of appeals that a district court determining the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose. 577 F.3d 169, 176 (3rd Cir. 2009). *see also Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004) (affirming district court's award of attorneys' fees by applying second and third Justice O'Connor's factors); *Murray v. City of Onawa*, 323 F.3d 616, 619 (8th Cir. 2003) (applying the three O'Connor factors when considering whether a plaintiff who received nominal damages was entitled to an award of attorneys' fees); *Brandau v. Kansas*, 168 F.3d 1179, 1182 (10th Cir. 1999) (same); *Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (same).

Mercer's rulings, rulings which this Court should find persuasive. Decided after *Farrar*, and by the Fourth Circuit, *Mercer* provides attorneys' fees are warranted in cases "which [serve] a significant public purpose" and where a plaintiff "succeed[s] on a significant legal issue," *regardless of the monetary degree of such success.* *Mercer III*, 401 F.3d 199 at 207-08; *see also* *Diaz-Rivera v. Rivera-Rodriguez*, 377 F.3d 119, 125 (1st Cir. 2004) ("[T]he Supreme Court has explicitly rejected the proposition that fee awards. . .should necessarily be proportionate to the amount of damages. . .plaintiff actually recovers.") (internal quotations omitted); *Cabrera v. Jakabovitz*, 24 F.3d 372, 393 (2nd Cir. 1994) (upholding fee award based on significance of legal issue on which plaintiff prevailed and accomplishment of public purpose). *Jama v. Esmor Correctional Services, Inc.*, 577 F.3d 169, 176 (3rd Cir. 2009) (finding the degree of a plaintiff's success should consider not only the difference between the relief sought and achieved, but also the significance of the legal issue decided and whether the litigation served a public purpose); *Morales v. City of San Rafael,* 96 F.3d 359, 361 (9th Cir. 1996) (overruling district court's calculation of attorneys' fees because of failure to consider second and third O'Connor factors).

In other words, Defendants' reliance on a *single* O'Connor factor is misplaced - it's the balancing of all O'Connor factors that proves dispositive of whether a plaintiff is entitled a fee award. Here, this balance weighs in favor of Plaintiff, and thus, Plaintiff is entitled an award of attorneys' fees and cost under his ILSA claim.

2.) Plaintiff Succeeded on a Significant Legal Issue

As evidenced by the verdict rendered in favor of Plaintiff on his ILSA claim, Plaintiff succeeded on a significant legal issue, and thus, the second O'Connor factors weighs in favor of awarding attorneys' fees to Plaintiff.

Indeed, according to Justice O'Connor, the second factor this Court should consider is "the significance of the legal issue on which the plaintiff prevailed." *Id.* at 122, 113 S.Ct. 566 (O'Connor, J., concurring). Specifically, "this factor is concerned with the general legal importance of the issue on which the plaintiff prevailed." *Mercer*, 401 F.3d 199 at 207.

Here, as this Court is aware, Plaintiff succeeded on an important legal issue – ILSA's anti-fraud provisions. Plaintiff's repeated reliance on these provisions, as opposed to Defendants' reliance on the Act's anti-disclosure provisions, emphasizes this point. Plaintiff's case confirmed that wronged purchasers may proceed under the Act's anti-fraud provisions based upon a developer's material misrepresentations, whether made orally, in writing, or otherwise. Plaintiff's case, like *Mercer*, also resulted in a "first-of-its kind" liability determination – the facts as found by the jury determined Defendants were legally responsible for violating Plaintiff's rights under ILSA's anti-fraud provisions. *Id.* Consequently, Plaintiff succeeded on a significant legal issue, and thus, "the second of Justice O'Connor's factors weights in favor of an award of fees" to Plaintiff. *Id.*

3.) The Litigation of Plaintiff's ILSA's Claim Served a Public Purpose

The final factor this Court must consider is whether Plaintiff's prosecution of his ILSA claim served a public purpose. *See Farrar,* 506 U.S. at 121–22, 113 S.Ct. 566 (O'Connor, J., concurring) (explaining that a plaintiff's "success might be considered material if it also accomplished some public goal other than occupying the time and energy of counsel, court, and client").

ILSA is a remedial statute enacted to regulate the sale of subdivided property through the use of "interstate commerce"[6] and to protect unsuspecting and ill-informed consumers from

[6] ILSA's reach is very broad because the definition of "interstate commerce" includes routine advertising practices such as mailing marketing materials and advertising over the internet.

fraud and abuse in the same. Indeed, the purpose of ILSA is to "prevent fraud and deception in the sale of undeveloped land." *Kemp v. Peterson,* 940 F.2d 110, 112 (4th Cir. 1991). To this end, ILSA provides anti-fraud provisions, 15 U.S.C. § 1703(a)(2), geared toward preventing developer prevarications and ensuring potential purchasers are provided with accurate property-related descriptions prior to purchase.

Unquestionably, ILSA's purpose of limiting unfair and deceptive acts in the sale of land *to the public* is an *important public purpose*. While the receipt of nominal damages did little for Plaintiff personally, his victory undoubtedly signaled to developers, including Defendants, the importance of ensuring that their property-related advertisements and representations do not mislead innocent purchasers or otherwise violate ILSA's anti-fraud provisions. *See, e.g., Lippoldt v. Cole,* 468 F.3d 1204, 1224 (10th Cir. 2006) (holding that a fee award was justified because the ruling against the defendants would encourage the defendants to comply with the First Amendment going forward).

Not only does Plaintiff's ILSA claim serve a public purpose, the public interest is best served by shifting the burden of the expense of litigation onto the shoulders of those whose unfair and deceptive acts are responsible for the litigation in the first place. Ultimately, Defendants were the cause of the litigation at issue, and thus, it is "reasonable" Defendants should bear the burden of the attorneys' fees necessarily expended in vindicating wronged purchasers' rights[7]. Allowing a plaintiff who successfully pursues an action under ILSA to recover his attorneys' fees encourages individuals to pursue litigation to protect the public interest. Similarly, requiring unsuccessful defendants to pay the plaintiff's attorneys' fees

[7] Regarding the "reasonableness" of Plaintiff's attorneys' fees, Plaintiff refers the Court to Plaintiff's Petition which details the complexity of the issues and the time necessarily involved to prosecute the same.

discourages developers from engaging in deceptive and unfair practices, such as promulgating false advertisements and material misrepresentations, thereby enforcing the purpose of ILSA.

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

Additionally, if Plaintiff must pay the attorneys' fees incurred on his behalf in light of Defendants' prevarications and the efforts necessary to try this case not once, but twice,[8] he will not receive any reimbursement for his loss. Such a result tends to cause other plaintiffs to forego their statutory rights under ILSA to bring claims against developers who misrepresent their development properties as they do not see any benefit in pursuing such actions. Consequently, Defendants, and other developers, will be able to use "tricks" and "deceptive" practices when dealing with innocent purchasers whenever they feel so inclined or believe necessary to "seal the deal." Not only does this harm innocent purchasers, it also causes honest developers to lose money or forces them to commit similar, bad acts so they can compete with less scrupulous developers.

Thus, while Defendants repeatedly attempt to diminish the value of Plaintiff's attorneys' efforts through a host of conclusory arguments – Defendants ignore the rational approach to

[8]While Defendants maintain the January mistrial of this case "was the direct result of the conduct of Plaintiffs' counsel", this is a completely erroneous, and also insulting, assertion. "As this court is aware," counsel for this Plaintiff had absolutely nothing to do with the January mistrial of this case.

justice for wronged purchasers under ILSA's provisions. Prohibiting such purchasers from recovering reasonable attorneys' fees, fees which ILSA expressly allows for, undermines both the important purpose of and the deterrent effect of the Act.

Simply put, the primary purpose of ILSA is to prevent developers from deceiving innocent purchasers when promoting and selling property and to require developers, who deceive innocent purchasers, to pay for all costs stemming from their misconduct. Clearly, imposing an innocent purchaser's attorneys' fees upon deceitful developers promotes ILSA's primarily public purpose, and thus, the third O'Connor factor weighs in favor of Plaintiff.

4.) The O'Connor Factors Weigh in Favor of Plaintiffs

In *Mercer*, the Fourth Circuit followed the majority of circuit courts in utilizing the O'Connor factors to determine whether a nominally-recovering plaintiff should recover attorneys' fees. The Fourth Circuit's interpretation of the O'Connor factors, along with its reasoned analysis, clearly support awarding attorneys' fees and costs to Plaintiff. Mercer's case did not fare well under the first O'Connor factor, but satisfied the other two O'Connor factors, and the Fourth Circuit upheld an award of several hundred thousand dollars in attorneys' fees on a one-dollar verdict. Just as the Fourth Circuit found Mercer's case warranted attorneys' fees, so too should this Court find Plaintiff's case warrants the same.

Like Mercer, Plaintiff received a one-dollar verdict; however, this one-dollar verdict is not the "measure" of Plaintiff's success – Plaintiff's satisfaction of the other two O'Connor factors are additional indicia of success. Given that Plaintiff succeeded on his ILSA claim, a claim which involved a significant legal issue and promoted public interest, Plaintiff's "success" is well more than "one-dollar", and thus, Plaintiff's victory *is not "minimal,"* and his recovery is *not "nominal". Farrar,* 506 U.S. at 121, 113 S.Ct. at 566 (O'Connor, J., concurring) ("[n]ominal

relief does not necessarily a nominal victory make."). Consequently, the balance of the O'Connor factors favor Plaintiff, and thus, an award of Plaintiff's attorneys' fees and costs is warranted.

5.) The Nominal Verdict Was Not So Nominal

Moreover, although similar to *Mercer* in that Plaintiff recovered on an important statutory claim, Plaintiff's recovery on his common law claims in addition to his ILSA claim distinguishes him from the plaintiffs in *Farrar* and *Mercer* who received only nominal damages *in total.* Notably, in this case, Plaintiff "recovered" $1,750,000 on his derivative breach of fiduciary duty claim as well as the $1 "recovered" on his ILSA claim.[9] Given the circumstances of this case, it's fair to conclude that the jury awarded one-dollar on the ILSA claim because it was fully awarding Walbeck on his concurrent, admittedly favored, derivative claim on behalf of the Association; and that the one-dollar was simply an additional validation of the incredible success that Walbeck achieved.

While the impact of this specific scenario has not been squarely addressed by South Carolina courts, other courts have concluded that a Plaintiff's success on related, common law claims may be considered as evidence of the overall success of the statutory claim. Indeed, the Third Circuit addressed a similar scenario and concluded a plaintiff's recovery on related, common law claims may affirmatively demonstrate the "successfulness" of plaintiff's statutory claim. Specifically, in *Jama versus Esmor Correctional Services, Incorporated,* the Third Circuit was faced with the question of whether a plaintiff's success on her negligence claim ($100,000 award) could "independently inform the degree of her success" on her Religious Freedom Restoration Act ("RFRA") claim ($1 award). Following a lengthy analysis which

[9]Plaintiff also "recovered" $20,000 on his negligent misrepresentation claim and $10,000 on his breach of contract claim.

involved defining what constitutes a "related" claim under the United States Supreme Court's decision in *Hensley versus Eckerhardt* , the *Jama* Court held as follows:

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

Jama v. Esmor Correctional Services, Inc., 577 F.3d 169, 179-80 (3rd Cir. 2009) (emphasis added) (citations omitted).

Following the *Jama* Court's reasoning, Walbeck's "success" is not nominal. The crux of his claim, and nucleus from which it stemmed, resulted in both a tremendous success for the association of which he is a member as well as significant success for the public at large.

CONCLUSION

Under South Carolina's, the Fourth Circuit's, and many other jurisdictions' prevailing precedent, Plaintiff is eligible for an award of attorneys' fees and costs under his ILSA claim. Plaintiff's ILSA claim is a statutory claim for which the jury entered a separate verdict, a verdict which represents Plaintiff's "success" in litigating an important legal issue (ILSA anti-fraud provisions) and advances the public interest (discouraging fraud and deception). The majority's decision not to grant fees in *Farrar* was born of its reluctance to reward attorneys for bringing less than meritorious claims that seek, but fail to obtain, large monetary judgments or fail to

promote a larger public good. Here, Plaintiff successfully brought a meritorious ILSA claim to prevent developer deception in the sale of undeveloped property to the public – the very form of litigation our legislators expressly encouraged by enacting ILSA. *Kemp v. Peterson,* 940 F.2d 110, 112 (4th Cir. 1991) ("The Act is designed to prevent fraud and deception in the sale of undeveloped land"). Thus, Plaintiff's claim, and the jury's award, are far more than "nominal" victories. Accordingly, South Carolina law, and the balance of the O'Connor factors, both weigh in favor of awarding Plaintiff attorneys' fees and costs, and thus, this Court should grant Plaintiff's Petition.

Respectfully submitted,

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Charleston, South Carolina
Dated: 9/3/14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	C/A NO. 2010-CP-10-10490
I'ON ASSEMBLY, INC.; BRAD J. WALBECK, AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC.,	)	
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF PLAINTIFF ADKINS' PETITION FOR UNJUST ENRICHMENT**
vs.	)	
THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; and I'ON REALTY, LLC,	)	
Defendants.	)	

Plaintiff Lea Ann Adkins, by and through her undersigned counsel, hereby submits the following Memorandum in Support of Plaintiff Adkins' Petition for Unjust Enrichment. The Plaintiff respectfully requests the Court issue an order finding the I'On Defendants were Unjustly Enriched at Adkins' expense.

Factual Background

This matter was tried to a jury between July 29, 2014 and August 1, 2014, with the jury returning a verdict on the Plaintiffs' behalf on August 1, 2014. The within equitable claim remains before the Court.

On or about February 1, 2003, Plaintiff Adkins entered into a contract for the purchase of a residential lot within the I'On neighborhood. Prior to contracting, Adkins received oral and

written representations regarding specific amenities within the neighborhood, including that the Creekside Park and Community Dock would be conveyed to the I'On homeowners association, the I'On Assembly, at no cost and with no encumbrances, for the benefit and enjoyment of all property owners within I'On. Adkins relied on these representations when contracting. In so doing, Adkins agreed to purchase a lot from the Defendants for one hundred fifty-nine thousand dollars ($159,000.00).

Rather than convey the Creekside Park and Community Dock to the I'On Assembly, as was represented by the Defendants in order to induce Adkins' purchase, the Defendants sold the property to a third-party for one million, four hundred thousand dollars ($1,400,000.00). The Defendants did not make, nor offer, any restitution, rebate, refund, or compensation to Adkins. Instead, Defendants retained Adkins' purchase money, gave away that which the Defendants promised to her as a member of the I'On Assembly, and reaped a financial windfall for the sale of the Creekside Park and Community Dock.

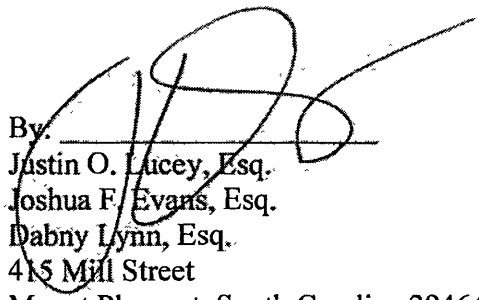
Argument

A party may be unjustly enriched when it retains benefits or money which, in justice and equity, belong to another. Unjust enrichment is an equitable doctrine "which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988); *see also JASDIP Props. SC, LLC v. Estate of Richardson,* 395 S.C. 633, 639, 720 S.E.2d 485, 488 (Ct. App. 2011). In South Carolina, a claim for unjust enrichment has three elements: (1) a benefit conferred upon the defendant by plaintiff; (2) realization of that benefit by defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for it to retain the benefit. *Ellis,* 294 S.C. at 473, 366 S.E.2d at 14.

Here, the Defendants were undoubtedly unjustly enriched by the Plaintiffs given they profited from Adkins purchase of her lot and the sale of the Creekside Park and Community Dock to a third-party; amenities which rightfully belonged to Plaintiff. Indeed, the Defendants were not authorized to sell the amenities, but did so, and realized a benefit in the form of significant profits from finalizing this lucrative, yet wrongful, transaction, as well as Adkins' lot purchase. Moreover, Adkins testified in deposition and at trial that she would have paid fifty-thousand dollars ($50,000.00) less had she known the Creekside Park and Community Dock would not be conveyed to the Assembly. Clearly, such circumstances make it unjust for the Defendants to retain the benefits they received in connection with the wrongful transfer of the amenities, especially given the deceptive acts employed by the Defendants in depriving the Plaintiffs of the same, as was deduced and proven at the trial of this matter.

WHEREFORE, Plaintiff Adkins respectfully requests the Court enter an order finding the Defendants were unjustly enriched at Adkins' expense, and award her fifty thousand dollars ($50,000.00) in damages or such other amount as the Court sees just and fit.

Respectfully submitted,



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Dated: 8/11/14

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2010-CP-10-10490
I'ON ASSEMBLY, INC.; BRAD J. WALBECK AND LEA ANN ADKINS, BOTH INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC.,	)	**BRIEF IN SUPPORT OF JUDGMENT IN I'ON ASSEMBLY'S FAVOR ON THE INVALIDITY OF THE 2000 RECREATIONAL EASEMENT**
Plaintiff,	)	
vs.	)	
THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; AND I'ON REALTY, LLC	)	
Defendants.	)	

Plaintiffs Brad J. Walbeck, and Lea Ann Adkins, individually and derivatively on behalf of the I'On Assembly, Inc., (hereinafter collectively referred to as Plaintiffs), by and through their undersigned counsel, hereby submit the following Memorandum in Support of Plaintiffs' Declaratory Action[1]. The Plaintiffs respectfully request the court issue an order declaring the 2000 Recreation Easement is invalid and void *ab initio*.

FACTUAL BACKROUND

On February 9, 2000, the I'On Club, LLC, the I'On Company, LLC, and the I'On Assembly executed a document entitled "Recreational Easement and Agreement to Share Costs." (hereinafter referred to as Easement) (Attached hereto as Exhibit "A"). In the Easement, the I'On Club purported to grant the Assembly an ostensibly perpetual right to use the Dock, parking lot and boat ramp, including the right to temporarily park vehicles and boat trailers in the parking lot for up to 12 hours. The Assembly in turn granted the I'On Club a similarly ostensibly

[1] Specifically, this memorandum is in support of judgment in I'On Assembly's favor and in opposition of judgment in the Defendants' favor in both this case and the companion case, I'On et al v. Walbeck, 2014-CP-10-02984.

perpetual right to use Eastlake and the Athletic Field for I'On Club members. Section 4.2 of the Easement limits its term to thirty years, negating any "perpetual" granting language referenced in previous sections.[2]

Moreover, only one individual, Joe Barnes, signed the Easement. Mr. Barnes signed the Easement three times in his capacities as Manager of the I'On Company, Manager of the I'On Club, and□ President of the I'On Assembly. This was not an arms' length transaction. At the time of the execution, the I'On Club, LLC did not even own the Dock, parking lot, or boat ramp. At the time of the execution, the Assembly did not own the Eastlake and Athletic Fields.

ARGUMENT

I. The Easement is Void Because the I'On Club Did Not have Title at the Time it Granted the Easement.

The 2000 Recreational Easement is invalid as a matter of law. Neither the I'On Club nor the I'On Assembly owned the relevant property at the time the Easement was executed. The granting party must, at the time of the granting, own the property over which the easement is granted. *See, e.g., Moore v. Reynolds*, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985); *Guy v. Guy*, 2008 M.E.141, 955 A.2d 212, 215 (2008); *Sakonnet Point Marina Ass'n, Inc. v. Bluff Head Corp.*, 798 A.2d 439, 442 (R.I. 2002); *Trahms v. Starrett*, 34 Cal.App.3d 766, 110 Cal. Rptr. 239, 242 (1973); *Stilbell Realty Corp. v. Cullen*, 352 N.Y.S.2d 656, 658 (1974).

In Moore, William Reynolds brought an action to prevent Robert Moore from obstructing his right-of-way over an easement that was granted by their predecessors in title. Moore, 285 S.C. at 575. On appeal, Moore conceded an easement existed but contested the location of the easement as determined by the master. Id. at 577. In determining the location of the easement the

[2] The Easement also provided for a sharing of costs to operate and maintain the Boating Facilities (the boat ramp, dock and parking area) according to a formula based on a proportion of the number of I'On lots compared with the number of non-I'On-lot-owner Club members.

court factored into its consideration which portion of the land was owned by the grantor at the time the easement was created. Id. at 578. In considering this the court said, "[T]he easement necessarily had to have been granted upon property owned by [the predecessor] in 1926." Id. The court concluded it could not accept Moore's assertion of the location because that would require the court to conclude that the predecessor granted an easement over land she did not own. Id.

As the court determined in Moore, an easement cannot be granted over land the grantor does not own. Following this rule the Recreational Easement cannot be valid. The Easement was signed and recorded in February 2000, over 6 months before the I'On Club acquired title to the dock amenity property from the I'On Company. Moreover, the Assembly did not acquire title to the Eastlake property until November 14, 2003, nearly three years after the execution of the Easement. Because the I'On Club and I'On Assembly did not hold title to the subject property at the time of the execution of the Easement, those entities as a matter of law could not grant or otherwise encumber those properties. The Easement is void *ab initio*.

II. An Invalid Easement Cannot be Cured by Application of the After-Acquired Title Doctrine or Subsequent Ratification of the Deed.

The Defendants assertions that the invalid Easement was cured via ratification or the doctrine of After-Acquired Title are off-base.

First, the After-Acquired Title Doctrine does not apply to servitudes. That doctrine is applicable to deed conveyances only, and prevents a seller from claiming he did not have title to the property at the time of the sale. *See Corbin v. Carlin*, 366 S.C. 187 (Ct. App. 2005). In the instant case, the void transaction was not a sale of property and did not involve the conveyance of a deed. Rather, the void transaction was the purported conveyance of an easement over land the grantor did not own. The After-Acquired Title Doctrine is not applicable. *See generally Douglas v. Medical Investors*, Inc., 256 S.C. 440 (1971)("An easement is a right which one

person has to use the land of another for a specific purpose . . . and gives no title to the land on which the servitude is imposed. An easement is therefore not an estate in lands in the usual sense.").

Similarly, Defendants' contention that a deed can be ratified by the subsequent act of its grantor is too off-base. The case on which the Defendants rely to support their argument does not stand for the proposition that one without title can convey property and by subsequent act ratify the conveyance. Instead, the rule deals with the transfer of property by an infant. Tolar v. Marion Cty. Lumber Co., 75 S.E. 545 (1912).

In Tolar, Ashton L Berry, the titleholder, conveyed title to a lumber company before his 18th birthday. Id. at 545. Sometime after conveying title but still before his 18th birthday Berry mortgaged the property to a third-party. Id. On March 4, 1902, four days after Berry reached the age of majority he ratified the mortgage to the third-party by indorsing the mortgage. Id. Later that year Berry then ratified and confirmed his deed of conveyance to the lumber company. Id. The court found that because the mortgage was the first transaction to be ratified as an adult, the lumber company would take title subject to the mortgage. The court concluded that when an individual executes a deed of conveyance as an infant and then later, after reaching the age of majority, executes another deed or mortgage the deed made as an infant becomes ineffectual. Id. at 546.

The rule that an infant, upon reaching majority, may ratify a document executed by him does not equate to a rule that a subsequent owner may ratify the transfer of land he does not own. The principle that Defendants put forth is in other words the After-Acquired Title Doctrine. As stated above, Plaintiffs contend that the After-Acquired Title Doctrine does not apply to servitudes such as easements.

Furthermore, the After-Acquired Title Doctrine is an equitable doctrine intended to estop a party from claiming he did not have title at the time of the sale. Corbin v. Carlin, 366 S.C. 187 (Ct. App. 2005). Being an equitable doctrine the party seeking it must come with clean hands if he intends to recover. Aaron v. Mahl, 674 S.E.2d 482 (S.C. 2009). The fact that Joseph Barnes signed all three documents indicates that the transaction was not an arm's length transaction and he was on actual notice that at the time of the purported grant the I'On Club did not own the property. The I'On Companies cannot now use the After-Acquired Title Doctrine in an effort to fix the mistake they made in early 2000.

III. The Easement is Invalid Because, in Granting the Easement, the Developers Breached the Fiduciary Duties they owed the Assembly

The easement is further invalidated given the Developers, in granting the easement, violated the fiduciary duties they owed to the Assembly. Simply stated, the Developers failed to act in the best interest of the Assembly when they granted a non-perpetual, invalid easement, a failure which was considered by the jury, and thus, encompassed within the jury's verdict against the Developers for breach of fiduciary duty. Indeed, the testimony and evidence presented at the trial of this case repeatedly referenced the easement's ambiguous terms, its non-perpetual interpretation, and its erroneous execution by the same individual, Joe Barnes, for three I'On entities. Clearly, the jury considered this evidence and implicitly recognized the invalidity of the easement in light of the Developers' fiduciary relationship with the Assembly. *See Wilson v. Wilson*, 117 S.C. 454, 117 S.E. 330 (1921) ("[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.").

IV. The Assembly's Purchase of the Property Created a Merger and Subsequent Termination of the Easement.

When the owner of the dominant estate acquires title to the servient estate over which the right-of-way exists the easement is extinguished because the essential ingredient of a right-of-way would be wanting. In other words, if the same entity owns the estate over which the easement exists and the easement serves, the easement is terminated. Haselden v. Schein, 167 S.C. 534, 166 S.E. 634 (1932). As such, any easement in favor of the Assembly ceased to exist when it acquired title to the subject property in accordance with the Settlement Agreement.[3] *See Windham v. Riddle*, 370 S.C. 415, 419, 635 S.E.2d 558, 560 (Ct. App. 2006) *aff'd*, 381 S.C. 192, 672 S.E.2d 578 (2009) (holding that an easement cannot exist where both the purported servient and dominant estates are owned by the exact same person). It would be difficult, if not impossible, to reconcile a valid easement with the verdict rendered by the jury.

WHEREFORE, The Plaintiffs respectfully request this Court enter an order Declaring the 2000 Easement invalid and unenforceable.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, PA

By: _____
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Joshua F. Evans, Esq.
Dabny Lynn, Esq.
415 Mill Street
Mount Pleasant, South Carolina 29464
Tel: (843) 849-8400

[3] Moreover, any remaining easement rights are voidable under ISLA and Plaintiff Walbeck's favorable ISLA verdict.

Fax: (843) 849-8406

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 8/11/14

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

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,

Defendants.

DEFENDANT I'ON COMPANY, LLC'S PETITION FOR ATTORNEYS' FEES AND COSTS

FILED
2015 12 PM 4:35
CLERK OF COURT
CHARLESTON

TO: JUSTIN O. LUCEY, ESQ. and TIMOTHY W. BOUCH, ESQ., COUNSEL FOR THE PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that as soon as counsel may be lawfully heard, Defendant The I'On Company, LLC will petition the Court for an award of attorneys' fees and costs. In support of their petition, the I'On Co. shows the Court as follows:

SUMMARY OF FACTS

1. This case was tried before this Court between Tuesday, July 29, 2014 and ended in the early morning of Saturday, August 2, 2014. The jury returned a verdict finding against Lea Ann Adkins ("Adkins") as to all of her claims, including her claim for breach of contract. (See Verdict Form, Question 14, p. 3). A true and correct copy of the Verdict Form in the above captioned action will be attached hereto as **Exhibit A** once published.

2. Pursuant to Section 12(d) of Ms. Adkins' I'On Lot Purchase Agreement between Ms. Adkins and the I'On Company, a true and correct copy of which is attached hereto as

Exhibit B, the prevailing party in any action to enforce obligations under the agreement shall recover from the non-prevailing party "reasonable attorneys' fees, costs and expenses *actually incurred.*" (emphasis added)

3. The I'On Company is the prevailing party with respect to Ms. Adkins' breach of contract claim – indeed with respect to all claims brought by Ms. Adkins. (See Verdict Form, Questions 8, 14, 22, 28, and 32).

4. A party need not prevail on all claims with respect to all parties to be entitled to an award of attorneys' fees and costs where it is entitled by contract. See e.g. Fox v. Vice, 131 S. Ct. 2205, 2214, 180 L.Ed.2d 45 (2011) (holding that "[a]nalogous principles" govern fee shifting to plaintiffs and defendants, and a defendant was entitled to an award of fees and costs even where it was not the prevailing party with respect to all claims).

5. The initial Complaint in this action was filed on December 22, 2010. Plaintiff Adkins joined the action as a Plaintiff on February 7, 2012. The claims at issue in this action are those alleged by the two plaintiffs Adkins and Brad J. Walbeck. As such, the I'On Company requests an award of one half of the total reasonable fees and costs incurred in its defense of this action from February 7, 2012 through the entry of a verdict.

6. The fees and costs actually incurred in this action from February 7, 2012 through the trial of this action are total fees of five hundred and twenty-eight thousand two hundred and thirty dollars and seventy-five cents ($528,230.50) and costs of forty-seven nine hundred and sixteen dollars and ninety eight cents ($47,916.98). Therefore, the I'On Company requests an award of two hundred and sixty-four thousand one hundred and fifteen dollars and thirty eight cents ($264,115.25) in attorneys' fees and twenty-three thousand nine hundred and fifty-eight

dollars and forty-nine cents ($23,958.49) in costs, for a total award of two hundred eighty-eight thousand and seventy-three dollars and seventy-four cents ($288,073.74).

7. The defense of this case involved voluminous discovery, numerous depositions, a significant number of motions, trial preparation, and trial. Given the mistrial in January, 2014, the I'On Company essentially had to prepare for trial twice, resulting in significantly increased costs. All told, the I'On Company's defense has required significant amounts of time and has resulted in significant fees incurred by the I'On Company and other Defendants.

8. The firm of Duffy & Young, LLC represented the Plaintiffs in this case. Brian C. Duffy and J. Rutledge Young, III were lead counsel, attorneys Seth W. Whitaker and Julie L. Moore were associate counsel involved in the trial of this action. Other attorneys within Duffy & Young provided further more limited assistance. Mr. Duffy and Mr. Young both have significant experience trying complex civil matters and are highly regarded members of the Charleston bar and South Carolina bar.

9. The fee structure for invoices associated with this matter was substantially reduced from current hourly rates charged by Duffy & Young. The standard hourly rate for Messrs. Duffy and Young is $375, and their time in this case was billed at $325/hour and reduced further to $300/hour. The standard hourly rate for Special Counsel to the firm is over $400 per hour and was reduced to $375 per hour. Mr. Whitaker, Ms. Moore and Ms. Johnson's time was billed at $250/hour, also reduced from existing rates. Paralegals' time is billed at $125 per hour.

10. In addition to the reduced hourly rates, fees in the amount of $174,871.93 associated with the first trial were generated but not actually incurred by the I'On Company in

light of a flat fee arrangement applicable only to December 2013 and January 2014. Those fees generated are not a part of this request.

11. Counsel believes that the rates charged by Duffy & Young for the services of its partners, principal, counsel, associate attorneys, paralegals and legal assistants are commensurate with rates charged in Charleston County by other attorneys with the same or similar experience in complex litigation matters. Given the complexity of this case, the amount of discovery required, the mistrial, the settlement among other parties adding to the complexity of trial, and the ultimate trial of this action, Defendant contends the total fee and expense award sought by this Petition is reasonable.

12. An Affidavit of Brian C. Duffy attached hereto as **Exhibit C**, further supports a finding that the fees and expenses requested by the I'On Club are reasonable.

WHEREFORE, based on the law of the State of South Carolina, the grounds set forth above, and such further materials as may be properly submitted to the Court, Defendant I'On Club respectfully prays this Honorable Court to award attorneys' fees and costs actually incurred to The I'On Company, LLC in the amount of two hundred eighty-eight thousand and seventy-three dollars and seventy-four cents ($288,073.74).

This 12 day of August, 2014 at Charleston, South Carolina.

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Attorneys for I'On Defendants

STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	**IN THE COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CIVIL ACTION NO. 2010-CP-10-10490**
I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC., **Plaintiffs,** **v.** **THE I'ON COMPANY, LLC, THE I'ON CLUB, LLC, THE I'ON GROUP, LLC F/K/A CIVITAS, LLC, VINCE GRAHAM, and TOM GRAHAM,** **Defendants.**	**MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION IN SUPPORT OF JUDGMENT IN I'ON ASSEMBLY'S FAVOR ON THE INVALIDITY OF THE 2000 RECREATIONAL EASEMENT**

FILED
2015 JUL 23 AM 9:30
CHARLESTON COUNTY
CLERK OF COURT

Defendants the I'On Company, LLC ("I'On Company"), the I'On Club, LLC ("I'On Club"), the I'On Group, LLC F/K/A/ Civitas, LLC ("I'On Group") and I'On Realty, LLC ("I'On Realty" and collectively as "Defendants"), by and through their undersigned counsel, submit the following Memorandum in Opposition to Plaintiffs' Motion in Support of Judgment in I'On Assembly's Favor on the Invalidity of the 2000 Recreational Easement.[1] For the reasons detailed below, Defendants respectfully request the Court deny Plaintiffs' motion and instead enter an order declaring the 2000 Recreational Easement was valid and perpetual.

FACTUAL BACKGROUND

On February 9, 2000, the I'On Company, the I'On Club and the I'On Assembly, Inc. ("Assembly") executed a "Recreational Easement and Agreement to Share Costs" ("2000 Recreational Easement") recorded in Deed Book M342, Page 051 at the RMC Office for

[1] As with the Plaintiffs' motion, this memorandum addresses declaratory judgment claims concerning the validity of the 2000 Recreational Easement in both the above captioned action and the companion case, I'On Company, LLC et al. v. Walbeck et al., 2014-CP-10-02984.

Charleston County. At the time the 2000 Recreational Easement was executed, the I'On Company still held title to the real property encompassing the Club Property described by Exhibit B of the 2000 Recreational Easement; however, the I'On Club was expected to become the owner of the "Club Property," and acquired ownership of the same on August 15, 2000. The Assembly signed the easement as "the entity charged with administering that Declaration of Covenants, Conditions, and Restrictions for I'On recorded in Deed Book 297, Page 282 of the Registry of Mesne Conveyances for Charleston County, South Carolina" and "maintaining and operating certain property described therein as 'Commons'". (2000 Recreational Easement at p. 1). As acknowledged by the 2000 Recreational Easement, the "Eastlake and the Amenity Area" described by Exhibit A of the 2000 Recreational Easement was owned by the I'On Company at the time the 2000 Recreational Easement was executed, but such property was intended to be conveyed to the Assembly as "a part of the Commons." (Id). Ownership of the Eastlake and Amenity Area property was officially transferred to the Assembly on November 14, 2003.

The 2000 Recreational Easement granted the Assembly "a nonexclusive easement over the Club Property for access to and use and enjoyment of the Boating Facilities by the owners of the property subject to the Declaration or their lessees, the occupants of such property, and their guests, in common with such other persons as Club Owner may authorize." (Id. at p. 2). Under the terms of the 2000 Recreational Easement, the easement for the use and enjoyment of the Boating Facilities was a "perpetual, nonexclusive easement." (2000 Recreational Easement at Art. I § 1.1.) The 2000 Recreational Easement also contained cost sharing provisions which were limited to a 30-year term. From the execution of the 2000 Recreational Easement until August, 2009, the I'On Company, I'On Club, and the Assembly continuously operated under the terms of the Recreational Easement.

In August 2009, the I'On Club sold the Club Property to 148 Civitas, LLC ("148 Civitas"). 148 Civitas and the I'On Club entered into a supplemental easement entitled the "Assignment of Certain Club Owner's Rights and Obligations Under Recreational Easement and Agreement to Share Costs" recorded in Deed Book 73, Page 776 of the RMC Office for Charleston County (the "Supplemental Easement"). The Supplemental Easement specifically incorporated the 2000 Recreational Easement. The Supplemental Easement obligated both 148 Civitas and the I'On Club to operate under the terms of the 2000 Recreational Easement as "Club Owner." (See Supplemental Easement, p. 2). Following the sale until the Boating Facilities were transferred to the Assembly pursuant to the Settlement Agreement in February 2014, 148 Civitas, the I'On Club, the I'On Company, and the Assembly continued to operate under the terms of the 2000 Recreational Easement.

During the course of this action, through prior filings and stipulation, both 148 Civitas and the Assembly have represented that it was their intent and understanding that the Assembly had an undisputed, perpetual easement to use all of the Boating Facilities located on the Club Property pursuant to the 2000 Recreational Easement.

ARGUMENT

While the Defendants do not dispute that the easement granting the Assembly access to the Boating Facilities has merged following the Assembly's acquisition of the Boating Facilities from 148 Civitas following entry of the settlement between the Assembly and 148 Civitas, the issue of whether the Easement was valid from the time of its execution until the Assembly's acquisition of title to lot CV-6 in February 2014 remains germane to this action and determination of damages to which the Plaintiffs may be entitled. The Plaintiffs' revisionist view of the validity and intended perpetuity of the easement has been directly contrary to the

interests of the Assembly, for which they brought their claims derivatively, and directly contradictory to the representations and stipulations all of the parties to the easement.

A. The Recreational Easement was Valid.

Plaintiffs assert that the 2000 Recreational Easement was invalid as it was executed prior to the transfer of the Club Property to the I'On Club and the transfer of the Eastlake property to the Assembly in 2003. However, this argument fails for a number of reasons. First, by its terms, the 2000 Recreational Easement acknowledges that the transfers of the Club Property and Eastlake Property from the I'On Company to the I'On Club and Assembly respectively were intended future transfers. Once the transfers were effectuated, the I'On Club and the I'On Assembly subsequently ratified the easement by their actions

Despite Plaintiffs' contentions to the contrary, South Carolina has long recognized that a deed which conveys property to which the grantor lacks title may be ratified by subsequent acts of the grantor after he acquires title. See e.g. Nettles v. Cummings, 30 S.C. Eq. (9 Rich. Eq.) 440, 448 (1857); Tolar v. Marion Cty. Lumber Co., 93 S.C. 274, 75 S.E. 545 (1912); Corbin v. Carlin, 366 S.C. 187, 192-93, 620 S.E.2d 745, 748 (Ct. App. 2005) (citing Richardson v. Atlantic Coast Lumber Corp., 93 S.C. 254, 75 S.E. 371, 372 (1912)). There is no indication that the after-acquired title doctrine does not apply to servitudes. The cases cited by the Plaintiffs in support of their distinction between servitudes and deed conveyances simply do not reach such a conclusion. See Corbin, 366 S.C. at 192-93, 620 S.E.2d at 748 (stating the general rule "settled beyond controversy in this state" that title could be acquired through application of the after-acquired title doctrine, but not addressing any limitation of said doctrine to deed transfers as opposed to servitudes); Douglas v. Medical Investors, Inc., 256 S.C. 440, 445-448, 182 S.E.2d 720, 723 (1971) (holding that an easement in gross could be formed by reservation in a deed).

Courts in other jurisdictions have specifically applied the after-acquired title doctrine to subsequently affirm easements. See e.g., Supraner v. Citizens Sav. Bank, 303 Mass. 460, 465, 22 N.E.2d 38, 41 (1939) (applying After-Acquired Title doctrine to easement stating the "rule has been held to apply to easements"); Noronha v. Stewart, 199 Cal. App. 3d 485, 491, 245 Cal.Rptr.94 (Cal. Ct. App. 2d Dist. 1988) (recognizing subsequent affirmation of easement pursuant to after-acquired title doctrine); Tishomingo Railroad Co., Inc. v. Bellsouth Telecommunications, Inc., 819 F. Supp. 2d 632 (N.D. Miss. 2010) (recognizing after-acquired easement in favor of Bellsouth).

With respect to the 2000 Recreational Easement, the parties to the 2000 Recreational Easement, including both the I'On Club and the Assembly, operated under the terms of the 2000 Recreational Easement—both with respect to use of the Boating Facilities and the Assembly's maintenance contributions—for many years after the date of conveyance of the Lot CV-6 and the docks to the I'On Club. The Assembly continued to do so even after control of the Assembly was turned over to the homeowners, by budgeting and paying dock usage fees to the I'On Club. The parties thereby ratified the 2000 Recreational Easement's validity and cured any defect.

Moreover, the Assembly engaged a lawyer to advise them as to the 2000 Recreational Easement at least as early as 2004. Nevertheless, they did not propose changes, did not suggest a problem with invalidity or a limited term, and did not alter their continued adherence to the terms of the 2000 Easement.

Finally, if the parties to a deed acquiesce, a third-person cannot invalidate the deed by showing what might be fraud or mistake. McCullough v. Wall, 38 S.C.L. (4 Rich.) 68 (1850); Sanders v. Hartzog, 6 S.C. (6 Richardson) 479 (1876). The Plaintiffs, therefore, cannot challenge the validity of the 2000 Recreational Easement, only its interpretation. In statements

to this Court related to the first trial of this action, all parties to the 2000 Recreational Easement agreed it was valid.

B. The Recreational Easement was Perpetual.

As a matter of law, as well as pursuant to Section 4.3 of the 2000 Recreational Easement, the Court must interpret the terms of deed and easements as a whole and give effect to all of the provisions contained therein if possible. Millvale Plantation, LLC v. Carrison Family Ltd. P'ship, 401 S.C. 166, 174, 736 S.E.2d 286, 290 (Ct. App. 2012); K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 262 (2009). The 2000 Recreational Easement contains multiple components with respect to the Assembly's rights and obligations: it both grants easements for the use and enjoyment of the Boating Facilities by the Assembly and the Commons by the I'On Club, and it establishes a cost-sharing agreement that obligates the Assembly and the I'On Club to each contribute to Boating Facilities maintenance. In Section 1.1 of the 2000 Recreational Easement specifically describing the easement for use and enjoyment of Boating Facilities, the 2000 Recreational Easement states that such easement shall be "a perpetual, nonexclusive easement." (2000 Recreational Easement, Sect. 1.1(a)). The section pertaining to the easement for the I'On Club's use and enjoyment of the commons contains similar language. (2000 Recreational Easement, Sect. 1.2(a)). All parties to the 2000 Recreational Easement have evidenced their intent that the Assembly's easement for the use and enjoyment of the Boating Facilities was perpetual. (See e.g. Def. I'On Assembly, Inc.'s Pre-Trial Brief at 3 ("[t]he I'On Club granted to the Assembly a perpetual right to use the Dock, parking lot and boat ramp") (Exhibit 1)).

These provisions are reconcilable with Section 4.2 of the 2000 Recreational Easement, which establishes a 30-year duration for the Assembly's financial obligations with respect to

Boating Facility maintenance. Defendants' proposed interpretation, unlike the Plaintiffs', gives effect to the perpetual nature of the use easement and the 30-year term of the cost-sharing agreement. Articles II and III of the 2000 Recreational Easement establishing the cost-sharing agreement and the I'On Club and Assembly's respective maintenance obligations do not contain durational language. (See 2000 Recreational Easement, Arts. II and III). Finally, Section 4.2 states that "[t]his Agreement . . . shall have a term of 30 years." The "Agreement" is distinguishable from the easements for use and enjoyment of the Boating Facilities and Commons. The distinction is even made by the document title: Recreational Easement and Agreement to Share Costs. The Defendants' interpretation complies with Section 4.3 and South Carolina precedent by giving effect to all provisions of the 2000 Recreational Easement. Plaintiffs' interpretation would ask the Court to ignore the language specifically establishing the easement contained therein as perpetual.

C. Plaintiffs' Position is Inconsistent with Assembly Interests.

The Plaintiffs' position that the 2000 Recreational Easement was invalid is incongruous with the representations and interests of the Assembly, on behalf of whom the Plaintiffs bring derivative claims. While contending that Assembly and its members were damaged for potentially having their access rights to the Boating Facilities expire, Plaintiffs simultaneously fought the enforceable stipulation in Court by all parties to make it clear the easement was perpetual. Despite Plaintiffs' litigation-driven arguments to the contrary, the 2000 Recreational Easement established a perpetual easement for the Assembly's use and enjoyment of the Boating Facilities.

CONCLUSION

For the reasons stated above, the 2000 Recreational Easement was valid and created a perpetual easement for the use and enjoyment of the Boating Facilities. The Defendants therefore respectfully request this Court deny Plaintiffs' instant motion and instead enter an order declaring that from the time of its execution until the date the Assembly acquired Lot CV-6 and the Boating Facilities from 148 Civitas, the 2000 Recreational Easement was valid and the easement for the Assembly's use of the Boating Facilities it created was perpetual. Such order would then be part of the Court's consideration of Defendants' motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial absolute or a new trial nisi remittitur.

This 25th day of August, 2014 at Charleston, South Carolina.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

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,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, NEW TRIAL ABSOLUTE OR NEW TRIAL NISI REMITTITUR

FILED
AUG 25 AM 9:01
CHARLESTON COUNTY
CLERK OF COURT

COME NOW Defendants, I'On Company, LLC, the I'On Club, LLC, the I'On Group, LLC, and I'On Realty, LLC (collectively the "Defendants"), by and through counsel, and submit the following legal authorities in support of their motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial absolute or a new trial nisi remittitur, pursuant to Rules 50(b) and 59(a) and (e) of the South Carolina Rules of Civil Procedure.

Defendants hereby incorporate by reference all legal arguments advanced in their motions for directed verdict, and in their motions for summary judgment, in support of the present motion.

I. Defendants are entitled to judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict is a renewal of the motions for directed verdict made during trial on the ground that the evidence at trial presents only issues of law. Rule 50(b), SCRCP. Defendants hereby incorporate all grounds cited in their motions during trial for directed verdict, in their motion for judgment notwithstanding the verdict and for

a new trial filed in this action, and all questions briefed herein, including those briefed as grounds for a new trial, as grounds for entry of judgment notwithstanding the verdict.

1. Plaintiffs failed to properly bring and maintain a derivative action on behalf of the I'On Assembly (Grounds 1 and 2).

The rule governing derivative actions, Rule 23(b), "seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." Carolina First Corp. v. Whittle, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). The derivative Plaintiffs have never properly met the strict requirements of alleging demand and refusal or futility of demand as required by Rule 23(b). Nor has there ever been a need for the individual Plaintiffs, who have unique interests in the maintenance of this suit not shared by the Assembly or its other members, to maintain the same claims on behalf of the Assembly derivatively that it pursued at trial of its own accord. Because of these fundamental legal defects in derivative Plaintiffs' claims, Defendants are entitled to judgment notwithstanding the verdict on those claims.

The derivative Plaintiffs have, despite an initial and four amended complaints, never properly initiated and maintained a derivative action, as Defendants have repeatedly pointed out in the course of this litigation. Specifically, the derivative Plaintiffs have failed to make or allege with verification and particularity proper demand on and refusal by the Assembly; have likewise failed properly to plead the futility of demand; and have acknowledged by their testimony at trial and in their most recent complaint that the facts pleaded in their prior complaints to establish the prerequisites of their derivative claims are no longer true.

In fact, Plaintiffs also conceded at trial that substantive facts they alleged in their complaint to support the derivative action—and verified to be true—in fact were not true. For the Court to permit a derivative action, which survived pretrial motions to dismiss and for summary judgment because of the verification of facts which it now knows to be untrue, to proceed would be no less than to permit Plaintiffs to use the rule requiring verification of derivative pleadings, which was designed to prevent fraud upon the court and the corporate plaintiff, to perpetrate such a fraud and benefit therefrom. This Court should dismiss the derivative claims on JNOV to prevent this abuse of the judicial process.

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

Plaintiffs have argued that two demands were made on the Board, but neither is sufficient in law. The first—Plaintiffs' Exhibit 53—was made by a person other than the Plaintiffs, Catherine Templeton. The uncontradicted evidence shows that Mrs. Templeton subsequently settled her claims with the Defendants. In fact, Plaintiffs asked Tom Graham to confirm that he has no evidence this lawsuit was in any way filed on behalf of Mrs. Templeton, which he did. No evidence demonstrated any support by Mrs. Templeton for Plaintiffs' current lawsuit. For

these reasons, Mrs. Templeton's letter of February 26, 2009 is not a derivative demand on which these Plaintiffs can base their derivative claims.

Although Plaintiff Walbeck brought this suit initially, he never claimed to have made any demand on the Assembly Board, and he should be dismissed as a derivative Plaintiff. Plaintiffs make a poor effort to rescue their claims by asserting what they call the "Adkins Demand," Plaintiffs' Exhibits 54 and 57. In these two letters to the Board's attorney, Adkins never goes further than to request that he give an opinion as to the Assembly's rights. The allegations of the complaint, at all stages, have been equally vague regarding these "demands." Plaintiffs repeatedly failed to describe specific wrongful acts, to identify the specific harm caused to the corporation, and to request any relief. These "demands" are therefore an improper basis for a derivative suit.

Knowing their "demands" are legally insufficient, Plaintiffs have also pleaded and argued that demand was futile. If alleging futility, the shareholder must demonstrate "why the Board of Directors should not be allowed to decide whether to institute litigation." Id. at 188, 539 S.E.2d at 409. Plaintiffs have not pleaded or otherwise provided an explanation as to why the Board was not qualified to make that decision.

In prior versions of their complaint, up through the Third Amended Complaint filed January 2, 2014, Plaintiffs alleged and verified that additional demands on the Assembly "would now be futile as The Assembly has failed to act to protect the rights of The Assembly and its members...." (Emphasis added.) This bare and wholly conclusory allegation falls far short of a demonstration of specific facts showing why the Assembly Board should not have been allowed to make the litigation decision.

The actual evidence at trial revealed much conflict among Assembly members as to whether they wanted ownership of the Creek Club docks, the boating facilities, or the Creek Club itself when they were presented with opportunities to own them at various times over the years. It was very reasonable for the Assembly's Board to exercise its business judgment to refuse to pursue the claims Plaintiffs now allege, particularly in light of Plaintiffs' asserted costs and fees associated with pursuing this action.

In the most recent Fourth Amended Complaint, the words "would now be futile" have become "would have been futile." By making this change, derivative Plaintiffs concede at the very least that demand is no longer futile because the Assembly accepted their claims on the eve of the mistrial of this case in January 2014. Immediately thereafter, the Assembly gained ownership of the property which the derivative Plaintiffs claimed. As a result, the nature of the relief sought against the Defendants has changed substantially—substantially enough that the Plaintiffs' claims are now new claims. No demand ever has been presented to the Assembly to press the new claims which Plaintiffs here allege arose out of the settlement, including claims for damages based on the cash price of the settlement, the alleged leasehold value of the Creek Club building, and the alleged price of the buyout of years 21-30 of that lease. Plaintiffs admitted in pre-trial deposition testimony that all their monetary damages arose post-settlement—an admission directly contrary to their verified allegations. Adkins July 9, 2014 Dep. 60:13-61:11 (Exhibit A hereto); Walbeck July 9, 2014 Dep. 29:8-30:14 (Exhibit B hereto). Moreover, the Assembly in fact agreed to assist in the plaintiffs' prosecution of claims. The prosecution of these claims, therefore, cannot be through a proper derivative action.

Although Plaintiffs have argued that the developers had a "veto power" over Board actions which would have rendered demand futile, they could not identify any decision regarding

this litigation (or any other matter) made by the Board which the existence of such power actually influenced.

Under South Carolina law, the purpose of these strict demand requirements for derivative suits is to ensure that boards of directors retain control of the acts taken on their corporations' behalf. Carolina First, 343 S.C. 176, 185-87, 539 S.E.2d at 407-08. The Assembly Board is infinitely better placed to balance the interests of all its members than derivative Plaintiffs, who represent only one among many points of view with respect to the claims at issue here.

In addition, a plaintiff bringing a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation." Rule 23(b)(1), SCRCP. If the plaintiff does not, "[t]he derivative action may not be maintained." Id. In Waller v. Seabrook Island Property Owners Association, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990), the South Carolina Supreme Court held that the mere fact that the plaintiffs were property owners in a large or populous development did not, in and of itself, qualify them to fairly and adequately represent the interests of the other property owners. Rather, the plaintiffs "must demonstrate they have no interest antagonistic to or in conflict with the interest of the unnamed members of the class such that they are fairly and adequately able to protect the interest of the purported class." Id.

The federal rule is identical to the South Carolina rule on this point. See Fed. R. Civ. P. 23.1(a). In Kuzmickey v. Dunmore Corp., 420 F. Supp. 226, 230-31 (E.D. Penn. 1976), a court interpreting the fair and adequate representation requirement held that where a single shareholder owning 16 percent of the stock in a corporation could not claim to fairly and adequately represent the interests of any "similarly situated" shareholders. Accord Rothenberg v. Security Management Co., Inc., 667 F.2d 958, 962 (11th Cir. 1982) (dismissing derivative action and

noting that named plaintiff owned only 2.04% of outstanding stock). To construe the rule otherwise would be to render unnecessary the language of the rule concerning representation of similarly situated shareholders. Kuzmickey, 420 F. Supp. at 230-31.

The derivative Plaintiffs cannot adequately represent all of the homeowners' legal interests, which require careful balancing, not just an assumption that it is best for the Assembly to own property. The evidence at trial revealed a wide range of opinion within the Assembly membership about whether outright ownership was in the Assembly's best interests. To maintain their derivative action, Plaintiffs must meet their burden of proof to establish a lack of antagonistic or conflicting interests. Waller, 300 S.C. at 468, 388 S.E.2d at 801. Derivative Plaintiffs' particular interests are protected by the Assembly's fiduciary duties to them, for breach of which they can bring an action against the Assembly.

The derivative Plaintiffs have taken positions in this litigation clearly contrary to the Assembly's interests. They have repeatedly argued to this Court that the easement in favor of the Assembly granting perpetual access to the Creek Club docks and boating facilities was invalid or that it was not perpetual—despite the stipulation by the Assembly's attorney at the inception of the mistrial of this case, and by counsel for 148 Civitas in prior motion filings, that the easement was perpetual and that it was in the Assembly's interests for it to be so. Thus, all parties to the easement agreed in court that the easement was valid and perpetual; the individual plaintiffs argued the opposite.

Defendants respectfully pray that the Court grant judgment notwithstanding the verdict on the derivative Plaintiffs' claims in this action for failure to comply with the requirements for derivative actions.

2. Plaintiffs' claims are barred by the applicable statutes of limitations (Grounds 3 through 6).

Plaintiffs' claims are subject to a three-year limitations period. See S.C. Code § 15-3-530(1), (2) and (5) (state-law claims); 15 U.S.C. § 1711(a)(2) (ILSA). Walbeck's individual claims are time-barred as to Defendants I'On Company, I'On Club, and I'On Group, because they accrued before December 22, 2007, and as to Defendant I'On Realty (which was not named in the initial action) because they accrued before March 8, 2008. The derivative claims are time-barred because they accrued before February 7, 2009, and the Assembly's own action is time-barred because its claims accrued before February 26, 2011.

The statute of limitations had run years before Plaintiffs instituted their action. No reasonable factfinder could conclude, as the jury did in this case, that the Plaintiffs' claims as to both the Creekside Park and the Community Dock accrued when the sale of Lot CV-6 to 148 Civitas, LLC closed on August 5, 2009. Defendants are therefore entitled to judgment notwithstanding the verdict.

Of particular note, even without disregarding the jury's verdict regarding the date of accrual of the claims, the Assembly did not become a plaintiff in this matter until February 26, 2014. If the derivative Plaintiffs' claims are dismissed for failure to properly plead and prove a derivative action, as is proper, the Assembly's own claims are thus time-barred.

The evidence is uncontroverted that at no time during the discussions with the Assembly leading up to the sale of Lot CV-6 to 148 Civitas, LLC in 2009 was there any discussion of conveying a park, and certainly not Lot CV-6 as a whole, which was being sold along with the adjacent Lot 275. Rather, the representations about conveying anything to the Assembly related to conveying the docks and boat ramp. For the jury to find specifically, as it did in response to

jury questions 2, 4, and 6, that the date that claims regarding ownership of a "Creekside Park" accrued was August 5, 2009 is completely untenable.

More generally, to reach the conclusion it did, the jury had to ignore the following uncontradicted evidence regarding when the Assembly knew or should have known it did not own Lot CV-6:

- The Assembly Board has operated under the February 9, 2000 Recreational Easement and Agreement to Share Costs since the docks were completed, which was itself sufficient notice to the I'On Assembly that the I'On Company did not intend to give the dock and boating facilities to the Assembly outright.

- On August 15, 2000, Lot CV-6 was conveyed of record from the Company to the Club which operated the Creek Club as a private for-rent facility from the outset once construction was complete.

- On April 10, 2001, a Certificate of Occupancy was issued for the I'On Creek Club building on Lot CV-6, indicating construction was complete. It is likewise uncontroverted that all docks in I'On were complete by this date.

- By December 3, 2003, non-developer homeowners constituted a majority of the Assembly Board and the entire Finance Committee, which analyzed expenses including payments to I'On Club reflected on annual budgets for rental of the Creek Club and for usage of the Creek Club dock. Moreover, the Finance Committee included Andy Gowder, Ed Clem, Annie Bonk, and Chairperson Libby Eble, all of whom received the 1998 Property Report prior to purchasing their lots.

- On February 12, 2004, at an Assembly Board meeting (with non-developer homeowners constituting a majority of the Assembly Board), Vince Graham told those in attendance that the I'On Club owned the dock at the Creek Club and referenced the easement agreement. Attendees included Andy Gowder, Gaye Joyner, and Libby Eble (each members of the Board), Ed Clem, and Annie Bonk (both Finance Committee members at that time and Clem later became Finance Committee Chair, a Board Member, and President of the Board), all of whom received the 1998 Property Report prior to purchasing their lots.

- By August 5, 2004, the Assembly had engaged its own attorney (Rick Brownyard) to advise it regarding the easement agreement and replace it if advisable. The same persons were in attendance.

- On November 11, 2004, the Board considered the possibility of the Creek Club being sold as a private residence. Ms. Bonk and Ms. Joyner, both recipients of the 1998 Report, were present.

- On March 23, 2005, the Board discussed its attorney's drafting effort and the fact that Olde Park residents contracted for access to the boating facilities years before. Ed Clem and Annie Bonk, both recipients of the 1998 Report, were present.

- On April 27, 2005, the Board again discussed the potential sale of the Creek Club and access to the boat ramp by easement. Ed Clem, Annie Bonk, and John White, all recipients of the 1998 Report, were present.

- On July 27, 2005, with Ed Clem and John White present as board members, the Board advised attendees that the Creek Club is the property of the I'On Club – and that the Assembly is not obligated to purchase it once development of the neighborhood is complete.

- On December 7, 2005, the last member of the Assembly Board affiliated with the I'On Company left the Board. As of this date, all documents described above were in the Assembly's records and available to the new Board on December 7, 2005. Ed Clem and John White, both recipients of the 1998 Property Report, were members of the Board. Clem continued on the Board and continued on the Finance Committee.

- During the April 25, 2007 Board Meeting, with Ed Clem and Libby Eble present (both Finance Committee members, and Clem a Board Member), the Board entertained discussion of the Assembly potentially purchasing the Creek Club and the boating facilities and overflow parking lot for $1,500,000.

- During the May 18, 2007 Board Meeting, with Ed Clem present, the Board entertained discussion of the Assembly potentially purchasing the Creek Club and adjacent parking lot for $700,000. The same proposal was considered during ensuing meetings, including August 22, 2007 with Mr. Clem and Ms. Bonk and Ms. Eble present.

- By the end of October 2007, the Assembly Board had established a Boating Committee whose stated purposes and responsibilities included "utilization and interpretation of the easement between the I'On Assembly and the I'On Company and [its] subsidiary organizations including the I'On Club." Plaintiff Adkins was a charter member.

- Each year, both before and over the handover of control, when it budgeted, the Assembly budgeted funds to pay for a Creek Club dock usage fee and for rental of the Creek Club for Assembly meetings and events. The dock payment was required by and made pursuant to the 2000 Recreational Easement. These two budget line items put every member of the Assembly on notice each year that it did not own the docks and that the easement was in place.

- Notices of annual meetings, including draft budgets, were provided to all I'On homeowners each year as required by law. Draft budgets included the Creek Club dock usage fee and Creek Club rental fee. Thus, on an annual basis, all homeowners in I'On, including Walbeck and Adkins, were made aware that they did not own the docks or

Creek Club. Walbeck and Adkins received the mailings and attended annual meetings where the proposed budgets were adopted.

Likewise, Walbeck's individual claims are based on the contention that, pursuant to the 1998 Property Report, the I'On Company was supposed to convey the "Creekside Park" and "Community Dock" "upon completion of construction." Walbeck plainly knew or should have known that the Creek Club building—or any other planned improvement to Civic Lot 6—and the docks in I'On were completed by April 10, 2001. Walbeck's title deed (Defendants' Exhibit 145) is explicitly subject to the I'On Declarations and all documents referenced therein, and to the recorded plat which includes Lot CV-6. Any claim which Walbeck had accrued at the latest on April 10, 2001, and no reasonable factfinder could conclude otherwise.

A claim accrues when the injured party knew or should have known by the exercise of "reasonable diligence" of the existence of a cause of action. Martin v. Companion Healthcare Corp., 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). This test is objective, not subjective. Id. The claim accrues not when advice of counsel is sought or a full-blown theory of recovery is developed. Id. at 576, 593 S.E.2d at 628 (emphasis added). Rather, a claim arises when the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 395, 593 S.E.2d 183, 187 (Ct. App. 2004). Thus, the legal issue is whether and when each Plaintiff knew or should have known of the existence of a cause of action.

Even if the Assembly has cognizable claims for breach of fiduciary duty, breach of contract, or negligent misrepresentation for the conduct of its formerly developer-controlled Board, such claims must be filed promptly after the homeowners assume control. In Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725

S.E.2d 112 (Ct. App. 2012), the Court of Appeals equitably tolled a limitations period for a POA to bring a lawsuit because the POA was composed entirely of officers of the developer until eight months before suit was commenced. The Court focused on when "the property owners gained control" over the POA as the time of accrual. 397 S.C. 348, 725 S.E.2d 112. In the present case, unlike in Magnolia, there were homeowners with their own fiduciary duties to the association on the Board—and in fact comprising a majority of the Board—even before "control" of the POA was transferred. Under Magnolia, it is proper to hold that claims for conduct of a POA board of directors while it was controlled by developer representatives accrue at the time control is handed over; in this case, on December 3, 2003. Even under Plaintiff's theory, control passed in December of 2005.

On the record of the trial of this case, no reasonable factfinder could conclude that the Plaintiffs were not on notice of the existence of a potential claim until August 5, 2009. Because the evidence actually demonstrates that the claims accrued, as to both the "Community Dock" and the "Creekside Park," more than three years before each Plaintiff filed suit, Defendants are entitled to judgment notwithstanding the verdict on the statute of limitations. In the alternative, because the verdicts do not distinguish between the damages awarded regarding the "Community Dock" and the damages awarded regarding the "Creekside Park," if the Court finds that Defendants are entitled to JNOV on statute of limitations grounds on the claim regarding a "Creekside Park," Defendants are entitled to a new trial regarding the "Community Dock" claim only.

Although the Plaintiffs suggest that the I'On Club ownership and operation of the property as a private club should be of no moment or should excuse them from recognizing a potential claim, that argument is unavailing for several reasons. First, the Assembly Board's

budgeting and payment of fees and its various discussions over time described above regarding ownership of the Creek Club trigger notice of any potential claims irrespective of who actually owns the property at the time. Moreover, though the Plaintiffs and Assembly now assert that the Club and Company were one and the same, the Assembly's minutes reveal that it has long been informed of and understood the distinction between the entities. See Assembly minutes dated February 12, 2004 (Defendants' Exhibit 108); August 5, 2004 (Exhibit 109); February 23, 2005 (Exhibit 114); March 23, 2005 (Exhibit 115); April 27, 2005 (Exhibit 116); July 27, 2005 (Exhibit 118); August 24, 2005 (Exhibit 119); December 7, 2005 (Exhibit 121); August 22, 2007 (Exhibit 127); September 26, 2007 (Exhibit 128); October 24, 2007 (Exhibit 129); January 15, 2009 (Exhibit 132).

The jury found that the parties intended to create a sealed instrument when Walbeck and the Defendants executed Walbeck's I'On Lot Purchase Agreement, resulting in the application of a twenty-year statute of limitations to Walbeck's breach of contract claim. The evidence is insufficient, however, to support the conclusion that it was the parties' intent that the Agreement be treated as a sealed instrument. See Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548, 550 (Ct. App. 2005); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996); S.C. Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct. App. 1984). No testimony from any party revealed any special intent or knowledge that the language of the document would create a special type of instrument, or that in creating such special type of instrument, the parties meant to prolong the limitations period. South Carolina Courts are careful not to create a legal scheme under which the twenty-year statute becomes the default limitations period for contract claims. Carolina Marine Handling, Inc. v. Lasch, 363 S.C.

169, 175-76, 609 S.E.2d 548, 552 (Ct. App. 2005). This Court should therefore grant judgment notwithstanding the verdict regarding the creation of a sealed instrument.

Because the jury found that the claims were not-time barred, the equitable doctrines of estoppel and tolling are not presently before the Court. Should the Court reach those issues in its analysis, Defendants hereby incorporate the arguments advanced on those issues in their memorandum in support of their motion for directed verdict.

3. Walbeck lacked standing because all losses he sought to remedy are losses to the Assembly (Ground 7).

Walbeck's own testimony revealed that he has no standing to recover the relief he sought. Walbeck testified that he wanted $50,000 in individual damages, because that is the amount by which he would have reduced his purchase price had he known that the Creekside Park and Community Dock, as he claims to have understood those terms, would not be deeded to the Assembly as promised—in other words, that is the value he places on his share of the Assembly's ownership of the amenities he claims. These damages are not unique to him, but are simply his share in the perceived loss to the Assembly, not to himself. Tim Eble, another homeowner, likewise gave uncontradicted testimony that the amenities which the Plaintiffs claim do not benefit him directly at all, but benefit the Assembly.

Walbeck has no damages as an individual plaintiff. An action seeking to remedy a loss to a corporation is a derivative action. Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation. A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." Id. The latter sentence describes Walbeck's claim exactly; the gravamen of his suit is a perceived injury to the Assembly, not to himself. His right to walk on or use the docks and

marshwalk on Lot CV-6 is derived from his membership in the Assembly, which is what gives him access to these amenities.

South Carolina courts have further recognized sound reasons for this rule, all of which apply here: "(1) it prevents a multiplicity of lawsuits by shareholders; (2) it protects corporate creditors by putting the proceeds of the recovery back in corporations; (3) it protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit; and (4) it adequately compensates the injured shareholder by increasing the value of his shares." Id. at 51, 557 S.E.2d at 685.

Here, any wrongful diminution in value of Walbeck's lot would immediately be rectified through an increase in the value of Walbeck's shares in the Assembly. Walbeck thus lacks standing to bring such claims as an individual. To the extent that Walbeck seeks either money damages for claims based on their membership of the I'On Assembly, he lacks standing to bring such claims individually. Defendants are therefore entitled to judgment notwithstanding the verdict on his claims.

4. Plaintiffs have no breach of fiduciary duty claim recognized under South Carolina law (Grounds 8 and 9).

The fiduciary duty of a developer to a homeowners' association is limited to that recognized in the line of cases including Concerned Dunes West Residents v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002) and Goddard v. Fairways Development G.P., 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). These cases recognize a very limited duty of developers that, when they convey common areas to a property owners' association, they must either convey such areas in good repair or provide sufficient funds to perform any needed repairs. This Court's rulings on directed verdict and charge to the jury expanded the scope of

this duty to create a general fiduciary duty of developers to "act in the best interests of property owners while controlling the development's property owners association." This expanded scope of the duty is nowhere recognized in existing law; therefore, the Court should now grant Defendants' motion for JNOV on the Assembly's breach of fiduciary duty claim.

South Carolina courts have been very restrictive in recognizing the existence of fiduciary duties. See Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 716 (2003) ("Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters.")

The facts of Goddard and Concerned Dunes West demonstrate the narrow scope of the recognized developer fiduciary duty. In Goddard, the developer of a 90-unit PUD "unload[ed]" control of all common areas to the HOA after selling just five residential units. Goddard, 310 S.C. at 414-16, 426 S.E.2d at 832-33. This small number of homeowners was left to bear the costs of maintaining all common areas without a plan to establish a reserve or fund the Association until assessments were adequate to cover maintenance costs. The Goddard court, finding evidence that the common areas were substandard at the time of transfer, recognized a fiduciary duty in that context and found the developer liable for the cost of repairs.

In Concerned Dunes West, the transfer of common areas to the HOA was made within a week of the developer discovering that the PUD's roads were in need of repairs. No repairs were made at the time of transfer; pursuant to the POA's covenants, the POA was responsible for maintenance and repairs. Concerned Dunes West, 349 S.C. at 255, 562 S.E.2d at 635-36. The Supreme Court confirmed the narrow duty it recognized in Goddard: "The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good

repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." Id. at 257, 562 S.E.2d at 637.

The limited duty between a developer and a homeowners association should not be extended here. Plaintiffs contend that the duty recognized by Goddard and Concerned Dunes West is to be construed as a blanket fiduciary duty of a developer to exercise control over a POA in the best interests of the homeowners. The Goddard court, however, refused to apply such a duty. It held rather that the conduct of directors of a POA, even where, as in Goddard, the directors are developers, must be judged by the "business judgment rule," such that "absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." 310 S.C. at 414, 426 S.E.2d at 832. The jury in this case specifically rejected all claims of fraud or unfair and deceptive trade practices; therefore it did not find bad faith.

Nor are Defendants in the position of corporate promoters owing promoter fiduciary duties. As the South Carolina Supreme Court recognized last week in Hansen v. Fields Company, LLC, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 4087772 (August 20, 2014), a corporate promoter acts before a corporation comes into existence; thus, for instance, a corporate promoter is not an agent, because he cannot be an agent of a non-existent corporate principal. The uncontroverted evidence shows that the I'On Assembly has existed as a corporate entity since June 4, 1998, and thus the developer which created it ceased to be a corporate promoter of it on that date, well before the issues in this case arose.

Plaintiffs also advance a more limited position: that the fiduciary duty to provide common elements that are not substandard and that are in good repair is expandable into a duty to provide promised common elements. This ignores the plain meaning of Concerned Dunes

West's statement of the rule, which is that "the developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so subjects the developer to liability for bringing the common areas up to standard." Id. at 257, 562 S.E.2d at 637 (emphasis added).

The two situations are distinguishable from a public policy perspective. Where a developer gives substandard common elements to a homeowners' association under circumstances like those in Goddard and Concerned Dunes West, there may often be no underlying contract or representation on which the homeowners' association can base a claim against the developer. Recognition of a separate legal duty may therefore be necessary to protect the homeowners' association from being stuck with a substantial repair liability. But in cases such as this one, where homeowners' associations seek to enforce alleged promises by developers to provide particular common elements, other preexisting causes of action such as fraud, negligent misrepresentation, and breach of contract are available. To recognize a new breach of fiduciary duty claim to provide all promised common elements under the present circumstances is both unnecessary and contrary to the South Carolina public policy of restrictive recognition of fiduciary duties.

This Court should grant JNOV in favor of Defendants and thereby decline to extend the developer fiduciary duty beyond that recognized in Goddard and Concerned Dunes West.

5. Defendants are entitled to JNOV on Plaintiffs' claim for breach of contract (Grounds 10 and 11).

The jury returned a verdict in favor of the I'On Assembly for breach of contract. The I'On Assembly was never party to any contract with the I'On Company regarding ownership of Lot CV-6, nor in privity with any such party, and cannot therefore sustain a direct action for breach of contract. Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494

S.E.2d 827, 833 (Ct. App. 1997). Thus, the Assembly's only possible claim is as an intended third-party beneficiary of Walbeck's purchase contract. The South Carolina courts have repeatedly held that only parties intended to be directly benefitted by a contract can bring an action to enforce it as third-party beneficiaries. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "In the absence of a clear intent to benefit the third person, he cannot sue on the contract." TC X, Inc. v. Commonwealth Land Title Ins. Co., 928 F. Supp. 618, 623 (D.S.C. 1995).

The language of the contract fails to support any such conclusion of a direct intent by the parties to benefit the Assembly in entering into it. A reasonable factfinder can only conclude that any benefit to the Assembly was incidental. Nor did Plaintiffs introduce any extrinsic evidence that any party intended to confer any specific benefit on the Assembly by entering into the purchase contracts. Rather, as facts adduced at trial revealed, the result to the Assembly from the contracts at issue very well may be considered a burden to the Assembly, not a benefit. The jury's finding that the Assembly could sustain a third-party breach of contract action is therefore untenable, and Defendants are entitled to JNOV on the Assembly's breach of contract claim.

Defendants are likewise entitled to JNOV on Walbeck's individual contract claim, which is based entirely on the meanings of the terms "Creekside Park" and "Community Dock" as used in his purchase contract and the 1998 Property Report. Tim Eble testified that the language of the Property Report had "no ambiguity" about what the homeowners were supposed to get. Lea Ann Adkins likewise testified that to her, there is no doubt what "Creekside Park" and "Community Dock" in the Property Report refer to. It is thus improper for the Plaintiffs to ask the finder of fact to apply extrinsic evidence to create an ambiguity in Walbeck's contract to

allow them to alter the plain meaning of the contract language by incorporating extrinsic evidence of the meanings of these terms.

Furthermore, the verdict on Walbeck's breach of contract claim is inconsistent with the verdict on his ILSA claim. Both are based on the same language and rely on the same document, the 1998 Property Report. For the jury to award $10,000 in damages for breach of contract and $1.00 under ILSA is irreconcilable. The could should therefore grant JNOV, or in the alternative grant a new trial nisi remittitur for a nominal $1.00 verdict on Walbeck's breach of contract claim.

6. Defendants are entitled to JNOV on Walbeck's ILSA claim (Grounds 12 through 14).

Walbeck's ILSA claim fails as a matter of law because he never established that ILSA actually applies to I'On. In particular, Walbeck never put forth evidence demonstrating that more than 100 lots in I'On were sold directly by the developer to individual purchasers, as opposed to builders or developers who built and resold. See 15 U.S.C.A. § 1702(a). Walbeck simply attempted to rely on the fact that Defendants actually complied with ILSA with respect to him and other buyers as his evidence that they were required to do so. There is, however, no legal support for making such assumption absent proof; rather, the plaintiff in an ILSA action bears the burden of proving that he qualifies for ILSA protection, as this Court correctly charged the jury without objection from Plaintiffs.

Walbeck's claim also fails for lack of reliance. Walbeck could not have relied on the extrinsic documents which now form the basis of his interpretation of the meanings of the terms "Creekside Park" and "Community Dock" in making his purchase, because by his own admission he had never seen them at that time. Because there is no other evidence of representations made to him that contradict the plain language of the Property Report, he lacks a cognizable ILSA claim.

A South Carolina federal district court addressed a similar issue in Gibbes v. Rose Hill Plantation Development Co., 794 F. Supp. 1327 (D.S.C. 1992). In that case, Plaintiffs contended a violation of the ILSA on the ground that the "stables" and "docks," which had been promised conveyance to their homeowners' association in two ILSA property reports, were supposed to be a fifty-two acre "Equestrian Center" including a polo field and floating docks. Id. at 1335. Developer actually conveyed a 17.24 acre stable complex, without a polo field, and non-floating docks. Id. at 1331, 1335. The Gibbes court granted summary judgment to the defendants as to plaintiffs' claims on false statements in the property report, pursuant to 15 U.S.C. § 1703(a)(1), because the property report in question did not define the terms "docks" or "stables" or specify their size or configuration, and the developer did in fact transfer docks and stables to the homeowners' association; therefore, the property reports at issue neither misstated nor omitted any material fact on such points. Id. at 1335-36. Likewise here, the Assembly received a "Creekside Park" and "Community Dock" in the ordinary meaning of those terms, which the property report did not further define. In fact, the Gibbes holding is even more appropriate here where Plaintiffs somehow contend that the reference to "Community Dock" actually entitles them to the two docks at Civic Lot 6.

Walbeck attempted to circumvent this rule at trial by citing oral representations by agents of Defendants. In Gibbes, one plaintiff alleged that he had been specifically told that the stables promised in the property report would be of a certain size, and was found to have established a genuine issue of fact for trial under 15 U.S.C. § 1703(a)(2) on that basis. Gibbes, 794 F. Supp. 1336-37. Although Walbeck testified at length about oral representations supposedly made to him by real estate agents of Defendants regarding the Creek Club and docks, he admits that no one ever told him that the I'On Assembly would receive ownership of Lot CV-6. Rather, he

assumed that since CV-6 was a civic lot on plans of I'On, it would be owned by the Assembly—an assumption on his part with no basis in any representation ever made by Defendants, who have consistently stated that civic lots, such as those which are now home to schools and churches, can be privately owned. Walbeck cannot point to a statement which is a specific misrepresentation by Defendants in dealing with him as a purchaser regarding Assembly ownership of Lot CV-6. His ILSA claim therefore fails as a matter of law, and Defendants are entitled to JNOV thereon.

7. Defendants are entitled to JNOV on Plaintiffs' negligent misrepresentation claim (Grounds 15 and 16).

A plaintiff must prove the following elements to establish a claim for negligent misrepresentation: (1) defendant's false representation to the plaintiff; (2) defendant's pecuniary interest in the representation; (3) defendant's duty of care to communicate truthful information to the plaintiff; (4) breach of the duty; (5) Plaintiff's justifiable reliance on the representation; and (6) plaintiff's pecuniary loss as a proximate result of his reliance on the representation. Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011).

Significantly, a forward-looking statement—such as the Defendants' statement at the time of the 1998 Property Report that they would provide certain amenities to the Assembly—is not ordinarily actionable as a negligent misrepresentation unless the plaintiff can prove that the defendant promised to do a thing with no intention at the time of keeping such promise. A mere breach of contract does not constitute fraud. Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 770-71 (2011). There is no evidence that Defendants did not intend to convey a "Community Dock" and a "Creekside Park" to the Assembly, as part of Phase 2 of I'On, either at the time of the preparation of the Property Report or at the time of its presentation to Walbeck. Whether or not Defendants' intentions later changed, without deception at the time the statement

was made there can be no negligent misrepresentation. Furthermore, Walbeck's position on this issue again requires him to rely on statements in documents he admits he did not see until years later, as described in more detail below.

The Assembly cannot establish a claim for negligent misrepresentation as a matter of law because it cannot show that it actually relied on any false representation of the Defendants or suffered any damages as a result. The record is replete with correct representations to the Assembly of the fact that it did not own Lot CV-6 from 2001 through 2009, as well as offers to the Assembly to purchase the lot—not to receive it for free. The only allegedly negligent misrepresentations are those which Defendants made in 2009 about whether a sale of CV-6 to 148 Civitas would or would not take place, or about giving the docks and boat ramp to the Assembly. All these representations were gratuitous and induced no reliance. The Assembly has failed to show how it relied, or how any of its conduct would have differed, or why any damages it incurred were a result of its reliance on a negligent misrepresentation to it by Defendants in 2009. If the Assembly's conduct in reliance was forbearance in filing suit, that may be relevant to the Court's analysis of equitable estoppel of the limitations period. But the decision whether to file suit is about redress for a preexisting legal right—not the creation of a new legal right. No actionable misrepresentation occurred in 2009. Defendants are therefore entitled to JNOV on this claim.

Walbeck claims negligent misrepresentation based on supposed reliance on extrinsic evidence which he admits he never saw until years after he purchased his lot in I'On. He could not have relied on the documents, such as the I'On Impact Assessment and ORCM permit application, which now form the basis of his claimed interpretation of the meanings of the terms "Creekside Park" and "Community Dock," because he admits he never saw them before making

his purchase decision. Nor was any reliance on alleged representations to him by I'On Realty agent Bill Orange justified, because his contract explicitly states that he had no right to rely on any representations except those contained in his contract or the Property Report.

The only question properly put to the factfinder was whether the Assembly received a "Creekside Park" and a "Community Dock" within the ordinary meanings of those terms—not what those terms meant according to documents which Walbeck never saw. To the extent the jury considered such evidence to find a negligent misrepresentation, such consideration was improper. Based on the evidence properly before the factfinder on this question, the only reasonable conclusion is that no reliance on the alleged negligent misrepresentation to Walbeck took place. This Court should therefore grant JNOV for Defendants on such claim.

8. Defendants' declaratory judgment claims regarding the validity and perpetuity of the 2000 Recreational Easement should have been granted as a matter of law. (Grounds 17 and 18).

Plaintiffs filed a separate motion seeking a judgment declaring the 2000 Recreational Easement invalid on August 11, 2014. Defendants file contemporaneously herewith a response to that motion, and hereby incorporate that response as their argument in favor of judgment as a matter of law that the 2000 Recreational Easement was in fact valid and that the portion pertaining to use of the Boating Facilities was perpetual.

During the trial, Plaintiffs repeatedly cited the supposed invalidity of the easement, or its supposed termination in the year 2030, to support their claim for breach of fiduciary duty. Had that issue been determined as a matter of law in advance, or had the jury been instructed that it had been determined prior to deliberation, Plaintiffs' argument would have been significantly undercut. The result of the Court's failure to rule on the issue, to make evidentiary rulings accordingly, and to instruct the jury thereon is substantial unfair prejudice to the Defendants.

Defendants are entitled to judgment notwithstanding the verdict on this claim, and to a new trial absolute on the remaining claims as a result of such prejudice.

9. Plaintiffs' damages awards are based wholly on speculation or conjecture. (Grounds 19 through 24).

While mathematical certainty of damages is not required, the evidence "should be such that a court or jury can reasonably determine an appropriate amount. . . . Neither the existence, causation, nor amount of damages can be left to the judge's or jury's conjecture, guess or speculation. . . . Bald allegations are insufficient to establish a claim for diminution in value, and the evidence must not be speculative as to the amount of the alleged diminution." Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000).

The jury did not base its damages awards to the Assembly, of $1 million for breach of contract and negligent misrepresentation and $1.75 million on breach of fiduciary duty, on the evidence of damages presented by any party or any comprehensible adjustment to that evidence. Thus the amount of these damages awards was based solely on the jury's speculation or conjecture, is improper, and is subject to judgment notwithstanding the verdict.

Walbeck has no evidence, expert or otherwise, supporting a claim of diminution in value of his lot, except his own purely speculative guess which has no basis in fact or logic. Walbeck asked for $50,000 in damages on this basis, but his total purchase price was $61,500. He admitted that pricing in I'On at the time he bought was "take it or leave it," and would not say that he would not have bought in I'On if he had known that the Assembly would not own the "Creekside Park" and "Community Dock" as he claims to have understood those terms. This testimony is plainly irrational, illogical, and speculative.

Furthermore, Walbeck was only awarded $20,000 on his negligent misrepresentation claim, $10,000 on his breach of contract claim, and $1.00 on his ILSA claim—figures which

have no basis in the record. Defendants are therefore entitled to judgment notwithstanding the verdict on these claims on the ground that the damages awards are based wholly on speculation or conjecture.

10. The Court erred as a matter of law in finding that Defendants are amalgamated. (Ground 25).

The Court found as a matter of law before charging the jury that all Defendants are liable for Plaintiffs' claims as a single unit under Plaintiffs' "amalgamation" theory. As Plaintiffs presented it, this is a novel theory under South Carolina law having different requirements than the more established and familiar alter ego theory. In particular, as Plaintiffs would have it, amalgamation differs from alter ego by not requiring proof of resulting fraud, wrong, or fundamental unfairness; total domination and control is sufficient. This is an erroneous interpretation of South Carolina law arising from some confusion in the existing opinions on the issue.

The existing amalgamation cases trace back to a single opinion, Kincaid v. Landing Development Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986), which cites no authority and upholds the trial court summarily. Of the cases which cite Kincaid, one of them, Pope v. Heritage Communities, Inc., 395 S.C. 404, 418, 717 S.E.2d 765, 772 (Ct. App. 2011), did not squarely present the issue, because the question of whether the trial court erred by not requiring "fraud, wrong, or fundamental unfairness" to find amalgamation was found not to have been preserved for appeal. In the other, Mid-South Mgmt. Co. v. Sherwood Development Corp., 374 S.C. 588, 605, 649 S.E.2d 135, 144 (Ct. App. 2007), the Court found no shared liability under any theory. There is thus no case squarely holding that "amalgamation" is a separate theory from alter ego under South Carolina law.

The corporate form may be disregarded only where equity requires. Hunting v. Elders, 359 S.C. 217, 223-24, 597 S.E.2d 803, 806 (Ct. App. 2004). The circumstances under which this may be done by an alter ego analysis are set forth in detail in Mid-South:

> An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby. Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the dominant entity. However, this theory does not apply in the absence of fraud or misuse of control by the dominant entity which results in some injustice. . . . [C]ontrol, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one; one must show that the retention of separate corporate personalities would promote fraud, wrong or injustice, or would contravene public policy.

374 S.C. at 603, 649 S.E.2d at 143 (emphasis added). There is no evidence of inequities that would result from permitting the Defendants to maintain their separate corporate forms, such as promotion of fraud, wrong or injustice or contravention of public policy. Defendants are therefore entitled to judgment notwithstanding the verdict, or in the alternative to a new trial absolute, because of the erroneous finding of amalgamation.

11. The Court erred as a matter of law in granting directed verdict on Defendants' claim for abuse of process. (Ground 26).

A claim for abuse of process has two elements: ulterior purpose, and a willful act in use of process not proper in regular conduct of proceedings. Broadmoor Apartments v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991). As noted in the discussion of the exclusion of Exhibit 106 below, Defendants attempted to present significant evidence of Plaintiffs' ulterior purpose, which the Court refused to admit. Tom and Vince Graham also testified regarding Plaintiffs' longstanding opposition to I'On. Furthermore, the evidence presented at trial was sufficient to create a question of fact as to whether Plaintiffs willfully filed verified complaints containing statements they knew were false in an effort to initiate and perpetuate this lawsuit and to harass Defendants. The Court should therefore reverse its prior ruling and grant judgment notwithstanding the

verdict for Defendants, or in the alternative, grant a new trial absolute on Defendants' abuse of process counterclaim.

II. This Court should grant Defendants a new trial absolute.

Defendants contend that they are entitled to a new trial absolute for all reasons set forth above, as well as those enumerated below. The analyses above regarding Defendants' grounds for new trial numbers 7 (directed verdict on abuse of process, Part I.11), 10 (scope of breach of fiduciary duty under South Carolina law, Part I.4), and 12 (amalgamation, Part I.10) apply also to the motion for new trial and are likewise incorporated by reference here.

The grant or denial of new trial motions rests within the discretion of the circuit court. Brinkley v. S. C. Dept. of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

1. The Court improperly admitted evidence of Defendants' marketing efforts after June 4, 2003 which was irrelevant to the claims at trial and unfairly prejudiced Defendants (Ground 1).

Defendants moved in limine to exclude, and objected to the admission of, evidence of their marketing efforts after June 4, 2003, the date the second of the individual plaintiffs contracted to purchase property from The I'On Company. Such evidence, which includes marketing materials, project fact sheet, mailers, and website images, is not relevant to the Plaintiffs' claims for breach of fiduciary duty, negligent misrepresentation, breach of contract, or violation of ILSA, or to any of the other claims tried in this case. Furthermore, it was unfairly prejudicial to Defendants, in that it allowed Plaintiffs to argue to the jury that Defendants made deceptive statements, although there was absolutely no evidence that any such statement was relied on by any Plaintiff in this case to its detriment, and provided a false basis for the jury to find that Plaintiffs' claims did not accrue until August 5, 2009. Plaintiffs' negligent misrepresentation claims will not lie without proof of their actual, justifiable reliance on a representation. Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 (2011). Plaintiffs could not

have relied on any such documents published after Plaintiffs' purchases of property, so their existence and contents are irrelevant to any misrepresentation, fiduciary duty, or ILSA claim. The admission of the documents thus constitutes reversible error, and Defendants are therefore entitled to a new trial absolute.

2. The Court improperly refused to take judicial notice of representations made by counsel for the Assembly and by 148 Civitas, LLC regarding the perpetuity of the easement (Grounds 2 and 3).

Defendants moved in limine and argued during trial that the Court should take judicial notice of representations made earlier in this case by counsel for the I'On Assembly and 148 Civitas, LLC regarding the perpetuity of the access easement granted by Section 1.1 of the 2000 Recreational Easement and Agreement to Share Costs. The Court refused to do so. In particular, Defendants requested judicial notice of (1) Mr. Bouch's statement to the Court that "we have always believed that it's in our interest that it be perpetual, but recognizing there is an interest there. I was asked yesterday to stipulate that the easement would be perpetual, and I said yes;" and (2) 148 Civitas's statement in its motion for partial summary judgment that "[i]mportantly, Plaintiffs and the Assembly already have the undisputed, perpetual[] right to use all of the amenities located on the Subject Property pursuant to the Recreational Easement."

These issues were placed directly in issue before this Court by the Defendants' complaint in the consolidated action No. 2014-CP-10-2984. The Assembly explicitly denied paragraph 27 of the Complaint in that consolidated action alleging that it "has represented in the Walbeck Action that the easement to use all of the Boating Facilities located on the Club Property is perpetual."

Plaintiffs proceeded to argue to the jury that Defendants wronged Plaintiffs and jeopardized their access to the docks on Lot CV-6 by including a 30-year time limitation in a different part of the document, and were awarded a verdict based thereon, although every party

to the easement had stipulated before this Court that the easement was perpetual. The stipulation also refuted the Plaintiffs' argument that the easement was invalid. The judicial notice would have exposed this alleged breach of duty as a litigation-driven contention contrary to the stipulation of the parties to the easement and to more than a decade of their operation under the easement. The Court's failure to take judicial notice of these prior representations therefore permitted Plaintiffs to make an incomplete statement of important facts in the case to the jury without correction.

The necessity for the judicial notice was made more glaring following the denial by the Assembly's corporate representative, Deborah Bedell, that such a stipulation had been made, and her statement before the jury of her recollection of the Court's description of Assembly counsel's stipulation, which the Court had made outside the presence of the jury. In addition, the other party to the easement, Mike Russo—now bound by the earlier settlement agreement to support the Plaintiffs' effort regarding the easement—intentionally and brazenly avoided service of a trial subpoena.

All information regarding which Defendants requested judicial notice is in the Court's own records, and therefore a proper subject for judicial notice under Rule 201 of the South Carolina Rules of Evidence. See Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("[a] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records"). Because the failure to take judicial notice of these representations under the circumstances constitutes reversible error, this Court should grant Defendants' motion for a new trial absolute.

3. The Court improperly admitted extrinsic evidence of whether the Assembly was an intended third-party beneficiary of the Walbeck Sales Contract (Ground 4).

A party cannot use extrinsic evidence to create an ambiguity which does not exist within the four corners of the instrument. Silver v. Aabstract Pools and Spas, 376 S.C. 585, 591 (Ct. App. 2008); Davis v. Davis, 372 S.C. 64, 75 (Ct. App. 2006). Nor can a party use extrinsic evidence to read additional terms into a contract which are not present. See ESA, 392 S.C. at 20 (refusing to read an additional term into the contract that does not exist); Davis, 372 S.C at 76 (refusing to imply additional conditions when contract's plain language suggested no such intent). Thus, in this case, Plaintiffs cannot use extrinsic evidence to establish an intent in Walbeck's contract to benefit the Assembly which is not present within the four corners of the instrument.

In light of the fact that the contracts themselves do not establish the Assembly as a third-party beneficiary, Plaintiffs sought to use extrinsic evidence and subsequent marketing statements in an attempt to create an intent not revealed in the contracts. This is improper and constitutes reversible error; the Court should therefore grant Defendants a new trial absolute.

4. Plaintiffs' counsel and the testimony of Deborah Bedell improperly and prejudicially characterized the exercise of control of The Assembly Board in front of the jury without a proper curative instruction (Grounds 5 and 6).

In an attempt to rescue the Plaintiffs' claims from application of the statute of limitations, the Assembly's counsel elicited testimony, readily provided by his client's representative, which was entirely new and completely false. Plaintiffs seek to use some idle provisions of the covenants governing the I'On Assembly to suggest that The I'On Company controlled the Assembly Board. The provisions never had been invoked, and Ms. Bedell had testified previously that she certainly did not think The I'On Company exercised control over the Board. Nonetheless, she testified affirmatively in response to a question whether one reason the Board had refused to authorize counsel to join the suit sooner or to bring suit against the Defendants independently was this idle "veto power" in the covenants. As the proffer of further cross-

examination revealed, Ms. Bedell had no knowledge of the Board ever considering such action in the first instance, and no knowledge of any Board member ever being influenced in consideration of such legal action by any power reserved in the covenants.

The jury should have been told to disregard Ms. Bedell's testimony as to the Board's consideration of any control or power reserved to The I'On Company having ever been considered by any Board member. Moreover, the false and unfairly prejudicial testimony required a curative instruction, and one framed in a way that did not simply prejudice defendant further by calling attention to the issue the Plaintiffs advanced. The Court recognized the necessity of this approach, and considered an appropriate instruction, but ultimately rejected it in favor of an instruction that would have reinforced the prejudice to the Defendants. Defendants opted not to suffer that instruction; the record before the jury thus remained uncorrected. The Court's refusal to give a charge which caused Defendants demonstrable prejudice is reversible error. Pittman v. Stevens, 364 S.C. 337, 340, 613 S.E.2d 378, 380 (2005). Defendants are therefore entitled to a new trial absolute.

5. The Court improperly excluded from evidence Defendants' Exhibit 106 which was offered to demonstrate evidence of Defendants' abuse of process counterclaim and general theme of their defense (Ground 8).

Defendants presented compelling evidence that the claims Plaintiffs were pursuing against them were not based on legitimate gripes, but were instead part of a larger campaign of long standing waged against them and their development by a handful of people, notably Ms. Adkins and her companion, Steve Brock, who lives with her in I'On. Testimony and emails linked Mr. Brock to the effort to bring these claims. In response, Plaintiffs sought to characterize Defendants as threatening legal claims against anyone who challenges them, and in particular Ms. Templeton for arguably tortiously interfering with the contract for sale to 148 Civitas.

After laying the foundation with Mr. Vince Graham of the many legal challenges this group of critics has launched against them over nearly twenty years, and that the I'On Company collected opposition materials along the way, Mr. Graham identified the documents collected in Defendants' Exhibit 106 and counsel moved to admit the exhibit. The Court reviewed the materials and sustained the objection on the grounds that the exhibit was simply cumulative.

The twenty-fifth (next to last) page of the exhibit, a January 23, 1997 letter from Steve Brock to Mr. Jordan, alone demonstrates the independent importance of the exhibit. First, the letter shows an early attempt to interfere with the developer's contract with the Jordan family to buy the real property in the first instance. More important, Mr. Brock indicated he would "do everything in [his] power to defeat this project [I'On]." He warned that he had "often been underestimated."

This evidence was not cumulative and was important to establishing Defendants' general theory of the case and their counterclaim. The evidence also tended to refute the Plaintiffs' responsive characterization of Defendants' counterclaims and defense theory. Its exclusion was therefore reversible error and a ground for a new trial absolute.

6. The jury's verdict as to The Assembly's claims for breach of fiduciary duty, breach of contract and negligent misrepresentation is inconsistent and cannot be reconciled (Ground 9).

Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge "should not be required to guess as to what the jury sought to render." Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003).

In the present case, Plaintiffs' claimed damages for each particular plaintiff were the same on all claims. The jury returned a verdict which not only did not award any amount of damages which the Plaintiffs sought, but awarded different amounts of damages on different claims without any basis for doing so. There is no way to reconcile a $1.75 million verdict for

breach of fiduciary duty and $1 million verdicts for breach of contract and negligent misrepresentation for the Assembly with each other in this case. The damages sought as a result of each claim are exactly the same. Likewise, the differing verdicts of $20,000 for negligent misrepresentation, $10,000 for breach of contract, and $1.00 for ILSA for Walbeck cannot be reconciled, either. The court should therefore grant a new trial absolute or, in the alternative, a new trial nisi remittitur for the lowest of these verdict amounts for each Plaintiff.

7. The Court improperly admitted into evidence the terms of the Settlement Agreement between Plaintiffs and Mike Russo and 148 Civitas, LLC (Ground 13).

The terms of the settlement between Plaintiffs and former Defendants 148 Civitas, LLC and Russo should have been excluded from evidence pursuant to Rules 403 and 408 of the South Carolina Rules of Evidence. Their admission focused the trial on the partial settlement rather than on the claims actually alleged in the case. For example, the Plaintiffs presented at least $2,782,000 in damages related to the settlement agreement, including $495,000 in cash, $1,975,000 as the value of the leasehold interest in the Creek Club, and $312,000 as the present value of the buyout of years 21-30 of the lease. Such confusion, distraction and unfair prejudice to a litigant are the very reasons that settlement agreements are inadmissible pursuant to South Carolina Rule of Evidence 408. It forbids the admission of settlements if offered "to prove or disprove the validity or amount of a disputed claim." S.C.R. Evid. 408. Plaintiffs used the settlement agreement to establish their damages, i.e., the "amount of a disputed claim." The terms of the settlement should have been excluded under both Rule 408 and Rule 403. Defendants recognize that the fact that a settlement took place may be admissible, but the terms should not have been admitted into evidence. See, e.g., Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1069 (5th Cir. 1986) (holding that "disclosure of the fact of settlement" was admissible for the purpose of explaining the absence of settling defendants and avoiding jury confusion while

"disclosure of the amount of settlement, however, is a different matter" and was properly excluded pursuant to Rule 408). Admission of the settlement terms was likewise substantially more prejudicial than probative and therefore inadmissible under Rule 403. Admission of the settlement terms constitutes reversible error and is a ground for a new trial absolute.

In addition, any claim based on the settlement was a separate claim. The Assembly entered an agreement with the former Defendants which included many terms and secured many benefits beyond those sought in the lawsuit to that point. Any claim about whether the lease included in the settlement was appropriate should have first been the subject of a demand on the Assembly Board for agreeing to it instead of continuing to pursue its claims. If some damages resulted from the agreement, the Assembly then should have brought a suit on its own. If the Assembly refused and the Plaintiffs believed the Assembly's rights were not protected, they could have made a demand on the Assembly to pursue a new action.

8. The jury's verdict is based on passion and caprice and is so large that it shocks the conscience (Ground 14).

The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, or some other improper motive. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). The amounts of the verdicts for the Assembly are completely inconsistent with any damages evidence advanced by Plaintiffs, and are therefore based on passion and caprice. The Court should therefore grant a new trial absolute.

In addition, the evidence established and Plaintiffs tacitly conceded they never expected or relied on any promise to own the Creek Club building free of charge. Nevertheless, the largest damages figure they requested was for the leasehold of the Creek Club building to 148

Civitas. Plaintiffs received everything else they claimed for the price of $495,000. Accordingly, the verdict for the Assembly was grossly excessive. Mr. Robinson's testimony of the more than $2 million value the Assembly received in the transaction that cost them $495,000 further indicates that the verdict was excessive.

9. The evidence presented at trial does not justify the verdict and Defendants are entitled to a new trial pursuant to the thirteenth juror doctrine (Ground 15).

The thirteenth juror doctrine is a vehicle by which the circuit court may grant a new trial absolute when it finds the evidence does not justify the verdict. Trivelas v. S. C. Dept. of Transp., 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004). Where conflicting evidence exists on the contested issues, a circuit court's decision to sit as a thirteenth juror and grant a new trial absolute is inviolable. Id.

For all the reasons noted above, the evidence presented at trial does not justify the verdict for either the Assembly or Walbeck. The Court should therefore grant Plaintiff a new trial absolute under the thirteenth juror doctrine.

III. This Court should grant Defendants a new trial nisi remittitur.

The trial judge has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive by granting a motion for new trial nisi remittitur. Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

For all the reasons discussed above, the jury's awards to the Assembly and to Walbeck were excessive and should be reduced as an alternative to a grant of a new trial.

This 25th day of August, 2014 at Charleston, South Carolina.

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EXHIBIT A

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

I'ON ASSEMBLY, INC., and
BRAD J. WALBECK and LEA ANN
ADKINS, individually and
derivatively on behalf of
I'ON ASSEMBLY, INC.,

Plaintiffs,

vs. CASE NO. 2010-CP-10-10490

THE I'ON COMPANY, LLC; THE
I'ON CLUB, LLC; THE I'ON GROUP,
LLC, f/k/a CIVITAS, LLC; VINCE
GRAHAM; TOM GRAHAM; I'ON REALTY, LLC;
and I'ON ASSEMBLY, INC.,

Defendants.

VIDEOTAPED
DEPOSITION OF: LEA ANN ADKINS

DATE: July 9, 2014

TIME: 9:13 AM

LOCATION: Duffy & Young, LLC
96 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: MARIE H. BRUEGGER, Registered
Professional Reporter, CRR

MR. BOUCH: Insofar as it involves conversations with counsel, it is privileged.

BY MR. DUFFY:

Q. Let me put it this way, let me put it this way: These are two separate analyses, as you mentioned, of what you view damages are as of July 8th, 2014. Is that right?

A. Yes.

Q. And you also understand that you had testified earlier that what you were looking for was the assembly to own CV6. Is that right?

A. I said that basically that is true.

Q. What you seek in damages, are these -- are the changes, the additions, are those damages that you now contend are your damages following the settlement agreement with Mike Russo?

MR. EVANS: Object to form.

THE WITNESS: I believe I understand what you're asking. I should say that when you reference when I said what I wanted before, that I wanted the property, CV6. I didn't just want the assembly to own it on paper. I wanted it as it had been promised to us, and I think I said that in my deposition, that I wanted what had been promised, and what we have today is ownership, but

it certainly is not what we were promised.
BY MR. DUFFY:
Q. Okay. And my question is: The change from what I want is the CV6 for the assembly, as it was promised, to enumerating the damages that are reflected on these two sheets, that change has come about since the settlement with Mike Russo. Is that right?
MR. BOUCH: Objection to form.
MR. EVANS: Object to form.
THE WITNESS: Yes.
BY MR. DUFFY:
Q. Okay. Now, the sale of CV5 is listed here. So you seek $225,000 for the sale of CV5, along with prejudgment interest that's reflected as $117,194.37?
A. Yes.
Q. Okay. I see an unfunded reserves listed. What does that mean?
A. In the past, the assembly and the I'On Club and then later 148 Civitas, simply put, shared use and expenses, to some extent, for the waterfront properties' facilities back there, and it was agreed, I think as would be understandable when you own an asset like that, that there would

EXHIBIT B

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

I'ON ASSEMBLY, INC., and BRAD J. WALBECK and LEA ANN ADKINS, individually and derivatively on behalf of I'ON ASSEMBLY, INC.,

Plaintiffs,

vs. CASE NO. 2010-CP-10-10490

THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC, f/k/a CIVITAS, LLC; VINCE GRAHAM; TOM GRAHAM; I'ON REALTY, LLC; and I'ON ASSEMBLY, INC.,

Defendants.

VIDEOTAPED DEPOSITION OF: BRAD J. WALBECK

DATE: July 9, 2014

TIME: 11:09 AM

LOCATION: Duffy & Young, LLC
96 Broad Street
Charleston, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: MARIE H. BRUEGGER, Registered Professional Reporter, CRR

Q. And is what was promised, as you understood it, Civic Lot 6, free and clear of encumbrances?

A. Yes.

Q. Now, there's obviously more listed on these two pages.

A. Right.

Q. What I want to know is is your contention of these additional items of damage, do those contentions arise subsequent to entering the settlement agreement?

MR. BOUCH: Objection to form.

MR. EVANS: Object to form.

THE WITNESS: You may have to rephrase it. I alleged these damages have arisen because the defendants didn't do what they said they were going to do, caused these damages.

BY MR. DUFFY:

Q. Right, but before, you were looking -- you sought as a remedy in the lawsuit conveyance of Civic Lot 6, free and clear of encumbrances, correct?

MR. BOUCH: Objection to form.

MR. EVANS: Object to form.

THE WITNESS: Right.

BY MR. DUFFY:

Q. You're not seeking that anymore, right?

MR. EVANS: Object to form.

THE WITNESS: There have been consequences.

BY MR. DUFFY:

Q. Right, and that's what I'm asking.

A. Right, right.

Q. Do these reflect --

A. Yes.

Q. -- damages you're seeking since the entry of the settlement?

A. Yes.

MR. EVANS: Object to form.

BY MR. DUFFY:

Q. You were here when we discussed the unfunded reserves with Ms. Adkins. Can you tell me what your understanding of the line item for unfunded reserves is?

A. The developer has a duty to fund ongoing for replacement of docks. The docks have a limited life span, the boat ramp, all of -- the docks are wooden. They're going to rot out. They'll need to be replaced. So it's something

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON I'ON ASSEMBLY, INC.; BRAD J. WALBECK, AND LEA ANN ADKINS, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF THE I'ON ASSEMBLY, INC., Plaintiffs, vs. THE I'ON COMPANY, LLC; THE I'ON CLUB, LLC; THE I'ON GROUP, LLC F/K/A CIVITAS, LLC; and I'ON REALTY, LLC, Defendants.	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-10-10490 **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR A NEW TRIAL ABSOLUTE OR NEW TRIAL NISI REMITTITUR**

Plaintiffs, Brad Walbeck and Lea Ann Adkins, individually and derivatively on behalf of the I'On Assembly, Inc. (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned counsel, hereby submit this Memorandum in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a New Trial Absolute or New Trial Nisi Remittutur (hereinafter "Defendants' JNOV Motion" or "Defendants New Trial Motion"), and pursuant thereto, states as follows:

SUMMARY OF ARGUMENT

This Court should deny Defendants' JNOV Motion because South Carolina law and the evidence presented at trial supports this Court's prior rulings as well as each and every verdict rendered by the jury in favor of Plaintiffs. Similarly, this Court should deny Defendants New

Trial Motions because the jury's verdicts are consistent with the evidence presented and well supported by the record.

STATEMENT OF THE CASE

The present case concerns I'On community amenities that the Defendants obligated themselves to convey to the I'On Assembly (the homeowners' association) and its members (I'On homeowners). Specifically, the amenities at issue included the "Creekside Park," "Community Dock," and the Community Dock's associated parking and boat ramp, all of which are located along the deep waters of Hobcaw Creek on a specific, civic lot within I'On known as CV6. According to the testimony of four witnesses at trial, the amenities at issue also included an overflow parking facility which was located on another civic lot within I'On known as CV5.[1] During the I'On development and sale process, the Defendants obligated themselves to convey each of the foregoing amenities to the I'On Assembly and its members, free and clear of all encumbrances. However, despite their repeated promises[2] to convey these amenities as well as to maintain a public waterfront, the Defendants entered into talks in mid-2008 to sell the Deep Water Amenities to an unaffiliated, third-party for profit (the third-party is hereinafter referred to as "Buyers" or "Civitas").[3] Upon learning of the potential sale, several I'On Assembly members, including Plaintiffs, made demands upon the I'On Assembly to secure the rights to the amenity

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

[2] As discussed in detail below, the Defendants' promises to keep the waterfront public, and out of private ownership, were reiterated during: (a) the many meetings held prior to approval of the I'On development and again reiterated in (b) the Impact Assessment filed with the Town and incorporated into the town ordinance granting approval of the project; (c) the Property Report required by the Interstate Land Sales Act; (d) various I'On marketing materials; (e) several I'On lot purchase agreements; (f) the dock applications submitted by I'On to DHEC; and (g) by I'On Realty agents to prospective purchasers.

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

property. (*See, e.g.*, March 11, 2009 Bruce Kinney e-mail, Pl. Ex. 56; February 26, 2009 Templeton letter, Pl. Ex. 53).

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

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

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

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

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

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

At a motion hearing held on October 23, 2012, the Defendants' Motion for Summary Judgment, the Assembly's Motion to Dismiss, and Tidelands Bank's Motion to Intervene were all denied. During the same hearing, Plaintiffs' dismissed their veil piercing claims against the individual defendants, but maintained their direct causes of action against the individual Defendants as well as their veil piercing/amalgamation causes of action against the corporate Defendants.

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

Shortly thereafter, the first trial of this case commenced, but ultimately, ended in a mistrial just short of the close of Plaintiffs' case. Following the January mistrial, Plaintiffs' filed

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

a Fourth Amended Complaint, and this case was re-tried before this Court beginning Tuesday, July 29, 2014 and ending Friday, August 1, 2014. The jury returned a verdict in Plaintiffs' favor. Specifically, the jury returned a verdict and awarded damages in favor of Walbeck on the following causes of action: (a) Violation of the Interstate Land Sales Full Disclosure Act ("ILSA" or "the Act"); (b) Negligent Misrepresentation; and (c) Breach of Contract. In addition, the jury returned a verdict and awarded damages in favor of the Assembly on the following causes of action: (a) Breach of Fiduciary Duty; (b) Negligent Misrepresentation and (c) Breach of Contract. Subsequently, Walbeck elected to recover the $20,000 in actual damages awarded to him under the negligent misrepresentation claim while the Assembly elected to recover the $1,750,000 in actual damages awarded to it under the breach of fiduciary duty claim. Defendant's JNOV Motion followed.

SUMMARY OF EVIDENCE PRESENTED AT TRIAL

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

Plaintiffs presented evidence at trial demonstrating the Defendants' "grand plan" to develop and market the I'On neighborhood as an upscale, residential neighborhood which featured many public, common areas as opposed to private, individual home sites. (*See* Grand Plan, Pl. Ex. 145). I'On was developed and operated by The I'On Company, a family owned business consisting of Tom Graham owning 75% and his son, Vince Graham, owning 25%[7]. During the initial planning phase of I'On, the I'On Company, under the direct control of the Grahams, also established several other "I'On" entities. I'On Realty was established as the listing and sales agent for the I'On home sites on behalf of the I'On Company. The I'On Club

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

was established to own and operate certain neighborhood amenities, including the pool and tennis club, as a private, members-only club. The I'On Club was a wholly owned subsidiary of The I'On Company. The I'On Company originally served as the Manager for both I'On Realty and I'On Club. Subsequently, The I'On Group became the Manager of the various I'On LLCs. As evidenced by the record, each of the foregoing I'On entities, along with the Grahams, were involved in various aspects of the development of I'On including planning, financing, marketing, and execution.

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

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

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

1.) The Impact Assessment

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

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

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

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

2.) The Property Report

Similarly, the Property Report dated November 3, 1998, required by the Interstate Land Sales Act, was drafted by the Defendants to inform potential purchasers of the development plan for the I'On neighborhood. (*See* Property Report Receipts, Pl. Ex. 150). The 1998 Property Report was provided to I'On lot purchasers, including Plaintiff Walbeck and Adkins, prior to the execution of their respective purchase contracts. Among other representations regarding the neighborhood, the Property Report includes a "Recreational Facilities" chart which provides a "Community Dock" and "Creekside Park" will be conveyed to the I'On Assembly at no cost during Phase Two of the I'On development process. (*See* Property Report, Pl. Ex. 1). The Property Report's list of "Recreational Facilities" also separates "Creekside Park" from "sidewalks, paths, and trails", indicating a distinction between these amenities promised to be transferred to the Assembly. Moreover, as described in the 1998 Property Report, the "major" characteristics of I'On includes "300 feet of deep water frontage along Hobcaw Creek" which

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

"rather than subdividing into lots. . .is planned as parks" to serve ". . .as an amenity for residents."

As evidenced by the testimony of Walbeck, Ebly, and Hussey, the Defendants and/or their agents represented the "Community Dock" and "Creekside Park" were located on CV6. Moreover, the Defendants and/or their agents represented the "300 feet of deep water" on Hobcaw Creek would remain unencumbered, and thus, be easily accessible to all I'On residents. The record further reflects Plaintiff Walbeck relied on the representations made in the 1998 Property Report when entering his lot purchase agreement.

3.) The Dock Application

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

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

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

Importantly, the dock plan submitted by Defendants and later approved by DHEC, the Army Corp. of Engineers and a host of other governmental authorities, reveals the principal I'On dock, the only dock with a both ramp which sits on 300 ft. of deep water frontage along Hobcaw Creek and is adjacent to a "creekside park",[9] is located on CV 6. Moreover, the dock plan sets forth this amenity as being owned by the "HOA," i.e., the Assembly. (*See* Dock Plan, Pl. Ex. 37).

4.) Plans and Plats

As also established during the trial of this case, the location of the "Creekside Park", "Community Dock", and boat ramp are also shown on plats and plans of I'On. Specifically, surveys prepared on behalf of Defendants by Thomas & Hutton Engineering and Palmetto Land Surveying, as well as hand-drawn plats prepared by Defendant's employee, Chad Besenfelder, clearly depict a Creek Club, Community Dock & Boat Ramp, and "HOA Open Space" located on CV 6 which, in turn, is located on Hobcaw Creek. (Pl. Ex. 196; Pl. Ex. 200, Pl. Ex. 218).

5.) Marketing Materials and Agent Representations

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

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

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

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

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

6.) Purchase Contracts

Indeed, based upon the marketing materials distributed and the many representations the Defendants made as to I'On amenities, including the Community Clubhouse, Creekside Park, Community Dock and Associated Parking, Plaintiff Walbeck decided to purchase a lot within I'On. After visiting the I'On Sales Center, taking a guided tour of I'On courtesy of Defendants' agent, and reviewing the 1998 Property Report, maps and other marketing materials depicting I'On's developmental plan, Plaintiff Walbeck entered into his a purchase contract on November 27, 1999. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Notably, the Walbeck purchase contract expressly referenced the 1998 Property Report which set forth: (a) the Community Dock and Creekside Park would be conveyed to the I'On Assembly at no cost during the I'On development process; and (b) the "300 feet of deep water frontage along Hobcaw Creek" would serve "as an

amenity" for I'On residents. *Id.* Additionally, the Walbeck contract separately included a version of the "Recreational Chart" contained in the 1998 Property Report, and the Walbeck contract specifically provided Walbeck could specifically "rely" on the representations included in both the contract and the 1998 Property Report. *Id.* Moreover, the signature page of Walbeck's contract contained an attestation clause, as well as two other "signed, *sealed* and delivered" references, evidencing an intent by both parties that the contract be considered a "sealed instrument." *Id.* [10]

7.) Defendants' Internal Communications

Not only is the record replete with evidence of the promises and representations made by Defendants to the Assembly and its members regarding the amenity property, the record also reveals Defendants were aware of their promises, and their obligations in connection with same, as evidenced by Defendants own communications.

For example, as evidenced by a November 15, 2006 e-mail between Defendant's employee, Chad Besenfelder, and the Grahams, the Defendants recognized they still owned "common areas" including the "Creek Club Boat Ramp and Dock" which belonged to the "HOA". (Pl. Ex. 179). A few months later, between April and July of 2007, the Defendants outline their options in connection with several of the I'On amenities, one of which includes giving the HOA "the infamous boat ramp and docks" because "the docks are too controversial and taking away even part of this community amenity would cause trouble." (Pl. Ex. 180, Pl. Ex. 181). Similarly, in May of 2007, Defendants provided a "list of venues being transferred to the I'On Assembly", a list which includes "The Boat Ramp." (Pl. Ex. 203). Perhaps most

[10] Plaintiff, Lea Ann Adkins, signed a purchase contract with the Defendants on February 1, 2003. The Adkins' purchase contract differed from the Walbeck purchase contract in that it did not specifically incorporate the Property Report. (*See* Adkins Purchase Contract, Pl. Ex. 45). Nevertheless, Adkins was provided the Property Report at the time of contracting to purchase her lot. (*See* Property Report, Pl. Ex. 1).

poignant, is the Besenfelder e-mail noting "the docks were promised handover to the homeowners and Vince would like to honor their promise one day" (Pl. Ex. 15), a promise repeated in 2009 when Defendants represented they were "preparing to deed the [C]ommunity [D]ock to the I'On Assembly." (*See also* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217).

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

On or about February 5, 1998, the I'On Company incorporated the Assembly for purposes of serving as the I'On homeowners association, as set forth in the Declaration of Covenants, Conditions, and Restrictions of I'On filed February 9, 1998. As set forth therein, all property owners in I'On are members of the Assembly; however, the Assembly was not "turned over" to the I'On homeowners until December, 2005. Prior to this transition, the Defendants, by and through the I'On Company, remained in control of the I'On Assembly and directed all aspects of the development of the I'On community, including entering into negotiations regarding various real estate transactions. The record reflects one such transaction involving the Defendants' recording of an invalid Recreational Easement on February 9, 2000. (Pl. Ex. 42). Executed by the same Defendant employee on behalf of three Defendant entities, the Recreational Easement purportedly provided for "perpetual" access and usage of CV6, yet the easement's term was expressly limited to thirty years according to its express provisions. The record reflects another, similar transaction involving the Defendants' internal conveyance of CV 6 on August 15, 2000 for nominal consideration in the amount of five dollars. (Pl. Ex. 11). As this internal transfer of CV6 among the Defendants occurred *after* the Defendants granted the Recreational Easement, Defendants did not have the right to grant the Easement, rendering the Easement null and void.

Not only did Defendants direct, manage and control all aspects of I'On prior to 2005, the record further reflects the Defendants still influenced and controlled the day to day operations of the Assembly, even after the Assembly was transferred to the I'On homeowners. (See Pl. Ex. 74). In fact, as evidenced by the testimony of Deborah Bedell: (a) the transfer of control and community property from Defendants to the Assembly continues through today; (b) the Defendants retain and exercise their power to reinstate their own agents as members of the Assembly's Board; and (c) the Defendants retain the absolute power to veto any Board action. Defendants absolute "veto power" is perhaps highlighted best by the testimony of Tom Graham who conceded that the Developer had unilaterally placed Besenfelder back on the Assembly Board in January of 2014 and who compared the Defendants' power to veto any action taken by the Assembly Board to that of the United States Supreme Court.

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

As previously mentioned, the record reflects Defendants made many promises to the Assembly and I'On lot purchasers regarding the conveyance of the amenity property free and clear of all encumbrances. In addition to ample evidence of Defendants promises, representations and contractual obligations, the record is replete with evidence of Defendants' failure to fulfill the same.

Indeed, only one month after finalizing the 1998 Property Report, and following many representations that the amenity property would be solely for the use of I'On residents, the Defendants submitted a proposal to a neighboring development, Olde Park, allowing Olde Park residents to use "the I'On Club and I'On's community dock and boat ramp" so long as Olde Park paid a usage fee to the tune of $350,000. (Pl. Ex. 189, 191). Olde Park accepted Defendants' proposal on February 19, 1999, *nine months before* Walbeck entered his purchase contract, yet

neither the Defendants nor the Defendants' agent informed Walbeck of this material change to his use and enjoyment of the amenity property. (Pl. Ex. 190).

In 2000, the Defendants, unbeknownst to I'On purchasers such as Walbeck, amended the 1998 Property Report to remove their obligation to convey a "Creekside Park" and "Community Dock". Notably, this amendment was made within days of Walbeck's closing, yet again, Defendants never informed Walbeck of any change as to the amenities specifically referenced in Walbeck's purchase contract, amenities Walbeck specifically relied upon in entering the same. In fact, the record reflects Defendants sent three letters to Walbeck around the amendment time frame, none of which informed Walbeck that the Defendants were no longer going to fulfill their contractual obligations. (Pl. Ex. 167).

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

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

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

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

Several times in March of 2009, the Defendants reiterated to the Assembly its intention to transfer the amenity property to Assembly; however, unbeknownst to the I'On homeowners and the Assembly, the Defendants and Civitas immediately resumed negotiating the sale of CV 6 and CV 5 e, and reached contract in June of 2009. (*See* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217). On August 1, 2009, the Assembly learned the amenity property was again under contract and, between August 1 and August 5, 2009, the Assembly orally demanded the docks be excluded from the sale and/or that the modifications to the use agreement be consummated. All Defendants ignored the Assembly's demand, and on August 5, 2009, Defendants sold and transferred the amenity property to Civitas. The transfer from Defendants to Civitas was at a price nearly one million dollars less than the then appraised value of the parcel, and included the overflow parking lot (CV5) that had been previously represented to be available for parking. Due to the sale of the amenity property to Civitas, who used the amenity property for commercial purposes, Plaintiff Walbeck and Adkins, as well as other Assembly members, were restricted in their use of the amenity property. Specifically, Plaintiffs were forced to endure repeated dock closures, increased traffic, drunken parties and rowdy visitors, all taking place on the very amenity property they were promised to own free and clear of all such encumbrances. (Pl. Ex. 167).

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

Upon learning of the 2008 potential sale of the amenity property, several Assembly members, including Plaintiffs, made oral demands at Assembly meetings and written demands, upon the Assembly to secure the rights to the Creekside Park and Community Dock property (*See, e.g.*, I'On Board Meeting Minutes, Pl. Ex. 52; Templeton Letter, Pl. Ex. 53; Adkins Letter, Pl. Ex. 54; Bruce Kinney letter, Pl. Ex. 56; Adkins Letter, Pl. Ex. 57). Plaintiffs also demanded the Defendants fulfill its obligations to convey the Creekside Park and Community Dock to the I'On Assembly. (*See, e.g.,* Pl. Ex. 63). Thereafter, the proposed sale of the amenity property was cancelled, and in the interim, it was represented to the Assembly and its members that the Defendants were finalizing the paperwork for the transfer of this common property to the Assembly. (*See* March 25, 2009 Chad Besenfelder e-mail, Pl. Ex. 58). However, this never occurred, and instead, the Defendants sold the property to Civitas on August 5, 2009.[12]

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

As the Court is aware, Plaintiffs settled with Russo at the commencement of the first trial, and were content to try the remaining case without reference to the settlement agreement. However, I'On Defendants moved to assert a counterclaim regarding the validity of the easement; and filed a new, nearly identical action regarding the validity of the easement; and moved to consolidate the new action into the old action. In both the new counterclaim and the new action, the Defendants pled the transfer of title of CV 6 to the Assembly, thereby putting into issue what the Assembly had paid for the title, while still objecting to evidence of the consideration paid from coming into evidence. In other words, the Defendants sought to show

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

that the Assembly was not damaged since it had gotten the Deepwater Amenity back; but objected to the evidence of payment.

This was an improper attempt at twisting the evidence, and the Court rejected it and ruled that the consideration paid would be admissible. Even as the Court indicated how it would rule if the Defendants pressed on, the Defendants did not withdraw the attempt to place the new title into evidence. Plaintiffs even offered on the record to try the case either way – with evidence of the title and consideration paid; or without. Defendants failed to avail themselves of this opportunity. Having improperly created the evidentiary issue, and having failed to avail itself of the opportunity to solve the problem it was creating, the Defendants cannot be heard to complain of the admission of this evidence.[13]

As a result, Plaintiffs introduced evidence that the Assembly paid $495,000 and granted a twenty year free lease, with two additional five year options, to get the property back. Plaintiffs calculated the damage at $3.5M; but reduce their request to the jury to $2.5M to allow for any offsetting benefit gained by eventual title to CV-5, eventual possession of the Creek Club, etc., which the Defendants argued were enhancements to which Plaintiffs were not entitled. On the other hand, Defendants ignored the value of the twenty year lease granted by the Assembly and argued to the jury that the enhancements exceeded the Assembly's cost, and therefore the Assembly had not suffered any damage. The resulting $1.75M verdict indicates that the jury weighed the evidence and reached a reasonable conclusion as to the value of Plaintiffs' damages suffered as a proximate result of the Defendants' conduct.

IMPORTANT LEGAL PRINCIPLES

A.) Judgment Notwithstanding the Verdict

[1313] Defendants later stipulated to the admission of the entire settlement in consideration of Plaintiffs' agreement that the Defendants rights to appeal the threshold ruling would be preserved.

A motion for a directed verdict is predicate to a motion for judgment notwithstanding the verdict ("JNOV"). In other words, a JNOV motion allows the trial court to reconsider its ruling on a directed verdict motion, but the court's consideration is limited to the grounds argued for directed verdict. Rule 50(b), SCRCP. In ruling on a motion for directed verdict, and similarly on a motion for JNOV, the trial court cannot disturb the factual findings of a jury unless a review of the record shows no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct. App. 1996). In making this determination, the trial court must view the evidence, and the inferences reasonably drawn therefrom, in the light most favorable to the plaintiff. *Gilliiand v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004); *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 494 S.E.2d 835 (Ct.App.1997). Specifically, the trial court is concerned with the existence of evidence, not its weight, and the trial court does not have authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998). Thus, the trial court must deny a motion for JNOV when the evidence leads to more than one inference or its inferences are in doubt. *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). Similarly stated, the trial court should uphold a jury's verdict if there is any evidence to sustain it. *Burns v. Universal Health Services, Inc.*, 361 S.C. 221, 231-33, 603 S.E.2d 605, 611 (Ct. App. 2004); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994). Moreover, issues not raised or presented to the trial court or not decided by the trial judge may not be later raised in a post-trial motion for JNOV or otherwise. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (noting a party may not use a post-trial motion to raise an issue

that could have been raised at trial); *Skinner v. Elrod,* 308 S.C. 239, 417 S.E.2d 599 (Ct. App. 1992).[14]

B.) New Trial Absolute and New Trial Nisi Remittur

Unlike motions for JNOV, new trial motions assume the existing evidence presents questions reserved for the jury's determination, but ask whether, in light of all the evidence, the jury reached the appropriate result. Thus, in ruling on new trial motions, the trial court, as the "thirteenth juror", has the discretionary power to deny a new trial absolute or *nisi remittutur* if the court agrees with the jury's verdict based upon the law and the facts, evidence and testimony presented at trial. Rule 59, SCRCP; *South Carolina State Hwy. Dep't v. Townsend,* 265 S.C. 253, 217 S.E.2d 778 (1975); *Fallon v. Rucks,* 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950) (noting the trial court's discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them. . . .").[15]

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

ARGUMENT[16]

[14] Many of the Defendants' current grounds were not raised or argued during directed verdict motions, at the close of Plaintiffs' case and/or at the close of Defendant's case and are not presented for consideration at this time.

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

[16] In further support of Plaintiffs' Opposition to Defendants JNOV and New Trial Motions, Plaintiffs incorporate all grounds cited in their various motions, responses, and memoranda previously filed in this action as well as all grounds referenced in their trial brief or otherwise made during motion hearings or the two trials of this matter. Regarding Defendants' JNOV argument as to the Recreational Easement, Plaintiffs note Defendants rely on their

I. This Court Should Deny Defendants' JNOV Motion Because the Law and the Evidence Supports Each Verdict Rendered by the Jury In Favor of Plaintiffs

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

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

Rule 23(b)(1), SCRCP, governs derivative actions and stipulates the requirements necessary to maintain derivative claims. Specifically, Rule 23(b)(1), SCRCP, requires: (a) the verification of a derivative complaint; (b) particular allegations of the plaintiff's efforts to "obtain action he desires from the directors or comparable authority;" and (c) "the reason for the plaintiff's failure to obtain the action or for not making the effort." Rule 23(b)(1), SCRCP, further provides a plaintiff maintaining a derivative action must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." In determining whether an individual plaintiff is an adequate representative, South Carolina Courts consider two criteria: (1) the common interests between the plaintiff and the members he represents; and (2) the plaintiff's ability and commitment to prosecute said common interests.

Here, the record clearly reflects Plaintiffs' satisfied Rule 23's verification, demand and futility requirements as well as the aforementioned adequacy considerations. (*See* Plaintiffs'

Memorandum in Opposition to Plaintiffs' Motion for a Declaratory Judgment on the Easement, and do not assert a substantive argument regarding the Easement in their JNOV Motion. Accordingly, Plaintiffs similarly rely on their Motion for a Declaratory Judgment on the Easement, along with Plaintiffs' Memoranda in Support of the same, and incorporate these arguments in opposition to Defendants' JNOV Motion as if fully stated herein.

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

B.) Plaintiffs' Claims are Not Barred by the Statute of Limitations

1.) Based Upon the Evidence Presented, the Jury Determined Each Plaintiff "Discovered" Each of Their Respective Claims on August 5, 2009, and thus, Plaintiffs' Brought Suit Well Within the Statute of Limitations

Contrary to Defendants contentions, Plaintiffs' claims are not barred by the Statute of Limitations as evidenced by the jury's verdict specifically finding August 5, 2009 as the date upon which Plaintiffs "discovered" their claims against Defendants. Because the jury determined, based upon the evidence, that Plaintiffs discovered the full extent of Defendants'

misconduct on August 5, 2009, Plaintiffs claims were brought well within the three-year statute of limitations.[17]

In South Carolina, a party must commence an action within three years of the date the cause of action arises. S.C. Code § 15-3-530 (2005). The three-year statute of limitations "begins to run when the underlying cause of action reasonably ought to have been discovered." *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 SC. 172, 183 (2001) *quoting Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 575, 593 S.E.2d 624, 627 (Ct. App. 2004). According to the discovery rule, "the three year clock starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Id.* "The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective." *Holly Woods*, 392 S.C. at 183 *citing Martin*, 357 S.C. at 576, 593 S.E.2d at 627. Consequently, the question becomes "whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his had been invaded, or that some claim against another party might exist." *Holly Woods*, 392 S.C. at 183-84 *quoting Young v. S.C. Dep't of Corrs.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999).[18]

Here, twelves persons of common knowledge and experience considered the circumstances of this case and concluded August 5, 2009 was the date Plaintiffs knew or should

[17]Moreover, even assuming the jury concluded Plaintiffs "discovered" their claims on an earlier date which would result in Plaintiffs' Complaint falling outside of the Statute of Limitations, the doctrine of equitable estoppel would have served to toll the Statute of Limitations in light of Defendant's misrepresentations.

[18]Throughout Defendants' JNOV Motion, Defendants' erroneously characterize the discovery rule as one which is governed by the "existence of a potential claim" as opposed to the "existence of an actual claim." (*See* Def. JNOV Motion, p. 12). Notably, this issue was addressed by the Court when considering the language of the general verdict form, and the Court agreed with Plaintiffs that, under South Carolina law, it's one's awareness of the "existence of an actual claim" that governs the application of the discovery rule. As a result, Defendants consented to a change in the general verdict form which eliminated the word "potential" from all questions relating to when Plaintiffs "discovered their claims" against Defendants. In so consenting, Defendants waived any arguments regarding Plaintiffs' discovery of "potential" claims, and its Plaintiffs' discovery of "potential" claims which is the crux of Defendants' statute of limitation argument.

have known of their claims against Defendants. The jury's conclusion is clearly supported by the overwhelming evidence presented at trial which demonstrated that the Defendants sold amenity property promised to the Plaintiffs, including the Creekside Park, Creek Club, Community Dock *and* Boat Ramp, to an unaffiliated, for-profit entity on *August 5, 2009*. *See* CV 5 Deed, Pl. Ex. 66; Lot 275 Deed, Pl. Ex. 67; Assignment of Club Owners' Rights and Obligations, Pl. Ex. 68; CV 6 Purchase Agreement, Pl. Ex. 148).

While Defendants maintain the jury "ignored" other evidence in reaching their conclusion, the Defendants' argument is wholly without merit – this Court is only concerned with the existence of any evidence supporting the jury's findings, and this Court does not have the authority to resolve conflicts purportedly created by the jury's disregard of other evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 320 585 S.E.2d 272, 274 (2003); *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998).

Here, the evidence revealed the very fact which constituted each and every cause of action maintained by Plaintiffs was the Defendants' August 5, 2009 conveyance of community property to a third-party in direct contravention of Defendants' repeated promise to convey this property to Plaintiffs. Clearly, the evidence documenting the August 5, 2009 conveyance as well as the evidence reflecting the Defendants' promise to convey this property to the Assembly, a promise Defendants repeated over the course of many years and even reiterated on the very day they negotiated the sale of the community property, sustains the jury's findings. (*See* Handover Agreement, Pl. Ex. 47; January 15, 2009 Board Meeting Minutes, Pl. Ex. 52; March 11, 2009 Bruce Kinney letter, Pl. Ex. 56; March 25, 2009 Besenfelder E-mail, Pl. Ex. 58; Russo/ Besenfelder E-mails, Pl. Ex. 119-137, 139, 140, 154; Graham/Besenfelder E-mails Pl. Ex. 180-181, 193-196, 201-205, 212, 214-218, 220-224).

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

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

Just as the evidence sustains the jury's findings as to the dates Plaintiffs "discovered" their respective claims, so too does the evidence sustain the jury's findings that Plaintiff Walbeck's purchase contract was a "sealed instrument."

Specifically, the signature page of Walbeck's purchase agreement includes an attestation clause referencing a "seal", and in addition to the attestation clause, twice references the

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

agreement was "signed, *sealed* and delivered" - once in connection with Walbeck's signature and once in connection Defendants' signature. (*See* Walbeck Purchase Agreement, Pl. Ex. 2). Thus, Walbeck's purchase agreement contains a minimum of three references to a "sealed" instrument, the combination of which clearly supports the jury's findings that the agreement was, in fact, sealed.[20]

Moreover, contrary to Defendants' contentions, "testimony" from a party revealing a special intent to create a sealed instrument is simply not required; rather, one need only look at the instrument (aka the evidence) itself to ascertain whether there was an intent to seal the same. Indeed, Section 19-1-160 of the South Carolina Code specifically provides:

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

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

Here, the jury found it "appeared" from the many "sealed" references existing within Walbeck's purchase contract that the contract was intended to be a "sealed instrument." This is all that is required for an instrument to be "sealed" under South Carolina law, and thus, all that is required to sustain the jury's "sealed instrument" finding.

C.) Plaintiff Walbeck Has The Standing Necessary to Maintain His Individual Claims as Evidenced by Walbeck's Recovery of Individual Damages

Defendants' argument as to Walbeck's purported lack of individual standing is equally misplaced and disingenuous in light of Walbeck's testimony regarding his individual damages,

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

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

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

D.) Plaintiffs' Breach of Fiduciary Duty Claim is Grounded within South Carolina Law

While Defendants cite a "line of cases" purportedly limiting the fiduciary duties a developer owes a homeowners' association, Defendants cannot escape this simple truth: *the relationship* between a developer and a homeowners' association the developer creates, manages and controls, is exactly the type of "special relationship" which *gives rise to fiduciary status under South Carolina law.* According to South Carolina law, "*anyone acting in a fiduciary relationship shall not* be permitted to make use of said relationship to *benefit his own personal interests.*" *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599 358 S.E.2d 150, 152 (Ct. App.

1987) ("[I]t is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of said relationship to benefit his own personal interests.").

Consequently, the Court's "expansion" of South Carolina law in recognizing a "general fiduciary duty of developers to act in the best interests of property owners while controlling the development's property owners association" is really no "expansion" at all – South Carolina law recognizes the fiduciary relationship between a developer and a property owners association and South Carolina law recognizes fiduciaries cannot taken advantage of such "special" relationships. *Id.*[21]

1.) Existence of a Fiduciary Relationship and The "General" Fiduciary Duty

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

situation, *such as a relationship where trust is reposed on one side and there is resulting superiority and influence on the other side.*

When considering facts similar to those presented here, South Carolina courts have found a fiduciary relationship exists between developers and property owners. In *Goddard,* for example, the Court of Appeals expressly recognized a fiduciary relationship between the developer of multiple villas and the owners of said villas by virtue of the organization of homeowners' association and the conveyance of the common areas to the association. *Goddard,* 310 S.C. at 415, 426 S.E.2d at 832-33. By virtue of these very facts - the developers' obligation to create a homeowners' association as well as the developers obligation to ultimately transfer common elements to the same - the villa owners reposed a special confidence in villa developer, *"so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the [villa owners] imposing the confidence."* *Id.* at 414, 426 S.E.2d at 832.[22] Accordingly, Defendants' new emphasis on *Hansen* and its repeated emphasis on *Dunes West* is still misplaced – Defendants still ignore the *precedent already set* in cases involving "fiduciary relationships" – precedent which makes clear there is no "limitation" to establishing

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

the existence of a fiduciary relationship *so long as "trust" is reposed on one hand and "influence" or "superiority" results on the other.*

Here, the record reveals *Plaintiffs trusted*, and the Defendants promised, to: (a) *construct, repair* and *transfer* common amenities to the I'On Community; and (b) form a property owners' association for purposes of, among other things, protecting homeowners' investment. The record further reflects Defendants (a) controlled the Assembly as evidenced by their veto power; (b) managed the Assembly as evidenced by the testimony of Tom and Vince Graham; and (c) influenced both the Assembly and its members by making promises (regarding both the repair and conveyance of community amenities) which they failed to keep as evidenced by the jury's verdict. A fiduciary relationship is presumed to exist between these parties under South Carolina law.

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

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

Given the record reflects Plaintiffs imposed a special trust in Defendants, and the overwhelming evidence indicates Defendants took advantage of this trust to better serve their personal interest as opposed to the Assembly's interest, there exists no error in this Court's prior ruling, and thus, this Court should deny Defendants' JNOV Motion.

2.) Other Fiduciary Duties Developers Owe Property Owners

As an additional sustaining ground, developers, in their fiduciary capacity, also owe homeowners' associations other duties expressly recognized by our Courts in the developer-association context. These additional duties, fiduciary by their very nature, include the duty to properly maintain a development's common areas and to establish a fund sufficient to maintain said areas.[23] In *Dunes West*, for example, the developer served as the original directors of the property owners' association; and in this capacity, it failed to properly maintain the property's common areas and failed to create a sufficient reserve fund for maintenance of said common areas. *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002). Due to the developer's collective failures, the South Carolina Supreme Court found the developer breached the fiduciary duties it owed to the association holding as follows:

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

Id. (emphasis added).

Obviously, as here, a developer's failure to convey community properties in their entirety is the equivalent of conveying them in "substandard condition," and thus, any distinction between properties which s*hould have been conveyed* and *properties which were actually*

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

conveyed in a substandard condition is a distinction without a difference. Moreover, the record reflects the developers were in the process of repairing the community dock in preparation for transfer, per the request of the Assembly, while simultaneously, negotiating the sale of this very property to a third-party for profit, rendering developers' argument wholly without merit. In other words, by failing to convey the community properties *as promised* to the Assembly, the Developers failed to act in the best interest of the Assembly, and therefore, breached at least one of the fiduciary duties it owed the Assembly, and this one failure is all that is necessary to uphold the jury's verdict.

E.) Defendants Are Not Entitled to JNOV on Any of Plaintiffs' Claims

As evidenced by the record, the I'On Defendants, in their role as fiduciaries and in their role as developers, made many promises to the Plaintiffs, both in writing and via way of a multitude of other representations. Specifically, Defendants *promised* to convey the Creekside Park and Community Dock to the Assembly and its members as evidenced by the testimony of Tom and Vince Graham as well as by the express terms of Plaintiff Walbeck's purchase contract and the 1998 Property Report. (*See* Property Report, Pl. Ex. 1; Walbeck Purchase Agreement, Pl. Ex. 2). In addition, Defendants *promised* to convey the Community Dock and associated boat ramp to the Assembly and its members as evidenced again by both Tom and Vince Graham's trial testimony as well as by the March 2009 Defendant e-mails. (*See* Pl. Ex. 58; Pl. Ex. 214; Pl. Ex. 215; Pl. Ex. 217). Defendants also *promised* to convey the 300 feet of deep water frontage along Hobcaw Creek and the "deepest porches" in the Lowcountry for the use and enjoyment of all I'On residents as reflected by various marketing materials and the testimony of Brad Walbeck. Similarly, Defendants *promised* to maintain an open waterfront, free from private ownership, and thus, easily accessible by all I'On residents according to the overwhelming

majority of trial witnesses as well as according to the Developers' own representations to a number of government agencies.

Not only does the record reflect the Defendants' many promises to Plaintiffs, the record also reflects the Defendants deliberately failed to fulfill these promises by selling the very amenity property they promised would belong to the Assembly and its members, to an unaffiliated, for-profit entity in 2009. Given the record contains ample evidence of the Defendants' contractual obligations and other guarantees as well as Defendants' failure to abide by the same, the Defendants are not entitled to JNOV on Plaintiffs' breach of contract claims, Plaintiff Walbeck's ILSA claim, nor on Plaintiffs' negligent misrepresentation claims. As further demonstrated below, the evidence presented at the trial of case indicates (a) Defendants breached a contract which was intended to directly benefit the Assembly; (b) Plaintiff Walbeck relied on misrepresentations promulgated by the Defendants to his detriment; and (c) Defendants, through various marketing materials and their agents' oral representations, deceived Plaintiff Walbeck as to the purchase of his lot. Accordingly, the jury's findings as to Plaintiffs breach of contract, ILSA, and negligent misrepresentation claims are not "untenable" as Defendants suggest, and there is no error of law which warrants the grant of Defendants' JNOV Motion.

1.) Plaintiffs' Breach of Contract Claim Does not Warrant JNOV

First, the jury's finding that the Assembly was entitled to a favorable verdict under its breach of contract claim is not "untenable" given the Assembly is an intended third-party beneficiary of both Plaintiff Walbeck's purchase agreement, the hundred odd other purchase agreements referenced in Pl. Ex. 115, and the 1998 Property Report.

In South Carolina, a contract between two persons for the benefit of a third person can be enforced by the third person, even if he or she is not named in the contract.