2015 WL 10435042 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
First Judicial Circuit
Dorchester County

Kirk R. FOUTZ, et al., Plaintiffs,
v.
ARBORGEN, INC., et al., Defendants.

No. 2010CP1803183.
December 18, 2015.

Final Order

Edgar W. Dickson, Judge.

***1** This matter was tried before the Court during the last three weeks of January, 2015. Following the Court's rulings on various evidentiary matters, the parties submitted proposed Findings of Fact and Conclusions of Law on June 24, 2015. The Court has now given careful consideration to the trial evidence and all other matters appropriately before it, assessed the credibility of witnesses providing testimony in this case and, pursuant to Rule 52 of the South Carolina Rules of Civil Procedure, now publishes these Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Overview of Parties and Claims

The Plaintiffs in this action, Kirk Foutz, John Clark, Tim Stout, Ron Kothera, Samantha Miller, Kimberly Winkeler, Narender Nehra, Shujun Chang, and Mary Cook ("Plaintiffs") are all either current or former employees of Defendant ArborGen, Inc. ("ArborGen"). Former Plaintiff Kristy Martin, a former employee of ArborGen voluntarily dismissed her claims before the conclusion of trial. Plaintiffs have brought a variety of claims against ArborGen, its founding and current members MeadWestvaco Corporation ("MWV"), International Paper Company ("IP") and Rubicon Ltd. ("Rubicon"); its current and former Board Members Bruce G. Burton, S. Luke Moriarty, Kenneth R. Munson, William D. Baughman, R. Scott Wallinger, Wayne A. Barfield, Mark T. Watkins, Sr., David A. Liebetreu, M. Eugene Hundley, Mike Andrews, George O'Brien, and Ed Owens; and its former Chief Executive Officer Barbara H. Wells. Plaintiffs assert causes of action under the Payment of Wages Act, S.C. Code Ann. § 41-10-10(1), section 552 of the Restatement (Second) of Torts, breach of fiduciary duty, breach of contract accompanied by a fraudulent act, civil conspiracy, and the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. [1]

Plaintiffs' allegations arise out of Defendants' actions in dealing with ArborGen's long term incentive plan titled the ArborGen LLC New Value Added Plan, known hereinafter as the NVA Plan. Units in the NVA Plan were offered to each Plaintiff as part of their compensation package when they were hired into ArborGen. Plaintiffs' claim that Defendants failed to honor their rights in the NVA Plan and failed to do so under false pretenses through misrepresentations, concealments, and fraudulent actions. Defendants' claim that the NVA Plan originally given to the Plaintiffs when they were hired into ArborGen was simply a draft plan that was inoperable, worthless, given to the Plaintiffs by a simple, one-time mistake, and never approved by the ArborGen Board.

ArborGen's Early History and Staffing

ArborGen, LLC was formed as a Delaware limited liability company in February 2000 by combining all of the biotechnology forestry research and development programs of three leading forest products companies: International Paper Company ("IP"), Westvaco Corporation, now MeadWestvaco Corporation ("MWV"), and Fletcher Challenge Limited, now known as Rubicon Limited ("Rubicon"), a New Zealand-based company.[2] On June 1, 2010, in preparation for a planned IPO, ArborGen converted from an LLC to a C-corporation. ArborGen currently exists as a privately held Delaware C-corporation.

***2** Prior to ArborGen's formation, each of the three founding companies, MWV, IP, and Rubicon, had independently developed its own biotechnology forestry research program over decades of significant investment. The combination of the founding companies' programs provided ArborGen with a broad portfolio of intellectual property. The combination also provided ArborGen with key founding personnel, as many of MWV and IP's leading biotechnology scientists, research associates and other lab personnel were hired into ArborGen. Included in this group of employees were the Plaintiffs.

Each Plaintiff was hired into ArborGen as a legacy (or "leased" or "secunded") employee from MWV or IP. Kirk Foutz, John Clark, Ron Kothera, Kimberly Winkeler, Samantha Miller, Shujun Chang and Mary Cook were hired into ArborGen from MWV. Narender Nehra and Timothy Stout were hired into ArborGen from IP. Prior to becoming full-time ArborGen employees, each Plaintiff worked on science projects for ArborGen while still being full-time employees of MWV or IP for pay and benefit purposes. TT 153:5-154:23 (Mann).

Thus, MWV and IP originally staffed ArborGen by leasing their own employees, including Plaintiffs, to ArborGen which, at the outset, operated as a "virtual company." By mid-2001, ArborGen began to transition into a veritable company, meaning an entity with its work done by its own full-time employees. *See* PX 121. ArborGen's new full-time employees came over to the company mainly in 2002 and 2003. They came from two main sources, employees hired into ArborGen from MWV and IP, and employees hired from outside the founding companies. Plaintiffs all were part of the first source of employees.

When MWV and IP staffed ArborGen with their employees, two different categories of employees were hired by ArborGen. The first group consisted of the so-called legacy employees. These legacy employees (including all Plaintiffs) were all full-time employees of the American founding companies, MWV and IP, who had been eligible for all fringe benefits at their predecessor employer.

A second group of employees that joined ArborGen during the 2002-03 time period consisted of the so-called non-legacy employees. These non-legacy employees consisted of (1) MWV and IP contract employees who worked for MWV and IP, but did not enjoy the full set of MWV or IP fringe benefits, such as pension plan participation, and (2) outside employees who had no prior employment history with the founders. These non-legacy employees received a different benefits package when hired by ArborGen from that received by Plaintiffs and the other legacy employees.

These different employee categories become important because, as discussed at length below, the form of long term incentive plan given out to the groups differed by group. In a nutshell, the legacy employees, including Plaintiffs, received a long term incentive plan referred to below as the Dot 3 Plan; the non-legacy employees received a different plan, referred to below as the Dot 7 Plan.

In the first part of 2003, the Plaintiffs transitioned from being leased or so-called "secunded" employees to becoming full-time ArborGen employees. From that point forward, ArborGen began supplying their pay and benefits. ArborGen gained by bringing Plaintiffs aboard. As James Mann, who was one of ArborGen's founding officers testified, "[I]t's a lot better to have employees as a start-up .... As a start-up, the value is bringing the employees together, to be able to have

single-minded focus on what you're doing, to have a compensation plan that's single-minded. All of those things were valuable to ensure the stability of the company and the single-mindedness of direction of the company." TT 154:13-20 (Mann).

***3** Plaintiff Kirk Foutz was employed by MWV, from May 1, 1996 until December 31, 2002; Plaintiff John Clark was employed by MWV from June 1999 until December 31, 2002; Plaintiff Ronald Kothera was employed by MWV from November 2000 until December 31, 2002; Plaintiff Samantha Miller was employed by MWV from August of 1999 until December 31, 2002; Plaintiff Kimberly Winkeler was employed by MWV from January of 1999 until December 31, 2002; Plaintiff Mary Cook was employed by MWV from April 2000 until December 31, 2002; Plaintiff Shujun Chang was employed by MWV from August of 1999 until December 31, 2002; Plaintiff Timothy Stout was employed by IP from June 1997 until April 15, 2003; and Plaintiff Narender Nehra was employed by IP from March 1, 2001 until April 10, 2003. Each of the Plaintiffs continued to be employed by ArborGen from their date of hire through June 1, 2010, when ArborGen, LLC converted to a C-corporation, which is the key date for purposes of the claims made and damages sought by Plaintiffs. Two Plaintiffs, Kimberly Winkeler and Timothy Stout, continue to be employed at ArborGen. The other seven Plaintiffs were either terminated or voluntarily left ArborGen after June of 2010.

Each of the Plaintiffs testified at trial. Two additional legacy employees, Jim Grant and John Eric Gulledge, also testified under subpoena and provided testimony corroborating Plaintiffs' contentions. Both Mr. Grant and Mr. Gulledge had formerly been full-time MWV employees. Both remain currently employed by ArborGen and are considered by this Court to be unbiased, independent third-party witnesses.

While working for ArborGen, Plaintiffs were productive. It is undisputed that, as one former ArborGen officer testified at trial, Plaintiffs were "good employees" when they worked for ArborGen. TT 224:1-7 (Mann). ArborGen's Chief Technology Officer Maud Hinchee testified by way of her deposition that the secunded employees, particularly the senior scientists including Plaintiff Shujun Chang, were instrumental in making ArborGen successful by generating intellectual property and technology when ArborGen was starting out. *See* PX 530 (Hinchee Depo. 25:2-11). Indeed, several Plaintiffs made key contributions to the intellectual property of ArborGen that helped ArborGen's value grow over time. *See*, e.g., PX 487 & 489 (relating to somatic embryogenesis patents generated for ArborGen by Plaintiffs Nehra, Clark and Stout). Dr. Nehra testified that the number of patents held by ArborGen that had been originated by its scientists probably numbered in the hundreds. TT 471:17-22 (Nehra). Mr. Clark testified he alone has 10 patent applications from his tenure at ArborGen. TT 1226:14-18 (Clark).

ArborGen's Financial Solidity and Growth

In addition to supplying ArborGen with its founding scientific base in the form of intellectual capital (biotechnology trade secrets) and human capital (key employees from MWV and IP), its founding companies also provided ArborGen with a long-term financial commitment. This long-term financial commitment was made known to Plaintiffs and the other legacy employees in their recruitment to ArborGen. *See* PX 97. In view of the company's reliance on long-term biotech development projects for tree species, financial statement losses were expected in ArborGen's early years. TT 393:16-394:8, 466:17-467:8 (Nehra). ArborGen was not expected to break even financially or be cash-positive for over a decade after its founding. TT 393:20-394:4 (Nehra).

Because it was foreseeable that ArborGen would not be cash positive in its early years, the long-term financial commitment promised by the founding companies was an important hiring inducement, encouraging incoming employees to feel comfortable that their new employer would be in existence for the foreseeable future. TT 365:2-366:7 (Nehra), 490:20-491:9 (Chang); TT 1576:12-24 (Miller). Prospective employees understood that the parent companies would be funding ArborGen for five years or longer. TT 1232:20-1233:3 (Clark); TT 1706:16-21 (Winkeler). The first products of ArborGen were not targeted to even go to market until the 2008/2009 time frame. TT 1706:16-21 (Winkeler).

At the time Plaintiffs were being hired into ArborGen in 2002 and early 2003, the assets and scientific know-how transferred into ArborGen were valued by its founders at $100,000,000, and this initial equity value was revealed by management to those being hired. *See* PX 70A & 41 as well as DX 651; TT 840:8-20 (Munson), TT 1275:7-15, 1299:18-1300:9 (Clark). Over the years, the value of ArborGen grew dramatically. In September of 2004, ArborGen's Chief Executive Officer ("CEO") Barbara Wells told employees that the company's business plan was worth more than $500 million. TT 393:9-19 (Nehra).

***4** ArborGen's value as a going concern was an issue of dispute during the course of trial. However, the only expert valuation offered at trial as to the value of ArborGen on the critical date of June 1, 2010 was from Plaintiffs' expert, Steve Pomerantz. Defendants identified valuation/damages expert, Jim Wolf, who attended Mr. Pomerantz's deposition in New York and was deposed by Plaintiffs in advance of trial TT 658:6-21 (Pomerantz), was ultimately withdrawn as an expert after trial commenced and did not testify. TT 719:23-720:1 (Farrier). Defendants offered no testimony from a valuation/damages expert as to the value of ArborGen.

Instead, Defendants purported to offer opinions as to the value of ArborGen around the June 1, 2010 timeframe through Defendant Luke Moriarty. Defendant Moriarty is a New Zealand resident who has never been qualified to testify as an expert witness. Unlike Defendants' expert James Wolf, who never appeared at trial, Defendant Moriarty was never listed, offered or deposed as a Defense expert on the subject of valuation or damages. At trial he was never qualified as an expert to render opinion testimony on the issue of valuation or damages. He was purely a fact witness. His lay opinion as to ArborGen's valuation as of June 1, 2010 and his criticisms of Mr. Pomerantz' opinions, are unsubstantiated by the evidence before the Court. This Court views Defendant Moriarty's opinions as not supported by competent, credible evidence and self-serving.

In contrast, Plaintiffs' expert, Mr. Pomerantz, was listed as an expert in discovery, he was deposed as such, he did appear in court as an expert, and he was qualified as such without objection. Mr. Pomerantz's opinion was that the worth or equity value of ArborGen as of June I, 2010, was $650,000,000. TT 714:5-9 (Pomerantz), PX 483 (Pomerantz Report). This Court finds Mr. Pomerantz qualified to render the opinions he did in this case and that his opinions are competent and credible. Thus, the facts in the record reflect that over the key time period embraced by this lawsuit, from early 2003, to June 1, 2010, the value of ArborGen increased dramatically, with the value increase exceeding half a billion dollars. For the reasons set forth herein, the valuation of ArborGen as of June 1, 2010 is essential to the decision reached by this Court.

Founder Control of ArborGen Management and Policies

Besides furnishing a founding scientific base and financial staying power, the founding companies also provided ArborGen with management direction by populating the Board and Board committees. In serving on ArhorGen's Board, the Board members were actually representing the interests of the founding company that employed them. *See* TT 167:13-14 (referring to "companies that are being represented by the board members"); 297:1-8 (Mann) *See also* TT 212:16-213:5, 824:1-8 (Munson); TT 945:12-25 (Watkins), TT 997:5-24 (Moriarty), TT 1045:13-1047:15 (Moriarty), TT 1154:11-16 (Liebetreu), TT 2151:17-2152:13, TT 2160:24-2161:6, TT 2187:12-19 (referring to "four representatives of the … companies that had developed the [NVA] plan") (Wallinger), TT 2408:22-2409:2 (Burton). According to Defendant Wallinger, that is the way that ArborGen's affairs were usually handled, to work with a subset of the board but with a representation from each of the equity members of ArborGen. TT 2161:4-6 (Wallinger). From the start, each of the three founding partners had two representatives that it appointed to ArborGen's board of directors.

As is discussed below, the record is clear that ArborGen's NVA Plan benefit was, from conception through implementation, orchestrated and controlled by the founding companies. They devised the NVA Plan in large part to attract and be an incentive to their skilled employees. Under the unique facts of this case, the Court concludes that, as to

their NVA Plan dealings, while they were serving on the ArborGen Board, the ArborGen directors were also working for and representing the interests of the founding partners. *See* PX 530 (O'Brien Depo. 17:15-21).

***5** Each founding partner placed a representative as a member of the Compensation Committee which was the Board Committee that had responsibility for formulating ArborGen's compensation policies, including the development and offering of interests in the NVA Plan and revisions to the NVA Plan. This committee was usually referred to as the Compensation Committee, but sometimes was called the People Committee or the Remuneration Committee. TT 2275:11-14 (Barfield).

The Compensation Committee's responsibilities arc laid out in detail in ArborGen's SEC-fllcd registration statement.

Compensation Committee.....The compensation committee's responsibilities include:
• reviewing and approving corporate goals and objectives relevant to the compensation of our executive officers and other key employees; …

• reviewing and approving the compensation of our other executive officers and other key employees;

• reviewing and establishing our overall compensation structure, policies and programs;

• reviewing and making recommendations to the board of directors with regard to incentive-based compensation plans and equity-based plans;

• reviewing and making recommendations to the board of directors with respect to our policies and procedures for the grant of equity-based awards…;

• reviewing and approving employment agreements, severance agreements and change in control agreements, and any additional special or supplemental benefits for key executives....

See PX 502 p.115-16.

The work descriptions of the Compensation Committee were also substantiated by testimony at trial. The responsibilities of the Compensation Committee and the actions carried out by its founder-representative members and other ArborGen Board founder-representative members form a central part of the wrongdoings alleged by the Plaintiffs in this case.

At both his deposition and at trial, Defendant Burton testified (1) “the purpose of the value-added plan was to promote the best interest of not just ArborGen but also its members,” with those members being Rubicon, MWV and IP, (2) and “when it came to the development and promulgation of the value-added plan, [it is] fair to say that it was a cooperative effort both by ArborGen and its members functioning through their representatives on the board and compensation committee of ArborGen.” TT 2430:6-23 (Burton). In effect, the ArborGen Board and Compensation Committee were stocked with employees of the founders who served both their employers and ArborGen while acting in those positions of authority.

Defendant Entities Accused of Wrongdoing

ArborGen

ArborGen, as the direct employer of the Plaintiffs, is accused of making an offer of employment with tangible benefits, including rights in an NVA Plan. There is no dispute that the offers were made by a properly authorized ArborGen

agent, namely ArborGen's President and CEO, Defendant Barbara Wells. Plaintiffs accepted those offers of employment with ArborGen which included a designated number of units in the NVA Plan with a specified effective date. Plaintiffs each received a copy of the NVA Plan upon acceptance of their written offers and went to work. For each Plaintiff, the effective date of his or her NVA unit award came and went. The NVA Plan was delivered to Plaintiffs by ArborGen's HR Director. The distribution came after they were hired and before they started work. The plan document given Plaintiffs was designated at trial as the "Dot 3 Plan." There is no dispute that the Dot 3 Plans delivered to Plaintiffs were passed out by an authorized agent of ArborGen.

***6** Plaintiffs had worked for ArborGen for 16 months or longer when, in the late summer of 2004, an announcement was made that the NVA Plan was formally being rolled out to them. This new NVA Plan, called the 2002 Value Added Plan, first revealed at that time was called at trial the "Rollout Plan." It differed from Plaintiffs' Dot 3 Plan in several ways.

Acting with full Board authority, ArborGen management disseminated the Rollout Plan in September 2004 claiming it was ArborGen's only NVA Plan, and hence the only NVA Plan under which Plaintiffs had rights. Plaintiffs were told they had no rights whatsoever under the Dot 3 Plan. It was claimed by ArborGen management at the time that the Dot 3 Plan could not be executed, had never been approved, could not deliver a payout and, in essence, had never taken effect.

ArborGen management required at the time of the Rollout in 2004 that Plaintiffs and other legacy employees sign "Acknowledged and Agreed" forms for the Rollout Plan executed for ArborGen by its CEO Barbara Wells (e.g., PX 511, p. 3). The forms were originated and used by Defendants as part of a preconceived plan in an attempt to have each Plaintiff relinquish any rights he or she may have had in the NVA Plan previously received upon acceptance of employment. The message sent to employees was sign here [for the Rollout Plan] or you don't have rights in anything. E.g., TT 331:14-16 (Gulledge), TT 1477:8-18 (Kothera), TT 397:13-16 (Nehra).

The NVA Plan rolled out to the Plaintiffs in September 2004 was represented by ArborGen and its members to be a better plan than the Dot 3 Plan Plaintiffs had originally been given. The NVA Plan originally delivered to Plaintiffs when they were hired was dismissed by ArborGen officers at the time of the Rollout as never really being an actual plan but a mere "mistake" plan, a nonfunctional plan, an unapproved plan, a plan that cannot be executed, and a plan that will never pay out. Employees were given the Rollout Plan and told "this is the plan that exists. There is no other plan." TT 341:11-12 (Gulledge). The message being conveyed was that the plan originally given Plaintiffs and other legacy employees carried no legally valid rights. Plaintiffs claim and provide evidence to this Court that Defendants schemed to exploit Plaintiffs' trust and deprive Plaintiffs of their rights under the Dot 3 Plan by making false representations and actions calculated to mislead Plaintiffs, all for the purpose of getting Plaintiffs to sign for the new Rollout Plan. Cutting Plaintiffs' rights to payment under the NVA Plan was an act that preserved greater equity shares for ArborGen's three founding owners.

MWV, IP and Rubicon

Personnel from MWV and IP were instrumental in providing disclosures to Plaintiffs at the time they were being recruited and hired into ArborGen and thereafter. Plaintiffs fault the three founding companies and their representatives on ArborGen's Board and Compensation Committee for orchestrating the NVA Plan switch in order to benefit the founders by diluting the financial value of the Plaintiffs' NVA Plan units to Plaintiffs' detriment. In the words of ArborGen's former Chief Technology Officer, Maud Hinchee, "ArborGen is not Barbara (CEO Barbara Wells) you know, ArborGen really is that board. And Barbara is kind of an executor, but the Board really makes these higher level decisions around this type of compensation and things and all that." *See* PX 484(A).

***7** Further, Plaintiffs contend that MWV, IP and Rubicon representatives on ArborGen's Board and Compensation Committee authorized, condoned, and ratified the actions of ArborGen management in misleading Plaintiffs, depriving Plaintiffs of the financial value they had accumulated as NVA Plan members, and did so through the Rollout scheme using deception, concealments, and false representations.

Defendant ArborGen Board Members

Bruce Burton

Defendant Bruce Burton is an officer of Defendant Rubicon and has served as a Rubicon Representative on ArborGen's Board from February of 2000 to the present. Mr. Burton was involved in the drafting and revising of the New Value Added Plan. Together with his fellow Board members during the 2001-03 time period, Mr. Burton was aware that units in the New Value Added Plan were being given to employees, including Plaintiffs, prior to the Board formally adopting the NVA Plan. Mr. Burton acted as the Chairman of the Board's Compensation Committee and was involved in setting the number of units that each class of employees would be awarded. Mr. Burton was very interested in the NVA Plan and had a lot of input into wording and suggestions on changes. TT 2136:10-14 (Baughman). Mr. Burton is said to have led the team of ArborGen Directors that purported to exercise due diligence concerning the events of September of 2004 discussed below. TT 885:15-887:3 (Munson). He was Rubicon's point man for the NVA Plan. TT 1045:23-1046:1 (Moriarty). Mr. Burton testified he "was aware that there had been some plans that Dawn [Parks] was replacing" due to misdistribution in the first part of 2002. TT 2409:11-16 (Burton).

Luke Moriarty

Defendant Luke Moriarty joined ArborGen's Board in August of 2004. Despite not being on the Board prior to August 2004, Mr. Moriarty was involved in the drafting and revising of the New Value Added Plan. Mr. Moriarty actively participated in policy matters related to employee long term incentive plans prior to that time. When it came to dealing with matters relevant to this lawsuit, Mr. Moriarty was kept apprised and "had a lot of key and insightful comments into the proper wording and development of the [NVA] plan." TT 2135:21-25 (Baughman). When it came to NVA issues, Mr. Moriarty was "in the loop." TT 2455:19-2456:6 (Burton). He was kept informed by Mr. Burton. Mr. Moriarty expected Mr. Burton to pass on to him "anything I needed to know" concerning ArborGen matters and particularly the NVA. TT 1023:24-1024:5 (Moriarty). He was very often on conference calls when it came to shaping the NVA Plan. TT 2135:3-2136:14 (Baughman). Like Mr. Burton, when the NVA Plan was being drafted, he offered a lot of input into how it should be worded. TT 2135:21-2136:9 (Baughman). According to ArborGen's former acting CEO Bill Baughman, "The NVA Plan was approved (and to a large degree developed) by the Board Compensation Committee … with a lot of valuable input from Luke [Moriarty] who participated in all of our conference calls." DX 625, p. 3. Mr. Moriarty was on the ArborGen Board when the Rollout occurred and he continues to serve as a Rubicon representative on the ArborGen Board.

Michael Andrews

Michael Andrews was a Rubicon representative on ArborGen's board from February 2000 until August of 2004. He was involved in the initial drafting and revising of the NVA Plan and actively participated in policy matters related to employee long term incentive plans. DX 625, p. 3. Mr. Andrews was replaced by Mr. Moriarty as a Rubicon representative on the ArborGen Board. Defendants Burton, Moriarty and Andrews worked at keeping each other informed about what was happening at ArborGen concerning various issues, including the NVA Plan. TT 2454:23-2460:7 (Burton).

Kenneth Munson

***8** Kenneth Munson, like Bruce Burton, joined ArborGen's board in February of 2000 and continues to serve. Mr. Munson is a representative of IP. With Mr. Burton, Mr. Munson has been a long-time member of ArborGen's Compensation Committee. In the words of Defendant Moriarty, "Mr. Munson was intimately involved with the NVA

plan and the rollout." TT 1048:15-16 (Moriarty). Mr. Munson testified that with Mr. Barfield and Mr. Burton he served on a team appointed to conduct due diligence concerning the handling of the NVA Plan given to Plaintiffs upon their hiring. TT 884:15-886:11 (Munson); *See* PX 530 (Munson Depo. 55 et seq, 147 et seq).

Mr. Munson testified he was a strong believer in fair treatment of employees. *See* PX 530 (Munson Depo. 189:16-24) (where an issue of fairness to employees arises, the company's policy and practices call for indulging the employees' interests and working to be fair to employees and promote an outcome favorable to the employees)). He said the principle of treating employees fairly and indulging their interests was a principle he followed in his dealings with the NVA Plan. TT 189:25-190:2 (Munson). The evidence reflects that privately to a fellow IP executive who served for years on ArborGen's Board, Mr. Munson derided the Dot 3 Plan, conveying the message that the Dot 3 Plan was an "incentive plan that on its face would be unsupportable financially and ridiculous in some ways." *See* PX 530 (Liebetreu Depo. 19:2-6), (Munson Depo. 179:16-180:9).

William Baughman

William Baughman served as an ArborGen Director during 2000-02. He also served as ArborGen's acting CEO from late 2001 to mid-2002. While performing those roles he did so as a full-time MWV employee where he reported to Defendant Scott Wallinger, until he retired from MWV. Following his retirement in 2002, he still continued to serve as ArborGen's CEO on a contract basis until the hiring of Barbara Wells as CEO in September of 2002.

As interim CEO in 2002, Mr. Baughman met with prospective employees in May of 2002 and presented information about the NVA Plan being finalized, including the established initial value of $100,000,000. TT 1403:23-1405:15, 1410:13-17 (Kothera). He also executed offer letters to employees, like Mr. Grant, offering unit awards in the NVA Plan (the Dot 3 Plan) as "a sign-on bonus." *See* PX 41, p. 1. He was quoted as telling the group of prospective employees, "If you remember, they made all those Microsoft millionaires. If things turn out half as well as we expect, we'll be making a slew of ArborGen millionaires." TT 1235:25-1236:11 (Clark), 1829:14-1850:25 (Foutz).

Mr. Baughman also represented to MWV employees being offered positions at ArborGen that the most likely course of events would be that ArborGen would convert to a C-Corporation triggering stock options to the employees. TT 1235:10-14, 1346:10-15 (Clark); TT 1404:8-19 (Kothera), TT 1626:18-22 (Miller), 1709:20-1712:15 (Winkeler). Mr. Baughman testified to having knowledge in mid-2002 of an incorrect version of the NVA Plan having been distributed to ArborGen employees. TT 2124:17-2126:20 (Baughman).

Scott Wallinger

Scott Wallinger was a MWV representative on ArborGen's Board from January 2002 through approximately 2003. When he joined the ArborGen Board he replaced MWV representative Ed Owens; he was replaced in 2003 by MWV representative Mark Watkins. Before Mr. Wallinger joined the ArborGen Board, Bill Baughman reported to him at MWV and shared with him information about ArborGen developments. Prior to joining the Board he was copied on select emails from ArborGen CEO Bill Baughman relating to the preparation of the NVA Plan. *See* DX 568.

***9** In 2002-2003 he served as Board Chairman. TT 2201:10-16 (Wallinger). He also served as ArborGen's acting CEO during 2002, (TT 1717:24-1718:4 (Winkeler)) and served on the ArborGen Compensation Committee. He was knowledgeable about the development and distribution of NVA Plan documents, including the Plan documents and the NVA Award Agreements. *See* PX 70A & 407; *see also* DX 518, 619, 621.

Mr. Wallinger testified to having knowledge in mid-2002 of an incorrect version of the NVA Plan having been distributed to ArborGen employees. TT 2225:12-2226:14 (Wallinger).

Mark Watkins

Mark Watkins succeeded Mr. Wallinger as a MWV representative on ArborGen's Board. He led the movement of MWV's forest research group into the joint arrangement that became ArborGen. TT 930:3-14 (Watkins). He served on ArborGen's Board from late 2003 until October 2014. He had been kept apprised of ArborGen developments by Mr. Wallinger over the year and a half to two year period pre-dating his joining the ArborGen Board. TT 930:3 to 931:5 (Watkins). He served MWV as a senior-level director on ArborGen's Board. TT 931:10-22. As a Board Member, he received a report in March of 2005 on the Rollout Plan that referred to "incorrect documents being included in personnel hiring documents" that led to "one-on-one discussions with all employees" and purportedly resulted in the "situation" being "turned around." *See* DX 662, p. 29. Admittedly, Mr. Watkins did no investigation to determine what happened or why the situation needed to be turned around.

Wayne Barfield

Wayne Barfield served as vice president of forest research at MeadWestvaco Corporation from 2002 to March 2008 when he joined ArborGen as a full time employee. He also replaced Bill Baughman as a MWV representative on ArborGen's Board. He served as a director of ArborGen from November of 2002 to 2007. He was ArborGen's General Manager of North American Operations from April 2008 to August 2010, and became ArborGen's Vice President and General Manager of U.S. Operations starting in September of 2010.

During Mr. Barfield's time on the board, he served on ArborGen's Compensation Committee and, according to Mr. Munson, Mr. Barfield was heavily involved with the promulgation, distribution and analysis of the NVA Plans. TT 877:14-18 (Munson).

As both a Compensation Committee Member and a Board member, he received reports concerning problems incurred by ArborGen management in connection with the Rollout in September of 2004. As noted above, he also was identified by Defendant Munson as a member of the ArborGen Committee tasked with investigating the events of September 2004. Admittedly, Mr. Barfield does not recall being on such committee and did no investigation concerning the events of the September 2004 Rollout.

Gene Hundley

Gene Hundley replaced Mr. Barfield as a MWV representative on the ArborGen Board in 2008. He served on the Compensation Committee in 2010 when ArborGen's NVA Plans terminated as a result of the conversion of ArborGen, LLC to a C-corporation. He testified he was not familiar with ArborGen's NVA Plans. TT 1193:7-1194:1 (Hundley). He "didn't know any details of the NVA until really the case came about." TT 1194:17-18 (Hundley). During the time he served on the Board and until the lawsuit he never heard any contention that ArborGen had distributed NVA plans that "couldn't work, wouldn't work, didn't work, [or] were inoperable." TT 1204:22-1205:4 (Hundley).

***10** In his view, ArborGen had an obligation to deal fairly with its employees. He testified that at the time of the termination of the NVA plans it was the intent of ArborGen's management and Board "to benefit the employees, treat the employees fairly, [and] see that the employees got a fair shake." TT 1200:4-8 (Hundley). He testified that ArborGen's culture called for employees to be treated with respect and integrity and honesty and that any mistakes that were made were to be straightened out promptly and properly. TT 1206:25-1207:15 (Hundley).

Admittedly, Mr. Hundley never attempted to determine who was responsible for the circumstances that culminated in the lawsuit and docs not know of any board member who did. TT 1207:16-1209:4 (Hundley).

David Liebetreu

David A. Liebetreu served as an IP representative on ArborGen's Board starting in January 2005. Mr. Liebetreu testified at his deposition that Kenneth Munson, an IP-representative Director on ArborGen's Board told him about "what seemed to be the specious case of somebody had a draft document with a typo in it that represented an incentive plan that on its face would be unsupportable financially and ridiculous in some ways." *See* PX 530 (Liebetreu Depo. 19:2-6). At trial, Mr. Munson testified his discussion with Mr. Liebetreu about the typo would have come up "in early September of 2004" or in "the middle of September 2004." TT 823:23-826:8 (Munson). At trial, Mr. Liebetreu testified the conversation "probably followed the delivery of [the complaint] in the fourth quarter of 2010. TT 1155:9-15 (Liebetreu).

Mr. Liebetreu testified he had a fiduciary duty to International Paper when serving on ArborGen's Board "to make sure that the investments that we've been making over the last decade or so would somehow create value." TT 1164:6-9 (Liebetreu). Mr. Liebetreu explained that a major reason for testifying at trial was because he was "looking out for the investment in International Paper and … want[ed] to make sure that the story is clear and justice is served, that the simple mistake that was made doesn't somehow cost the company that I represent money." TT 1144:21-25 (Liebetreu).

He testified he read the Complaint but was unaware of the contention that employees were lied to at the time of the Rollout. TT 1171:7-13 (Liebetreu). According to Mr. Liebetreu, employees were to be treated with respect and that ArborGen's management was intent on doing the right things for the right reasons, and that if a mistake was made that is something the Board "would take to heart and want to investigate and resolve." *See* PX 530 (Liebetreu Depo. 43:9-45:21). Admittedly, Mr. Liebetreu never attempted to determine who was responsible for the circumstances that culminated in the lawsuit brought by Plaintiffs.

George O'Brien

George O'Brien was an IP representative on the ArborGen board until February of 2005 when he left IP. He was succeeded by Mr. Liebetreu on the ArborGen Board. Both Mr. O'Brien and Mr. Liebetreu supervised Mr. Munson. Mr. O'Brien did not testify at trial. Counsel for Defendants explained Mr. O'Brien's limited role: "George O'Brien was on the board early on, is on some emails, but he … didn't have any … input in the development of the NVA plan. George O'Brien was there in 2001 and is on some emails that have already been entered into evidence about the development of the NVA plan or the drafts, but he never provided any input in any documents and had testified at his deposition he doesn't recollect anything." TT 1675:7-14 (stipulation by Defense Counsel).

***11** Conversely, Mr. O'Brien was reported by Bill Baughman to be on the Compensation Committee. TT 2135:3-14 (Baughman). Mr. Baughman wrote that "The NVA plan was approved and to a large degree developed by the board compensation committee, made up at the time of George, Jim, Mike and me," with "George" being Mr. O'Brien. DX 625-3, TT 2253:21-2254:11 (Baughman). When asked whether he believed companies have a right to cut employee benefits once promised and delivered purely to cut expenses, Mr. O'Brien testified that, "America is generally an at-will employment, and companies do have the right to change their plans if they deem - if they deem it." *See* PX 530 (O'Brien Depo. 61:14-24). He was unaware of any NVA Plan provision protecting employees from unconsented adverse changes in their NVA benefits. *See* PX 530 (O'Brien Depo. 62:7-18).

The 2004 Rollout was something he did not closely monitor and about which he has no knowledge. *See* PX 530 (O'Brien Depo. 68:3-69:2). He testified that it "might" be all right to give employees draft benefit plans, and that it "sounds like a good practice" to label the drafts as "drafts" if they were going to be used. *See* PX 530 (O'Brien Depo. 79:9-80:5).

Ed Owens

Ed Owens reported to Bill Baughman at MWV while Baughman was on the Compensation Committee. Mr. Owens was copied on some of the NVA Plan drafts when they were being prepared in 2001. He left the ArborGen Board in late 2001. Mr. Owens did not testify at trial.

Mr. Owens testified at his deposition that he was unsure that he ever saw the plan that is the subject of the lawsuit; nor does he recall discussing the plans with anyone. "I had nothing to do with it." *See* PX 530 (Owens Depo. 12:19-13:9). Yet, Mr. Owens sent PX 40 to Jim Grant advertising work being done on a "mechanism for key personnel to share in the success of ArborGen," with "all of the details [expected to be] worked out in a few weeks. He testified that the NVA Plan was such a "mechanism" and that he could not think of any other plan/program that was designed to provide such a mechanism. *See* PX 530 (Owens Depo. 19:5-21:1).

Contrary to Mr. Owens' testimony. Plaintiff Chang testified at trial that he was told about ArborGen's long term investment program by Defendants Baughman and Owens and that they made it sound "excellent." TT 491:15-493:12 (Chang). Mr. Owens testified no Plan was approved while he served on the ArborGen Board, and that giving out an unapproved plan "is not something I would recommend." *See* PX 530 (Owens Depo. 15:10-11). His practice would be to "insist that the staff refrain from distributing any non-approved plan." *See* PX 530 (Owens Depo. 15:24-16:2)

Mr. Owens testified he learned later that the Dot 3 Plan had been distributed to most if not all of the legacy employees. See PX 530 (Owens Depo. 16:4-10). Admittedly, Mr. Owens, even though he is a named Defendant, never read the Complaint and was unaware about "what's in there." *See* PX 530 (Owens Depo. 37:2308:3). Mr. Owens claims he did not know that NVA units were being awarded to employees during the term he served as an ArborGen Board Member. *See* PX 530 (Owens Depo. 51:12-16).

Defendant CEO Barbara Wells

Defendant Barbara Wells served ArborGen as its CEO and President from September of 2002 through September 2011. She was the chief ArborGen management official most involved in the offer, issuance, and revocation of Plaintiffs' rights under the NVA Plan they were given to list the elements of the offeree's proposed compensation package, including salary, bonus, medical, dental and other benefits, and vacation. Item (3) on the list was the following:
Equity Participation: As an employee of ArborGen, LLC, you are eligible to participate in the ArborGen New Value-Added (NVA) Plan. This plan provides employees a way to share in the successful long-term growth in the value of ArborGen. As a new employee of ArborGen, you are being awarded 6250 [or some other number] units effective January 1, 2003. From time to time the Board of Directors expects to make additional awards of NVA units on a periodic basis to qualifying employees based on ArborGen and individual performance. An award agreement and plan document will be sent to you to memorialize this initial grant.

***12** *See* PX 118.

In November of 2002, Plaintiffs Foutz, Clark, Kothera, Miller, Winkeler, Cook, and Chang returned their signed offer letters, accepting employment with ArborGen. The signed offer letters each listed the employee's respective New Value Added units awarded, and the date the award became effective, which for each of these Plaintiffs was January 1, 2003.

Plaintiffs Nehra and Stout were hired from IP in April of 2003. Their offer letters were basically the same as the other Plaintiffs', except for the unit award effective date being set as April 15, 2003 instead of January 1, 2003. *See* PX 118.

Unquestionably, the terms of the "compensation arrangements" agreed to between ArborGen and Plaintiffs were contractual in nature. The offer letters to Plaintiffs unequivocally represented to Plaintiffs that: (1) ArborGen actually had a NVA Plan, (2) Plaintiffs were eligible to become Plan participants; (3) that the Plan was designed to afford a means for Plaintiffs to accumulate wealth by sharing in gains made when and if ArborGen grew in value; and (4) upon joining ArborGen as an employee a certain number of Plan units "this initial grant" would belong to Plaintiffs. *See* PX 118. Two additional documents, "the plan document" and "[a]n award agreement" were promised to be later sent to Plaintiffs to "memorialize this initial grant." *Id.*

Plaintiffs testified at trial in substance that at the time of their offers they were led to believe, and reasonably did believe based on their offer letters and related pre-hiring communications, that the ArborGen NVA Plan referenced actually existed, that the specified number of NVA units were actually being awarded to them, and that their respective unit award actually did become effective on the date stated in the letter. This testimony was credible.

In light of the offer letter signed by ArborGen's CEO and accepted by each of the Plaintiffs, each Plaintiff was entitled to believe that the ArborGen NVA Plan referenced did exist, and that units were actually being awarded to them by the CEO as an authorized ArborGen agent, and that the unit awards actually became effective on the date stated in the letter.

As discussed above, the "Equity Participation" opportunity described in the ArborGen offer letter had been described to prospective legacy employees in glowing terms by MWV and IP representatives when they were being recruited.

The "Equity Participation" awards mentioned in paragraph 3 of Plaintiffs' offer letters from CEO Wells were in the nature of a "sign-on bonus." In fact, the NVA units were referred to as a "sign-on bonus" in the offer letter sent by ArborGen's CEO, Defendant Baughman, to legacy employee Jim Grant. See PX 41. Mr. Grant understood that his NVA Units were being given as a sign on bonus. TT 107:16-18 (Grant). Plaintiff Nehra testified he viewed the long-term incentive plan as a sign-on bonus that he was being given, not a lottery ticket as suggested by defense counsel. TT 379:3-14 (Nehra). Defendant Burton was involved in the NVA Plan design from the early days. He testified he had always viewed the NVA awards as a sign-on bonus. TT 2449:5-13 (Burton); See PX 330. Mr. Baughman also told Plaintiffs at promotional meetings that the NVA units were a sign on bonus to employees hired into ArborGen. TT 1712:8-15 (Winkeler). ArborGen's original CEO, Kenneth Davenport, testified that the NVA Plan functioned in a way that was "really tantamount to a stock-option plan." TT 586:14-19 (Davenport). Plaintiff's expert, Steve Pomerantz testified that the structure of the NVA Plan was identical to a plain vanilla options contract. TT 663:10-14 (Pomerantz).

***13** Upon being hired, each of the Plaintiffs accepted the terms of the offer letter given to them, including acceptance of their units awarded in the ArborGen New Value-Added (NVA) Plan. Plaintiffs were awarded NVA units in the following amounts:

Plaintiff	**# of Units**
Kirk Foutz	1250
John Clark	1250
Ron Kothera	1250
Tim Stout	1250
Narender Nehra	6250
Samantha Miller	1250
Kim Winkeler	1250

Shujyin Chang	6250
Mary Cook	*500*
	20,500

After the signed offer letters were tendered by Plaintiffs back to ArborGen, Plaintiffs each received copies of their NVA Plan. Each Plaintiffs' NVA Plan was contained within his or her packet of hiring documents distributed by ArborGen's HR Director, Dawn Parks. Each Plaintiff's NVA Plan document was identical. *See* PX 135. Each was titled, "ArborGen LLC New Value Added Plan," matching the description in Paragraph (3) of the offer letters. *See* PX 118.

Authority of Wells and Parks to Make Representations

It is undisputed that Ms. Wells, ArborGen's CEO and President, had authority to make the offers to Plaintiffs on behalf of ArborGen. It is undisputed that Dawn Parks, who was ArborGen's HR Director, had authority to pass out the NVA documents. As stated previously, the plan document Plaintiffs were given upon being hired was given the short-hand designation at trial, the "Dot 3 Plan." That designation refers to the footer numbers on the left side of the bottom of the Plan's pages which end ".3" All Plaintiffs testified they received a copy of the Dot 3 Plan in their hiring packets after they signed their offer letters accepting employment.

Scope of the Dot 3 Plan's Distribution

Plaintiffs were not the only legacy employees who received the Dot 3 Plan. Testimony at trial established that the Dot 3 Plan had been given to a large number of the MWV and IP legacy employees who were hired in to ArborGen, "in round numbers, 50 or 60 people." TT 188:5-10 (Mann); TT 2511:3-6 (Baum).

Besides Plaintiffs, also in the group of legacy employees receiving the Dot 3 plan were Eric Gulledge and Jim Grant. Both identified the Dot 3 Plan as the plan they received when they were hired. As stated earlier, their plans were identified as PX 42 and 512, respectively. See TT 108:18-22 (Grant), TT 320:15-321:2 (Gulledge). The hiring process witnesses Grant and Gulledge reported having experienced, including receipt of the Dot 3 Plan after accepting ArborGen's offer, essentially mirrored the hiring process as described by Plaintiffs. Their testimony about the Rollout event likewise paralleled Plaintiffs' reports.

Mr. Gulledge testified that he felt he has been treated fraudulently and lied to. He testified that, concerning his NVA Plan dealings, "somewhere within there, there was a lie that happened." TT 340:16-21 (Gulledge). As Mr. Gulledge articulated it, the lie arose because he was given a plan originally and then that plan was eliminated and replaced by a different plan under the representation that no other plan conferred any rights. TT 340:25-341:17, 345:13-16 (lie was company's position that "legally only the final version was binding") (Gulledge). Mr. Gulledge testimony of the lie told to him, rests on the same actionable conduct the Plaintiffs' have alleged. Mr. Gulledge, remains employed at ArborGen and has no financial interest in the outcome of this case. His testimony that "somewhere within there, there was a lie that happened" corroborates Plaintiffs' contentions and proof.

***14** The lie testified to by Mr. Gulledge is consistent with Plaintiffs' allegations of their contractual rights being invaded by the Defendants through the Rollout scheme's use of false representations and concealments. Plaintiffs' allege they had valid, enforceable contractual rights to benefits under the Dot 3 Plan, that their contractual rights were breached, and that the breach was accompanied by separate and distinct fraudulent acts and concealments by ArborGen and its founders through their agents. Plaintiffs' allege that Defendants wrongfully prevented them from sharing in the growth of ArborGen's value as they were entitled to do under the Dot 3 Plan. Plaintiffs' claim they have been wrongfully deprived

by Defendants of the value due them under the NVA Plans they signed for when they were hired, and that they had those rights taken away under false pretenses. As discussed in detail below, clear, cogent, and convincing evidence in this record substantiates Plaintiffs' contentions.

Non-legacy Employees and the Dot 7 Plan

Unbeknownst to Plaintiffs, at the time they and other legacy employees were hired and given copies of the Dot 3 Plan, the non-legacy employees being hired by ArborGen were being awarded NVA units in a different plan, referred to at trial as the "Dot 7 Plan." *See* PX 426. The hiring documents that accompanied the award of units in the Dot 7 Plan to non-legacy employees included an Award Agreement. *See* PX 109, 507, 509 & 510. It is undisputed that the Dot 7 Plan was given to non-legacy employees hired by ArborGen including CEO Wells and former ArborGen Officer, James Mann. Mrs. Wells' NVA Plan and Award Agreement was the topic of numerous Board emails, which were presented at length at trial by the defense.

The numerous emails concerning Ms. Wells' NVA Plan and Award Agreement confirms this Court's understanding of the importance of the NVA Plan and that the Board, especially the Compensation Committee, was deeply involved in its implementation to employees. In their dealings related to the Dot 3 Plan, the Rollout Plan, the Rollout operation, and the Appreciation Rights Conversion in 2010, the ArborGen directors who served on the Compensation Committee and the Board were serving the interests of, and acting on behalf of the specific ArborGen founder by whom they were employed, as well as ArborGen itself.

Dot 3 versus Dot 7 – Similarities and Differences

Administrative Similarities Between the Plans

The Dot 3 and Dot 7 Plans were generally similar in form and operation in that both were designed to provide employees owning units with a fractional share in the growth of ArborGen assuming the company gained value over time. Most of their administrative provisions were identical. Thus, both NVA Plans contain language protecting participants from being prejudiced by adverse termination or amendment action taken by ArborGen's Board.[3] Both Plans, likewise, include a provision providing that in the event the Plan terminated as a result of ArborGen converting from being an LLC into a corporation, that outstanding NVA unit awards would terminate and each plan participant would receive an equitable award in the successor corporate plan. *See* Section 9(a) of PX 135 (Dot 3 Plan), and PX 426 (Dot 7 Plan). Equitable, as determined by this Court, means receiving units equal in value to the units held by the employee in the predecessor plan.

***15** In promotional meetings with prospective ArborGen legacy employees, Defendant Baughman represented that the most likely outcome for a type of triggering would be the conversion of the LLC to a corporation. TT 1404:5-23 (Clark). He further represented that upon conversion, the Plaintiffs would receive an equitable award of stock options. TT 1429:12-24. Defendant Baughman represented to the MWV employees being hired into ArborGen that the conversion of the LLC to a Corporation was an important event under the NVA Plan. TT 1271:16-1272:6 (Clark); TT 1581:10-13 (Miller).

Financial Differences Between Dot 3 and Dot 7

While the Dot 3 and Dot 7 Plans were similar in form and operation, they differed when it came to calculating the employee's financial share in ArborGen's growth over time. There arc two ways in which, from a unit value calculation standpoint, the Dot 7 Plan was inferior to the Dot 3 Plan given to Plaintiffs. One way related to the way the gain in

ArborGen's value is calculated, the second pertained to the fraction of the gain being shared per NVA unit held by the employee.

Unit value under the plans is calculated by subtracting the beginning ArborGen equity value (initial value) from the ending ArborGen equity value (final value), and multiplying the difference by a fraction. For the Dot 3 Plan, the fraction was .0001 percent. For the Dot 7 Plan, the fraction is .00001 percent, which is 90 percent smaller than the Dot 3 Plan. Thus, assuming hypothetically, a beginning equity value for ArborGen of $ 100 million and an ending equity value of $650 million, the gain in value would be $550 million. Focusing purely on the decimal-shift difference between the Dot 3 and Dot 7 Plans, the per unit gain for Dot 3 Plan members would amount to $550 per NVA unit held; for Dot 7 Plan members, the gain would be $55 per NVA unit held.

The other key difference between the Plans relates to the way gains were calculated. The Dot 3 Plan features a fixed beginning equity value, meaning that it does not change over time once the units are issued. The Dot 7 Plan is different. It features an initial base value that rose over time in two ways.

First, the initial base value rose as new capital investments were put into ArborGen by the founders. For example, if the beginning initial value for ArborGen's equity was $100 million, and another $70 million was invested in ArborGen subsequently, the added investment went to increase the “adjusted” initial value. This increase in base value had the effect of increasing the amount subtracted from the final value, thereby reducing the ultimate payout to unit-holders under the Dot 7 Plan.

Second, is another feature added into the Dot 7 Plan which likewise had the effect of cutting employees' returns was the addition of a “hurdle rate” in the form of an interest charge on capital contributions made by ArborGen's founders after the units were issued. This interest charge was 15% compounded daily, meaning an effective annual interest rate of over 16%. Simply put, the Dot 7 Plan was formulated to yield a smaller slice (value cut by more than 90%) of a smaller pie (shrunk due to being cut by post-award capital contributions plus interest) compared to the Dot 3 Plan. Whereas the Dot 3 Plan featured a fixed initial value, the Dot 7 Plan featured a moving “hurdle rate.” As that hurdle rate rose upward, the value of the plan to Dot 7 Plan holders was cut. Sometimes at trial the rising hurdle rate was referred to as the Plan's “adjusted initial value.”

Assuming an initial base value of $100 million, and a final equity value of $650 million, the difference between unit values generated by the different plans over time is dramatic. Whereas the Dot 3 Plan formula would yield a gain of $550 per unit, the Dot 7 Plan would yield a far smaller return. For the Dot 7 Plan units, for the period from January of 2003 to June 1, 2010, the combined effect of the decimal shift and the rising hurdle rate result in the same gain in value for ArborGen of $550 million yielded a Dot 7 Plan employee participant a gain of only about $20 per unit. *See* PX 428, p. 3.

***16** Thus, during 2002, 2003 and into the late Summer of 2004, ArborGen employees were hired and working under two very different NVA Plans, each of which had the same name, “ArborGen, LLC New Value Added Plan.” The Dot 3 Plan went to legacy employees; the Dot 7 Plan went to the non-legacy employees. TT 219:4-11 (Mann). The Dot 3 Plan prospective financial payout given to legacy employees hired into ArborGen from MWV and IP was potentially more lucrative. The evidence before the Court supports Plaintiffs' contention that they were offered and accepted unit awards in a potentially lucrative NVA Plan, the Dot 3 Plan.

At trial, a former ArborGen officer, James Mann was called by Plaintiffs. Mann served at one time as ArborGen's de facto CFO and performed financial evaluations about how the NVA Plans worked from a financial standpoint. TT 185:8-23 (Mann). Mr. Mann was asked:

> Q. Do you remember ever having the thought that the board of directors concluded that the Dot 3 plan was too lucrative or expensive for the -- too lucrative to employees or expensive to the company or too rich for the employees and therefore decided to go with a less lucrative plan?

TT 248:9-13 (Mann).

He responded: “To answer the question, yes.” TT 248:14 (Mann).

It is clear from the record facts that ArborGen's leadership came to view the Dot 3 Plan Plaintiffs' rights under it as “specious … financially unsupportable, and ridiculous.” TT 823:23 - 824:8 (Munson). And that the Board joined with ArborGen's management to take steps in an effort to see to it that Plaintiffs' rights under the Dot 3 Plan were not honored. ArborGen's management, with the Board's blessing, launched an effort to strip away the Dot 3 Plan unit awards from those who had received them, and this was accomplished through false representations, confusion, dishonesty and fraudulent conduct. In the eyes of this Court, ArborGen and its Board perpetrated a financial fraud on ArborGen's legacy employees, including the Plaintiffs.

ArborGen's Treatment of Award Agreements

Both the Dot 3 Plan and the Dot 7 Plan referred to an “Award Agreement” to be given to employees receiving NVA unit awards. Section 6 of PX 135 (Dot 3 Plan), and PX 426 (Dot 7 Plan) both use the same language which provides:

> Each grant of NVA Units shall be evidenced by an Award Agreement, which shall include, among such other provisions as the Committee may determine, the Grant Date and the Initial Value. The grant of NVA Units shall not be effective unless and until the Participant to whom such units are granted executes and delivers to the Company the Award Agreement.

When they were being hired, Plaintiffs were not informed that Award Agreements for their Dot 3 NVA Plan performed any critical function. In fact, each was told that “[a]s a new employee of ArborGen, you are being awarded 6250 [or some other number] units effective January 1, 2003....” *See* PX 118 para 3. Any reasonable employees informed of the unit award's effective date in a letter signed by ArborGen's CEO, would have believed that the award actually would and did become effective on that precise date.

In the Plaintiffs' offer letters, their NVA unit awards were presented as self-executing, i.e., you receive your award once you start work. The letter went on to state that: “An award agreement and plan document will be sent to you to memorialize this initial grant.” Id. Plaintiffs were thus led to believe by their offer letters that their “initial grant” of NVA units had been made and that paperwork that followed would simply “memorialize” that fact. At trial, Defendant Munson was asked, “Q. So these award agreements and the delivery of the plan would commemorate the award that's being made in the letter, true? Is that a “yes”?” TT 817:16-18 (Freeman). He replied: “A. That's a yes.” TT 818:16-19 (Munson). As has been rioted, the Plan documents did follow; but ArborGen never provided the promised Award Agreements to recipients of the Dot 3 Plan; holders of Dot 7 Plan unit awards did not have their Award Agreements withheld.

***17** Dot 3 Plan recipients were treated differently from Dot 7 employees with respect to receiving Award Agreements specified in Plaintiffs' offer letters and in paragraph 6 of each Plan. Evidence in the record reflects Award Agreements being delivered to Dot 7 Plan unit holders. *See* PX 109 (Dot 7 Plan delivered to non-legacy employee Jed DeHaven). Mr. DeHaven received both a copy of the Dot 7 Plan and Award Agreement in 2002. James Mann, a former ArborGen officer and non-legacy employee testified at trial that he received the Dot 7 Plan in 2002 along with an Award Agreement covering his units. TT 165 (Mann); *See* PX 507.

Also, included in this group of non-legacy employees who received the Dot 7 Plan were the non-legacy contract employees who had worked for MWV and IP. TT 2931-13 (Burton). Plaintiff Clark testified about the significance to him of the allocation of Dot 3 Plans versus Dot 7 Plans as follows:
Q. Anything else that you've learned since 2010?

A. Oh, gosh.

Q. That caused you to file this lawsuit?

A. That caused me to file the lawsuit?

Q. Yes.

A. Now I'm trying to separate what we've learned in discovery from what I knew at that moment. Well, the distribution of the plans was, like you said, it's not numerosity. It was who got the plans and when. And the fact that there was a - apparently there was another plan that was issued. We learned that later. And the plans -- the Dot 3 was, I call it intercalated. So for instance --

Q. What?

A. Intercalated.

Q. Interc -- I have never heard that word before.

A. I'm sorry. It means that it was like interleaved. So, for instance --

Q. That's not helping me.

A. Jed DeHaven would get Dot 7, and then Jim Grant would get Dot 3, then Christina Cannistra would get Dot 7, then I would get Dot 3, then somebody else would get Dot 7, then Tim Stout would get Dot 3. So it was going back and forth between the plans, and it was a consistent pattern in what we call the legacy employees in this litigation got Dot 3, whereas employees that were hired, as we said, off the street would get Dot 7.

Q. It sounds to me like you're describing a consistent inconsistency, right?

A. I call it an intelligent distribution.

TT 1340:7-1341:11 (Clark).

As Plaintiff Clark suggested, the existence of what he referred to as “intercalated” results cuts against the notion that the distribution of Dot 3 Plans to Plaintiffs was a one-time simple mistake. The distribution looks deliberate. The same is true of the withholding of Award Agreements.

There is no evidence of any non-legacy employee, receiving a Dot 3 Plan, and there is no evidence of any legacy employee except Dawn not receiving a Dot 3 Plan. Plaintiff Kothera testified accurately as to the state of the record as follows:
Q. And then you talked about this symmetry --

A. Right.

Q. -- of the distribution of the pattern of documents. Are you aware all Dot 3 people, all legacy employees got the Dot 3?

A. Yes.

Q. Are you aware any legacy employee that didn't get the Dot 3 --

A. No.

Q. -- outside of maybe Dawn Parks?

A. Correct.

Q. And as far as the Dot 7, you understand that went to people that were hired off the street?

A. That's my understanding.

Q. And are you now aware — you didn't know this in 2004, but are you aware that the people that got the Dot 3 in 2002 and 2003 were not given award agreements, but those being hired along the same timeline and were given a Dot 7 were given award agreements?

A. Yes, that's what I understand.

TT 1438:11-1439:5 (Kothera).

No record evidence contradicts the accuracy of Mr. Kothera's understanding as he voiced it at trial.

Thus, though ArborGen had Award Agreement forms and were distributing them to Dot 7 Plan unit holders, no documents denominated "Award Agreement" were ever delivered to the 50-60 Dot 3 Plan unit holders covering that Plan. Plaintiff Samantha Miller testified as to her perception concerning distribution of the Dot 3 Plan versus the Dot 7 Plan as follows: "And so the Dot 3s were going to the latest employees, the Dot 7s were going to the new hires, and the new hires, the Dot 7, they got the award agreements, which I never knew existed, but nobody ever with the Dot 3s received one. That seemed very deliberate to me." TT 1610:19-1611:8 (Miller).

***18** Plaintiffs asserted at trial that the withholding of the Award Agreements to the legacy employees was intentional. At the time HR Director Dawn Parks was telling Plaintiff Clark the initial value had not been established for ArborGen (PX 75), the Dot 7 Plan recipients were being given Award Agreements with the established initial value of ArborGen. See PX 109. Further, numerous emails and board documents indicate that an initial value of $100 million had been established for ArborGen early on and well in advance of the Plaintiffs and other legacy employees being hired and was honored going forward. [4] The evidence before this Court supports Plaintiffs' contention that the Award Agreements to the legacy employees were intentionally withheld. The Defendants contend that the Award Agreement is necessary to make the NVA units awarded effective. The withholding creates a strong inference that the Award Agreements were not tendered so that Defendants could later argue, as they have at length in this case, that Plaintiffs never really had rights under the Dot 3 Plan in the first place.

There is no compelling evidence of any legitimate reason for withholding the Award Agreements aside from a deliberate effort to prejudice Plaintiffs. ArborGen management had no difficulty tendering Award Agreements to Dot 7 Plan holders in a timely fashion. Yet no Dot 3 Plan holders ever received Award Agreements for their Plan. The only Award

Agreement's ever tendered to Plaintiffs relating to their Dot 3 Plan awards were for the Rollout Plan. The reasonable inference from this striking disparity is that Dot 3 Plan Award Agreements were withheld as part of a deliberate plan to prejudice Dot 3 unit award holders. [5] The Court draws that inference.

In summary, the record reflects no evidence that any employee who received a Dot 7 Plan failed to receive an Award Agreement, nor does it show that any of the 50 or so Dot 3 Plan legacy employees ever received an Award Agreement for that Plan. The symmetry that exists in the record reasonably supports the conclusion that the withholding of award agreements from the Dot 3 Plan recipients, including Plaintiffs, was deliberate. The consistent disparate treatment between the two classes of employees leads the Court to conclude that the differences in treatment were intentional.

Award Agreements Were Not Essential for Effective Unit Awards

***19** Defense witnesses made much at trial about the failure of Plaintiffs to receive and sign Award Agreements pertaining to their Dot 3 NVA Plans due to section 6 of the Plan document which states: "The grant of NVA Units shall not be effective unless and until the Participant to whom such units are granted executes the Award Agreement." *See* PX 42. From this, the Defendants argued that Plaintiffs actually never had rights under the Dot 3 Plan, no injury could have been suffered because the Plan was non-functional, invalid, worthless, etc. However, under the facts presented at trial, any need for Plaintiffs to execute an Award Agreement was redundant and unnecessary.

Plaintiffs all indisputably accepted the terms of their awards set forth in their hiring letters by signing those letters and by reporting to ArborGen for work. There was no need for Award Agreements being distributed to Plaintiffs or other legacy employees who had been given the Dot 3 Plan. "Award Agreement" as defined in the Dot 3 Plan, PX 135 sec. 2(b) means: "a written agreement between a Participant and the Company that sets forth the terms and conditions of the Participant's award of NVA Units, as determined by the Committee." As a practical matter, Plaintiffs' offer letters sufficed to meet the Award Agreement definition in the Dot 3 Plan.

Award Agreement documents that were issued, were only issued to Dot 7 Plan unit holders. Those Award Agreements only provided four items: (1) the number of units being issued, (2) the effective date of the issuance, (3) the employee's signature agreeing to the issuance, and (4) the initial value. The first three items were already in ArborGen's hand once the offer letter was signed. The initial value was something that was calculable based on information ArborGen supplied. In any event, the initial value element was no mystery.

Making the initial value calculation was not hard to do because the record reflects the dissemination of Award Agreements with initial values to Dot 7 Plan unit holders. Numerous emails and board documents in the record indicate that the Board had agreed upon an initial value of ArborGen of $100 million prior to the Plaintiffs ever receiving their offer letters and Dot 3 plan. TT 498:8-17 (Nehra); 875:6-10 (Munson); *see also* PX 70A. As discussed herein, the initial unit value was known from early on by ArborGen's management and, for that matter, by Plaintiffs.

As of late December 2002, seven Plaintiffs (all but Nehra and Stout) had accepted their offers of employment with ArborGen and were poised to receive unit awards "effective January 1, 2003," On December 20, 2002, Michael Andrews, an ArborGen Director asked his fellow directors in writing, "Is there really any need for the NVA Unit Award Agreement? Isn't the only additional document necessary a two-line letter for the employee outlining the number of NVA units awarded, and the date of the award[?]" *See* PX 70A. The Plaintiffs got more detail than the two-line letter, what they got was a specific award of NVA units outlining the number of NVA units being awarded and the date the award became effective. *See* PX 118.

Further evidence that an Award Agreement delivery was not essential for Dot 3 Plan unit awards to become effective comes from the testimony of Defendant Munson. Defendant Munson testified that the language used in the employees'

offer letters promising an award of specific number of units, effective on a specific date, resulted in the hired employees owning the specified units on the specified date:
Q. Did the employee have to get an award agreement for the units to take effect?

A. Employee would need it to have been awarded units.

***20** Q. Well, let's look at what the [offer] letter says. As a new employee — right in the middle of 3 -- you are being awarded 1,250 units effective January 1, 2003.

Assume the employee goes to work. Assume the calendar moves on. We have our bowl games on January 1. Does the employee have the units at that point in time, yes or no?

A. Yes.

TT 816:17-817:1 (Munson).

The Court agrees with Defendant Munson's view of the facts, Plaintiffs owned their Dot 3 Plan NVA awards upon signing their offer letters and going to work for ArborGen which each indisputably did.

The Initial Value of ArborGen's Equity was Always Known

In his December 20, 2002, memo "Subject NVA Scheme" Mr. Andrews stated: "[W]e learnt at the December [ArborGen Board] meeting in Auckland that employees have already been placed on the scheme and have been told that the initial starting value is $100 million, which obviously places us in a position where we have little choice but to accept that figure now. We agree to move forward on that basis given the advice already given to employees.... We do not have a copy of the units awarded to the employees and would appreciate seeing the table completed." [6] *See* PX 70A.

Defendant Munson testified that the initial value of the ArborGen's equity used to calculate initial value of a unit was $100,000,000 for 2002 and 2003. TT 840:8-13 (Munson). All Plaintiffs joined ArborGen in early 2003. As to the Dot 3 Plan specifically, Defendant Munson testified to the $100 million starting value stating that the Dot 3 Plan, has "no escalator of anything … [it] just has a $100 million as a starting point and doesn't say anything at all about adjusted initial value." TT 919:20-24 (Munson).

It is reasonable to conclude that the appropriate starting initial NVA equity value for the Plaintiffs who received and accepted offers of employment in November of 2002 and April of 2003 is $100 million. The Court credits Mr. Munson's testimony about the $100 million initial value for ArborGen's equity in 2002 and 2003, and that ArborGen employees had ownership of their units upon accepting their offers. Moreover, the fact that in 2010 ArborGen reported that all Plaintiffs had the same NVA Plan unit values as employees hired in 2002 shows that the $100 Million starting equity value was used to set initial values across the board. [7]

Nature of the NVA Unit Awards: A Form of Compensation

Each Plaintiff's offer letter presented the "Equity Participation" component describing the Plaintiff's unit award terms as one of several of the "compensation arrangements" being offered. The designation "compensation arrangements" was selected and used by ArborGen CEO and President Wells in her offer letters to Plaintiffs. Plainly, the NVA Unit awards were meant to be and were a form of compensation.

ArborGen's founding CEO, Kenneth Davenport, was heavily involved in designing the NVA Plan. His testimony at trial was that "new value added component [was] really tantamount to a stock-option plan." TT 586:14-16 (Davenport). *See also* id. at 591:4-5 (saying that for ArborGen, in actuality "a stock option plan" is "referred to as an NVA plan"); *id.* 592:17:21 (ArborGen's long term incentive plan was "more common a stock option plan."); *id.* 593:10-11; *id.* Stock options were not issued because ArborGen was an LLC at the time and, unlike a C-Corporation, could not issue stock. TT 586:16-19 (Davenport). As Defendant Munson testified, "because ArborGen was not a company, we could not issue options, and so the NVA plan was designed to in effect give us the same outcome." TT 865:21-24 (Munson). Although both Mr. Davenport and Mr. Munson testified they viewed the NVA Plan as akin to a stock option arrangement, neither Mr. Munson, nor Mr. Davenport, nor any other witness suggested at trial that the NVA Plan functioned as either a form of pension plan or a profit sharing plan. No competent, credible evidence presented at trial supports the position that the NVA Plans were a form of either a pension plan or a profit sharing plan.

***21** It is clear that the disclosures in the offer tetters were made with the intent that they be relied upon and the employees were justified in relying upon them. TT 2120:11-2122:3 (Baughman). As noted above, the award of NVA units is referred in the record as providing a "founding employee sign-on bonus." *See* PX 41; DX 507; and TT 379 (Nehra). A Compensation Committee report reflects knowledge of 36 employees who received NVA units as "a sign-on bonus" as of December 20, 2002. *See* PX 330, Attachment 2. [8] As noted earlier, NVA Awards were deemed a "sign-on bonus" by ArborGen. TT 1081:18-23 (Moriarty). Based on the language of the employee offer letters and the intent of the terms surrounding the NVA program, this Court finds it reasonable to conclude that each Plaintiffs' NVA Units was presented and received as a form of compensation.

Multiple NVA Plans Created Enhanced Risks

The record reflects that over the months and years preceding Board approval of the NVA Plan, different iterations of the NVA Plan, including the Dot 3 and Dot 7 Plans, were circulated to and reviewed by the Board. Board members were aware that NVA units were being awarded even though no NVA Plan had been finally approved by the Board. There is evidence in the record that Board Members were aware that, on occasion, *both* the Dot 3 and Dot 7 Plans were being handed out by Dawn Parks to employees. There is evidence that as early as 2002, ArborGen's management and Board members were aware this had actually happened. The evidence of the Board's awareness of NVA Plan unit awards and plan distribution shows these actions were taken with implied authority, apparent authority, and/or ratification.

At his deposition, Defendant Munson testified repeatedly that he learned in, "[e]ither 2002 or 2003 … [m]ost likely 2002" from CEO Wells that the Dot 3 plan had been disseminated to some employees. *See* PX 530 (Munson Depo. 81:13-82:20). Munson later testified the mistake made in "the middle of 2002" involved a typographical error. *See* PX 530 (Munson Depo. 206:11-207:13). He filed an errata sheet (PX 490) after the deposition (and after receiving an extension of time within which to do so, TT 793:5-14), but never corrected any of the testimony about when he learned about distribution of the Dot 3 Plan in 2002. At trial, Mr. Munson disavowed his deposition testimony, and testified that he learned for the first time about distribution of differing NVA Plans in 2004. TT 777:10-16 (Munson).

Munson's now-recanted deposition testimony (but not his trial testimony) is consistent with testimony given at trial by Defendants Baughman, Wallinger, and Burton about an incident in 2002 before Plaintiffs were hired.

At his deposition and again at trial, Defendant Baughman admitted knowing about a situation that occurred in or around mid-2002 where the Dot 3 Plan had been handed out to employees by mistake. Defendant Baughman testified that he was "aware of the fact that the initial six or seven people who received the NVA plan had the Dot 3 version copied on it." TT 2130:5-11. It seems that in or around mid-2002, Dawn Parks, ArborGen's HR Director, had been "called in" for having incorrectly given the Dot 3 Plan to a "handful of employees." TT 2125:13-23 (Baughman). Mr. Wallinger's trial testimony reflects he was informed in 2002 by Mr. Baughman of an NVA Plan that had been mistakenly distributed with a "typo in it and that they were correcting it." TT 2225:12-25 (Wallinger). In Mr. Wallinger's words,

"Bill [Baughman] had told me at one time, and I don't recall at what stage it was, that he had become aware that there was a document with a typo in it and that they were correcting it." TT 2226:4-8 (Wallinger). Mr. Wallinger testified that this incident was something Mr. Baughman discovered and created something of a problem within the company. TT 2225:19-25 (Wallinger).

***22** Defendant Wallinger's trial testimony thus corroborates Mr. Baughman's recollection as well as Mr. Munson's repeated deposition testimony about first learning in 2002 of an NVA Plan distribution mistake. The "something of a problem" referenced in Mr. Wallinger's testimony, involving Dawn Parks allegedly improperly handing out the Dot 3 Plan to no fewer than "six or seven people" according to Mr. Baughman (TT 2130:5-11) is, of course, precisely the same set of facts before this Court involving the Dot 3 Plan given by Dawn Parks to Plaintiffs and many other legacy employees in 2002 and early 2003.

Mr. Burton, likewise, had a vague memory at trial of being "aware that there had been some plans that Dawn was replacing" and that something was going on … [i]n the first part of 2002," but then claimed not to have heard about it at the time. TT 2409:4-25 (Burton).

By mid-2002, it is evident that ArborGen's management and Board members were on notice of risks posed by ArborGen's practice of disseminating multiple versions of NVA Plans, and making awards when no Plan had been formally approved by the Board. Nonetheless, the record tends to show that following Dawn Parks' supposedly "mistaken" dissemination of the Dot 3 Plan in mid-2002, she proceeded to hand out Dot 3 Plan to every single one of the 50 or more legacy employees hired thereafter, including Plaintiffs during late 2002 and the first quarter of 2003. The Board and ArborGen's management had no basis for surprise when it learned of the widespread dissemination of the Dot 3 Plan in 2004-05, assuming that the dissemination had not actually been expressly or tacitly authorized in the first place.

At a minimum, ArborGen's Board and its Compensation Committee were on notice from the start of ArborGen's hiring, that the failure to have a single, official board-approved NVA Plan to offer and distribute to employees could and actually had resulted in "something of a problem" that needed to be addressed. From early 2002 onward, the record reflects no Board of Director efforts to supervise the hiring process, including the oversight as to which documents were used and when and how they were distributed.

ArborGen's Board Authorized Dissemination of Plaintiffs' NVA Plans

ArborGen's Board knew, that from at least June of 2002 onward, ArborGen's management was offering and awarding NVA Plan units to incoming employees in the absence of Board approval. Official ArborGen documents reflected issuance of NVA Awards to the knowledge of Board members well in advance of the November 2003 Board approval date. A large number of units were issued prior to the time the Board formally acted on the NVA Plan in November of 2003. *See* PX 365, p. 9981 (includes a report titled "NVA Summary" showing that a large number of NVA units had been issued under the 2002 NVA Plan, which was applicable to grants made prior to the summer of 2003). All of those units were awarded prior to the time of formal Board approval of any NVA Plan. Well knowing the units were being awarded prior to Board approval, the Board took no action to stop the distribution of the units, and no employee was told by ArborGen management that the NVA Plan was still pending board approval.

[Note: Pages 52-58 missing in original document]
"Plan"). As you know, you were awarded 1,250 units under the Plan on January 1, 2003. The attached document provides the terms governing your units and the operation of the Plan generally.

Please let me know if you have any questions regarding the foregoing or the Plan, and please sign the enclosed copy of this letter in the space provided below indicating your acknowledgement and agreement with the foregoing, and return it to me for my files.

***23** *See* PX 149A & 525.

According to Plaintiffs, the Rollout efforts aim was to divest Plaintiffs' rights by telling them they had no rights in any other NVA Plan and strongly encouraging them to sign the Acknowledge and Agree document. It was Mr. Mann's understanding that by getting the employees to sign the Acknowledged and Agreed documents, the Dot 3 Plan disappeared as a problem. TT 295:5-9 (Mann). Specifically, when Mann was asked at trial about what was being accomplished in 2004, he made clear his belief that the result achieved by the Rollout meeting effort was that by getting the employees to sign the Acknowledgement documents, "the Dot 3 plan went away."

> Q. And did — was it your guiding understanding that they abandoned their rights under the Dot 3 plan, or were those rights still preserved when they executed this? A. It was my understanding that the Dot 3 plan went away when they signed this.

TT 295:5-9 (Mann).

Ms. Hinchee, in her conversation with Plaintiff Foutz in 2010, supports the testimony of Mr. Mann as to the intention of the 2004 meetings. Ms. Hinchee in that conversation stated, "1 know for a fact that they (referring to ArborGen's Board) thought signing in 2004 was a restart." In response to Mr. Foutz's question, "Oh, so the 2004 was to get them out of the first plan basically", Ms. Hinchee responded, "Yeah". *See* PX 484A. According to Plaintiff Foutz, this is diametrically opposed to what he was told in 2004. In 2004, he was told that it was a single, one-time clerical error and you need to sign this for the company. TT 1873:17-1874:8 (Foutz). Essentially, in 2004 Mr. Foutz was told that the plan he was given in 2002 wasn't a valid plan, then later in 2010 he was being told by Ms. Hinchee, a senior ArborGen officer, that he had really been asked to sign for the new NVA Plan in 2004 to get him out of the Dot 3 Plan he received in 2002. TT 1874:4-13 (Foutz).

The Rollout Meeting Effort

The Board-approved Plan Rollout Plan was introduced to ArborGen employees starting with email blasts to ArborGen's employees from HR Director Dawn Parks, sent on August 23-24, 2004. *See* PX 81 & 82. The introductory email was headed "New Value Added Plan Roll out!" It announced, "The time is come when we can fully describe one of ArborGen's best benefits: THE NEW VALUE ADDED (NVA) PROGRAM." Employees were encouraged to sign up for meetings on August 31, 2004 and September 1, 2004 "to learn more about this great benefit." *Id.*

Team leaders like Plaintiffs Dr. Nehra and Dr. Chang attended the first of the Rollout meetings on August 31, 2004. Then the remaining Plaintiffs and other employees attended Rollout meetings later on August 31, 2004 and into September 1, 2004 where the Rollout Plan was discussed in general terms. According to the Plaintiffs, questions were raised at these meetings about why a new plan was being given to them with no substantive answers being provided.

Subsequently, on September 8, 2004, ArborGen's President and CEO, Barbara Wells, sent a blast email to ArborGen's employees, including Plaintiffs with the Subject line: "ArborGen Strategic Plan Roll Out and NVA Q&A." The email stated:

***24** I am looking forward to the opportunity to address your questions tomorrow about the NVA plan. I would like to ask that all of you who are able to attend please attend independent of the date you joined ArborGen. Please allocate 1 -1.5 hours for this meeting, as I will be taking this opportunity to share with you the details of ArborGen's Long Range Strategy that was recently approved by the Board of Directors. This is after all, is what we have all been working hard to create and will all have to work hard to deliver. Sharing in the value of the incredible business we call ArborGen is

the opportunity that the ArborGen founders wanted to share with each and every one of us. I thought it appropriate to share with you the details of our strategy.

Personally, I consider it a gift, to be given a share of that which we are all pouring our hearts and souls into creating. In the end, our share will only be worth what we make of it. This is a huge and demanding charter which clearly will be a challenge. I am confident though, that with the team we have, we will make it happen!

Barbara

See PX 51; *see also* PX 86.

At the September 8, 2004 meeting, employees were given a glowing picture of ArborGen's financial status. The NVA Plan was discussed and employees were told that the NVA Plan being given them at the Rollout meeting was the only NVA Plan. No Plaintiff or independent third-party witness recalls being told in the large group meeting about a "mistake" having been made with the NVA Plan. According to Ms. Wells' recorded conversation with Mr. Foutz, HR Director Dawn Parks actually volunteered to leave the company for the "mistake" she had made in handing out the wrong plan. *See* PX 484B. Dawn Parks testified to the contrary at her deposition. *See* PX 530 (Parks 107:10-12 & 111:6-8).

Rollout Representation: There is Only One Plan

Through attendance at ArborGen meetings, Plaintiffs and other legacy employees were informed by Defendant Wells and/or ArborGen executives James Mann and Maud Hinchee that the Rollout Plan being presented to them was the one and only version of their NVA Plan that ever existed and that the Dot 3 Plan was invalid. *See* TT 327:5-7, 330:18-21, 348:22-349:3 (Gulledge). TT 1266:3-12, 1324:8-11 (Clark), 1434:8-13 (Kothera), TT 1726:19-1727:6 (Winkeler).

The Rollout Plan was represented to be the only valid and operable NVA Plan. TT 330:18-21 (Gulledge). The Dot 3 Plan was presented as nonfunctional, meaning that the Rollout Plan was the only option available if employees wanted any chance to have NVA units. TT 1584:16-1585:2, 1600:8-13 (Miller). Employees were told that the Rollout Plan was the only plan. TT 1552:13-23 (Stout), TT 1600:11-13 ("only option") (Miller). The Dot 3 Plan was dismissed as the unenforceable product of a clerical error. TT 1306:23-1307:2, 1309:12-25 (Clark). In essence, the representations made to Plaintiffs and other legacy employees were directed to the Dot 3 Plan's legal efficacy; the Dot 3 Plan was portrayed as an invalid product that would not pay off financially.

At trial, the conduct of Barbara Wells and Dawn Parks was classified as "careless" by James Mann. TT 288:12-17 (Mann).

Defendants' only consistent testimony in this case was that the terms of the Rollout Plan are significantly better for ArborGen employees than the terms of the Dot 3 Plan. TT 2425:2-9 (Burton). Defendant Munson testified the Dot 7 (which became the Rollout Plan [12]) was absolutely far superior to the Dot 3 Plan. TT 826:3-5 (Munson). He also testified, "there never was a Dot 3 plan." TT 827:5 (Munson). He later amplified his views on the Rollout Plan's superiority:

***25** Q. [A]ny reasonable person, looking at the facts accurately and correctly in 2004 in September, would have agreed that they're actually being benefited and not hurt by the rollout plan?

A. That's correct. Had I been the receiver of that [Rollout Plan] document, I would have shaken the hand two times the person that gave me that document and thanked them for making this improvement.

TT 873:8-15 (Munson).

Plaintiffs testified that, in essence, they signed up for the Rollout Plan believing that it was the only plan, and supplanted the Dot 3 Plan which was worthless and meaningless and could not deliver value in the future. TT 1553:21-1554:1 (Stout). In essence, the Plaintiffs believed what they were being told by ArborGen's management. The Defendants plan to get the employees to act in ignorance and unknowingly sign away their rights in the Dot 3 Plan worked. However, no Plaintiff testified that they knowingly gave up their Dot 3 Plan rights; they were told and believed, in essence, there was no valid Dot 3 Plan in the first place.

Rollout Representation: Dot 3 Plan Dissemination Was a One-time Simple Error

At the group Rollout meetings, employees were not told about the Dot 3 Plan being handed out by mistake. The employees were encouraged to meet with James and Maud Hinchee individually to address their questions about the NVA Plan, not CEO Barbara Wells. *See* PX 50. Later, through the one-on-one counseling discussions with James Mann and Maud Hinchee, some employees were told a mistake had been made. Plaintiff Clark testified that Mr. Mann told him about a mistake, but in a way that downplayed the incident. "He said that he investigated the issue and that a simple, one-time error had been made at the period that they were distributing the plans tome." TT 1262:12-14 (Clark). Despite the dissemination of the Dot 3 Plan to virtually all legacy employees over an extended time period [13], the distribution was represented by ArborGen management to limited employees as a simple one-time error. *Id.*, TT 1600:2-25, 1610:19-1611:8 (Miller). Employees were not told the same thing when their signatures on the Acknowledged and Agreed document were sought. For example, Dr. Nehra, Dr. Chang, Ms. Cook and Mr. Stout all testified that no one ever told them a mistake had been made. TT 395:13-396:6 (Nehra); TT 505:23-506:17 (Chang); TT 1552:1-23 (Stout) & TT 1667:13-24 (Cook). Plaintiffs Clark, Foutz, Kothera, Winkeler and Miller were told that a mistake had been made in one-on-one discussions with James Mann and Maude Hinchee, not in the group meetings where the Rollout plan was discussed. [14]

***26** James Mann testified that the meetings were designed to help the employees understand that a mistake had been made. Mr. Mann had a specific recollection that he told each Plaintiff that their Dot 3 Plan was a mistake. TT 224:9-12 (Mann). However, it appears that in 2004 not much discussion about any mistake actually occurred. Dr. Nehra was not ever told by Mr. Mann that a mistake had been made.

Q. You were in the courtroom yesterday when Mr. Mann was giving his testimony, were you not?

A. I was, yes.

Q. Do you recall him using the word "mistake" over and over and over again?

A. Yes, I do.

Q. Do you recall him saying he has a specific recollection of telling each plaintiff that a mistake had been made? Do you remember that testimony?

A. Yes, I do, yes.

Q. Would it surprise you to know that he testified 58 times that a mistake had been made?

A. Yes....

Q. When was the first time that you, Dr. Nehra, heard the words "mistake" come out of James Mann's mouth in relation to the NVA plan?

A. The first time 1 heard was yesterday. It never came in our conversation it was a mistake. TT 394:25-395:17 (Nehra).

Plaintiffs Chang, Cook and Stout also testified to not being told in 2004 about any mistake related to their NVA Plan. See TT 506:1-5 (Chang), TT 1667:13-19 (Cook), TT 1552:11-12 (Stout). Nobody ever told Mr. Gulledge that his Dot 3 Plan was a mistake, either:
Q. When you attended your meeting, do you ever remember anybody telling you that the plan that you had received back in 2002 had been given to you by mistake?

A. No.

Q. Do you remember anybody ever telling you the plan that you had been given had been given to you by mistake?

A. No.

Q. How about James Mann, are you familiar with who James Mann is?

A. Yes.

Q. He testified yesterday that he told each plaintiff that a mistake had been made. Do you recall him ever telling you that a mistake had been made?

A. No.

Q. Did Barbara Wells ever tell you a mistake had been made?

A. No.

Q. Did Dawn Parks ever tell you a mistake had been made?

A. No.

Q. Did Maud Hinchee ever tell you a mistake had been made?

A. No.

TT 325:23-326:17 (Gulledge).

Mr. Grant's memory was not that the Dot 3 Plan had been handed out by mistake, but "that something was wrong with the original plan. It couldn't be executed, I believe, that there couldn't be a payout in some form in that and that we might end up with nothing." TT 116:10-24 (Grant).

The Court finds it peculiar that while Mr. Mann is adamant that the employees were all told a mistake was made, Ms. Hinchee doesn't have the same recollection. The record suggests that Ms. Hinchee was in the dark as to what was going on as well and used as a pawn to the employees because she was so well respected and trusted by the employees. In her deposition, Ms. Hinchee testified to not saying anything to the employees about a "mistake".
Q. Do you have a recollection that the employees were in possession of a different plan than what they were being asked to sign for in 2004?

A. I was aware of the fact that employees thought they had something different.

Q. Okay. Did the employees at that time have the .3 plan in their possession?

A. That, I don't know.

Q. Okay. But you do recall the employees believing that they had something different than what they were being asked to sign in 2004?

A. Certain employees.

A. Just certain employees; the ones that we talked to.

Q. Do you ever recall telling any of these employees that you talked to that the plan that they had in their possession was given to them by mistake?

***27** A. I didn't say anything like that. I didn't even know about that.

See PX 530 (Hinchee Depo. 65:6 - 66:2).

When asked about the purpose of the 2004 Rollout meetings, Ms. Hinchee stated "well, the purpose was that we thought - that, basically, James told me that it was in the best interest for them and the company for them to sign and that it would be beneficial if they signed." *See* PX 530 (Hinchee Depo. 66:18 - 67:1). Mr. Mann, of course, is the ArborGen executive who testified at trial, "It was my understanding that the Dot 3 plan went away when they signed this." TT 295:8-9 (Mann). In essence, contrary to what was told to the legacy employees during the Rollout, Mann's view based on his testimony was that those employees held rights in the Dot 3 Plan, but that those rights could be extinguished by getting them to sign up for the Rollout Plan. The record reflects that ArborGen's chief objective, pursuant to the Rollout Plan, was to extinguish those rights, and the Court so finds.

Rollout Representation: Rollout Plan is Superior

Employees were also told they had no rights in the Dot 3 Plan. "James told me we had no rights because the [Dot 3] plan was unenforceable." TT 1266:3-7 (Clark); *see also* TT 1421:22- 24 ("no rights in the Dot 3 Plan at all") (Kothera), TT 1572:12-20 ("I was told I had no rights in the Dot 3 Plan") (Stout), TT 1909:22-23 (I was told … I had no rights in the Dot 3 Plan") (Foutz). As Plaintiff Mary Cook stated, "If I had not been told that I had no rights in the … Dot 3, yes, I would have wanted to keep the Dot 3." TT 1473:12-13 (Cook). At trial Mr. Mann testified it was "very possible" that employees were told the Dot 3 Plan is "not a valid plan."

Q. Were they told at the time that they signed those receipts for the new plan that they had no rights under the old plan?

A. I don't recall exactly what was told to the employees at the time, but it is very possible we would have said: Hey, this is a mistake plan, so that's not a valid plan.

TT 241:2-7 (Mann).

Employees were told that the Rollout Plan was superior in that it would have more tangible value than the Dot 3 Plan and was a better plan. TT 1265:8-24 (Clark). Maud Hinchee testified that she would have told the employees what Mr.

Mann told her, which was that the Rollout Plan "would be more likely to deliver tangible value." *See* PX 530 (Hinchee Depo. 73:9-15).

Plaintiff Miller testified "There were individual group meetings after the clarification meeting, and I met with James and Maud and I recall they told me that I needed to sign for the new - what I call the new plan, the 2004 plan, because that was the only functional plan," TT 1584:16-25 (Miller). She continued, "I really trusted Maud and I had no reason not to trust James, and they both told me that I - that was the only way I was going to have any rights, was to sign this." TT 1586:16-1587:5 (Miller). Mr. Mann testified that a reasonable employee could view the Rollout Plan as superior to the Dot 3 Plan, and that is how he presented the Rollout Plan. TT 235:17-21 (Mann). Defendant Munson agreed with that assessment, and so did other defendants. E.g., TT 2425:2-9 (Burton).

***28** It is true that the likelihood of a "sale event" was somewhat greater under the Rollout Plan than under the Dot 3 Plan, assuming the sale event was not by virtue of an asset sale, in which case the terms were identical. Absolute voting control needed to be transferred in either case; for the Rollout Plan a 51 % voting interest was needed; for the Dot 3 Plan the number was 100%. Compare PX 42 sec. 2(o) *with* PX 44 sec. 2(r). No such equity transfer has ever occurred or, so far as the record reflects, has ever been seriously considered by ArborGen's controlling founders.

The contention that the Dot 3 Plan had little or no value because it was not likely to pay off is at odds with the concern voiced by ArborGen-affiliated witnesses that the Dot 3 Plan was "an incentive plan that on its face was unsupportable financially" TT 824:1-8 (Defendant Liebetreu testifying about Defendant Munson's comment to him). ArborGen's one-time acting CFO James Mann was asked at trial whether he remembered "ever having the thought that the board of directors concluded that the Dot 3 plan was too … lucrative to employees or expensive to the company or too rich for the employees and therefore decided to go with a less lucrative plan?" TT 248:9-13 (Mann). His succinct response was: "To answer the question, yes." TT 248:14 (Mann). Referring to the Dot 3 Plan, Defendant Burton actually admitted at trial: "If we implemented it as a board-approved plan, it would have been too rich." TT 2424:13-14 (Burton).

Plaintiffs testified that, in essence, they signed up for the Rollout Plan believing that it was the only Plan, and supplanted the Dot 3 Plan which was worthless and meaningless and could not deliver value in the future. TT 1553:21-1554:1 (Stout). As Plaintiff Clark testified, "Maud and James were promoting the Rollout plan as being better to this other plan, and they were trying to convince people to sign onto the new plan because it was better." TT 1265:15-20 (Clark). According to Clark, the purpose of the one-on-one Rollout Meetings was to get ArborGen employees to sign the Acknowledge and Agree documents prepared in advance. *Id.*:21-24 (Clark). He later testified, "I signed the documents because James Mann told me these are the documents we needed to sign." TT 1318:13-15, TT 1266:14 ("James was very convincing.") (Clark).

To the same effect was Mr. Foutz's testimony that "Maud and James" went around to employees saying, "It's very important that you sign this document. We need you to sign this document.... And what choice do you have when your chief technology officer, your boss's boss, tells you need to sign this, okay?" TT 1847:13 (Foutz). Ms. Hinchee, in her conversation with Mr. Foutz in 2010 remembered "going around with James trying to convince people to sign it." *See* PX 484A p. 9. However, Ms. Hinchee couldn't remember what rationale was used. "I don't even remember what rationale we used to compel them to do that" *Id.* at pg. 13.

Legacy employees were "pressured" to sign the "Acknowledgement and Agreement" letters presented to them by Ms. Wells. TT 330:5-13, 388 (Gulledge), TT 396:22-25 (Nehra), TT 1265:4-7 (Clark), 1586:18-24 (Miller). "When we signed the award agreements in 2004, there was a lot of pressure from management to sign that document." TT 1735:13-16 (Winkeler). The message conveyed and received was that if the legacy employees did not sign the "Acknowledgement and Agreement" document for the Rollout Plan, they would have no rights to any NVA units going forward. TT 330:8-17 (Gulledge) & TT 1585:25-1586:13 (Miller). ArborGen executives Hinchee and Mann promoted the Rollout Plan as better than the Dot 3 Plan. TT 1265:11-24 (Clark). The Plaintiffs believed what they were being told.

***29** As for the purported superiority of the Rollout Plan claimed by Defendants, clear and convincing evidence in the record reflects that from the employees' standpoint, the Dot 3 Plan was superior financially to the Rollout Plan. This is seen from Defendant Burton's admission at trial, "If we implemented it as a board-approved plan, it would have been too rich." TT 2424:13-14 (Burton).

Plaintiffs' Reliance on Rollout Representations

ArborGen had a strong culture of a special trust and confidence that existed between ArborGen management, the founders, Board members and employees. This trusting relationship was described by Defendant Moriarty who was on the ArborGen Board at the time of the Rollout:

Q. Are you aware that ArborGen had a strong culture that favored fair dealing and honesty with employees?
A. Yes.

Q. Are you aware that the culture of ArborGen was for the managers, and even at the board level, to care for employees, seek to promote their trust and confidence in management?

A. Yes.

Q. Would you expect that at ArborGen?

A. Yes, I would.

Q. Did you actually understand that that's the way it was, based on your own personal experience, a culture of trust and confidence between the board, management and the employees?

A. Yes. I think that's fair, yes.

TT 1047:25-1048:9 (Moriarty).

From a corporate culture standpoint, the view at ArborGen was "that when the employees are told something and rely upon it, they're entitled to keep whatever it is that they are being promised." TT 1081:47 (Moriarty).

ArborGen's former CEO, Ken Davenport, testified that under ArborGen's unique culture, when it comes to making decisions concerning the wealth of employees, a high fiduciary duty was owed to employees by management (not including the HR Director), the CEO and the Board to the employees. TT 645:18-646:7 (Davenport).

The standards of conduct both at IP and ArborGen called for managers to be "fair to employees at all times and honest with employees,"' and this, according to Defendant Munson, was a requirement he lived by. TT 800:2-801:2 (Munson). Another ArborGen Director, Defendant Liebetreu, likewise testified to the strong culture requiring honesty, integrity and fair dealing towards employees. TT 1178:19-1179:8 (Liebetreu); *See* PX 530 (Liebetreu Depo. 50:17-51:11). Defendant Hundley testified that the same standards requiring honesty and fair treatment of employees apply at MWV and ArborGen. TT 1206:25-1207:15 (Hundley).

In terms of ethics and honesty and integrity and fair dealing with employees, Defendant Munson testified he was absolutely proud of the way ArborGen and IP handled the entire Rollout situation matter from start to finish. TT 884:7-11 (Munson). Similarly, Defendant Barbara Wells testified that if she had it to do over again, she would not change

how the dealings transpired between ArborGen, its management, the Board and Plaintiffs concerning matters related to Plaintiffs NVA Plan interests. *See* PX 530 (Wells Depo. 55:2-9). [15]

Based on the evidence before this Court, the Court finds that the actions of ArborGen, its management and Board members with regards to the dissemination of the NVA Plan and its overall handling of the NVA Plan from start to finish, especially the 2004 Rollout, and the associated treatment of employees does not live up to the IP, MWV and ArborGen standards of conduct that were ingrained in ArborGen's culture and were so highly prized according to testimony on behalf of the Defendants. *See* PX 427. According to the standards set forth at MWV, "we must always seek to deal fairly with our customers, suppliers, competitors, employees and others. We will not take advantage of anyone through illegal conduct, deceit, or any other unfair practice. *Id.* The Court finds that these obligations of fair dealing, which Defendants assumed were not honored. Rather, Defendants' behavior in dealing with Plaintiffs as Dot 3 Plan unit-holders was tainted by deceptive acts, statements, and concealments designed to prejudice Plaintiffs to make their rights under the Dot 3 Plan "go away," thereby foreseeably cutting ArborGen's compensation costs and minimizing any future adverse impact on the founders' holdings of ArborGen's equity.

No Evidence of Intent to Waive Dot 3 Plan Rights & No Consideration Given.

***30** No Plaintiff or other ArborGen legacy employee testified that he or she intended to voluntarily relinquish any of their legal rights under the Dot 3 Plan. Nor did any Plaintiff or other ArborGen employee testify to ever giving written consent to having their rights under the Dot 3 Plan terminated or amended as required by Section 9(a) of the Dot 3 Plan's terms. The essence of Defendants' Rollout Plan scheme was to convince Plaintiffs that they had no legal rights under the Dot 3 Plan and, in any event, were better off under the Rollout Plan.

When it was pointed out to Mann at trial that the Acknowledge and Agree document "doesn't ask for your written consent to give up your rights," he conceded "it does not ask for them to give up." TT 295:25-296:2 (Mann). CEO Barbara Wells, whose signature was on the Acknowledge and Agree forms presented during the Rollout process was asked at her deposition whether "the purpose of signing [the] document [was] to show that they got it or to show that they agreed with it and agreed to be bound by it?" She testified that her "recollection is more an acknowledgement of this is what I received." *See* PX 530 (Wells Depo. 192:12-19).

The legacy employees holding Dot 3 Plans were not asked to approve a change in their rights under the Dot 3 Plan's section 9(b), which called for written consent in the event any of the Dot 3 Plan's terms were change in a way disadvantageous to the employee. Nor were they told which rights were being changed or how. They simply were informed the only NVA Plan rights they had were those that existed were under the Rollout Plan, period. The employees were told they had no rights under the Dot 3 Plan because it was unenforceable, nonfunctional, and/or was not capable of being executed. TT 116:13-24 (Dot 3 Plan "couldn't be executed") (Grant), TT 1266:6-7 ("James told me that we had no rights because the plan was unenforceable") (Clark) TT 1584:19-23 (Rollout Plan presented as "the only functional plan"), 1600:11-13 (Miller).

Plaintiff Mary Cook's trial testimony was typical of Plaintiffs' statements in Court to the effect that there was never an intent by a legacy employee to give up his or her rights under the Dot 3 Plan:

Q. As for this acknowledgment and agreement, ma'am, you know, this was what was presented to you by Barbara Wells in September of 2004. Do you remember that? And you signed it and you had this little addition here (indicating)?
A. Yes.

Q. Okay.... [N]obody, including

Barbara Wells at ArborGen or anywhere else, explained to you the consequences of signing this on whatever rights you had in your original plan, did they?

A. No.

Q. They never told you that this was intended by them to revoke your rights such as they existed, if they existed, in your original plan, did they?

A. No, they never did.

Q. You never gave up intentionally your rights in your original plan, did you?

A. No.

Q. To this day you've never intentionally given up or relinquished your rights in your original plan, have you?

A. Correct.

TT 1692:2-21 (Cook).

The consistent, unequivocal testimony from Plaintiffs and other legacy employee witnesses was that their execution of the "Acknowledged and Agreed" document and acceptance of the Rollout Plan units was unaccompanied by any form of consideration, no bonus, no raise, nothing that could be called a form of consideration. TT 126:18-23 (Grant), TT 331:22-24 (Gulledge), TT 1553:17-20 (Stout), TT 1587:16-19 (Miller). Defendant Burton testified that he understood that in order to change an employee's existing rights by giving them a substitute, you need to furnish the employee consideration in return at the time that they take the substitute. *See* PX 530 (Burton Depo. 147:22-148:6). CEO Wells confirms the Plaintiffs testimony that no consideration was given in 2004 to sign the "Acknowledge and Agree" document. Ms. Wells testified through her deposition that in return for giving the acknowledgements the employees did not get "any bonus or tangible benefit." *See* PX 530 (Wells Depo. 191:20-24).

***31** This Court finds that no form of consideration was given to the Plaintiffs or other legacy employees in return for their signatures accepting the new NVA Plan in 2004. As is discussed infra, the Court further finds that ArborGen's continued employment of Plaintiffs after the Rollout did not work to supply consideration needed to justify the attempted 2004 contract modification. The Court further finds as a fact that Defendants did not attempt to comply with its duty to obtain written consent to adverse NVA Plan changes under section 9(b) of the Dot 3 Plan. To the extent that consents to accept the Rollout Plan were obtained by Defendants in 2004 from Plaintiffs, they were not knowingly and voluntarily given. Rather, they were a product of an organized campaign based on misrepresentations and concealments calculated to pressure Plaintiffs and divest them of their rights as Dot 3 Plan unit holders.

The Real Rollout Agenda: Eliminate "A High Liability Risk"

At her deposition, Ms. Wells testified that the purpose of the Rollout meetings was to clarify the details of the board-approved Rollout Plan; she said she did not expect any problems with the Rollout because she understood and believed that the Rollout Plan was simply a repackaging of the Dot 7 Plan, which she believed everyone had been given when they were hired. *See* PX 530 (Wells Depo. 74:9-75:11).

Ms. Wells further testified that HR Director Dawn Parks, who was handling passing out the Rollout Plan documents, came to see her and reported "some confusion for people about the plans" and that "an individual has a different

version." *See* PX 530 (Wells Depo. 64:7-21; 73:16-21). Ms. Wells also testified that her understanding was that all ArborGen employees had received the Dot 7 Plan initially, and that this remained her understanding until she was sued in this case in 2010. This testimony is diametrically at odds with Mr. Mann's testimony quoted and discussed earlier to the effect that the Rollout operation was conceived precisely because, as he learned directly form CEO Wells, a "big mistake" involving widespread distribution of the Dot 3 Plan had created a major problem. Referring to his phone call from Ms. Wells informing him of what had happened, Mr. Mann's words were, "it's one of those things you never forget." TT 267:20-24 (Mann).

A report on the September 2004 NVA Rollout event sent by Ms. Wells in February of 2005 to various ArborGen Compensation Committee members, including Munson, Burton, and Barfield tells a different story compared to her sworn testimony:
Board finalized NVA documents at end of Q2. Roll out completed September 2004. During the transition in 2002 of MWV and International Paper employees to ArborGen, the hiring package included an incorrect version of the NVA plan. This version was viewed by some employees as preferable to the Board Approved Plan that was being rolled out. Some employees indicated that they were unwilling to accept the new plan and that ArborGen had the legal obligation to allow them to keep the incorrect plan. Given the legal nature of the situation and the credibility of the management team at risk, all Dawn's HR responsibilities were immediately terminated and she is to focus exclusively on GA and PA. HR now directly reports to the CEP.

The situation was turned around through one-on-one discussions with every employee in the organization. The end result was positive as everyone signed the agreement and the NVA program was successfully rolled out and we successfully managed through a situation, which had a high liability risk."

See PX 170, at pp. 28-29.

The entire ArborGen Board received a less detailed report in April of 2005, PX 365 which reads at page 9972:

> NVA program rolled out in September. Although initially not rolled out smoothly due to incorrect documents included in personnel hiring documents, through one-on-one discussions with all employees, the situation was turned around and the NVA program was successfully implemented. Rapid action taken to adjust HR responsibilities.

***32** An email sent by CEO Wells to Mr. Mann after the Rollout meetings makes it clear that the meetings were integral to ArborGen's plan to eliminate a potentially very dangerous legal risk.
I wanted to thank you for your contribution to turning around what could have been a very bad situation with the NVA agreements to an outcome which way exceeded our any possible expectation we could have had. You helped in developing the best plan we could have put together and dedicated an unbelievable amount of time to make sure we got the best outcome Imaginable.

James, please take [your wife] out to her favorite restaurant in downtown Charleston on ArborGen. You and she both deserve a little time alone after the many long days and weekend time you have had to put into this.

See PX 363.

Had the purpose of the Rollout operation been purely to explain how the Rollout Plan differed from the Dot 7 Plan, the job could have been handled in a memo written in a very few hours. The fact that CEO Wells' email calls attention to Mann having invested "many long days and weekend time," demonstrates the real Rollout agenda was far more broad

and delicate than just relating a few formalistic wording changes. The aim was to talk the trusting ArborGen legacy employees into surrendering their Dot 3 NVA Plan rights without a fight. As CEO Wells put it in her memorandum reporting to her superiors, this maneuvering entailed managing "through a situation which had a high liability risk." *See* PX 170, at pp. 28-29. It also involved acting in bad faith and unfairly with respect to Plaintiffs' rights under the terms of their Dot 3 Plans.

Board Approval of the Rollout Effort

In advance of the Rollout in September of 2004, the Board approved the Rollout Plan, the Rollout process and the sign-off effectuated through the Award Agreements tendered to the employees at that time. TT 2312:9-20 (Barfield) ("The Board had approved the plan and approved the rollout."). The Board knew that the Award Agreements would be presented to the ArborGen employees at the time of the Rollout. TT 2312:21-2313:3 (Barfield), TT 2440:4-14 (Burton).

According to ArborGen Director Defendant Burton, the Rollout went "relatively smoothly," "Inasmuch as we got all those employees who had been handed another plan to agree to sign the [Rollout] Plan and move on and live with [it]." *See* PX 530 (Burton Depo. 27:2-10), TT 2397:19-2399:6 (Burton). Mr. Burton further testified "if the employees hadn't signed up, for example, I'm sure I would remember that because that would have been a major change of what was expected." TT 2428:15-2429:2 (Burton).

Just as the ArborGen Board authorized or ratified management's conduct in disseminating NVA Plans at the time employees were hired, so also the Board either authorized or ratified management's conduct in handling the Rollout in a manner seeking to manage through a situation that had, in CEO Wells' words, "a high liability risk."

The conduct authorized and ratified by the Board was permeated by deception and a lack of candor. It involved misleading employees into thinking that what they were receiving was superior to what the employees had been originally given, which this Court finds to not be true. The conduct created contusion among employees. TT 114:2-5 (Grant) ("September of 2004 … was actually a confusing time"). As discussed in more detail in the fiduciary duty discussion, infra, the Plaintiffs had reposed special trust and confidence in ArborGen, its management, its Board, and the founders that the Board members represented. Under ArborGen's unique culture, it was reasonable for the employees to trust in and believe that what they were being told was true when the Rollout was effectuated. They reposed their faith and trust in management's representations and actions and Plaintiffs had no reason to believe or know that they were wrongfully being deprived of any rights or harmed in any way.

Conclusions Concerning 2004 Rollout Activity

***33** After careful review of the entire record in this case, this Court finds that the 2004 Rollout activities was designed and orchestrated to generate self-serving paperwork for use by the Defendants in support of their plan to divest Plaintiffs and other legacy employees of their rights under the Dot 3 Plan. The Acknowledged and Agreed forms were presented to lay the groundwork for the defense contention in this case that employees waived or released their rights under the Dot 3 Plan. The aim was, in essence, to create evidence supportive of CEO Wells' claim, "[W]e successfully managed through a situation, which had a high liability risk."

June 1, 2010 Entity Conversion of ArborGen

In June of 2010, in preparation for a proposed public offering by ArborGen, ArborGen, LLC was merged into its successor, ArborGen, Inc. and the Plaintiffs' original option compensation plan was terminated and replaced by a new plan formulated by ArborGen, Inc.

Section 9 of the Dot 3 Plan reads:

Section 9. Amendment, Modification and Termination of the Flan and Awards

(a) *Term*. Unless the Plan is terminated earlier by the Board pursuant to subsection (b), the Plan shall terminate on the earlier of (i) the Payment Trigger Date, or (ii) the date the Company converts to a corporation. If the Plan is terminated as a result of the conversion of the Company into a corporation, all outstanding awards under the Plan shall also immediately terminate as of such date, and each Participant who is an employee of the Company immediately prior to such conversion shall be entitled to receive an equitable award granted under the equity incentive plan adopted by the successor corporation as soon as practicable after such conversion.

At the time of the conversion of ArborGen, LLC into ArborGen, Inc., the NVA Plan terminated, and the Plaintiffs were to receive an equitable award granted under the equity incentive plan adopted by the successor corporation. The "equity incentive plan adopted by the successor corporation" was ArborGen Inc.'s Appreciation Rights Plan. *See* PX 237.

The "Equitable Award" Obligation Owed Under § 9(A) was Breached

Unit awards in the Dot 3 Plan were offered to Plaintiffs and accepted by them in consideration of their joining ArborGen in early 2003. For reasons discussed elsewhere in this opinion, Defendants' efforts to divest Plaintiffs of their rights in the Dot 3 Plan by use of the Rollout scheme were to no avail. The operation was tainted by misconduct and there was no consideration given to Plaintiffs for the switch, nor is there credible, competent evidence that Plaintiffs ever intended to waive their rights under the Dot 3 Plan under section 9(b) of the Plan or otherwise. Proof of the elements of knowing waiver is completely lacking. Thus, when ArborGen, LLC converted into ArborGen, Inc. effective on June 1, 2010, Plaintiffs still held the Dot 3 Plan unit awards they received in early 2003.

It is undisputed that no attempt was made by any Defendant in June of 2010 to ascertain the value of Plaintiffs' unit awards in the Dot 3 Plan, nor was there any attempt to vest Plaintiffs or other legacy employees with awards under the new Appreciation Rights Plan to carry over Dot 3 Plan equity values. When the LLC conversion took place, the Dot 3 Plan's provisions, and Plaintiffs' rights thereunder, were never considered by Defendants. Rather, the focus was on shaping interests in the Appreciation Rights Plan that would give commensurate value for an employee's holdings in the Rollout Plan as it then existed. *See* PX 428 (reflecting Defendant Burton's calculations toward that end).

Under Defendant Burton's analysis, an ArborGen valuation in 2010 of $420 million, up from an initial value of $100 million, would yield employees zero value ($0) for their Rollout Plan's NVA units. *See* PX 428 p. 2. [16] Under Defendant Burton's calculations, an "Equity Value" valuation of $650 million for ArborGen as of December 1, 2010, would have produced a net gain for each AR Plan unit holder of only $19.73 per unit. Using his initial base value at the time of conversion, $42.43, PX 428, p. 2, connotes a slightly higher per-unit net value to employees of $22.57. [17]

***34** Plaintiffs' expert Steve Pomerantz, appeared at trial and testified as to valuation and damages issues. TT 651-719 (Pomerantz). His report is in the record as PX 483. Mr. Pomerantz's expert opinion was that the value of ArborGen at the time of the conversion was $650 million. TT 670:1-8 (Pomerantz). Mr. Pomerantz applied the Dot 3 Plan's calculation formula to the $650 million valuation for ArborGen as of June 1, 2010 and derived a unit value of $550 per unit for the Dot 3 Plan units at that point in time. The difference between Mr. Pomerantz's unit value of $550 per unit, and the inferred unit value of $22.57 is $527.43. This number represents, on a per-unit basis, the value that needed to be added to each Appreciation Rights unit received by Plaintiffs when the Dot 3 Plan terminated and their holdings were transferred over to the AR Plan. Stated differently, $527.43 represents the amount of value that Plaintiffs were shorted in June of 2010 when their holdings in the Appreciation Rights Plan failed to match up to the value of their Dot 3 Plan units. Plaintiffs contend the difference reflects their damages on a per unit basis as of June of 2010. This Court agrees.

In a case such as this, issues of valuation and damages are matters of opinion and often are the subject of expert testimony. Plaintiffs' expert, Steve Pomerantz was presented and qualified as an expert in the fields of "option contracts, investment analysis, investment valuation and damage valuation." TT 659:7-18 (Freeman). Here, Mr. Pomerantz's credentials were not challenged by the defense. They accepted him as "a very qualified witness … [who] certainly knows what he's talking about within his field of expertise." TT 659:15-17 (Farrier).

As previously stated, the Defendants provided no expert testimony to contradict the testimony of Steve Pomerantz. Instead, the Defendants provided self-serving opinions of the value of ArborGen that were drastically different. However, the documents before the Court, including value numbers considered by Burton in 2010, and including the representations made by Defendants Moriarty and Burton to Rubicon's shareholders at Rubicon's annual meeting provide further support to ArborGen's $650M value. *See* PX 211 [18]. This Court observes that for the purposes of assessing the financial worth of Plaintiffs' claims, the Defendants argue and testify that ArborGen is a struggling company with little if any value in the market. However, outside the courtroom, when the Defendants represent the value of ArborGen to its public Rubicon shareholders, the valuation number is glowingly positive.

The only expert opinions on valuation and damages were presented by Plaintiffs' expert, Mr. Pomerantz. Those opinions are credible and persuasive. The only adjustment deemed appropriate is to reduce the $550 per unit value by $22.57 for each unit, assuming a $650 million valuation number. The net loss per Plaintiff on a per unit basis as of June 1, 2010, is thus $527,43. On a per-unit basis, this is the amount of damages suffered by each Plaintiff effective June 1, 2010.

Defendants Claim Plaintiffs have no Damages

In addition to a difference of opinion over damages stemming from a dispute regarding ArborGen's value, the Defendants claim that Plaintiffs have no damages arising from their Dot 3 Plan unit holdings for a variety of other reasons.

ArborGen's two New Zealand-based Rubicon directors, Moriarty and Burton, contend that the Dot 3 Plan was missing an essential term, was never operable, and was worthless. TT 1066:10-1067:6, 1097:16-23 (Moriarty), TT 2399:7-18 (Burton). According to Defendants Burton and Moriarty, the term "specified fraction" within the NVA Unit value definition is undefined and therefore you cannot calculate the value of an NVA Unit under the plan. However, exactly the same "specified fraction" term appears in the NVA Unit value definition in the Dot 7 Plan. The definition of Unit Value in the Dot 7 Plan is exactly the same as the supposedly fatally infirm definition of the same term in the Dot 3 Plan. Yet, no Defendant has ever claimed or even suggested that the Dot 7 Plan is unintelligible or inoperable.

***35** The theory of the "specified fraction" term making the Dot 3 Plan inoperable is not supported by any other board member's testimony. No other board member or ArborGen business record said anything about the term "specified fraction" rendering the Dot 3 Plan unenforceable or inoperable. None of the countless communications between board members discussing the NVA Plan ever mentions the term "specified fraction" being undefined or that some definitional failing with the Dot 3 Plan's construction made it unworkable. For example, at trial, Defendant Liebetreu testified he had never heard it suggested that the Dot 3 Plan was inoperable or that you could not calculate values from it until he arrived in the courtroom. TT 1158:7-11, 1158:15-20 (Liebetreu).

Casting further doubt on the "specified fraction" infirmity claim advanced by Defendants Moriarty and Burton, and them alone, is the fact that they both were instrumental in developing the NVA Plan's "proper wording." Defendant Baughman discussed their contributions at trial:

Q. And Luke Moriarty, and we've seen signs of him being well papered and informed pretty much every step of the way. Would you agree that he was being kept apprised?

A. Yes, he had a lot of key and insightful comments into the proper wording and development of the plan.
Q. Yes, and Mr. Moriarty as well would participate in conference calls between those of you here and those in New Zealand. It's kind of cumbersome, but that's how you actually had a lot of your discussions or meetings is by using conference calls; is that correct?

A. That's correct.

Q. And he was very often on a conference call?

A. He was. Sometimes both he and Mike were on the call at the same time.

Q. And Mr. Burton tended to be a regular participant?

A. Very much so.

Q. And a very interested person, true?

A. And also a person that had a lot of input into the wording and suggestions on changes, yes.

TT 2135:21-2136:14 (Baughman).

According to Mr. Burton, the first time there was any mention about the "specified fraction" term was in discussions he had with Mr. Moriarty after they were sued. TT 2478:12-20 (Burton).

No business record document or other Defendants' testimony supports the Moriarty-Burton specified fraction contention. At trial, Defendant Baughman was referred to the definition of "NVA Unit" and the specified fraction language used therein. He testified that there was nothing in the definition he did not understand. TT 2116:6-14 (Baughman). He further testified that nothing in the definition made the "plan unworkable, inoperable, meaningless, worthless or anything of that nature." TT 2116:15-20 (Baughman). According to Plaintiffs' expert, Steve Pomerantz, the term "specified fraction" in the Dot 3 Plan has no effect on the operability of the NVA Plan. Mr. Pomerantz did not find the Dot 3 Plan inoperable in any way. TT 660:8-18 (Pomerantz). *See* PX 483, p. 2 (Pomerantz Report, para. 4 "In my opinion, once the necessary action establishing the initial value was taken by the ArborGen board, the Dot 3 Plan became fully operable").

Related Defense refrains already discussed herein were that the Dot 3 Plan was merely a draft that was nonfunctional (TT 1600:11-13 (Miller)), was nothing but a draft that never took effect (TT 1066:19-22 (Moriarty)), was missing an essential term, "initial value," and never became activated because Plaintiffs never signed Award Agreements for the Dot 3 Plan. Defendants further contend that any rights Plaintiffs may have had in the Dot 3 Plan were extinguished when they signed the Acknowledged and Agreed document during the Rollout, or the Amendment document tendered them in 2008, or when, with the exceptions of Plaintiffs Foutz, Clark, Stout, and Winkeler, they signed the Appreciation Rights Agreements tendered Plan in 2010.

***36** Despite claiming that the Plaintiffs have not been harmed by the switching of the NVA Plans and that Plaintiffs have no damages, the Defendants further contend the Plaintiffs claims are barred from recovery based on the statute of limitations. This Court does not find the defenses of the Dot 3 Plan being inoperable to be credible or valid. Nor, under the unique facts of this case, and as discussed in detail herein, is it possible to find that Plaintiffs' knew or should have known they had claims for damages against Defendants in 2004, such that they would be time-barred.

Defendants' Credibility

Throughout the course of trial, the credibility of the Defendants witnesses, and ArborGen management witnesses called during Plaintiffs' case in chief has been in question in the eyes of this Court. The inconsistencies between the documents and Defendants' testimony along with Defendants' and ArborGen managements' contradiction of each other's testimony, not to mention wholesale changes in testimony all combine to raise considerable credibility concerns. Upon review of the trial record, including the Exhibits presented by both the Plaintiffs and Defendants and the submitted deposition excerpts of various witnesses, this Court notes the following inconsistencies and contradictions that weigh on the Court's mind when assessing the credibility of the witnesses.

Mr. Munson and the 2002 Dot 3 Plan Handout "Mistake"

Defendant Munson twice volunteered at his deposition that he learned about a mistaken distribution of an NVA Plan well in advance of the Rollout in 2004 and in advance of any of the Plaintiffs having received their Dot 3 Plan. *See* PX 530 (Munson Depo. 81:13-21 & 206:17-207:13). After his deposition, Mr. Munson was given an extended time period to correct the timeline on his errata sheet. He did not do so.

Instead, he appeared at trial and told a different story, moving the date he learned about the "error" to 2004 after the initiation of the Rollout. This change in testimony is self-serving. It appears tailored to bring his knowledge of the Dot 3 Plan distribution within the Defense's theory of a lack of knowledge of the Dot 3 Plan prior to the 2004 Rollout.

Defendant Munson's change in testimony raises questions as to his credibility for several reasons. First, at his deposition, he received detailed instructions about using care in answering and giving truthful answers. TT 784:13-785:3 (Munson). At trial, Mr. Munson admitted that there was nothing about the instructions given to him as a deponent that he failed to understand. TT 785:4-6 (Munson). Yet, at his deposition he twice referenced learning, in mid-2002, about the incorrect distribution of Dot 3 Plans, and he recanted this testimony at trial.

Given that Mr. Munson was, according to Defendant Moriarty, "intimately involved with the NVA plan and the Rollout," (TT 1048:15-16 (Moriarty)) it is especially peculiar and suspicious that he would deny at trial learning of the mishandling of Dot 3 Plan documents in 2002, since two other ArborGen directors testified that the 2002 Dot 3 Plan "mistake" event actually happened. Mr. Munson testified at his deposition that the problem spotted in 2002 involved a "typographical error." *See* PX 530 (Munson Depo. 206:11-22). At trial, Mr. Wallinger recalled being told in 2002 by Mr. Baughman about the problem of plans being distributed with a "typo" related to a decimal point. TT 2225:15-2226:24, 2239:8-11 (Wallinger). Both Defendant Baughman and Defendant Wallinger's testimony (TT 2124:3-2126:20 (Baughman) and TT 2225:15-2227:14 (Wallinger) thus corroborate Mr. Munson's original deposition testimony about an error involving a typo in 2002, testimony he volunteered with no prompting, but recanted at trial.

***37** Like Defendants Baughman and Wallinger, Mr. Munson had every reason to know about the 2002 event; he consistently served on the Compensation Committee, which was tasked with supervising the NVA Plan's development and distribution. The distribution "to the initial six or seven people" TT 2130:9-11 (Baughman) of the Dot 3 NVA Plan with a "typo" that created what Defendant Wallinger heard from Mr. Baughman was "something of a problem within the company" (TT 2225:19-25 (Wallinger)) happened in 2002. That this event could have occurred without Mr. Munson knowing about it is highly questionable, particularly since he testified repeatedly exactly to the contrary at his deposition. Moreover, Mr. Munson's deep involvement and experience in NVA-related matters was mentioned at trial by his fellow director Luke Moriarty, "Mr. Munson was intimately involved with the NVA plan and the rollout." TT 1048:15-16 (Moriarty).

Mr. Munson and the "Financially Unsupportable" Characterization Testimony

Defendant Director David Liebetreu is an executive with IP to whom Mr. Munson reported. Mr. Liebetreu testified at trial that Mr. Munson had "shared with [him] what seemed to be the specious case of somebody had a draft document with a typo in it that represented an incentive plan that on its face would be unsupportable financially and ridiculous in some ways." *See* PX 530 (Liebetreu Depo. 19:2-6).

At his deposition, Mr. Munson was asked directly about Mr. Liebetreu's testimony: "What do you remember telling him that you had learned about the mistake and when?" He responded: "And when. Let's start with the when. And I don't remember when." *See* PX 530 (Munson Depo. 181:1-4). At trial, Mr. Munson admitted having such a conversation with Mr. Liebetreu in early September of 2004. TT 823:23-825:7 (Munson). However, at the close of the completion of his cross examination at trial by Mr. Farrier, Mr. Munson recanted his previous testimony and testified that his conversation with Mr. Liebetreu was not in 2004, but rather in 2010 after the lawsuit was brought. TT 912:19-913:22 (Munson). Mr. Munson thus has presented three different stories under oath about the timing of his "unsupportable financially and ridiculous" statement to Liebetreu: (1) 1 don't remember when it was, (2) it was in 2004, (3) it was in 2010.

Again, this change in testimony can be viewed as an attempt to conform to the Defendants' theory of a lack of timely knowledge by ArborGen's board members of the events surrounding the Dot 3 Plan and the Rollout. Having received a report from CEO Wells in March of 2005 describing the Rollout and the fact that the company had avoided a "high liability risk", it is not credible that Defendants Munson and Liebetreu would not have discussed the events surrounding the "high liability risk" prior to 2010 when the Plaintiffs' suit was filed.

Defendants' interpretation of the meaning of "high liability risk" is unreasonable.

No Defendant would testify that Ms. Wells' terminology "high liability risk" meant the potential of being sued and losing. The Defendants' skirted the issue by claiming that "high liability risk" could mean a morale issue [19] or risk of employee defection. [20] This Court finds that by far the more reasonable interpretation of Ms. Wells' terminology "high liability risk" is potential legal liability.

Defendants' contradict each other related to their "due diligence"

***38** The behavior of Board members in dealing with what Ms. Wells called "a situation which had a high liability risk" is riddled with contradictory testimony. Defendant Munson testified he was part of the committee that was looking into "the situation" and that the committee "did exercise some due diligence to understand what happened." *See* PX 530 (Munson Depo. 43:6-9). He testified that, "[a]s part of the team that was exercising due diligence … we asked questions." *See* PX 530 (Munson Depo. 55:4-6). He identified Mr. Barfield and Burton as being on the team with him (56:3-6), with the team being led by Mr. Burton. *See* PX 530 (Munson Depo. 56:13-14). At trial in his direct testimony, Mr. Munson stated the Board "very quickly" took strong action to deal with the Rollout "situation." TT 769:8-20 (Munson).

This testimony was consistent with parts of Mr. Munson's deposition testimony about exercising "due diligence" to address the issue. However, this diligence testimony is contradicted by other evidence in the record to the effect that Board members conducted no detailed investigation whatsoever. Mr. Munson himself testified he could not remember learning of anyone who attempted to determine the scope of the problem or the number of employees affected. *See* PX 530 (Munson Depo. 148:5-10). Mr. Munson testified that in dealing with the problem the Board members "did not know the number of employees that were affected," *See* PX 530 (Munson Depo. 86:6-13); there was no investigation of "the dimensions of the problem in terms of employees affected," *See* PX 530 (Munson Depo. 86:21-14). When asked "[W]hat did your investigation show exactly as to who was personally responsible for the mistake?" Mr. Munson admitted

"We did not conduct an investigation." *See* PX 530 (Munson Depo. 86:25-87:3). In answer to the question: "Who was responsible for this problem being caused?" Mr. Munson replied, "I honestly don't know." *See* PX 530 (Munson Depo. 87:14-16).

Throughout the time leading up to the Rollout, the Board never investigated to determine what NVA Plan was being handed out to the employees. *See* PX 530 (Burton Depo. 114:7-25). Mr. Burton, who Mr. Munson said led the investigation into what Ms. Wells called "a situation which had a high liability risk," denied ever conducting any investigation into the circumstances. *See* PX 530 (Burton Depo. 163:8-10). He likewise stated that no other Board member ever conducted an investigation to find out what happened. *See* PX 530 (Burton Depo. 163:11-13). Mr. Barfield, another alleged due diligence team member, has no recollection of being on such team or performing any investigation. *See* PX 530 (Barfield Depo. 17:25-18:3. 80:5-81:15) *see also* TT 2315:21-2316:17 (Barfield). Mr. Munson was challenged at trial about his deposition testimony in which he claimed [at Munson Depo. p. 55:22-56:14] that a due diligence effort into the Rollout situation had been led by Mr. Burton:
Q. And you said that Mr. Burton ran that investigation. It will be in the record. The Court's going to have your deposition.

Do you recall saying Mr. Burton was spearheading that?

A. I don't remember that, no.

Q. Okay. Would you be surprised to find that Mr. Burton testified at his deposition that there was no investigation?

A. That wouldn't surprise me at all.

TT 860:1-8 (Munson).

No effort was made to determine from the employees' standpoint what had happened. TT 886:15-23, 887:10-18 (Munson). The investigative team Mr. Munson testified about never made a determination of what caused the problem in the first place, and never made any determination of what was the scope of the problem. TT 887:16-888:1 (Munson). Nor did Mr. Munson's alleged investigation determine who was responsible for the Dot 3 Plan problem. TT 882:10-16 (Munson). According to Defendant Munson, "[i]t was never particularly important" to determine who was responsible for the "situation" addressed by the Rollout meetings. TT 882:18-22 (Munson). Defendant Hundley said he never attempted to determine who was responsible for the "situation." TT 1209:10-1210:8 (Hundley). He went on to note, "if anyone did, it would have been Mr. Burton, but … he says he did not." TT 1210:5-8 (Hundley).

***39** Mr. Munson's sworn testimony at his deposition and at trial about undertaking a due diligence investigation into the Rollout "situation" is not credible. The so-called due diligence investigation by Munson, Barfield and Burton was a sham. The evidence is there was no such investigation. The Court concludes that there was no due diligence team of Directors or Compensation Committee members who conducted or attempted any meaningful investigation into the circumstances that gave rise to this case and there was no due diligence performed by any board member as to the Dot 3 Plan distribution and Rollout issues.

The "Mistake" Message at the Rollout Meetings Does Not Ring True

Mr. Mann, ArborGen's former Chief Financial Offer, testified that "all" Plaintiffs were told that a "mistake" had been made. "I'm sure it was told over and over to them that it was a mistake and that it was a bad mistake." TT 198:7-9 (Mann). Oddly, Ms. Hinchee who was accompanying Mr. Mann during these meetings says she never told any of the employees a "mistake" had been made because she didn't even know about it. *See* PX 530 (Hinchee Depo. 65:22-67:2).

Ms. Wells, ArborGen's Chief Executive Officer, testified she had no recollection of a mistake or any other NVA Plan existing prior to being sued. Ms. Wells' testimony is contradicted by her March 2005 report to the Board. *See* PX 170. Mr. Mann's testimony is contradicted by the testimony of Plaintiffs Nehra, Chang, and Cook along with the testimony of current ArborGen employees Jim Grant and Eric Gulledge. Further, no Plaintiff or ArborGen employee testifying in this case was ever told in any of the group Rollout meetings that a "mistake" had been made.

Ms. Wells, despite testifying that she doesn't recall any "mistake" having been made, stated to Mr. Foutz in a recorded conversation in 2010 that "I personally got in front of everyone and said, I'm very, very sorry. It was a mistake. Even we make mistakes." Mr. Foutz testified this absolutely did not happen. TT 1839:16-22; 1840:4-7 (Foutz). As discussed above, Mr. Foutz's testimony is corroborated by all other Plaintiffs' testimony and testimony of current ArborGen employees Jim Grant and Eric Gulledge.

Dawn Parks and Barbara Wells Tell Different Stories About the Events of 2004

According to Ms. Wells' conversation with Mr. Foutz, Ms. Parks volunteered to leave the company for the mistake that she had made. *See* PX 484B p. 10. Ms. Wells March 2005 report to the board indicates that all of Ms. Parks HR responsibilities had been taken away. *See* PX 170. Ms. Parks testified at trial, through her deposition, that she never was almost fired for handing out the first NVA Plan that she handed out, nor did she offer to leave the company in 2004 because of her handling of the NVA Plan. *See* PX 530 (Parks Depo. 107:10-12 & 111:6-8). Ms. Parks testified she gave out the NVA Plan that was approved to be given out. *See* PX 530 (Parks Depo. 96:23-97:8).

The Specified Fraction Defense is Not Credible

Defendant Moriarty and Defendant Burton's testimony as to the inoperability of the Dot 3 Plan because of the undefined term "specified fraction" is not supported by any other evidence in this case. The supposedly flawed definition of "NVA Unit" in the Dot 3 Plan is identical to the definition of "NVA Unit" in the Dot 7 Plan, and the validity of the Dot 7 has never been in question.

No other board member was aware of that assertion during the development of the NVA Plan or ever. No board correspondence reflects the term "specified fraction" being a problem because it is undefined despite numerous iterations of the NVA Plan and numerous communications regarding the same. As stated previously, Mr. Liebetreu testified at trial that he had never previously heard of the Dot 3 Plan being inoperable or unable to calculate values prior to coming to the courtroom the day he testified. TT 1158:7-11, 15-20 (Liebetreu).

***40** Mr. Pomerantz, who testified without objection and who this Court finds qualified to provide an opinion as to the functionality of the Dot 3 Plan, reported no drafting issues with the Dot 3 Plan being operable. As noted above, making the "specified fraction" contention particularly dubious is the fact that both Defendants Moriarty and Burton were personally involved in choosing the wording that went into the NVA Plan. It is notable that the alleged "specified fraction" problem, put forward only by Defendants Moriarty and Burton, surfaced for the first time only after they were sued in this case. TT 2478:12-20 (Burton). The contention the Dot 3 Plan had a fatal defect is not credible and is rejected.

Defendants Lack of Consistency on ArborGen's Value is Notable and is Noted

The Defense, including particularly Defendant Moriarty and Defendant Burton continually downplayed the value of ArborGen for purposes of the Plaintiffs' claims. For example, Defendant Burton testified that in the last few days prior to trial ArborGen had an "implied value" of only $210 million. TT 2375:16-25 (Burton). Yet, when reporting the value of ArborGen to Rubicon's shareholders, Rubicon management gladly published a report showing ArborGen to be an extremely valuable asset.

The ArborGen valuation numbers published by Rubicon to its shareholders on the Internet were in line with valuation numbers put forth at trial by Mr. Pomerantz and with the valuation numbers place on ArborGen by various financial institutions in 2010 preparation for the proposed IPO. *See* PX 211, p. 11 (placing a $660 million dollar valuation on ArborGen as of late 2013), see *also* PX 530 (Burton Depo. 194:11-195:25).

The Purported "Draft" Plan Designation for the Dot 3 Plan is Meaningless

The defense in this case has continually referred to the Dot 3 Plan as a "draft" plan. The Dot 3 Plan has no indication on its face that it is a "draft". No Plaintiff or ArborGen legacy employee was ever told it was a "draft", not even during the Rollout. Insofar as the designation of the Dot 3 Plan as a draft is intended to convey the idea that was automatically invalid, the suggestion fails because the Dot 7 Plan had the same characteristics and yet no Defendant question its validity or ability to operate. Several Plaintiffs and current ArborGen employees Jim Grant and Eric Gulledge testified the first time they heard the Dot 3 Plan referred to as a draft was in an interview with defense counsel, Richard Farrier, after Plaintiffs Foutz, Clark, Kothera and Stout had filed suit in December 2010.

Maud Hinchee's Recorded Criticisms Are Telling

In addition to the inconsistencies noted above, former Chief Technology Officer Maude Hinchee's recorded conversation with Plaintiff Foutz paints a telling picture of the Board's actions and intentions with regards to the NVA Plan. The conversation took place at ArborGen in the office of ArborGen's executive officer in 2010 prior to the lawsuit having been filed. Mr. Foutz was expressing his frustration of the new Appreciation Rights Agreement that had been given to the employees after ArborGen's conversion to a Corporation and reflecting on the events of the 2004 Rollout.

During that conversation, Ms. Hinchee had very notable things to say. In referring to the 2004 Rollout, Ms. Hinchee stated

• "I just remember - I just remember being told we had to get everybody to sign it. *See* PX 484A p. 8 & PX 528.

• "I just think the original intention got morphed and changed and - and who knows what forces and dynamics were in place that they evolved into these different plans and forced us to sign them and everything." *See* PX 484A p. 12 & PX 528. Ms. Hinchee later backed off of the term "forced" and replaced it with "strong encouragement." *See* PX 484A p. 13 & PX 528.

***41** • "I don't know the details, but I know it probably, it probably was too rich for the company, for the company really couldn't probably afford to pay out all that or the Board, because there's a compensation committee." *See* PX 484A p. 24-25 & PX 528.

• When questioned whether the Board changed their mind, referring to the NVA Plan, Ms. Hinchee responded "yes". *See* PX 484A p. 25 & PX 528.

• Ms. Hinchee knew for a fact that "they (referring to the ArborGen Board) thought signing in 2004 was, was, was a restart". When questioned by Mr. Foutz whether 2004 was to get them (referring to himself and other employees) out of the first plan, Ms. Hinchee responded "yeah". *See* PX 484A p. 32 & PX 528.

In expressing her own frustration over the Appreciation Rights Agreement, Ms. Hinchee stated

• "Well, I just - I - I, you know, felt very depressed after we had that session. And, you know, it wasn't just for me. It was just for everybody because it just seemed like the chances for everybody having any value from it was really low, and it turned out not to be any option for stock or anything like that." *See* PX 484Ap. 16 & PX 528.

• Ms. Hinchee stated she has a jaded attitude toward the board because "I've seen the Board in operation too. You know what I mean? Those guys are, well, you know what, let's put it this way, they're going to make sure they get their money back as companies." *See* PX 484A p. 34 & PX 528.

See PX 484A & PX 528 (both admitted into evidence without objection).

While Ms. Hinchee's recorded conversation with Mr. Foutz is not sworn testimony, she was speaking as an ArborGen officer about matters within the scope of her employment. It is fair to view her statements as admissions. Her statements support the Plaintiffs' allegations in this case that they are the victims of a scheme to cheat them out of their monetary rights in ArborGen's growth in value. In Ms. Hinchee's words, "You know, so, you know, you've just got the feeling that it was, you know bait and switch. Bait and switch all the way through." *See* PX 484A p. 16 & PX 528.

As has been noted, the opening section of the Dot 3 Plan on which Plaintiffs' base their claim for relief expressly states that Plaintiffs' NVA units were "intended to represent a fractional interest in the growth of the equity value of the Company over time." The record reflects that ArborGen's enterprise value indisputably did grow substantially from the time Plaintiffs were hired until the NVA Plan ceased to exist in June of 2010.

Plaintiffs were employed over that entire time span. It is unchallenged that over that time Plaintiffs did supply to ArborGen, as stated in the Dot 3 Plan's text, section 1, "the judgment, interest, skills, and special effort" upon which ArborGen was largely dependent for "the successful conduct of its operations." The Court views Mr. Foutz's impressions taken from his recorded conversation with Ms. Hinchee as opinions that a reasonable person in similar circumstances would take away from the same conversation. TT 1867:11-23 & 1870:25-1887:12 (Foutz).

Summary of Court's Findings of Fact

This Court finds that ArborGen's legacy employees reposed special trust and confidence in the Defendants and were in turn abused by ArborGen, its founders, its board members and its management team. Based on promises made in writing and signed by ArborGen's CEO Plaintiffs entered into contracts, which the Defendants did not honor. In not honoring the contracts, the Defendants acted with a lack of honesty and integrity in communicating with the Plaintiffs. The Defendants orchestrated a cover-up scheme created and executed to switch the Plaintiffs out of the Dot 3 Plan that the Defendants had determined to be "too rich," all in an effort to eliminate what Defendants recognized as a "high liability risk."

***42** The actions and inactions of ArborGen management and the individual Defendants are imputable to ArborGen and the founder Defendants, MWV, IP, and Rubicon because those actions and inactions were authorized, approved, condoned, and/or ratified by the Defendant entities through their authorized agents, and were for the financial benefit of those entities. To date, no Defendant has in the slightest criticized or disavowed the action or inaction of any other Defendant, including the conduct of CEO Wells. A united front has been presented; in essence, the Defendants' position is "all for one and one for all." To a great extent, the NVA Plan operation and its associated problem represent a production conceived, designed, and administered by and on behalf of the founding companies working with ArborGen agents through their appointed Board members.

The switch imposed on the Plaintiffs was for the financial benefit of ArborGen and its members and to the detriment of the Plaintiffs. The Plaintiffs were given a plan of significantly less value as a result of Defendants' scheme.

Misrepresentations, concealments, and false pretenses were used by Defendants to get the Plaintiffs to sign for the 2004 Rollout Plan. By such conduct, the Plaintiffs were deceived into believing that what they were receiving was better for them, an actual benefit. The Plaintiffs were given no form of consideration to substitute their NVA Plan. The Plaintiffs' trust and confidence reposed in ArborGen, its management, its board members, and the controlling founders was not honored, but was abused.

In 2010, when the company converted to a corporation, the Defendants failed to provide the Plaintiffs with an equitable award in the successor corporations' incentive plan as required by the terms of the NVA Plan originally given to the Plaintiffs. At that point in time, the Plaintiffs suffered significant monetary harm in the way of lost equity rights in ArborGen. Mr. Pomerantz testified credibly, and no Defense valuation or damages expert was offered at trial. When ArborGen undervalued or ignored Plaintiffs' equity value in the Dot 3 Plan in June of 2010, Plaintiffs' suffered financial injury and damages became calculable. As a result of the Defendants' actions, the Plaintiffs suffered significant financial loss, and it is those damages for which they should be compensated. As discussed above, those damages amounted to $527.43 per NVA unit effective June 1, 2010.

CONCLUSIONS OF LAW

PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED

Defendants rely on the three-year statute of limitations set forth in S.C. Code § 15-3-530(1), (5) to defeat Plaintiffs' six causes of action claiming, respectively, violations of the South Carolina Payment of Wages Act, negligent misrepresentation, breach of fiduciary duty, breach of contract accompanied by a fraudulent act, civil conspiracy, and violation of the South Carolina Unfair Trade Practices Act. Suit was first filed in this case by four plaintiffs on November 24, 2010. The remaining Plaintiffs sought to join the suit through a motion to amend on April 10, 2012 and were formally added by an amendment of the Complaint on March 13, 2013. Defendants contend that Plaintiffs knew or should have known of their claims within three years of the Rollout in September of 2004, and are hence time-barred. This Court has previously rejected Defendants' statute of limitations arguments set forth in Defendants' Motion to Dismiss and Motion for Summary Judgment. Now having heard all the evidence presented at trial, this Court disagrees with and rejects on the merits Defendants' assertion that Plaintiffs' claims are time barred.

As is discussed in more detail in the section of this opinion relating to Plaintiffs' fiduciary duty claims and in other parts of this opinion, Defendants' actions taken in August and September of 2004 were an attempt to convince ArborGen's trusting employees that the Rollout Plan was the only ArborGen Plan, and, compared to the Dot 3 Plan, the Rollout Plan was "superior, better, operative, the gold standard of NVA plans." TT 1554:21-24 (Stout). Employees were told that the Rollout Plan was "the board-approved plan, [and] was the only valid and operable plan." TT 331:18-21 (Gulledge). The Dot 3 Plan was dismissed as an inferior product that "was not operable," TT 1555:2 (Stout) and, that "couldn't be executed," TT 116:15 (Grant). In truth, Defendants wanted the Dot 3 Plan to "go away" not because it didn't work, but because it worked too well financially for Plaintiffs; it was seen as "too rich" and "unsupportable financially."

***43** The essence of Defendants' scheme was to induce Plaintiffs to give up their rights in the Dot 3 Plan by convincing Plaintiffs that in light of all the facts, the Rollout Plan was the better Plan to own. Defendant Munson, who served both on the ArborGen Compensation Committee and the Board at all relevant times was emphatic about the Rollout Plan's superiority:

Q. And you believe that the company has throughout this from A to Z acted in a forthright and honorable way?

A. No question, we have.

Q. And there has been no prejudice whatever suffered by these employees?

A. That's correct.

Q. And, in fact, giving them the Dot 7 successor, the 2002 rollout plan was doing them a big favor, was it not?

A. Absolutely.

Q. And any reasonable person, looking at the facts accurately and correctly in 2004 in September, would have agreed that they're actually being benefited and not hurt by the rollout plan?

A. That's correct. Had I been the receiver of that document, I would have shaken the hand two times of the person that gave me that document and thanked them for making this improvement.

TT 872:24-873:15 (Munson).

Defendants did a good job of convincing Plaintiffs that the Dot 3 Plan was worthless and that, in any event, the Rollout Plan was a superior product. However, the actions taken to successfully convince Plaintiffs that they had not been disadvantaged undercut Defendants statute of limitations argument that, starting with the Rollout, Plaintiffs either knew or should have known they had been cheated. A person awarded a superior product has no reason to believe he or she has been cheated.

The essence of the wrong in this case was tricking Plaintiffs into giving up their rights under the Dot 3 Plan and accepting the Rollout Plan. Defendants have contended that the Rollout event should have made Plaintiffs realize they had been wronged, and thus the statute of limitations bars their claims. However, as reflected at length in this record, the Rollout event was not a point at which deception was revealed, it was really the point at which Defendants' deception was most effectively practiced. Defendants' emphasis was not at all on disclosing or explaining; the emphasis was on deception and cover-up so that, CEO Wells could later boast, "[w]e successfully managed through a situation with a high liability risk." *See* PX 170 at pp. 119-20.

Following the Rollout a good amount of time passed until an NVA Plan issue next arose. That happened in 2008 when employees were notified in writing about additional changes to the Rollout Plan given them in 2004. As Plaintiff Chang's testimony reflects, those amendments were reasonably viewed as a nonevent:
Q. And then in 2008, do you recall getting a letter about amendments to the plan related to a lax issue?

A. Yes, that's right.

Q. Okay. And then do you — and that was related to the — those amendments were to the 2002 value added plan, the rollout plan, correct?

A. My understanding was — again, I mean, I thought the matter was related to a tax issue, the management was actually trying to do something good for us, so 1 didn't pay much attention.

TT 551:13-22 (Chang).

All throughout this time, ArborGen's value was increasing. The way employees' NVA Plan unit values could assume great significance were through a sales event or upon a conversion of ArborGen, LLC into a C-corporation. The sales event trigger depended on a transfer of equity to a third party. This pathway opened for ArborGen and was actively pursued in 2010 in connection with the planned IPO. The IPO opportunity involved the public offering of stock.

***44** In order to pursue the IPO opportunity, it was necessary for ArborGen to change from LLC status and become a C-corporation capable issuing shares. Under the Dot 3 Plan and the Rollout Plan as well, the conversion out of LLC status had two consequences: it terminated the plan and required that that each Plan member receive an equitable award from the company in the successor Appreciation Rights plan going forward.

Testimony at trial reflected that employees were spurred into undertaking an investigation of the underlying facts by management's insistence that they sign up for the Appreciation Rights Plan after the LLC conversion and in advance of the IPO. *See* TT 1368:6-11 (Clark). Quite naturally, the NVA Plan conversion explanation meeting opened legacy employees' eyes. Mr. Clark testified:
Q. Do you recall any financial discussions being made at the appreciation rights meeting about what the employees were going to get at different valuation levels of the company?

A. Yes. They threw out some hypothetical numbers saying if we did an IPO and we got 450, $420 million, that this would be what you would get.

Q. Which was what?

A. If it was below, they put out some number, 420, 430, something like that, said if it was below this threshold, then the plan value is equal to zero.

Q. If the company sold for 420 million or $450 million, you were going to get zero?

A. That's what they told us, yes.

Q. Does that seem to be lucrative as what was described to you back in 2002 when you were going to work for ArborGen?

A. I don't think zero is lucrative.

TT 1274:16-1275:6 (Clark); *see also* TT 1714:21-1715:8 (Winkeler).

It is obvious from this record that Plaintiffs' delay in suing is not due to sloth or indifference on their part; it is because Defendants' planned, orchestrated, and pulled off a scheme calculated to convince Plaintiffs to believe that by signing up for the Rollout Plan they were getting rid of a malformed, ineffective Plan that would never offer value in exchange for a superior product. According to John Clark, "James [Mann] was very passionate and convincing," TT 1309:17-18 (Clark); *see also* 1873:24-25 (Foutz) (quoting Maud Hinchee referring to the Acknowledge and Agree document: "I do remember going around with James trying to convince people to sign it."). It was Mr. Mann who, after the successful Rollout scheme was over, was praised and rewarded by CEO Wells for his efforts "in developing the best plan, we could have put together" which culminated in "turning around what could have been a very bad situation with the NVA agreements." *See* PX 363.

Defendants' self-serving "mistake" story line is called into question by Defendants' actions. First, the distribution of Dot 3 Plans uniformly to the legacy employees does not have the trappings of a mistake, particularly where all the non-legacy employees receive Dot 7 Plans. The same goes for the passing out of Award Agreements to Dot 7 Plan recipients, but withholding them from Dot 3 Plan unit holders. This behavior looks like deliberate conduct. Likewise casting doubt on the mistake story is Dawn Parks' testimony that she was authorized to pass out the plans, i.e., that she did not make any mistake. The same goes for Barbara Wells' testimony that no mistake occurred. The same goes for the Board's decision that the "mistake" was something that did not need to be inquired about.

In fact, James Mann, who led the Rollout operation, and who liberally used the word "mistake" in his trial testimony, made it clear that he was well aware that the way the system worked, ArborGen's legacy employees got the Dot 3 Plan, whereas outside hires like him got the Dot 7 Plan:

***45** Q. Do you remember testifying at your deposition that you came to ArborGen from the outside, so the plan you got was the Dot 7 plan?

A. Yes.

Q. And at your deposition you knew and implicit in that is that there's outsiders, Dot 7; seconded [sic, secunded], lateral transferred employees, Dot 3. You knew that.

A. I did know that, yes.

TT 219:4-11 (Mann).

By clear and convincing evidence, drawn from various sources, Plaintiffs have demonstrated that the dissemination to them of the Dot 3 Plan was not due to a mistake, but rather was deliberate.

It is well established that equitable tolling can and will be applied against one asserting a statute of limitations defense if the defendant's behavior led to the delay in filing suit. The applicable legal principal was explained by our Supreme Court in *Black v. Lexington Sch. Dist*. No. 2, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997):

Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.' " *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)(quoting *Dillon County School Dist. Number Two v. Lewis Sheet Metal Works. Inc.*. 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986), overruled on other grounds by *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Such inducement may consist either "of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary." *Id.*

The law of Delaware is to the same effect. In *Bechtel v. Robinson*, 886 F.2d 644, 646 (3d Cir. 1989), the Third Circuit applied Delaware law and barred a defendant's statute of limitations defense where the defendant's conduct had led to the plaintiffs' delay in filing suit. The court explained that deceptive conduct can lead to a party being barred from asserting an affirmative defense:

As a result, "the person whose conduct has brought the situation about [is] estopped from asserting his legal rights against the party so misled." *Wolf v. Globe Liquor Co.*, 34 Del. Ch. 312, 316, 103 A.2d 774, 776 (1954) (citations omitted).

Stated another way by one of the leading commentators on this subject:

Equitable estoppel in the modern sense arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.

See 3 S. Symons, Pomeroy's Equity Jurisprudence § 802 (5th ed. 1941) (footnote omitted) (emphasis in original); *see also Timmons v. Campbell*, 35 Del. Ch. 68, 75, 111 A.2d 220, 224 (1955) (quoting treatise).

***46** Upon our review of the record in this case, we find that the overwhelming weight of the evidence supports the use of equitable estoppel to bar Gray from pleading the statute of limitations as a defense. It is undisputed that, at the time appellants' brought their suit, Gray had not registered Creative Dining, Inc., as the owner of the Restaurant, and that the only name on record in the Prothonotary's office was Robinson's. It is further undisputed that Gray did not post the Restaurant's license, the only public document disclosing the true owner of the business, in an area of the Restaurant that was open to the public. As a result, the appellants were misled by Gray into thinking that Robinson was the owner, and their reliance proved detrimental since they did not discover that they had sued the wrong party until after the statute of limitations had expired.

While we recognize that "[t]he statute of limitations is important to a defendant to protect it from the unfair surprise of a stale claim," *Callowhill*, 832 F.2d at 273 (*citing Kreiger v. United States*, 539 F.2d 317, 322 (3d Cir.1976)), in this case any surprise to Gray is not "unfair." It was through Gray's own conduct, by misleading the appellants as to the proper party to sue, that appellants were forced to bring a stale claim against him. Therefore, we hold that Gray is equitably estopped from pleading the statute of limitations as a defense.

Plaintiffs have provided clear, cogent, and convincing evidence of fraudulent concealment, of wrongdoing, and concerted inequitable behavior by Defendants which serve to toll the statute of limitations. Defendants' wrongs, including particularly their concealments, are made more egregious by the fact that Plaintiffs reposed trust and confidence in them and their agents. By their concerted conduct, Defendants are estopped and barred based on fraudulent concealment from asserting Plaintiffs' claims are time-barred. As stated in *Kelly v. Logan, Jolley & Smith*, L.L.P., 383 S.C. 626, 638, 682 S.E.2d 1, 4 (Ct. App., 2009) (internal citations omitted):

> To establish that the applicable limitations period was tolled, [A] defendant is estopped from benefitting from the statute of limitations as a defense because the defendant has acted in such a manner as to induce the plaintiff to delay in timely filing a cause of action. The conduct may be either an express representation that the claim will be settled without litigation or actions suggesting that a lawsuit is unnecessary. To establish equitable estoppel, 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 … 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.

The record reflects every bit of the bad conduct recognized in *Kelly* to cause the limitations period to be tolled.

Further justification for Plaintiffs' delay in suing is provided by Defendants' repeated refrain that Plaintiffs have no damages. Defendant Munson's testimony is typical. According to him, the Plaintiffs NVA units never had any value:
Q. Okay. So the NVA plan came and went, and from the beginning when the employees joined it to the time they were cashed out of the NVA plan because it ceased to exist, the grand total of accumulated value for those NVA units was zero?

A. That's right, there was no - if you look at the NVA plan, which I presume you have looked, for there to have been any value, it would have required a triggering event which was conditioned on certain values being met, and that is the only point in time when those units would have value; and since that had not occurred during this time that NVA was transitioned into its following plan, they have no cash value.

***47** Q. They had no monetary value at all?

A. At that point in time, correct.

Q. And they never have had any monetary value?

A. That's correct.

TT 862:12-863:3 (Munson).

It is true that, "[t]he date on which discovery should have been made is an objective, rather than subjective, question," and the limitations period accrues even though a plaintiff may not know the full extent of his damages. *Estate of Livingston v. Livingston*, 744 S.E.2d 203, 208 (S.C. App. 2013) (*quoting Hedgepath v. Am. Tel. & Tel. Co.*, 559 S.E.2d 327, 336 (Ct. App. 2001). However, it is not at all clear that a plaintiff who has not actually suffered damages needs to sue immediately, particularly where proof of damage is an element of the claim.

Defendants have the burden in proving their statute of limitations affirmative defense, a burden made heavier by their repeated arguments that Plaintiffs have suffered no damages and that Defendants "successfully managed through a situation with a high liability risk," *See* PX 170 at pp. 119-20, by giving Plaintiffs a better NVA Plan than they had in the first place. Defendant Munson minced no words in explaining at trial that Plaintiffs, in essence, came out of the Rollout scheme with a far more valuable NVA Plan:
Q. And you believe the Dot 7 plan is far superior?

A. Oh, absolutely.

Q. Okay.

A. No doubt about it.

Q. And any reasonable person, fair-minded, looking at those two plans on their face, would prefer the Dot 7 plan and consider it a plus to get it compared to the Dot 3?

A. Absolutely.

Q. Okay. And the Dot 7 plan became, with nonsubstantive changes but clarifying changes, became the rollout plan, true?

A. More or less, yes.

Q. Well, are you aware of any big substantive changes between the rollout plan and the Dot 7 plan?

A. No. I think I'm agreeing with you that there was a little bit of cleanup on what you're calling Dot 7 and what's final approved, but in effect, they're the same.

TT 845:9-25 (Munson).

There is simply no principled way to hold that Plaintiffs were obligated to sue for damages within three years of the Rollout when Defendants who have the burden of proof as to this affirmative defense are willing to testify under oath

that (1) no damages have been suffered even now; and (2) any reasonable fair-minded person would conclude that the Rollout Plan was a far superior product to the Dot 3 Plan Plaintiffs were given when they were hired. Defendants' further must bear responsibility for the trickery they used successfully in persuading Plaintiffs that their rights under the Dot 3 Plan were nonexistent or worthless. Defendants' ongoing campaign of deception and concealment which started in in 2004 bars them from profiting off the statute of limitations defense. Defendants' statute of limitations defense must be rejected and overruled. The statute of limitations was tolled due to estoppel and fraudulent concealment as to all causes of action until at the earliest June of 2010.

DEFENDANTS ARE LIABLE TO PLAINTIFFS FOR BREACH OF FIDUCIARY DUTY

As it was filed, Plaintiffs' Sixth Cause of Action for Breach of Fiduciary Duty names as Defendants the Defendant entities, ArborGen, MWV, IP, and Rubicon. In the course of the trial, Plaintiffs moved to amend their Sixth Cause of Action to include the Defendant ArborGen Directors, and that motion was granted. For purposes of this discussion of Plaintiffs' fiduciary duty claims, "Defendants" refers to the entity Defendants, ArborGen, MWV, IP, and Rubicon, as well as the Defendant ArborGen directors.

Defendants were in a Fiduciary Relationship with Plaintiffs

***48** The threshold question in a fiduciary duty case is whether there actually was a fiduciary relationship between the parties. That inquiry is fact-specific. "[T]o to determine whether a fiduciary relationship existed, [one] must look at the particulars of their relationship." *Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 330, 574 S.E.2d 502, 507 (Ct. App. 2002). Fiduciary obligations can grow out of an employment relationship. For example, in *Davis v. Greenwood School Dist. 50*, 352 S.C. 319, 620 S.E.2d 65 (S.C. 2005), a school district was held to be in a fiduciary relationship with its employees because of the position of confidence held by the employer.

Here, each of the ArborGen employees in question was brought over to ArborGen while an employee of either MWV or IP, who were founders of ArborGen. ArborGen's founders were instrumental in attracting Plaintiffs and other legacy employees to work for ArborGen. ArborGen needed trained scientists conversant with the technology transferred to ArborGen by its founders, in order to generate increased value. For this reason, the founders traded on the trust already reposed in them by their legacy employees and paved the way for the transfer of those employees over to ArborGen.

The record reflects that officers from both MWV and IP (including Defendants Munson and Baughman) were intimately involved in recruiting personnel from within their own ranks, including Plaintiffs. The recruiting effort included describing to prospective hires in very favorable terms the forthcoming ArborGen long term incentive plan which the founders, through their Board representatives, were responsible for shaping, approving, and implementing. The ArborGen long term incentive plan, which became the ArborGen NVA Plan, was presented as a fitting, very attractive and desirable replacement for the pension plan opportunities the employees being hired would leave behind when they transferred over to ArborGen. Indeed, the NVA Plan was described to Plaintiffs in writing as a "great benefit" and "one of ArborGen's best benefits." *See* PX 81 & 82.

One way for a fiduciary duty to arise in South Carolina is where "the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 361, 559 S.E.2d 327, 339 (Ct. App. 2001). In this case, the NVA Plan was conceived and operated in a way that the parties' dealings concerning the NVA Plan were intrinsically fiduciary. This was a Plan that was conceived by the founders through their agents, and administered by those agents. The employees had no say-so over the Plan's form or operation. They were required to repose special trust and confidence in the controlling parties, and they did so. Plaintiffs were inherently dependent on ArborGen and its Board populated by Rubicon, MWV and IP appointees when it came to receiving fair treatment.

The founders' pre-hiring sales effort was affirmed by documents given to Plaintiffs for them to rely upon. The Dot 3 Plan's text affirms on page 1, section 1, sentence 1 the pre-hiring pledge that success coming from hard work by employees who joined ArborGen would be rewarded with a share of ArborGen's "equity value":
The purpose of the ArborGen, LLC New Value Added Plan (the "Plan") is to promote the best interests of ArborGen, LLC (the "Company") and its members by providing for the acquisition of an interest in the growth of the Company by employees through the grant of units intended to represent a fractional interest in the growth of the equity value of the Company over time, and by enabling the Company to attract and retain the services of such individuals upon whose judgment, interest, skills, and special effort the successful conduct of its operations is largely dependent.

***49** *See* PX 42; 135 & 512.

According to Defendant Burton, the NVA Plan's purpose was to attract and compensate "scientists who had been in teams within … divisions of large corporations … [and] move them into an organization that was highly focused on commercial outtake -- results." *See* PX 530 (Burton Depo. 97:18-98:2). Burton testified the long-term incentive program was added on to ArborGen employees' compensation program as a sign-on bonus to reward and incentivize longer term performance. *Id.* 98:16-18. The "real objective" was to get the employees aligned with what "the partners were wanting to see achieved." *Id.* 98:18-22.

According to Defendant Liebetreu, the Board's aim was "to make sure that it was a good incentive for the employees to stay with the company, create value for the company and that hopefully all boats would rise and that some of that value would be shared with everybody who put in the work." TT 1158:10-1159:1 (Liebetreu).

In the same vein, CEO Barbara Wells made clear to Plaintiffs and other ArborGen employees that employees' NVA unit awards flowed directly from the founders' desire to allow employees to share in ArborGen's growth: "Sharing in the value of the incredible business we call ArborGen is *the opportunity that the ArborGen founders wanted to share with each and every one of us*." *See* PX 51 (emphasis added). The NVA Plan was presented and understood to be a valuable benefit put together by the founders for ArborGen's employees. TT 126:6-17 (Grant). Defendant Munson testified that, in fact, "in the context of the NVA plan," ArborGen's founders actually did "wish to share with each and every one of ArborGen's valued employees the value of the incredible business we call ArborGen." TT 842:3-7 (Munson). The NVA Plan offered benefits for the employees who were being rewarded and incentivized and, by so doing so, it served "to promote the interests of ArborGen and the founders, being Rubicon, IP and MeadWestvaco." TT 842:3-19 (Munson).

To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004). This requirement is met in this case.

Plaintiffs were induced to rely upon ArborGen's founders and their agents from the outset of the ArborGen venture. Plaintiffs were beholden to Defendants for everything concerning the timing, size, and valuation of the NVA awards given them. The Plan paperwork was controlled by Defendants. If Plaintiffs lacked for Award Agreements, it is because the Defendants did not furnish them. Defendants implicitly led Plaintiffs to believe that the equity Plaintiffs accumulated through the growth in value of their NVA units would be protected by the express provision in section 9(b) of the Plan preventing any action that would adversely affect a participant's rights absent express written consent to the change.

***50** It is true that a relationship must be more than casual to equal a fiduciary relationship. *Ellis*, 358 S.C. at 519, 595 S.E.2d at 822. Here the relationship between Plaintiffs and the Defendants was long-running and formalized by various

written documents reflecting power and control held by Defendants, with Plaintiffs reposing special trust and confidence in Defendants' integrity and fidelity.

It is also true that, as a general rule, a fiduciary relationship cannot be created by the unilateral action of one party. *Regions Bank v. Schmauch*, 354 S.C. 648, 671, 582 S.E.2d 432, 444 (Ct. App. 2003). Here, the relationship was created by mutual action, starting with the hiring offer letters sent by CEO Wells to each of the Plaintiffs. The employees inherently reposed their trust and confidence in ArborGen, its management, and its control persons by agreeing to sign on for the NVA Plan sight unseen.

This case involves a compensation plan designed, created, implemented, and intended specifically to incentivize and reward Plaintiffs. The role of the founders in shaping and providing the NVA Plan was prominently advertised. All control over the Plan was in the Defendants' hands. Plaintiffs had no input into the NVA Plan's makeup, operation, or documentation. Plaintiffs had no choice but to repose trust and confidence entirely in what the entity defendants and their agents did and said. Defendants were at all times in a superior position of control compared to Plaintiffs with respect to the NVA Plan. The development, approval and dissemination of the ArborGen NVA Plan was controlled by ArborGen's Board, which in turn was controlled by the founders.

Former CEO Kenneth Davenport testified as follows:
Q. As far as the development of the long-term incentive plan or the NVA plan, the founders of the company were in charge with the development of that plan and the control of that plan as to how it was being given out and awarded to employees; is that not right?

A. The board of directors, if you want to call them the founders, that is correct.

TT 634:18-24 (Davenport).

Directors appointed by ArborGen's founders also populated ArborGen's Compensation Committee which was heavily involved in NVA-related matters. TT 213:6-13 (Mann).

ArborGen's founders and ArborGen itself had their own unique corporate culture. Those cultures fostered and rewarded employees for being trusting and productive. Mr. Davenport made it clear that when it came to dealing with ArborGen employees concerning matters pertaining to employee wealth, fiduciary duties were owed to the employees by both the Board members and the CEO:
Q. All right. And you talked about fiduciary responsibilities during the course of your testimony?

A. Yes.

Q. And that you testified as to your fiduciary duty, but a board of directors would have that same fiduciary duty to the employees, would they not?

A. Yes, they would.

Q. And when you're dealing with the wealth of employees, that fiduciary duty exists by management, the CEO and the board of directors, does it not?

A. It would not include an HR manager.

Q. The CEO and board of directors?

A. Yes.

Q. And the board of directors is responsible for the CEO of the company?

A. The CEO answers to the board.

Q. All right. And that duty would be a high duty, right?

A. Yes.

Q. And when you were at ArborGen, that duty, that high duty was part of ArborGen's culture, was it not?

***51** A. Absolutely.

TT 645:15-646:10 (Davenport).

Defendant Moriarty testified that ArborGen's unique corporate culture entailed a relationship of trust and confidence between managers, board members, and the company's employees:
Q. Are you aware that ArborGen had a strong culture that favored fair dealing and honesty with employees?

A. Yes.

Q. Are you aware that the culture of ArborGen was for the managers, and even at the board level, to care for employees, seek to promote their trust and confidence in management?

A. Yes.

Q. Would you expect that at ArborGen?

A. Yes, I would.

Q. Did you actually understand that that's the way it was, based on your own personal experience, a culture of trust and confidence between the board, management and the employees?

A. Yes. I think that's fair, yes.

TT 1047:25-1048:9 (Moriarty).

In addition to Defendant Moriarty, Defendants Baughman, Hundley and Barfield testified that the ethical cultures of MWV and ArborGen demanded integrity and called for caring, scrupulously honest treatment of employees. TT 2327:19-2129:18 (Baughman); TT 1206:25- 1207:15 (Hundley); and TT 2305 (Barfield). This testimony was echoed by each of the board of director Defendants testifying in this case. The need for ethical behavior reached to ArborGen's management as well. The obligation of scrupulously ethical conduct was a special part of the culture permeating ArborGen and its founders. Defendant Munson drove this point home at trial:
Q. Did you tell the management of the company in dealing with the employees to be honest and forthright in dealing with the employees and that's what the board expected and the board was going to supervise to make sure that happened?

A. I don't remember having a specific discussion giving that detailed of instructions. It would have been unlikely to do that, because we exercised -- part of our responsibility was to hire people, in this case Ms. Wells, who had an ethics and had a code of conduct that was consistent with ours.

TT 883:8-17 (Munson).

At trial Defendant Barfield, a long-time member of both the Compensation Committee and ArborGen's Board, was asked whether the Compensation Committee "was the most responsible agency within ArborGen for determining what was in the NVA plan, when the NVA plan went out, when the award agreements went out, when everything happened concerning the NVA plan ...." His answer was "Not true." Then he explained, "I would think the board was." TT 2300 (Barfield). Of course, every Compensation Committee member was also a Board member, and every Board member was representing one of the founders while serving on the ArborGen Board.

At trial it was clear from Plaintiffs' testimony that they reposed special trust and confidence in Defendants when it came to the NVA Plan. Each Plaintiff testified before this Court how they trusted the company and had no reason in 2004 to question management or the companies' intentions with what they were being told. Each Plaintiff valued his or her interest in the NVA Plan and believed the company was looking out for his or her interest. When Plaintiffs signed for the Rollout Plan in 2004, they did so because of their trust in management. For example, Dr. Nehra testified, "I completely trusted my management and in that trust, I signed all these [NVA-related] documents." TT 431:1-2 (Nehra). His testimony was corroborated over and over again by the other eight Plaintiffs.[21] Plaintiffs now understand and believe they were not treated fairly with regard to the NVA Plan.

Summary Regarding Fiduciary Relationship

***52** Plaintiffs do not contend they were owed fiduciary duties purely because they were ArborGen employees. Their focus instead is on the specific corporate cultures in which they functioned at ArborGen's predecessor-founders, and at ArborGen itself. The testimony at trial from both Plaintiffs and various Defendants supports the view that the relationship between the parties was fiduciary in nature. Plaintiffs were induced to look to the Dot 3 Plan as providing not just a "long term incentive" to work hard and well, but also as a potentially lucrative means of accumulating wealth in the absence of corporate pension benefits. Control over the Dot 3 Plan was totally reposed in Defendants, who perforce were entrusted with an obligation to deal fairly and honestly with Plaintiffs.

Section 12(b) of the Dot 3 Plan contains a provision that reads:
"Nothing contained in this Plan and no action taken pursuant to its terms shall create or be construed to create a trust of any kind, or a fiduciary relationship between the Company or the Committee and the Participant or any other person. Participants have the status of general unsecured creditors of the Company."

See PX 135.

However, Plaintiffs do not point to the Plan language or actions taken pursuant to the Dot 3 Plan's terms as creating a fiduciary relationship in favor of Plaintiffs. Rather, Plaintiffs point to the myriad facts and circumstances found in this record which show they actually did repose trust and confidence in Defendants with a reasonable foundation for believing the Defendants would treat them fairly in dealings related to the Dot 3 Plan. And, as noted above, they point as well to the recognition and acceptance by Defendants of that special trust and confidence having been reposed.

It is also true that section 1 of the Dot 3 Plan provides that:

> The purpose of the ArborGen, LLC New Value Added Plan (the "Plan") is to promote the best interests of ArborGen, LLC (the "Company") and its members by providing for the acquisition of an interest in the growth of the Company by employees through the grant of units intended to represent a fractional interest in the growth of the equity value of the Company over time, and by enabling the Company to attract and retain the services of such individuals upon whose judgment, interest, skills, and special effort the successful conduct of its operations is largely dependent.

Fairly read, this purpose declaration attests to the mutuality inherent in the equity option plan itself. Inherent in every employee benefit plan is an expectation on the part of the employer and those responsible for the Plan's creation that the Plan will benefit the employer by incentivizing the employee-beneficiaries. But there is nothing unilateral about the Plan's purpose; clearly the Plan was expected to potentially benefit all sides by spurring employees to work hard and well and rewarding them for good results obtained. Nothing in section 1 of the Dot 3 Plan undercuts a finding that the particular and unique facts and circumstances of this case gave rise to a fiduciary relationship between Plaintiffs and Defendants with respect to the Defendants' handling of the Dot 3 Plan.

Attesting to the mutual relationship of trust and confidence between the parties was the testimony of Kenneth Davenport, ArborGen's former CEO various individual Defendants who conceded that, in essence, the Plaintiffs were encouraged to repose special trust and confidence of a fiduciary nature in Defendants and did so. *See* TT 645:15-646:10 (Davenport), TT 1047:25-1048:9 (Moriarty). According to Defendant Munson ArborGen's culture called for scrupulous fairness toward employees. He testified as follows at his deposition,

Q. What I am hearing you say it that, if there was an issue of fairness to the employees, the company's policy and practices is to indulge the -- indulge the interest of the employees and work to be fair to the employees and to try to make the outcome favorable for the employees.

***53** Is that right?

A. It was one of the principles that we followed in our work.

Q. And that is a principle that you followed with the NVA plan. True?

A. Yes

See PX 530 (Munson Depo. 189:16-190:2).

The owners of a business would typically be unlikely to be in a fiduciary relationship with the company's employees. This case is unusual however, because both MWV and IP joined with Rubicon and combined their business operations and advanced scientific technology into ArborGen for their mutual benefit and ArborGen's. For that technology pooling to pay off, scientists were needed, and that is where the legacy employees came in. The value added by the legacy employees was crucial to ArborGen's success, and thus to the founders' success. Well knowing this, MWV and IP induced a hand-picked group of their employees to move to ArborGen, holding out various compensation-related benefits, including a proposed long term incentive plan that was billed as potentially very lucrative.

The role of the founders was advertised in the NVA Plan and was lauded by CEO Wells who explained that the NVA Plan was devised because "the ArborGen founders" wanted to share "the value of the incredible business we call ArborGen … with each and every one of us." *See* PX 51. In essence, through the NVA Plan unit awards. Plaintiffs were offered an opportunity by the founders to join with the founders and obtain "equity participation" in ArborGen. *See* PX 118. Thus, the founders, through their appointed agents, controlled ArborGen's establishment, as well as the creation, processing

and administration of the NVA equity participation opportunity. The founders and the other Defendants are responsible for having created a unique culture and business environment in which Plaintiffs and other ArborGen legacy employees were induced to repose special confidence in them, and did so.

As noted earlier, one way for a fiduciary duty to arise in South Carolina is "where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 361, 559 S.E.2d 327, 339 (Ct. App. 2001). Plaintiffs point to the nature of the parties' dealings, "in its essential nature" as being intrinsically fiduciary, and there is merit to this position. Plaintiffs were encouraged by the circumstances, including the business culture of ArborGen and its founders repose special trust and confidence in Defendants and clearly did so.

Fiduciary Duties were Owed and Breached

Once a fiduciary relationship exists, those in whom confidence has been reposed are obligated to act in good faith and with due regard to the interests of the one imposing the confidence. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003). A fiduciary relationship imposes "the duty of the finest loyalty[,] … [n]ot honesty alone, but the punctilio of an honor the most sensitive." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 597,538 S.E.2d 15, 24 (Ct. App. 2000) (*quoting Meinhard v. Salmon*. 249 N.Y. 458, 164 N.E. 545 (1928)).

***54** "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Ellie v. Miccichi*, 358 S.C. 78, 100, 594 S.E.2d 485, 497 (*quoting Anthony v. Padmar, Inc.*, 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App.1995)). One who is bound by fiduciary ties is obligated "to disclose all relevant facts and refrain from taking advantage of the other partners by the slightest misrepresentation or concealment." *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 475, 581 S.E.2d 496, 505 (Ct. App. 2003), *citing Lawson v. Rogers*, 312 S.C. 492, 435 S.E.2d 853 (1993); *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961).

It is a well-settled rule that "anyone acting in a fiduciary relationship shall not be permitted to make use of that 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). Courts "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." *Id.*, (*citing* 36A C.J.S. Fiduciary at 388 (1983)).

Also relevant is South Carolina case law dealing with the fiduciary obligation owed by corporate officers and directors when dealing with shareholders in stock transactions. *See Jacobson v. Yaschik*, 249 S.C. 577, 584-85, 155 S.E.2d 601, 605 (1967). Although ArborGen, LLC had no stock issued and outstanding because of its LLC status, the NVA units being awarded were designed to provide "Equity Participation." *See* PX 118. The equity participation units thus reflected a claim on ArborGen's equity and were akin to stock. Although it is a novel question, there is no reason to believe why the logic underlying a fiduciary duty of full disclosure and fair dealing imposed on corporate directors in corporate stock transactions would not also apply to LLC directors when they deal with persons to whom equity units have been awarded. In transactions dealing with equity interests, business insiders are barred from using deception or concealments to disadvantage other equity investors. Here, deception and concealments were used to prejudice Plaintiffs' equity ownership rights.

The record reflects various instances in which Defendants breached their fiduciary duties in dealings with Plaintiffs. First, Defendants authorized or ratified the withholding from Plaintiffs' Award Agreements covering their units in the Dot 3 Plan. Second, relatedly, Defendants wrongfully withheld communicating to Plaintiffs the "initial value" of Plaintiffs' Dot 3 Plan units. These wrongs were masked and obscured by Defendants' predominant cover story that the Dot 3 Plan was

invalid, nonexistent, etc. Third, Defendants authorized or ratified the Rollout in September of 2004 in a way calculated to mislead Plaintiffs in an effort wrongfully to divest them of their rights as Dot 3 Plan unit holders. Fourth, Defendants did not provide Plaintiffs with an "equitable award" granted under the Appreciation Rights Plan when ArborGen converted from being an LLC to a C-corporation in 2010. Additionally, in an effort to show that Plaintiffs never actually had Dot 3 Plan units, Defendants have advanced groundless arguments at odds with their fiduciary obligations to act in good faith and fairly. For example, Defendants contend that because the term "specified fraction" used in the Dot 3 Plan was undefined, that this made the plan inoperable and worthless. Defendants have further contended that the Dot 3 Plan was worthless because it was a mere draft plan that was never formally approved by ArborGen's Board and thus never validly existed. These different wrongs are discussed in order below.

Award Agreements and Initial Values were Wrongfully Withheld

***55** As discussed above, a major Defense argument is that Plaintiffs never actually acquired units in the Dot 3 Plan because section 6 provides, "The grant of NVA Units shall not be effective unless and until the Participant to whom such units are granted executes the Award Agreement." *See* PX 135. Of course, in order to "execute the Award Agreement" the unit grantee would need to receive one. Dot 7 Plan grantees did receive Award Agreements, Dot 3 Plan grantees did not. At the same time that Plaintiff Clark was being told the initial value had not been established (PX 75), the Dot 7 Plan recipients were receiving Award Agreements. *See* PX 109.

Thus, according to the Defense, having failed to execute the never-tendered Award Agreements, Plaintiffs never really had units in the Dot 3 Plan and hence were not misled or deprived of value at the time of the Rollout. Defendants, in essence, are contending that they successfully prejudiced Plaintiffs rights as recipients of Dot 3 Plan NVA Unit awards by withholding a document the signing of which the Defendants' contend was a condition-precedent to true unit ownership. The argument amounts to a fiduciary claiming a right to manufacture a purported defense by breaching a fiduciary obligation. This bootstrap argument fails.

Plainly, Defendants had control over the NVA Plan setup and its paperwork. As fiduciaries, they held that control power in trust for the benefit of Plan unit holders. Plaintiffs had each been told, in writing, by Defendants' agent, CEO Barbara Wells, that they were being issued NVA units on a certain effective date, and for each Plaintiff, that effective date came and went. Once that happened, Plaintiffs became unit holders. Defendant Munson who as described by Defendant Moriarty was "intimately involved with the NVA plan and the rollout" TT 1048:15-16 (Moriarty), and Munson testified that the language used in the employees' offer letters promising an award of specific number of units, effective on a specific date, resulted in the hired employees owning the specified units on the specified date. TT 816:20-817:1 (Munson). This Court agrees.

The delivery or non-delivery of an Award Agreement to Plaintiffs was an immaterial term of their NVA agreement. This point was driven home by Defendant Andrews who asked his fellow directors in writing, "Is there really any need for the NVA Unit Award Agreement? Isn't the only additional document necessary a two-line letter for the employee outlining the number of NVA units awarded, and the date of the award[?]"' *See* PX 70A. Because of Plaintiffs having signed their offer letters, the exact data specified by Mr. Andrews as being furnished by an Award Agreement was already in ArborGen's hands before Plaintiffs started work.

The Court does not conclude that receipt and execution of an award agreement was essential for Plaintiffs to have rights under the Dot 3 Plan. The facts of this case show otherwise. However, to the extent that Award Agreements could be deemed essential, it was a breach of fiduciary duty by Defendants to withhold the award agreements and to attempt to exploit their absence. That continuing attempt to turn a profit on Defendants' misconduct simply calls attention to the organized campaign of misconduct that lies at the heart of this lawsuit.

Defendants' actions in withholding the initial value number from Dot 3 Plan unit holders parallels the wrongful withholding of Award Agreements. The Court does not conclude that the personal receipt by each Plaintiff of the initial value number was essential for Plaintiffs to have rights under the Dot 3 Plan. However, to the extent that receipt of the initial value number could be deemed essential, the fact is that it was actually supplied. However, even if it were missing, there would be no profit for Defendants; it would be a breach of fiduciary duty by Defendants to withhold the initial value number and to attempt to exploit its absence.

***56** The withholding of materials from Plaintiffs can only be deemed bad faith conduct when it is recognized that exactly the same materials were easily prepared and freely handed out to the Dot 7 Plan non-legacy employees. Plaintiffs were entitled to the materials, and there was nothing difficult about originating and delivering the materials. James Mann was the third ArborGen employee hired. He was an off-the-street hire, so he got the Dot 7 Plan. TT 219:4-11 (Mann). By January of 2002, well before Plaintiffs were hired, Mann had received his plan Award Agreement and a statement of the initial value of his Dot 7 Plan units. *See* PX 507. The record reflects that Defendants had no difficulty delivering Award Agreements and initial value information to Dot 7 Plan unit-holders. Indeed, there is no evidence reflecting that any Dot 7 Plan unit holder ever *failed* to receive an Award Agreement or a statement of initial value for NVA units.

Nor is there evidence reflecting that any Dot 7 Plan unit holder ever failed to receive a written statement of initial value for the Dot 7 Plan NVA units. By the same token, there is no evidence that any Dot 3 Plan unit holder, including Plaintiffs, ever received that same information in writing. However, the trial record does reflect that Defendant Baughman publicized to aspiring ArborGen Employees, including John Clark, that the partners had set an initial equity value for ArborGen of $100 million, meaning that the initial value for an NVA unit in the Dot 3 Plan was $100. *See* TT 1234:21-1235:5 (Clark). At trial, Defendant Munson agreed that the Dot 3 plan, has "no escalator of anything … [it] just has a $100 million as a starting point and doesn't say anything at all about adjusted initial value." TT 919:20-24 (Munson).

In part, the Plaintiffs' dealings over the ArborGen NVA Plan were contractual. "Although implied covenants are not favored in the law.... there exists in every contract an implied covenant of good faith and fair dealing." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 366-67, 147 S.E.2d 481, 484 (1966). It is not consistent with good faith or fair dealing for a party to a contract, much less ones in a fiduciary position, to: (1) promise delivery of a document (such as an Award Agreement) to "memorialize" (or "commemorate" *See* TT 817:2-19 (Munson)) a contract (which is what the NVA Plan was), and then (2) withhold that document, and then, based on the withholding, (3) claim that the other side's contract rights had been successfully nullified.

A party to a contract is barred from relying on nonperformance of a condition precedent occasioned by that party's own conduct. In *Champion v. Whaley*, 280 S.C. 116, 122,311 S.E.2d 404, 407 (Ct. App. 1984), our Court of Appeals held that *Restatement (Second) of Contracts* § 245 (1979), is "the proper rule in this jurisdiction." It reads: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." Stated differently, you cannot rely on non-performance of a necessary contractual condition you deliberately prevent from happening. Defendants have wrongfully and deliberately authorized or ratified the withholding Plaintiffs of the Award Agreement and the initial value element for Plaintiffs' NVA units, and have then asserted the absence of these items as grounds for their contention that what Plaintiffs received as the "Equity Participation" of their compensation hiring package was nothing.

Under Restatement section 245, Defendants are barred from using the purported Award Agreement or initial value shortcomings as grounds for the nonexistence of a binding contract between ArborGen and its members and Plaintiffs. The legal principle applied to nullify the contractual condition is sometimes called "The Prevention Doctrine." The Prevention Doctrine ties into the truism that contracting parties owe duties of good faith and fair dealing, and has been explained as follows:

***57** When parties enter a contract that is conditioned upon the happening or non-happening of an event, and the condition fails, generally the contract has no further effect. (*See*, *e.g.*, *Grill v. Adams* (1984), 123 Ill.App.3d 913, 917, 79 Ill. Dec. 342, 346, 463 N.E.2d 896, 900 (failure of condition means contract does not take effect or that performance of party is excused). If one party directly causes the condition to fail, however, the contract may be fully enforced against that party; one cannot take advantage of his own conduct and then claim that the resulting failure of the condition defeats his liability. (123 Ill.App.3d at 918, 79 Ill. Dec. 342, 463 N.E.2d 896.) In *Grill v. Adams*, for example, the defendants were parties to a contract for a tax-deferred exchange of commercial real estate. Defendants, who were to select a suitable property for the exchange, declined to do so after market conditions and soaring interest rates made their agreement less favorable to them. They claimed that the failure of the condition (to locale a suitable exchange property) released their liability under the contract. The court rejected this position, holding that the condition was in the sole control of defendants, who had not used reasonable, good faith efforts to locate a property.

Many other cases have recognized that a party who prevents the fulfillment of a condition upon which his own liability rests many not defeat his liability by asserting the failure of the condition he himself has rendered impossible. (*E.g. Foreman State Trust and Savings Bank v. Tauber* (1932), 348 Ill. 280, 286, 180 N.E. 827; *Lukasik v. Riddell*, Inc., (1983), 116 Ill. App.3d 339, 346, 72 Ill. Dec. 123, 452 N.E.2d 55; *Blackback Hotel Association v. Kaufman* (1981), 85 Ill.2d 59, 65, 51 Ill. Dec. 658, 421 N.E.2d 166). In application, then, the "wrongful prevention doctrine" is in the nature of an estoppel because it prohibits a party from profiting through his own wrongdoing.

Cummings v. Beaton & Associates, Inc., 249 Ill. App. 3d 287, 306-07, 618 N.E.2d 292, 303 (1992).

In summary, Defendants are responsible for the failure to supply Plaintiffs with Award Agreements and initial unit values. Failure to deliver essential items under the circumstances can be viewed in various lights, all unfavorable. The failure can be seen as bad faith conduct and unfair conduct by a fiduciary. It can be seen as a breach of the inherent duties of good faith and fair dealing owed by all contracting parties in South Carolina. There is merit to Plaintiffs' contention that Defendants should be barred from hiding behind Defendants' own authorized or ratified performance failures, and asserting them as grounds for divesting Plaintiffs of their very property rights Defendants purported to grant them in early 2003.

As is discussed below, Defendants' wrongful conduct in withholding documents and data from Plaintiffs was compounded by actions taken at the time of the Rollout to convince Plaintiffs that they never had any Dot 3 Plan rights capable of being abridged in the first place.

The Rollout was Deceptive and Improper

The testimony at trial convincingly established that the September 2004 Rollout of the board-approved NVA Plan was calculated to divest Plaintiffs of their rights under the Dot 3 Plan. James Mann, the chief ArborGen executive charged with dealing directly with employees, testified that the chief purpose of the Rollout meetings with employees was not to explain how the Rollout Plan worked, but to quell foreseeable concern on (he part of employees who were losing their rights under the Dot 3 Plan, which Mann called "mistake plan." TT 189:21-22 (Mann).

As part of the plan to divest legacy employees of their rights under the Dot 3 Plan, an email was sent by Dawn Parks to all employees captioned enthusiastically, "New Value Added Plan Roll out!" The email told employees, "The time is come when we can fully describe one of ArborGen's *best benefits*: THE NEW VALUE ADDED (NVA) PROGRAM" (emphasis added). It went on to state:
All ArborGen employees are invited to attend a meeting on August 31 or September 1 to learn more about this *great benefit*.

***58** There are two NVA Plans. One plan is for employees that were hired before June 30, 2003. The second plan covers employees hired on July 1, 2003 or later. More details about the different plans will be made available at your meeting. Please sign up for a meeting that corresponds with your hiring date. Hire dates are posted outside my door. (emphasis added).

See PX 82.

Conspicuously absent from the Dawn Parks email, and from any communication ever given to Plaintiffs or the other legacy employees during the Rollout, was any reference to the Dot 3 Plan's dissemination, that a mistake had been made, or that the purpose of the Rollout effort was to try to get the legacy employees to give up their rights under the Dot 3 Plan, "the mistake plan," and accept the Rollout Plan in its place. James Mann's testimony makes clear the real Rollout agenda"

Dr. Wells called me and was concerned and upset because of the fact that a pretty -- *a big mistake* had been made. She and I talked that evening. It had to have been a Friday evening, because it was during a football game and *it's one of those things you never forget*....

And so we developed a plan to go talk to the employees. Some of them were one-on-one, but we also held some pretty big meetings where the employees were present and told them a mistake had been made and *this is what we were going to ask them to do.*

And certainly *there was some reluctance on a number of people to sign the new agreement*, but I think in the end most did, if not all -- I just can't recall if all did.

TT 267:20-268:17 (Mann).

The "plan" was really a hidden agenda. That hidden agenda was to get rid of the Dot 3 Plan problem by getting the employees to sign up for the Rollout Plan, which all eventually did. For his efforts, Mr. Mann received a gift from CEO Wells, because "[s]he was grateful for me … trying to fix the mistake." TT 242:3-4 (Mann). At trial, Mann conceded that Wells personally told him of her appreciation for his efforts in helping "manage through a situation which had a high liability risk." TT 238:5-15 (Mann). Mann's efforts on CEO Well's behalf were obviously known to ArborGen's directors. A paper circulated by ArborGen's Compensation Committee referred to Mr. Mann "being Barbara's 'fix-it person." ' *See* PX 179, p. 1759.

Mr. Mann testified at length about the so-called mistake. He said that "our first goal was to make sure they [the employees] understand that a mistake had been made." TT 237:23-24 (Mann). In his view, the Rollout Plan was devised because, "we needed to come up with a way to … make sure employees knew there was a mistake that had been made." TT 240:7-8 (Mann). The evidence reflects, however that the chief reason for the Rollout and for Mr. Mann's work was not about explaining the mistake. It actually was something different: the aim was to execute the hidden agenda. The chief reason for the Rollout Plan was simply to try to get employees to (1) agree with ArborGen's position that the Dot 3 Plan conferred no rights, (2) and accept the Rollout Plan without a fight. The justification for the Rollout effort as a mistake-explanation exercise is refuted by what actually happened.

Given Mann's testimony about the supposed primacy of explaining through the Rollout meetings about the mistaken distribution of the Dot 3 Plan, it is surprising that testimony from ArborGen's employees at trial reflects the "mistake" was either not a topic of conversation or was sloughed over. It is also surprising (and telling) that not a single piece of correspondence from management to the employees even hints of any problem or mistake with the Dot 3 NVA Plan.

James Grant and Eric Gulledge's Testimony

***59** Mr. Grant testified the Rollout was "a confusing time." TT 114:5 (Grant). He "wasn't really sure what was going on." TT 115:15-16 (Grant). One of the purposes of the meeting was to "get you to sign for the new plan." TT 115:18-20 (Grant). The stated purpose was to "roll out the plan .... I wasn't sure what was going on, whether there was a new plan or replacement plan or how that went." TT 115:22-116:1 (Grant). When he was asked why he signed for the new plan, Mr. Grant explained, "Well, you know, there was confusion, but it was really — you know, the thought then was that something was wrong with the original plan. It couldn't be executed, 1 believe, that there couldn't be a payout in some form in that and that we might end up with nothing. So there was never really any figures to understand how much the value was, so I signed the plan." TT 116:13-19 (Grant). According to Grant, ArborGen's management "said that's something we needed to do and so I did." TT 116:20-24 (Grant).

Mr. Grant was asked whether at that time signing up for the Rollout plan "was a smart thing to do." TT 117:7-8 (Grant). He answered, "I think it was about the only thing to do.... I mean, there really wasn't any options ...." TT 117:9-11 (Grant). Mr. Grant is still employed by ArborGen and is not a Plaintiff. He testified credibly.

At no time during his testimony did Mr. Grant ever reference being told of any mistake concerning the Dot 3 Plan. Like Mr. Grant, Mr. Gulledge is a legacy employee who is still currently employed by ArborGen. He was clear that nobody told him about any mistake at the time of the Rollout, not Mr. Mann, Ms. Wells, Ms. Parks or Ms. Hinchee. TT 325:23-326:17 (Gulledge). Mr. Gulledge did not remember being told about the plan being a mistake but did recall being told what he had was invalid, so he felt he had to sign for the new plan or he would have no NVA rights. TT 331:5-12 (Gulledge). He was led to believe that "legally" only the Rollout Plan was binding on ArborGen. TT 345:13-16 (Gulledge).

Mr. Mann testified the "first goal" in making sure the employees understand that a mistake had been made. Given that the employees who testified in this case were told different stories, which only occasionally involved a muted reference to a mistake, Mr. Mann's testimony rings hollow. Treating the employees in good faith with fair dealing would entail conveying to the employees an accurate, complete, uniformly full and honest account of the issue at hand. From the testimony of unbiased witnesses, Mr. Grant and Mr. Gulledge, this did not happen.

The Plaintiffs' testimony further draws into question and sheds light on the Defendants motive. For example, Dr. Nehra, Dr. Chang, Ms. Cook and Mr. Stout all testified that no one ever told them a mistake had been made. TT 395:13-396:6 (Nehra); TT 505:23-506:17 (Chang); TT 1552:1-23 (Stout) & TT 1667:13-24 (Cook). Plaintiffs Clark, Foutz, Kothera, Winkeler and Miller were told that a mistake had been made in one-on-one discussions with James Mann and Maude Hinchee, not in the group meetings where the Rollout plan was discussed.[22] The mistake was downplayed by James Mann and Maude Hinchee as being a "simple, one time error". TT 1262:5-25 (Clark). Mr. Foutz was told "this was a single, one-time mistake, and you can't hold the company to a one-time error." TT 1849:3-6 (Foutz). The Rollout scheme's hallmark was a lack of candor coupled with a result-oriented pressuring of Plaintiffs to sign up for the Rollout Plan. Such actions by and on behalf of Defendants are not consistent with a discharge of fiduciary obligations of candor and loyalty.

Defendants' Rollout Misconduct Set the Stage for Later Breaches

***60** The end and aim of the Rollout scheme was to convince Plaintiffs that they never had anything of value in the form of the Dot 3 Plan, and thus they would suffer no loss by signing the Rollout Plan paperwork that ArborGen management pressured them to sign. Added to this representation was the claim that the Rollout Plan was a better product anyhow.

A recurring theme at trial was the impression reported by the legacy employees, including Plaintiffs, that they had been pressured to sign the Acknowledged and Agreed documents. Each Plaintiff was asked if they felt pressure to sign for the Rollout Plan, and each Plaintiff answered the same, "yes".[23] When Mr. Gulledge was asked the same question, his answer was also the same, "yes". TT 330:1-25 (Gulledge). Former ArborGen executive, Maud Hinchee, went as far in her recollection of events to Plaintiff Foutz to refer to the signing as the "forced signature stuff" situation. *See* PX 484A, p. 12. Ms. Hinchee later in that same conversation, softened her recollection to "strongly encouraged". *Id.* at 13.

In essence, ArborGen's agents enlisted to execute the Rollout had the implicit task of explaining to Plaintiffs what Plaintiffs' legal rights were. None of the Rollout operation participants was a lawyer. The emphasis during the Rollout operation was not on giving frank, truthful information to Plaintiffs. The emphasis was on getting Plaintiffs to sign off on the Rollout Plan in order to eliminate, secretly, the "high liability risk" hanging over ArborGen and the Defendants.

The record in this case reflects that Defendant Wells, with authorization from ArborGen's Board and with the assistance of ArborGen executives James Mann and Maud Hinchee, developed and executed a plan to inform the legacy employees that the Rollout Plan being presented to them was the one and only version of their NVA Plan that ever became functional and that the Dot 3 Plan was invalid. In doing so, they gave legal advice they were not qualified to give. As legacy employee Eric Gulledge testified at trial, the message sent to him by the rollout effort was only the Rollout Plan was binding. He was asked, "[D]id you understand the company was taking the position factually that, no you never got the Dot 3, or legally only the final version [Rollout Plan] is binding upon you." TT 345:13-15 (Farrier). Mr. Gulledge responded, "Legally the - this is the version that is binding." TT 345:16 (Gulledge).

This Court disagrees with Defendants' view that the Dot 3 Plan was not valid and was not binding. By this Order, Court rules in this case that the Dot 3 Plan was valid and that Plaintiffs had rights thereunder, notwithstanding the ill-advised and incorrect legal advice they were given to the contrary by ArborGen's management.

Giving legal advice is inherently a fiduciary responsibility. Persons not fully qualified to give legal advice do so at their peril in South Carolina. *State v. Buyers Serv. Co.*, 292 S.C. 426, 429, 357 S.E.2d 15, 17 (1987) (listing "[g]iving legal advice" as conduct potentially involving the unauthorized practice of law). Giving incorrect legal advice is problematical for a lawyer and no less problematical for a lay person. Bad, self-serving legal advice rendered by someone in a conflict of interest position, like ArborGen's management, Board and founders were during the Rollout and afterward, is even more problematical.

***61** Putting aside failings on the part of ArborGen and the Defendants for which they alone are responsible, the Court is aware of no legitimate reason why ArborGen's conveyance to Plaintiffs of the Dot 3 Plan when they were hired failed to vest Plaintiffs with contract rights under the Dot 3 Plan. Clearly, contemporaneous conveyances of the similarly unapproved Dot 7 Plan by the same ArborGen managers have always been deemed valid and enforceable. The Rollout operation was predatory and improper. The actions taken, or authorized, or ratified by Defendants in an effort to divest Plaintiffs of their rights under the Dot 3 Plan were wrongful, taken in bad faith and under false pretenses, and accordingly were ineffective.

The improper Rollout scheme, tainted by deception, disloyalty, and conflicts of interest, reached fruition when it caused Plaintiffs to buckle under and conclude that their only way of realizing benefits under the NVA Plan was to sign up for the Rollout Plan. This deception and misinformation delivered by conflicted ArborGen personnel excuses Plaintiffs' failure thereafter to sue within three years of the Rollout switch. Under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." ' *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994) (quoting *Dillon County School Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. dismissed*, 288 S.C. 468, 343 S.E.2d 613 (1986), *overruled on other grounds by Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Such inducement may consist … of "conduct that suggests a lawsuit is not

necessary." *Id.* Here, the Plaintiffs were led to believe any lawsuit would be fruitless because the Dot 3 Plan was invalid and worthless, hence there was nothing to sue over.

The issue whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact. *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 61, 488 S.E.2d 327, 330 (1997). Here, the Defendants launched an orchestrated campaign to convince Plaintiffs that "a lawsuit is not necessary" on the dual ground that (1) Plaintiffs had not lost anything because they never had anything in the first place, and (2) the Rollout Plan was clearly superior to the Dot 3 Plan in any event. Moreover, at that time, Plaintiffs had no claim for damages because there had been neither a sales event nor a conversion of ArborGen, LLC into a C-corporation. This misconduct served to toll the statute of limitations based on estoppel and fraudulent concealment principles.

Summary Concerning Fiduciary Duty

As the foregoing discussion shows, fiduciary duties were owed and breached repeatedly in this case. Actual damages for those breaches are appropriate, and are discussed below in the Award section of this opinion.

PLAINTIFFS ARE ENTITLED TO RECOVERY UNDER THE SOUTH CAROLINA PAYMENT OF WAGES ACT

The SCPWA, S.C. Code Ann. §§ 41-10-10 to - 110, imposes civil liability on employers who fail to pay "wages" due. S.C. Code Ann. § 41-10-80(C). The statute defines "wages" as:

> all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount and includes vacation, holiday, and sick leave payments which are due to an employee under any employer policy or employment contract. Funds placed in pension plans or profit sharing plans are not wages subject to this chapter.

The offer letters accepted by Plaintiffs designated their Dot 3 Plan unit awards as providing them with "equity participation." At various times NVA unit awards were referred to as sign-on bonuses. *See* PX 41, PX 507, PX 330, p. 2469 (in 2001 Compensation Committee approved "compensation program" that included "a sign-on bonus of NVA units"). Defendant Burton testified he had always viewed the NVA awards as a sign-on bonus. TT 2449:5-13 (Burton). Defendant Moriarty testified about practice of awarding NVA units as a sign-on bonus:

***62** Q. Are you aware that it was a standard ArborGen practice, really from the inception of the company, to bring aboard new hires with NVA awards as part of their sign-on bonus?

A. Yes. I mean, I've read the - I've read a lot of discovery, and 1 see that that's how it's termed, as a sign-on bonus, so yes, I am now aware.

TT 1081:18-23 (Moriarty).

Plaintiff Winkeler testified that Defendant Baughman told legacy employees that they would "receive a sign-on bonus" of "units in ArborGen similar to stock options." TT 1712:9-10 (Winkeler). Plaintiffs' expert, Steve Pomerantz, described the NVA Plan as "identical to a plain vanilla options contract and the valuation and the payout, the termination of the equitable nature of it, just follows standard options theory and options modeling." TT 663:10-14 (Pomerantz). Mr. Pomerantz added that it is common across the industry. TT 663:18 (Pomerantz).

Indeed at trial, testimony was clear that the NVA Plans were designed to parallel the operation of stock option plans. Kenneth Davenport, a former ArborGen CEO, was deeply involved in designing the NVA Plan, and explained its similarity to a stock option plan:

> [T]he new value added component … is really tantamount to a stock-option plan. However, given the legal entity structure of ArborGen at the time, an LLC not a C Corp., there's not a, if you will, stock option plan referred to, but rather a new value added plan referred to. TT 586:14-19 (Davenport).

As Mr. Davenport explained, the reason the NVA Plan does not refer to awarding NVA units as "stock options" is because LLCs do not issue stock as corporations do. The Plaintiffs' offer letters (PX 118) explained that the NVA Plan provides employees a way to share in the successful long-term growth in the value of ArborGen. "As a new employee of ArborGen, you arc being awarded 1250 units effective January 1, 2003. From time to time the Board of Directors expects to make additional awards of NVA units on a periodic basis to qualifying employees based on ArborGen and individual performance. An award agreement and plan document will be sent to you to memorialize this initial grant." (The units awarded and the effect date varied among the Plaintiffs). *See* PX 118.

The Plan's dual aim was, like a stock option plan, to incentivize and reward good work. Defendant Munson made this clear at trial in his direct testimony:

Q. What was the NVA plan in its original concept?

A. The original concept was it was a long-term incentive plan, the purpose of which is to orient employees towards a common goal of making ArborGen a success.

Q. And was it designed to incentivize the employees?

A. Yes, it was, that was its purpose.

A. Ken Davenport was originally given the assignment of developing the draft of that for consideration by the board.

Q. And at the time that the board delegated that to Ken, did the board have an idea of what it wanted the NVA to look like?

A. We had an idea about what we wanted the NVA plan to accomplish, and that would be to motivate and align employees towards a common goal.

Q. Did that goal ever change within the board?

A. Practically, it has not changed.

TT 734:8-25 (Munson).

The NVA Plan functioned as an "employer policy or employment contract" designed to provide a form of recompense to employees for their labor.

***63** The Wage Act excludes from its coverage "Funds placed in pension plans or profit sharing plans." This exclusion does not apply here. The NVA Plan functioned neither as a "pension plan" nor a "profit sharing plan." No credible evidence supporting the contention that the NVA Plan was either a "pension plan" or a "profit sharing plan" is found in this record. The payment of future bonuses was discretionary and purely ad hoc. Those "awards" were not pension

plan or profit sharing plan payments, because ArborGen management had free rein in meting out the awards. Further, the award provided to the employees was not a right to share in the profits of the company, but rather to obtain an interest in the company's growth in value.

Under the NVA Plan, the value of a unit award is not connected directly to sharing the company's profits. The value of the NVA Plan unit instead is linked to the growth of the company worth. Nor did ArborGen ever allocate or place "funds" into the NVA Plan. Over more than two weeks of trial, not a single witness testified that the NVA Plan was actually either a pension plan or a profit sharing plan. Nothing in any exhibit before the court shows the grant of NVA units being anything other than bonus compensation to ArborGen employees. Those NVA awards, when, as and if issued, were intended to be bonus compensation, and they were contractual.

It is true that there has to date been no sale event within the coverage of the NVA Plan. However, at the time ArborGen converted from LLC status to corporate status on June 1, 2010, the Dot 3 Plan terminated and an obligation arose under section 9(b) of the Plan (PX 135, p. 4) to provide Plaintiffs with an equitable award under the Plan established by the successor corporation. ArborGen never fulfilled this obligation. The value of the Appreciation Rights given to the Plaintiffs in 2010 were not equitable to the value of the Plaintiffs' Dot 3 Plan NVA Units on the date of the conversion. Plaintiffs were injured by being deprived of the value they held in their Dot 3 Plan units in June of 2010. Simply put, the existence or nonexistence of a sales event is irrelevant to the question of whether Plaintiffs suffered damages when the obligation to provide an "equitable award" arose. Those damages arc calculable. They were credibly calculated by Plaintiffs' expert and they are part of this record.

Plaintiffs SCPWA cause of action is alleged against ArborGen, and its founders, MWV, IP and Rubicon. The SCPWA is concerned with the payment of wages and "is directed to the entity responsible for such payment." *Williams v. S. Carolina Dep't of Corr.*, 641 S.E.2d 885, 887 (S.C. 2007). Here the Court finds that duty to make compensation payments under the Dot 3 Plan rests with ArborGen and not to MWV, IP or Rubicon.

The Court has considered and rejected the Defendants' contention that Plaintiffs should somehow be estopped from collecting on their Wage Act claims because, supposedly, Plaintiffs were notified via the Rollout that their compensation had changed and nonetheless impliedly consented to the change by continuing to work at ArborGen. In truth, there was no valid employee consent, implied or otherwise, to any "change" in compensation. There was no waiver, and there is no basis for claiming that the Plaintiffs deserve to be estopped by their conduct. What the Plaintiffs did was accept, as truthful, the deliberately deceptive cover story imparted by Defendants. This innocent and trusting behavior creates no basis for estoppel to be used by Defendants to Plaintiffs' prejudice.

As discussed at length in this opinion, the record reflects that there was an organized campaign by Defendants to deceive and pressure Plaintiffs to accept the Rollout Plan, a campaign that included representations to the effect that the Dot 3 Plan was a mere unapproved, worthless draft plan that had no value, was inoperative, would never execute, etc. This is not the sort of conduct that the concept of estoppel is designed to protect.

***64** Under section 9(b) of the Plan, Plaintiffs were expressly entitled to withhold consent to any adverse change in their NVA Plan rights. The testimony at trial was clear that Plaintiffs never got proper notice of their rights, and never intended waive or otherwise voluntarily to relinquish the legal rights that they had under the Dot 3 Plan. Rather, they were told that they had no such rights in the first place.

ArborGen, having used deception and pressure to effectuate the Rollout in order to "manage[ ] through a situation involving a high liability risk," (DX 660, PX 170) has contended that it should be allowed to estop Plaintiffs from recovering under a remedial statute ArborGen deliberately violated. This stands the equitable concept of estoppel on its head; estoppel is more properly used by innocent parties who have been wrongfully injured, not by parties who resort to deception and pressure tactics to get their way. Here estoppel is correctly used by Plaintiffs to defeat Defendants'

limitations claim; it is not a device that may properly be used by Defendants based on the fact in this record. Plaintiffs never consented to Defendants' misconduct, nor are they estopped, nor have they waived their rights, nor have they in any way ratified or consented to Defendants' wrongs.

As is discussed in the Award section of this opinion, Plaintiffs are entitled to recovery based on their Wage Act claims.

PLAINTIFFS ARE ENTITLED TO RECOVERY ON THEIR NEGLIGENT MISREPRESENTATION CLAIM

To recover for pecuniary loss caused by a negligent misrepresentation, a plaintiff must allege and prove six elements:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

AMA Mgmt. Corp. v. Strasburger, 420 S.E.2d 868,874 (S.C. Ct. App. 1992).

Plaintiffs' Fifth Cause of Action specifically refers to Section 552 of the Restatement Second of Torts.

Section 552 provides:

INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS.

(1) 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 transaction, 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.

(2) [T]he liability stated in subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Section 552 was held to state a viable cause of action in South Carolina in *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 240, 489 S.E.2d 470, 471 (1997).

Plaintiffs' Fifth Cause of Action names the corporate defendants, acting through their agents, as tortfeasors: ArborGen, MWV, IP and Rubicon. The evidence presented at trial suffices to satisfy the elements of both versions of the negligent misrepresentation tort.

***65** The fraud in this case involved seeking to divest Plaintiffs of their rights in the Dot 3 Plan under false pretenses, and seeking to capitalize on that misconduct by presenting them with inequitable awards under the Appreciation Rights Plan in 2010. In both cases, the aim was to benefit ArborGen's corporate owners by cutting Plaintiffs' equity interests.

In neither case were the representations made to Plaintiffs classifiable as "future promises." Rather, Plaintiffs received representations of material fact about existing circumstances, not future circumstances.

In essence, Plaintiffs were told they had no rights under the Dot 3 Plan. This Court respectfully disagrees. They were told that the Rollout Plan would produce superior financial results for the unit holders compared to the Dot 3 Plan. The record reflects that, to the contrary, the Defendants' wanted the Dot 3 Plan eliminated because they secretly believed it was too rich, i.e., "unsupportable financially."

As discussed above in detail, Plaintiffs were told that told they had no rights whatsoever under the Dot 3 Plan. It was claimed the Dot 3 Plan could not be executed, was invalid because it had never been approved, that it could not deliver a payout, was worthless, and, in essence, had never taken effect. Plaintiffs have produced clear, cogent and convincing evidence in this case that reflects that these were false statements of existing facts. "Fraud must be established by a preponderance of the evidence … However, the courts have frequently stated that fraud must be established by evidence that is … clear, cogent, and convincing … These expressions, however, have been interpreted to mean only that there must be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime, and, while the evidence must be clear and convincing, such clear and convincing proof may be met by a preponderance of the evidence." 37 C.J.S. Fraud § 114a (1943). *See Gilbert v. Mid-S. Mach. Co.*, 267 S.C. 211, 222-23, 227 S.E.2d 189, 194 (1976).

In the words of legacy employee James Grant, the message delivered at the time of the Rollout was "that something was wrong with the original plan. It couldn't be executed, I believe, that there couldn't be a payout in some form ...." TT 116:14-19 (Grant). According to Grant, the reason for signing up for the Rollout Plan was because ArborGen's management "said that's something we needed to do and so I did." TT 116:20-24 (Grant). Mr. Grant was asked whether at that time signing up for the Rollout Plan "was a smart thing to do." TT 117:7-8 (Grant). He answered, "I think it was about the only thing to do.... I mean, there really wasn't any options ...." TT 117:9-11 (Grant). ArborGen legacy employee, Eric Gulledge, put it succinctly when he said about Defendants' Rollout scheme: "[S]omewhere within there, there was a lie that happened." TT 340:16-21 (Gulledge).

ArborGen's Rollout campaign was built around misrepresentations and pressure tactics of the sort Mr. Grant testified about. All Plaintiffs were equally affected by these unprincipled tactics. Mr. Gulledge, told the Court he did not remember being told about the plan being a mistake but did recall being told what he had was invalid, so he felt he had to sign for the new plan or he would have no NVA rights. TT 331:5-12 (Gulledge). Even in cases where legacy employees were told that the Dot 3 Plan had been issued by mistake, ArborGen's management tended to misrepresent and downplay that representation by calling it a one-time mistake, which it was not.

***66** There is no question that Defendants are responsible for material false representations made at the time of the Rollout. Likewise, at the time of the ArborGen conversion from an LLC to a C-corporation on June 1, 2010, Plaintiffs were told that their rights were governed purely by the Rollout Plan as transferred over to the Appreciation Rights Plan. This was untrue. Plaintiffs' financial payment rights under the Dot 3 Plan had never been surrendered, and there was no recognition of this fact, only statements and actions to the contrary.

The Defendants' pecuniary interest in divesting Plaintiffs of their Dot 3 Plan rights is obvious, and plainly was a major motivating factor for the attempt to divest Plaintiffs of those rights. Plaintiffs were given a claim on equity at a time when ArborGen's controlling founders owned 100% of that equity. Defendants, thus had a vested interest in minimizing the size of the equity shares paid out to Plaintiffs, and they plainly took steps to do that by attempting to secretly divest the Plaintiffs of their Dot 3 Plan rights.

Unquestionably, a duty of care in conveying information to the employees was owed and breached. At trial, former ArborGen officer James Mann testified that both Barbara Wells and Dawn Parks were "careless" based on his analysis

of what happened. TT 288:12-17 (Mann). They were not the only ones. With CEO Wells, Mr. Mann led the Rollout program's planning. He spearheaded the execution from start to finish. From its conception to its completion, the Rollout program was handled in a way that showed a reckless disregard for the truth, with complete, accurate, truthful information about their rights being something which was never fully and honestly conveyed to Plaintiffs or the other legacy employees. Recklessness is a hallmark of all Defendants who approved or ratified the deceptive and wrongful Rollout operation. Simply put, in their effort to "manage through a situation which had a high liability risk," (*See* PX 170), Defendants deliberately elected to resort to tactics that carry exactly that same type of risk. The later representations regarding the transfer of Plaintiffs' Rollout Plan units to the Appreciation Rights Plan marked the culmination of the deception campaign.

The record is replete with evidence that the deceptive Rollout scheme was accomplished by deceptive statements, acts, and practices on which Plaintiffs reasonably relied. The record is also replete with contradictions in Defendants' testimony that call their credibility into question. The number of legacy employees who transferred over from MWV and IP and had been given the Dot 3 Plan was, in round numbers, 50 or 60 people. TT 188:5-10 (Mann). At the end of the 2004 Rollout, every single one of those employees had been convinced to sign Acknowledged and Agreed forms and take the Rollout Plan. Standing alone, that unanimity testifies to the convincing nature of the deception practiced on Plaintiffs and the reasonableness of the actions Plaintiffs' took as a result.

A consideration in evaluating the reasonableness of Plaintiffs' behavior is the fact that the relationship between the parties was one of trust and confidence. This is discussed in greater detail in the fiduciary duty section of this opinion. Suffice it to say, the record shows clearly that special trust and confidence was reposed by Plaintiffs in Defendants before, during and after the Rollout scheme took place; and that trust and confidence was abused.

Unquestionably, Plaintiffs justifiably relied on Defendants' false disclosures regarding Plaintiffs' NVA Plan rights. This reliance was detrimental to the Plaintiffs; the Dot 3 Plan's unit values at the time of the LLC conversion dwarfed those of the Rollout Plan by a factor of more than twenty to one.

***67** Unquestionable, too, is the fact that Plaintiffs suffered damages as a result of reposing trust in Defendants words and deeds. Damages that the Plaintiffs arc entitled to recover against the Defendants equal to the amount of value the Plaintiffs were shorted in June of 2010 when their holdings in the Appreciation Rights Plan failed to match up to the value of their rights in the Dot 3 Plan. Damages are discussed further in the Award section of this opinion.

DEFENDANTS ARE LIABLE UNDER THE BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT CAUSE OF ACTION

The Dot 3 Plan was Contractual

Plaintiff's claim for breach of contract accompanied by a fraudulent act alleges that the Dot 3 Plan was a valid contact. The Dot 3 Plan contains a Delaware choice-of-law provision and the alleged torts occurred in South Carolina. *See* PX 42 § 12(e). Thus, the contract elements are governed by Delaware law and the tort elements are governed by South Carolina law. *See Lister v. NationsBank of Delaware*, NA., 494 S.E.2d 449, 454 (S.C. Ct. App. 1997).

Under Delaware law, a valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration. *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010), *citing Carlson v. Hallinan*, 925 A.2d 506, 524 (Del.Ch.2006) ("Three elements are necessary to prove the existence of an enforceable contract: 1) the intent of the parties to be bound by it, 2) sufficiently definite terms and 3) consideration."). These elements are met here.

The Dot 3 Plan's Distribution Was Authorized

The record is clear that the Dot 3 Plan was offered and delivered by authorized agents of ArborGen acting within the scope of their authority to bind ArborGen. The ArborGen Board was well aware that NVA Plan units were being awarded by ArborGen management in advance of formal Board approval and assented to that process. Exactly the same process was followed at the same time for distribution of the Dot 7 Plans to nonlegacy employees and ArborGen has never contested the validity of those unit awards.

It is not necessary that Plaintiffs prove that CEO Wells or Dawn Parks had express board authority to bind ArborGen to the Dot 3 Plan. The issue rather is whether those agents had authority to bind ArborGen. As stated in *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117-18 (Ct. App. 2000), "the principal," in this case ArborGen, "is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption."

Here, Defendant Barbara Wells was installed by the Board as ArborGen's President and CEO. She was thus placed in a position to send offer letters promising "equity participation" in the NVA Plan, and HR Director, Dawn Parks, likewise was in a position where she was cloaked with at least apparent authority to complete the hiring process by distributing the Dot 3 Plan document in the employees' benefit packets. No Defendant ever suggested at trial that Wells was not authorized to send the hiring letters or that Parks was not authorized to distribute NVA Plan documents.

It is no defense for ArborGen to say that the Dot 3 Plan was not actually expressly approved by ArborGen's Board. Neither was the Dot 7 Plan. The Board knew that NVA Plan unit awards were being made from at least early 2002 and never registered an objection. Express authority is not needed to bind a principal when apparent authority is present as it is here.

The Dot 3 Plan's Terms were Sufficiently Definite

***68** The Dot 3 Plan's language basically mirrors the Dot 7 Plan's. The major differences are the decimal point shift, the imposition of a hurdle rate, and a modification of the "sales event" definition. In each plan, the definition of an "NVA Unit" is the same.

The record reflects that Defendants' chief concern with the Dot 3 Plan was not that its terms were too indefinite to be understandable, but that the Plan was "too rich." Defendant Liebetreu testified he was told by Defendant Munson about "what seemed to be the specious case of somebody had a draft document with a typo in it that represented an incentive plan that on its face would be unsupportable financially and ridiculous in some ways." *See* PX 530 (Liebetreu Depo. 19:2-6). The record reflects that the chief term in the Dot 3 Plan that aroused concern related to the alleged typographical error in the Dot 3 plan that produced a decimal point of .0001 instead of .00001. When Defendant Wallinger testified at trial about the error Defendant Baughman reported in 2002 when the Dot 3 plan was handed out, it was because the one handed out "had the wrong number in it." TT 2154:23 (Wallinger). He went on to explain, "Bill [Baughman] related to me that there was one that went out that had the decimal in the wrong place and he said we caught it, it was a typo and we're correcting it." TT 2154:25-2155:3 (Wallinger).

Likewise, Defendant Munson testified that in his conversation with Defendant Liebetreu he told him "that it appears like it's a typographical error." TT 824:11-12 (Munson). He later said, "I probably would have described something about, you know, one version had one more zero than another version." TT 825:25-826:1 (Munson). It was the alleged typographical error that really concerned Defendants Wallinger, Liebetreu, Munson, Baughman, and others, not the

alleged inability of the Dot 3 Plan to function. It was a given the Dot 3 Plan could function, those Defendants just disliked how well it functioned in generating value for the employees.

Two defense witnesses, Defendants Moriarty and Burton, testified at trial that the Dot 3 Plan was "inoperable" due to the use of the term "specified fraction" in the definition of "NVA Unit" in section 2(k). *See* PX 42, p. 2. No other witness and no document in this voluminous record supports the positions advanced by Defendants Moriarty or Burton. This supposedly fatal problem with the "NVA Unit" definition was replicated verbatim in the "NVA Unit" definition found in section 2(m) of the Dot 7 Plan (PX 109, p. 4), yet nobody has ever contended that the Dot 7 Plan's definition of and "NVA Unit" is fatally flawed. Defendants Moriarty and Burton's fellow Rubicon-based co-defendant, Michael Andrews, commented on NVA Plan language in detail and never mentioned a problem with the "specified fraction" term. *See* PX 70A.

Testimony at trial contradicted the position advanced by Defendants Moriarty and Burton, including this testimony from one of the Plan's drafters, Defendant Baughman:
Q. Yes. Let's look at [the] NVA unit [definition]. Now, as I understand it, your value as an employee is the difference between your initial value and your final value; is that right?

A. Roughly, yes, yes.

Q. Okay. "NVA unit means a unit of measurement that entitles a participant to receive a cash payment equal to a specified fraction of the difference between the initial value and the final value of such unit subject to the terms and conditions of the plan and the participant's award agreement." Did I read that right?

***69** A. Yes, you did.

Q. Is there anything in there that you don't understand?

A. No.

Q. Is there anything in this plan as you — as you worked on it, reviewed it, edited it, thought about it, conferred with whoever about it, that you thought made the plan unworkable, inoperable, meaningless, worthless or anything of that nature?

A. No, there's not.

Q. Specifically as to this phrase "specified fraction," you understand that, correct?

A. I do, yes.

TT 2116:2-23 (Baughman), *see also* TT 660:8-661:1 (Pomerantz).

Aside from Defendants Moriarty and Burton's oral testimony in the case, no evidence of any sort, written or oral refers to the alleged "specified fraction" defect, much less suggests that the use of the term is a fatal flaw. Defendants Moriarty and Burton themselves, despite having "a lot of key and insightful comments into the *proper wording* and development of the plan" (TT 2135:21 - 2136:14 (Baughman) (emphasis added), never mentioned an issue with specified fraction in any of the markups of the plans or in correspondence to other board members regarding the plans. Plaintiffs' expert testified that the plan was operable. *See* TT 661:9-662:3 (Pomerantz); *see also* PX 483, p. 2. The specified fraction claim is a red herring. Clearly, the Dot 3 Plan held by Plaintiffs in the summer of 2004 was an operable plan.

Defendants' contention that Defendants' own failure or refusal to supply Plaintiffs with Award Agreements caused the Dot 3 Plan never to become effective is explored and found wanting in the section of this opinion dealing with breach of fiduciary duty. As Plaintiff Stout testified at trial, legacy employees signed documents setting forth the amount of units, the effective date, and were informed about initial value, meaning that issuance of award agreements to Plaintiffs was redundant. TT 1551:10-20 (Stout). Even Defendant Munson testified that when the employees went to work after signing their offer letters, they "have the units." TT 816:17-817:1 (Munson).

Groundless for the same reason is the defense contention that the Dot 3 Plan never took effect because Defendants refused or failed expressly to designate an initial value for Plaintiffs units. Plaintiffs' initial values were premised on a starting company equity value of $100 million, and this value was no mystery; it was set "very early on." TT 840:14-20, 875:6-15 877:5-8, 919:20-21 (Munson); TT 1234:21 -1235:5, 1248:7-10, 1275:7-15, 1299:14-1300:9 (Clark); TT 1410:13-17 (Kothera); TT 1551:14-17 (Stout); TT 1579:17-19, 1607:21-1608:2 (Miller); TT 1830:11-15 (Foutz); TT 2112:21-23, 2134:7-10, 2140:2-6 (Baughman); and *See* PX 70A.

In any event, Defendants cannot manufacture a defense to Plaintiffs' claim based on Defendants own failure to act in good faith and deal fairly with Plaintiffs over those conditions, performance of which was solely within Defendants' power, In *Champion v. Whaley*, 280 S.C. 116, 122, 311 S.E.2d 404, 407 (Ct. App. 1984), our Court of Appeals held that Restatement (Second) of Contracts § 245 (1979), is "the proper rule in this jurisdiction." It reads: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *See also* Richard A. Lord, *Williston on Contracts* § 39:4 (4th ed. 2000) ("[W]here one improperly prevents the performance or the happening of a condition of his or her own promissory duty, the offending party thereby eliminates it as a condition."). Both Restatement of Contracts § 245 and section 39.4 of the Williston treatise have been recognized as valid in Delaware. *See WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C.*, No. C.A. 2993-VCS, 2010 WL 3706624, at *14 (Del. Ch. Sept. 17, 2010). Defendants' nonperformance issues, and the prevention doctrine, which is related thereto, are dealt with in greater detail in the fiduciary duty discussion *supra*. That discussion is incorporated by reference here.

***70** Defendants have contended that the only enforceable NVA Plan contract involved in this case is the Board-approved Rollout Plan presented to Plaintiffs in 2004. The Defendants' contention that the Rollout Plan either replaced or at least controlled over the Dot 3 Plan is rejected. As this opinion makes clear, Defendants' Rollout effort left Plaintiffs' rights under the Dot 3 Plan intact. The Rollout did not cause the Dot 3 Plan to go away or disappear. Further, Defendants' actions in connection with the Rollout scheme provide grounds for various legal claims advanced by Plaintiffs, including breach of contract accompanied by fraudulent act.

Consideration was Supplied Sufficient to Form a Contract

The final prerequisite for a contract is an exchange of legal consideration. There is no dispute that this element was satisfied by the Plaintiffs when they went to work for ArborGen in 2003. On the other hand, there is a dispute over whether under the facts of this case, the Rollout Plan's introduction served to annul or vitiate Plaintiffs' rights under the Dot 3 Plan based on concepts of waiver, estoppel, consent or ratification. This issue, too, is discussed in the fiduciary duty section, and that discussion is incorporated by reference. Suffice it to say that the record reflects no facts tending to show that Plaintiffs knowingly and voluntarily agreed to have their Dot 3 Plan rights modified or abridged; there is also a complete lack of proof that Plaintiffs were given any form of consideration for the change.

CEO Wells who signed each of the Acknowledge and Agree documents used during the Rollout testified at her deposition that the signing by the employees of the 2004 Rollout Plan was simply an acknowledgement of receiving the plan, i.e., a receipt, and that no tangible benefit was received for the new plan. *See* PX 530 (Wells Depo. p. 194:6-24). The Defendants failed to give any additional consideration to the Plaintiffs for execution of the new Plan in 2004. Each

Plaintiffs' continued employment with ArborGen after the Rollout did not serve as valid consideration for the NVA Plan switch. *See Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 207 (2001) (holding that when a covenant is entered into after the inception of employment, separate consideration, *in addition to continued employment*, is necessary in order for the covenant to be enforceable). The Defendants have failed to show separate consideration given for the signing of the new Plan in 2004. In fact, Defendants' witnesses have testified like Barbara Wells that no consideration was given. Insofar as Defendants' continued-employment argument rests on estoppel, it fails because there is no basis here for Defendants' asserting any estoppel against the Plaintiffs, whom they successfully tricked.

Under Delaware law, "A contract having been made, no modification of it could be brought about without the consent of both parties and without consideration." *De Cecchis v. Evers*, 54 Del. 99, 101, 174 A.2d 463, 464 (Del. Super. 1961) (citations omitted). Further lacking is proof of any attempt by Defendants to comply with section 9(b) which demands that no adverse changes in the Dot 3 Plan can be effective absent the unit-holder's written consent to the changes. This requirement connotes consent given after full disclosure of the changes being made and the consequences, including the right to withhold consent. No such consent was ever sought or obtained by ArborGen at the time of the Rollout. Plaintiffs' contract rights were breached when Defendants refused to honor, or even recognize, Plaintiffs' Dot 3 Plan rights in June of 2010.

Summary: The NVA Plan Created Contract Rights

***71** As discussed above, all of the elements required under Delaware law for the Plaintiffs' Dot 3 Plan unit awards to have valid contractual status are satisfied in this record. The same is true for the facts needed to establish that the breach of Plaintiffs' contracts were accompanied by fraudulent acts. The fraudulent acts element of the tort is discussed below.

Defendants' Contract Breach was Accompanied by Fraudulent Acts

South Carolina law defines the elements of the tort known as an action for "breach of contract accompanied by a fraudulent act." As stated in *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986):
In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*. 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). It is not necessary to allege the elements of common law fraud and deceit. *See Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Id*. As the Court observed in *Sullivan v. Calhoun*, "fraud," in this sense,

assumes so many hues and forms, that courts arc compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.

Id., 117 S.C. at 139, 108 S.E. at 189.

In *Corley v. Coastal States Life Ins. Co.*, 244 S.C. 1, 135 S.E.2d 316 (1964), the Supreme Court held that a misrepresentation made in reckless disregard for the truth will support an action for breach of contract accompanied by a fraudulent act. In *Vann v. Nationwide Ins. Co.*. 257 S.C. 217, 185 S.E.2d 363 (1971), South Carolina's Supreme Court explicitly recognized that reliance on the misrepresentation must also be proved. Under South Carolina law, the fraudulent act accompanying the breach "is of like character to a fraudulent intention, but imports some definite act

looking to the perpetration of the fraud." *Hardee v. Penn Mut. Life Ins. Co. of Philadelphia*, 215 S.C. 1, 11, 53 S.E.2d 861, 865 (1949).

The evidence presented in this case over more than two weeks of trial shows that Defendants engaged in a concerted, organized campaign using deception and concealments to mislead Plaintiffs so ArborGen would not have to honor its Dot 3 Plan which was considered by Defendants to be "unsupportable financially," i.e., too rich. CEO Wells led the effort, with major assistance from high ArborGen officer James Mann, who was instrumental in preparing and executing the plan. Reliance is shown by the legacy employees unanimously executing the "Acknowledged and Agreed" documents prepared for them.

According to Mr. Mann's testimony, the Rollout Plan's main purpose was to explain to employees that their plan The Dots Plan was a "mistake" plan and that the Rollout Plan was the superior Board-approved plan. According to Mr. Mann, "[t]he goal was to try to talk to them to say, hey, a mistake's been made and you received the wrong plan." TT 235:6-7 (Mann). However, the clear and convincing evidence at trial was that the "mistake" explanation was not made at all in large group meetings or in any written communications to employees. Rather, the Rollout scheme's aim was to get the employees to sign up for the Rollout Plan, with the aim of stripping their rights under the "too rich" Dot 3 Plan they'd been given without the trusting employees realizing they were being duped "Fraud must be established by a preponderance of the evidence… However, the courts have frequently stated that fraud must be established by evidence that is … clear, cogent and convincing." *See Gilbert v. Mid-S.Mach Co.*, 267 S.C. 211, 227 S.E.2d 189 (S.C. 1976). This Court finds that the fraud perpetrated by the Defendants has been established by "clear, cogent and convincing evidence."

***72** To quote Mr. Mann's testimony at trial, "It was my understanding that the Dot 3 plan went away when they signed this." TT 295:8-9 (Mann). Legal rights can "go away" only if they exist in the first place. Yet Plaintiffs, and the other legacy employees, were not told they had rights under the Dot 3 Plan that were theirs to keep if they wished; rather, they were told the Dot 3 Plan conveyed no rights at all and that if they wanted to have any rights under an NVA Plan they needed to sign up for the Rollover Plan. [24]

As noted above, a number of witnesses at trial who witnessed the Rollout disclosures testified they were never told about any mistake. The trial testimony reflects that the "mistake" information was disclosed principally if not exclusively in follow-up one-on-one meetings with the relatively few employees who tended to be the most concerned about the switch. But in those cases "the mistake" was downplayed as a very limited "simple, one-time" occurrence, which, unbeknownst to the employees, it was not. TT 1261:13 (Clark); TT 1418:22-1219:1 (Kothera): TT 1610:19-24 (Miller), TT 1763:23-1764:8 (Winkeler): TT 1848:25-1849:6 (Foutz). Contrary to the one-on-one disclosures to several Plaintiffs, the Dot 3 Plan's distribution was not a simple, limited, one-time event. The Plan was broadly distributed over time; Mr. Mann conceded at trial that, in round numbers, 50 or 60 legacy employees got the Dot 3 Plan. TT 188:9-10 (Mann). The evidence before the Court is that the Dot 3 Plan was distributed to these 50 or 60 legacy employees hired in the summer of 2002, then in late fall 2002 and again in April 2003. The extended time span and the large number of Dot 3 Plan recipients belies any notion of a simple, one-time mistake. So does the fact that the record reflects non-legacy employees received the Dot 7 Plan, plus Award Agreements that were withheld from Plaintiffs.

Never did Defendants' agents attempt to bluntly and honestly and fully explain how and why the Dot 3 Plan got handed out, or how rights under it differed from those under the Rollout Plan, or that Plaintiffs had a right to withhold consent to any adverse change under section 9(b) of the Dot 3 Plan. Instead, Defendants preyed on Plaintiffs' trust and ignorance. James Grant testified: "[T]here was confusion … [T]he thought then was that something was wrong with the original plan. It couldn't be executed, I believe, that there couldn't be a payout in some form in that and that we might end up with nothing." TT 116:13-17 (Grant). Employees were led, falsely, to believe they either signed up for the Rollout Plan or had nothing:

Q. Did you feel like you had a choice whether to sign it or not?

A. No. If I didn't, I would give up the units, I guess. If I didn't sign it, I'd give up the units.

***73** Q. Was it presented to you that what you were receiving in 2004, the board-approved plan, was the only valid and operable plan?

A. Yes.

TT 330:14-21 (Gulledge).

Mr. Gulledge was a legacy employee who is still employed by ArborGen and he is not a Plaintiff. He testified poignantly to the atmosphere of deception and concealment that was the Rollout Plan's hallmark: "I don't know who specifically, but somewhere in there, there was a lie that happened." TT 340:19-21 (Gulledge).

The Rollout Plan was calculated to pressure Plaintiffs while exploiting their trust. There was no thought of giving the employees a choice: it was the Rollout Plan or you have nothing. As Plaintiff Kothera testified:
Q. So really, did you think you had two plans and you could just pick at whatever time which one you wanted to go by?

A. No. What we were being told is that if you weren't in the 2002 value-added plan (the Rollout Plan distributed in 2004), you weren't in any plan.

TT 1474:2-5 (Kothera) (clarification added).

The presentations were deliberately deceptive:
Q. But the rollout plan at the time was represented to you to be superior, better, operative, the gold standard of NVA plans, true?

A. Yes.

Q. Whereas what you had before, in a figurative sense, was garbage?

A. Right....

TT 1154:21-1155:2 (Stout).

Undercutting the "mistake" story is the sworn testimony from CEO Wells that no mistake had been made:
Q. Let's focus on the NVA plan or plans, and let me ask if in hindsight you or the company made any mistakes in the handling of the plan or plans?

A. I'm not aware of mistakes that were made in the time that I was with the company.

See PX 530 (Wells Depo. 53:23-54:3).

At the same deposition, Ms. Wells testified that she had no memory of Dawn Parks making a "mistake by disseminating incorrectly an NVA Plan to employees." *See* PX 530 (Wells Depo. 90:5-16). Yet Mann's testimony at trial was directly to

the contrary, and so is Ms. Wells "high liability risk" report to the Compensation Committee which specifically mentions punishing Dawn Parks as a result of putting "an incorrect version of the NVA Plan in the legacy employees' hiring packages." *See* PX 170 pp. 28-29. Mr. Mann testified that admissions made in the PX 170 report by Ms. Wells were specifically related to him back in 2004.

As Ms. Wells' plainly inaccurate testimony reflects, even during the pendency of this case, Defendants have engaged in acts aimed at keeping Plaintiffs in the dark. Thus, Defendant Munson's document production included the document written by Defendant Wells reporting on the 2004 Rollout, but with a telling redaction. Completely covered up in Munson's production was the description of the Rollout event, including the telling language about how "we successfully managed through a situation which had a high liability risk." *See* PX 407, pp. 28-29. The critical language was redacted based on a purported privilege claim. No privilege applied. Looking at Defendants' conduct, there is no sign of any attempt to discharge obligations of good faith and fair dealing towards Plaintiff; rather, the evidence in this record shows the opposite type of conduct.

***74** The crowning wrongful act tied to Defendants Dot 3 Plan contract breach was Defendants' insistence in the summer of 2010 that Plaintiffs sign up for the Appreciation Rights Plan and receive far less consideration than was warranted in light of their unit values under the Dot 3 Plan.

Missing from Plaintiffs' dealings with ArborGen and the various Defendants is any attempt by Defendants to act in an honest, fair way concerning the Dot 3 Plan starting in 2004 and extending to the present. It was not Plaintiffs' fault that in late 2002 and early 2003 they were handed the Dot 3 Plan and told they had unit awards. They then went to work in the good faith belief they owned those units.

A review of the Rollout effort leads inexorably to the conclusion that Defendants used deception, misplaced trust, and pressure tactics to convince Plaintiffs to sign up for the Rollout Plan. In doing so, they also convinced Plaintiffs that they had no pecuniary rights in the Dot 3 Plan. Rather than be honest and candid and seek waivers based on full, honest disclosure and scrupulous adherence to the requirements of section 9(b) of the Dot 3 Plan, Defendants relied on trickery and deceit. Defendants' motivation was clearly not to benefit Plaintiffs by relieving them of a malformed, ineffective plan; it was to eliminate unit awards the Board deemed to be too rich or "unsupportable financially." The aim was not to help Plaintiffs by getting rid of an NVA Plan that was bad, it was to help ArborGen and its founders by getting rid of a plan that was viewed as too good for the employees.

Plaintiffs have proven by clear and convincing evidence that Defendants' attempted termination of Plaintiffs' contract rights under the Dot 3 Plan, and the denial of their "equitable award" under the Appreciation Rights Plan amounted to breach of contract accompanied by fraudulent act, and that the fraudulent acts element, perpetrated according to a plan by authorized agents, was committed with an intent to defraud.

PLAINTIFFS ARE ENTITLED TO RECOVERY UNDER THEIR CIVIL CONSPIRACY CAUSE OF ACTION

"Civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff thereby causing him special damage." *Future Group, II v. NationsBank*, 324 S.C. 89, 478 S.E.2d 45, 50 (1996). The tort of civil conspiracy has three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage, *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15, 31 (2000). In order to establish a conspiracy, a plaintiff must produce either direct or circumstantial evidence from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372, 383 (Ct.App.1998). "A conspiracy is actionable only if overt acts pursuant to the common design proximately cause damage to the party bringing the action." *Id.*

Here, Plaintiffs attack the Defendants for contriving and executing the multifaceted Rollout scheme, and then withholding proper credit to Plaintiffs of an equitable award to Plaintiffs in 2010. The evidence in the record reflects that the Board of Director Defendants and CEO Barbara Wells positively or tacitly came to a mutual understanding that the Dot 3 Plan was too rich and that Plaintiffs needed to be divested of their rights under that Plan. In the opinion of former ArborGen executive, Maud Hinchee, speaking during her term as the ArborGen's Chief Technology Officer, the NVA Plan was probably too rich for the company to pay out on. "I don't know the details, but I know it probably, it probably was too rich for the company, for the company really couldn't probably afford to pay out all that." *See* PX 484A p. 24-25 & PX 528. As she went on to say to Plaintiff Foutz, "the Board makes the entire level decisions around this type of compensation" and they changed their mind. *See* PX 484A p. 25 & PX 528. At trial Mr. Mann was asked:

***75** Q. Do you remember ever having the thought that the board of directors concluded that the Dot 3 plan was too lucrative or expensive for the — too lucrative to employees or expensive to the company or too rich for the employees and therefore decided to go with a less lucrative plan?

TT 248:9-13 (Mann).

He responded: "To answer the question, yes." TT 248:14 (Mann).

Rather than deal candidly and honestly with Plaintiffs to structure a buy-out of the Dot 3 Plan or some kind of proper settlement of Plaintiffs' rights therein, the Board of Director Defendants and CEO Barbara Wells originated, orchestrated, authorized and/or ratified a common scheme to injure Plaintiffs using deceptive means and practices. Ostensibly, the scheme was represented and sold as a means of providing Plaintiffs and ArborGen's other employees with a valuable plan in the place of the worthless Dot 3 Plan they'd originally been given. It was carried out through pressure applied to convince Plaintiffs and others to sign for the Rollout Plan because if they didn't they would get nothing.

In truth, the scheme was based on deliberate deception and abuse of trust, all for the purpose of "manag[ing] through a situation involving a high liability risk," *See* PX 170 & DX 660. The scheme was calculated to financially benefit ArborGen and its founders, for whom the Defendant directors worked, at Plaintiffs' expense. Purely and simply, the Rollout scheme was designed for no other reason than to rid ArborGen and the founders of an employee benefit obligation that they decided was, to quote Defendant Munson, "on its face … unsupportable financially and ridiculous." The Defendants' intent was to cut future payments to Plaintiffs, a result that had the concomitant effect of enriching Defendants. A benefit to the Board of Director Defendants' patrons, the founders (MWV, IP and Rubicon), obviously and directly flowed from cutting Plaintiffs' benefits. One equity pie was being shared; smaller slices for Plaintiffs meant more left over for the founders.

In all these acts of misconduct, ArborGen's Board and Defendant Wells were fully complicit. The conspiracy's main objective was to switch Plaintiffs out of their rights under the Dot 3 Plan. As Mr. Mann understood it, "by getting the employees to sign the Acknowledge and Agree documents (PX 149A), the Dot 3 Plan went away." TT 295:5-8 (Mann). Mr. Mann's understanding is significant because he was credited in a post-Rollout email from CEO Wells for having "helped in developing the best plan we could have put together and [having] dedicated an unbelievable amount of time to make sure we got the best outcome imaginable." "[T]he best outcome imaginable" obviously translates into making sure "the Dot 3 Plan went away."

The Board's go-ahead for the plan was made clear by Maud Hinchee when she said, "I know for a fact that they," referring to the ArborGen Board, "thought signing in 2004 was a restart" *See* PX 484A p. 32 & PX 528. She continued, "they think they resolved the battle when you signed in 2004." *See* PX 484A p. 43 & PX 528. Ms. Hinchee's overall impression of the NVA Plan after receipt of the Appreciation Rights Agreement was that it was a "bait and switch" stating, "You've just got the feeling that it was, you know, bait and switch. Bait and switch all the way through." *See* PX 484A p. 16 & PX 528.

***76** The Board knew about and blessed the fraudulent Rollout scheme in advance. As Defendant Burton testified: "[I]f the employees hadn't signed up, for example, I'm sure I would remember that, because *that would have been then a major change of what was expected.*" TT 2428:25-2429:2 (Burton) (emphasis added). At trial, Defendant Barfield specifically referenced CEO Wells' comment about managing around "a high liability risk," saying that, "[i]n the context of this conversation, to the best of my recollection, when we looked at liability, it was from an employee engagement standpoint, the possibility of losing employees." See PX 530 (Barfield Depo. 102:14-103:2). Obviously, Mr. Barfield remembers "the conversation" the Board had "when we looked at liability." The deception was deliberate. Very clearly, the Board knew what the Rollout was aimed at accomplishing, and blessed it from start to finish.

Although the Defendant directors did not directly execute the fraudulent Rollout scheme, like Defendant Wells, James Mann, and Maud Hinchee, they did authorize and approve it. Even today they still ratify and endorse it as not just proper, but they even claim the Rollout Plan switch was actually beneficial to the employees. Defendant Munson explained that had he been given the Rollout Plan as a legacy employee in lieu of the Dot 3 Plan, "I would have shaken the hand two times of the person that gave me that document and thanked them for making this improvement." TT 873:12-15 (Munson).

Well after the Rollout, both CEO Wells and the ArborGen Board members conspired together to not honor Plaintiffs' Dot 3 Plan rights at the time of the LLC/C-corporation conversion in June of 2010. When ArborGen converted from LLC status on June 1, 2010, it had an obligation to provide the Plaintiffs an "equitable award" in the successor corporation.

As stated earlier, this Court determines "equitable" to mean equal in value. As testified to by Mr. Pomerantz's, "valuation is essential to make an equitable award in the new corporation from what value was held in the LLC." TT 719:3-8 (Pomerantz). As discussed, Mr. Pomerantz valuation of ArborGen as of June 1, 2010 is credible and based upon data from reputable financial institutions. ArborGen's Board of Directors did not base its Appreciation Rights given to the Plaintiffs on a proper fair market valuation of the company. Mr. Burton testified that there was no reason to do a valuation when the company converted to an LLC as long as the award is equitable. TT 2402:25 - 2403:8 (Burton). Mr. Burton's assessment is flawed; equal value was not given to the Plaintiffs. No "equitable award" was provided as set forth in "The "Equitable Award" Obligation Owed Under § 9(A) Was Breached" section of this Order's Findings of Fact.

Plaintiffs have sought special damages in the form of the costs imposed on them in seeking redress for the wrongs inflicted on them by ArborGen, which is not named in the conspiracy cause of action. Plaintiffs have been allowed in a civil conspiracy suit to seek special damages in the form of attorney's fees incurred as the result of the conspiracy where the attorney's fees sought were those incurred in litigation against third parties that was proximately caused by the alleged conspiracy. *PCS Nitrogen. Inc. v. Ross Dev. Corp.*, No. CIV.A. 2:09-3171, 2010 WL 3893619, at *14 (D.S.C. Sept. 30, 2010). Here the third-parties are the founders, and ArborGen. The fact that they are sued based on different theories in the same case does not affect their third-party status for purposes of Plaintiffs' conspiracy cause of action which names only the individual Defendants.

Insofar as it might be argued that the alleged special damages duplicate other fee claims asserted by Plaintiffs under the SCPWA or SCUPTA, any ruling on that issue is premature. It remains to be seen whether there will be any duplication when judgment is entered. Until issues relating to election of remedies are resolved, it is unclear which causes of action will be reduced to judgment. Hence it is premature to rule that damages fatally overlap.

DEFENDANTS' ACTIONS VIOLATE THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

***77** Plaintiffs' Tenth Cause of Action for Violation of South Carolina's Unfair Trade Practices Act ("SCUTPA") names as Defendants the Defendant entities, ArborGen, MWV, IP and Rubicon.

SCUTPA Does Not Apply to Plaintiffs' Claims

To establish a claim for Defendants' violation of the SCUTPA, Plaintiffs must show (1) the entity Defendants engaged in unlawful trade practice; (2) the Plaintiffs' suffered actual, ascertainable damages as a result of the entity Defendants' use of the unlawful trade practice; and (3) the unlawful trade practice engaged in by the entity Defendants had an adverse impact on the public interest. *See Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574 (D.S.C. 2003).

As a preliminary matter, SCUTPA does not apply to employer-employee relations. *See Miller v. Fairfield Communities, Inc.*, 382 S.E.2d 16 (S.C. Ct. App. 1989) (sustaining summary judgment dismissal of SCUTPA claim because complaint regarding "employer-employee relations matter … is not covered by the Unfair Trade Practices Act"). As discussed above in this Court's Order pertaining to Plaintiffs' claim as to the South Carolina Payment of Wages Act, the employer-employee relationship in this matter exists between the Plaintiffs and its direct employer, ArborGen. Therefore, the SCUTPA is inapplicable as to Plaintiffs' claims against ArborGen.

The language of the SCUTPA makes it clear that the General Assembly intended for the act to apply to business or consumer transactions. *Health Promotions Specialists, LLC v. South Carolina Board of Dentistry,* 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013). Therefore, SCUTPA is not applicable to the situation here as it is neither a business or consumer transaction.

This Court finds SCUTPA does not apply to Plaintiffs' claims against ArborGen, Rubicon, International Paper and MeadWestvaco and finds for the Defendants as to this cause of action.

DEFENDANTS FAILED TO PROVE THEIR AFFIRMATIVE DEFENSES

The Statute of Limitations Defense Was Not Proven

All Defendants asserted the defense of statute of limitations. For reasons stated above, that defense is unavailable. Any delay by Plaintiffs in bringing suit was occasioned by Defendants' misconduct. Principles of fraudulent concealment and equitable estoppel are applicable and served to extend Plaintiffs' deadline for bringing claims. It is undisputed that all Plaintiffs sued within 3 years of June 1, 2010, which the Court deems to be the earliest date on which a reasonable person in Plaintiffs' position would have known or should have known that a wrong had been committed. Relatedly, prior to suffering financial harm, Plaintiffs had no reason to sue for money damages. The record reflects that financial injury first occurred at the time of the conversion in June of 2010.

The Defenses Under SCRCP Rule 12(b)(1) & (6) Were Not Proven

All Defendants asserted defenses based on Rules 12(b)(1) and 12(b)(6). Those defenses are unavailable. This case involved a justiciable controversy and Plaintiffs stated claims and those claims were proven at trial.

The Defense Asserted Under SCRCP Rule 12(b)(2) Was Not Proven

Claims in this case were brought pursuant to a forum-selection clause inserted into NVA Plans by or on behalf of the Defendants. The Defendants were properly sued in Dorchester County. The defense was waived and not proven.

The Defense, "Estoppel, Employment" Was Not Proven

***78** All Defendants asserted this defense. It was not proven. In *Estes v. Roper Temp. Servs.*, 304 S.C. 120, 403 S.E.2d 157 (Ct. App. 1991), an employee's contract was unilaterally altered by her employer. The employer argued the employee was estopped from suing because the employee stayed on the job after the change. The *Estes* court noted that the employer, as the party seeking estoppel, was required to prove the elements of estoppel, including that the employee "engaged in conduct that amounted to a false misrepresentation or concealment." *Id.*, *citing Frady v. Smith*, 247 S.C. 353, 359, 147 S.E.2d 412, 415 (1966) (the party estopped must have made a false misrepresentation or concealment or made some representation calculated to convey an incorrect impression of the facts), *overruled on other grounds by Tolemac, Inc. v. United Trading, Inc.*, 326 S.C. 103, 484 S.E.2d 593 (1997). Here, as discussed in great detail above, the Plaintiffs were tricked into accepting the Rollout Plan, and it was the Defendants, not the Plaintiffs, who engaged in misrepresentations and concealments.

Further, the Defendants failed to show any additional consideration was given to the Plaintiffs for execution of the Rollout Plan in 2004. Any subsequent agreement must be supported by consideration. *See Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 548 S.E.2d 207 (2001) (holding that when a covenant is entered into after the inception of employment, separate consideration, in addition to continued employment, is necessary in order for the covenant to be enforceable).

Estoppel in this case works in favor of Plaintiffs, not against them. No estoppel in favor of Defendants was proven.

The Defense "Failure to Mitigate" Was Not Proven

All Defendants asserted this defense. At trial, a consistent defense refrain was that Plaintiffs had no damages. There was no credible, competent proof sufficient to meet the preponderance standard showing that Plaintiffs failed to mitigate the damages which Defendants contend were nonexistent in the first place.

The Defenses of Ratification, Consent to Defendants' Conduct, and Statute of Frauds Were Not Proven

All Defendants asserted these defenses. They fail due to a lack of proof.

Defendants Equitable Affirmative Defenses are Moot

All Defendants raises equitable defenses of unclean hands, laches, waiver and estoppel. Plaintiffs' have no equitable claims pending before this Court; therefore, all of Defendants' affirmative defenses that sound in equity are moot.

Punitive Damages are Unconstitutional

All Defendants asserted this defense. The Court respectfully disagrees, and further finds that awarding punitive damages in this case is appropriate.

AWARD/JUDGMENT

Having given careful consideration to the trial evidence accumulated during the eleven (11) days of trial which is summarized in the Findings of Fact and Conclusions of Law set forth herein, this Court makes this award as to the Causes of Action set forth by the Plaintiff.

In making this award, the Court notes that it was privy to documents and testimony submitted under proffer, including, but not necessarily limited to several iterations of the NVA Plan, billing documents from the law firm of Foley & Lardner from 2004, Plaintiff salary information, ArborGen profit and loss information, and documents produced by Defendants'

withdrawn expert related to ArborGen's value. While the documents submitted under proffer, and the accompanying testimony along therewith, arc not evidence in this case, this Court, having been privy to those documents and testimony, notes that had those documents and related testimony been admitted into evidence in this case, they would have had no impact on the Court's Findings of Facts and Conclusions of Law or in the Court's Award to the Plaintiffs under any of the causes of action set forth by the Plaintiffs or affirmative defenses raised by the Defendants.

***79** Plaintiffs' most recent Complaint sets forth ten (10) causes of action as follows: [1] Declaratory Judgment; [2] Specific Performance; [3] Promissory Estoppel; [4] Violation of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10(1); [5] Negligent Misrepresentation under Section 552 of the Restatement (Second) of Torts; [6] Breach of Fiduciary Duty; [7] Breach of Contract Accompanied by a Fraudulent Act; [8] Civil Conspiracy; [9] Injunction against Violating South Carolina Securities Laws; and [10] Violation of South Carolina Unfair Trade Practices Act. During the course of this case, Plaintiffs have withdrawn their causes of action for Specific Performance, Declaratory Judgment, Promissory Estoppel and Injunction against Violating South Carolina Securities Laws. Thus, the Court makes no findings as to those four withdrawn causes of action.

AS TO PLAINTIFFS' FOURTH CAUSE OF ACTION

(Violation of South Carolina Payment of Wages Act)

Plaintiffs' fourth cause of action is alleged against ArborGen, MWV, IP and Rubicon. The SCPWA is concerned with the payment of wages and "is directed to the entity responsible for such payment." *Williams v. S. Carolina Dep't of Corr.*, 641 S.E.2d 885, 887 (S.C. 2007). Here the Court finds that, under the statute's express language, the duty to make compensation payments under the Dot 3 Plan rests with ArborGen and not with MWV, IP or Rubicon. Thus, this Court finds in favor of the Plaintiff as to its fourth cause of action against ArborGen only. Plaintiffs are awarded actual damages in the amount of $10,812,315, which represents the value each Plaintiff lost ($527.43 per unit) under the Dot 3 Plan when it terminated on June 1, 2010 and Defendants made an inequitable transfer of Plaintiffs rights into the Appreciation Rights Plan. The actual damages award is broken down as follows:
- Plaintiff Clark (1,250 Units) = $659,287.50

- Plaintiff Foutz (1,250 Units) = $659,287.50

- Plaintiff Stout (1,250 Units) = $659,287.50

- Plaintiff Kothera (1,250 Units) = $659,287.50

- Plaintiff Nehra (6,250 Units) = $3,296,437.50

- Plaintiff Chang (6,250 Units) = $3,296,437.50

- Plaintiff Miller (1,250 Units) = $659,287.50

- Plaintiff Winkeler (1,250 Units) = $659,287.50

- Plaintiff Cook (500 Units) = $263,715.00

SCPWA, S.C. Code Ann. § 41-10-80(C) provides that an employee can recover an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. *See* Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (S.C. Ct. App. 2013). An award of treble damages and attorney's fees is

appropriate under the Act when there is no good faith wage dispute. *See Goodwyn v. Shadowstone Media, Inc.*, 408 S.C. 93, 757 S.E.2d 560 (S.C. App. Ct. 2014).

The Court finds clear and convincing evidence of bad faith conduct of ArborGen and its management in the handling of the distribution, retraction and then substitution of the NVA Plan to the Plaintiffs, the lack of credibility of CEO Wells and executive James Mann, as well as the admissions made by ArborGen executive, Maud Hinchee, in her recorded conversation with Kirk Foutz. Based on this evidence, this Court finds no "good faith" wage dispute exists and it is appropriate to treble the damages awarded to the Plaintiffs.

Thus, Plaintiffs are entitled to an award against ArborGen in the amount of $32,436,945 under the South Carolina Payment of Wages Act, exclusive of attorneys' fees.

AS TO PLAINTIFFS' FIFTH CAUSE OF ACTION

(Negligent Misrepresentation in reference to Section 552 of the Restatement Second of Torts)

Plaintiffs' fifth cause of action names the corporate defendants, acting through their agents, as tortfeasors: ArborGen, MWV, IP and Rubicon. Plaintiffs have proven through clear, cogent and convincing evidence all the elements of both versions of the negligent misrepresentation tort set forth by Plaintiffs. In doing so, this Court finds that the Defendants conduct was not only negligent, but reckless. Thus, this Court finds in favor of the Plaintiffs as to its fifth cause of action against ArborGen, MWV, IP and Rubicon.

***80** Plaintiffs are awarded damages in the amount of $10,812,315, which represents the value each Plaintiff lost ($527.43 per unit) under the Dot 3 Plan when it terminated on June 1, 2010 and Defendants made an inequitable transfer of Plaintiffs rights into the Appreciation Rights Plan. The actual damages award is broken down as follows:
- Plaintiff Clark (1,250 Units) = $659,287.50

- Plaintiff Foutz (1,250 Units) = $659,287.50

- Plaintiff Stout (1,250 Units) = $659,287.50

- Plaintiff Kothera (1,250 Units) = $659,287.50

- Plaintiff Nehra (6,250 Units) = $3,296,437.50

- Plaintiff Chang (6,250 Units) = $3,296,437.50

- Plaintiff Miller (1,250 Units) = $659,287.50

- Plaintiff Winkeler (1,250 Units) = $659,287.50

- Plaintiff Cook (500 Units) = $263,715.00

Thus, Plaintiffs are entitled to an award against ArborGen, MWV, IP and Rubicon in the amount of $10,812,315 for negligent misrepresentation. As stated herein, the Court has determined that awarding punitive damages in this case is appropriate. Plaintiffs have sought punitive damages as to their Fifth Cause of Action. The Court, having found Defendants ArborGen, MWV, IP and Rubicon's conduct to not only be negligent, but reckless, accordingly awards punitive damages to the Plaintiffs against Defendants ArborGen, MWV, IP and Rubicon in the amount of $32,436,945

representing 3 times the actual damages awarded for a total award of $43,249,260 under Plaintiffs' Fifth Cause of Action, exclusive of pre-judgment interest.

AS TO PLAINTIFFS' SIXTH CAUSE OF ACTION

(Breach of Fiduciary Duty)

Plaintiffs' sixth cause of action is alleged against Defendants ArborGen, MWV, IP, Rubicon and the individual board member Defendants, Burton, Moriarty, Andrews, Munson, Baughman, Wallinger, Watkins, Barfield, Hundley, Liebetreu, O'Brien and Owens as tortfeasors. While this Court questions the conduct of all the Defendants against whom this cause of action is presented, this Court does not find the actions or inactions of Defendants Hundley or Owens to have proximately resulted in the claimed damages of the Plaintiffs.

Mr. Hundley did not join the ArborGen Board until 2008. He did not participate in any drafting, revising or implementing of the NVA Plan, nor did he have knowledge of plans being distributed without Board Approval. Mr. Hundley was on the Board in 2010; however the evidence in the record does not prove through clear and convincing evidence that he had knowledge of a wrong plan being distributed at any point in time, or that another plan existed for consideration when the Appreciation Rights Plan was being developed. For these reasons, the Court does not extend its award to Plaintiffs as to the Breach of Fiduciary Duty cause of action to Defendant Hundley.

Mr. Owens left the ArborGen Board in 2001. Mr. Owens appears to have been involved with the NVA Plan early on and notified employees, like Mr. Grant of work being done on a “mechanism for key personnel to share in the success of ArborGen” The record does not show by clear and convincing evidence that Mr. Owens had knowledge of the NVA Plan actually given to the employees, or that the plan was distributed without board approval, or that the NVA Plan given to legacy employees like Mr. Grant and the Plaintiffs was later switched. For these reasons, the Court does not extend its award to Plaintiffs as to the Breach of Fiduciary Duty cause of action to Defendant Owens.

***81** This Court awards Plaintiffs damages in the amount of $10,812,315 against Defendant ArborGen, MWV, IP, Rubicon and Defendants Burton, Moriarty, Andrews, Munson, Baughman, Wallinger, Watkins, Barfield, Liebetreu, and O'Brien. As stated previously, the actual damages awarded represent the value each Plaintiff lost ($527.43 per unit) under the Dot 3 Plan when it terminated on June 1, 2010 and Defendants made an inequitable transfer of Plaintiffs rights into the Appreciation Rights Plan. The actual damages award is broken down as follows:
- Plaintiff Clark (1,250 Units) = $659,287.50

- Plaintiff Foutz (1,250 Units) = $659,287.50

- Plaintiff Stout (1,250 Units) = $659,287.50

- Plaintiff Kothera (1,250 Units) = $659,287.50

- Plaintiff Nehra (6,250 Units) = $3,296,437.50

- Plaintiff Chang (6,250 Units) = $3,296,437.50

- Plaintiff Miller (1,250 Units) = $659,287.50

- Plaintiff Winkeler (1,250 Units) = $659,287.50

- Plaintiff Cook (500 Units) = $263,715.00

Punitive damages may be awarded under a cause of action for breach of fiduciary duty where the Plaintiff proves by clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the Plaintiffs' rights. *See Keane v. Lowcountry Pediatrics*, P.A. 372 S.C. 136, 641 S.E.2d 53 (Ct. App. 2007). For all the reasons set forth in this Courts Findings of Fact and Conclusions of Law, this Court finds that Plaintiffs have proven by clear and convincing evidence that certain Defendants acted willfully, wantonly, and in reckless disregard of their rights in the NVA Plan.

While this Court questions the conduct of Defendants Liebetreu and Baughman, the Court does not find clear and convincing evidence in the record that these individuals acted willfully, wantonly, and in reckless disregard of the Plaintiffs' rights to have punitive damages assessed against them. However, this Court cannot say the same for the corporate Defendants, nor Defendants Burton, Moriarty, Andrews, Munson, Wallinger, Watkins, Barfield, and O'Brien.

Thus, this Court awards punitive damages to the Plaintiffs against Defendant ArborGen, MWV, IP, Rubicon, Burton, Moriarty, Andrews, Munson, O'Brien, Watkins, Wallinger and Barfield in the amount of $32,436,945 representing 3 times the actual damages awarded for a total award of $43,249,260 under Plaintiffs' cause of action for Breach of Fiduciary Duty, exclusive of pre-judgment interest.

AS TO PLAINTIFFS' SEVENTH CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

Plaintiffs' seventh cause of action is against ArborGen. As stated previously in this Courts Conclusions of Law, all prerequisites to establish a contract between the Plaintiffs and ArborGen have been met. Plaintiffs have shown by clear and convincing evidence that all of the elements required under Delaware law for the Plaintiffs' Dot 3 Plan unit awards to have valid contractual status have been satisfied. Further, Plaintiffs have shown by clear and convincing evidence that Defendant ArborGen breached that contract by fraudulent acts.

This Court awards Plaintiffs actual damages in the amount of $10,812,315 against Defendant ArborGen. As stated previously, the actual damages awarded represent the value each Plaintiff lost ($527.43 per unit) under the Dot 3 Plan when it terminated on June 1, 2010 and Defendants made an inequitable transfer of Plaintiffs rights into the Appreciation Rights Plan. The actual damages award is broken down as follows:
- Plaintiff Clark (1,250 Units) = $659,287.50

- Plaintiff Foutz (1,250 Units) = $659,287.50

***82** - Plaintiff Stout (1,250 Units) = $659,287.50

- Plaintiff Kothera (1,250 Units) = $659,287.50

- Plaintiff Nehra (6,250 Units) = $3,296,437.50

- Plaintiff Chang (6,250 Units) = $3,296,437.50

- Plaintiff Miller (1,250 Units) = $659,287.50

- Plaintiff Winkeler (1,250 Units) = $659,287.50

- Plaintiff Cook (500 Units) = $263,715.00

Under Plaintiffs' cause of action for Breach of Contract Accompanied by a Fraudulent Act, both actual and punitive damages may be recovered. *See Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004). Plaintiffs have shown that Defendant ArborGen engaged in a concerted, organized campaign using deception to mislead Plaintiffs so ArborGen would not have to honor its Dot 3 Plan which was considered by ArborGen's Board to be "unsupportable financially." i.e., too rich. The actions of ArborGen through its Board and management were willful, wanton and in reckless disregard of Plaintiffs' rights in the NVA Plan.

Thus, this Court awards punitive damages to the Plaintiffs against Defendant ArborGen in the amount of $32,436,945 representing 3 times the actual damages awarded for a total award of $43,249,260 under Plaintiffs' cause of action for Breach of Contract Accompanied by a Fraudulent Act, exclusive of pre-judgment interest.

AS TO PLAINTIFFS' EIGHTH CAUSE OF ACTION

(Civil Conspiracy)

Plaintiffs' eighth cause of action is alleged against the individual board member Defendants Burton, Moriarty, Andrews, Munson, Baughman, Wallinger, Watkins, Barfield, Hundley, Liebetreu, O'Brien, and Owens, as well as against former ArborGen CEO Wells. While this Court questions the conduct of all the Defendants against whom this cause of action is presented, this Court does not find the actions of Defendants Hundley, Owens, Baughman or Liebetreu to have amounted to the level of the other named Defendants participating in the conspiracy.

This Court does not find that the direct or circumstantial evidence presented establishes that Mr. Hundley, Mr. Owens, Mr. Baughman and Mr. Liebetreu jointly assented to engage in overt acts to purposefully harm the Plaintiffs. The same cannot be said for Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and CEO Wells. The evidence in the record reflects that Defendants Burton, Moriarty, Andrews, Munson, O'Brien Wallinger, Watkins, Barfield and Wells positively and tacitly came to a mutual understanding that the Dot 3 Plan was too rich and that Plaintiffs' needed to be divested of their rights under the Dot 3 Plan. Rather than deal candidly with the Plaintiffs, Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and Wells orchestrated, authorized and/or ratified a common scheme to injure Plaintiffs' using deceptive means and practices. At a minimum, this conduct was reckless.

Plaintiffs have sought special damages in the form of attorneys' fees and costs incurred as a result of the conspiracy and this Court finds the Plaintiffs are entitled to such an award against Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and Wells. This Court addresses the award of attorneys' fees in more detail within this Order below and awards Plaintiffs' special damages in the amount of $5,123,700 under Plaintiffs' Cause of Action for Civil Conspiracy.

***83** Punitive damages may be awarded under a cause of action for civil conspiracy where actual malice is shown. *See Swinton Creek Nursery v. Edisto Farm Credit*, 326 S.C. 426, 483 S.E.2d 789 (Ct. App. 1997). For all the reasons set forth in this Court's Findings of Fact and Conclusions of Law, this Court finds that Plaintiffs have proven by clear and convincing evidence that Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and Wells acted with ill-will and desire to financially harm Plaintiffs.

Thus, this Court awards punitive damages to the Plaintiffs against Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and Wells in the amount of $15,155,100 representing 3 times their special damages for a total award of $20,206,800.00 to Plaintiffs' under their cause of action for civil conspiracy.

AS TO PLAINTIFFS' TENTH CAUSE OF ACTION

(Unfair Trade Practices)

Plaintiffs' tenth cause of action names the corporate defendants, acting through their agents, as tortfeasors: ArborGen, MWV, IP and Rubicon. As stated previously, the SCUTPA does not apply to employer-employee relations. *See Miller v. Fairfield Communities, Inc.*, 382 S.E.2d (S.C. Ct. App. 1989). The evidence before this Court clearly shows an employer-employee relationship between the Plaintiffs and Defendant ArborGen. Plaintiffs cannot recover under the SCUTPA against ArborGen. Further, the language of SCUTPA makes it clear that the General Assembly intended for the act to apply to business or consumer transactions. *Health Promotions Specialist. LLC v. South Carolina Board of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013).

Thus this Court finds in favor the Defendants as to Plaintiffs' Tenth Cause of Action.

SUMMARY OF RULINGS CONCERNING DAMAGES

The Court has awarded actual damages as to Plaintiffs' Fourth, Fifth, Sixth, and Seventh Causes of Action in the amount of $10,812,315. The award of actual damages are allocated among the Plaintiffs as follows:
- Plaintiff Clark (1,250 Units) = $659,287.50

- Plaintiff Foutz (1,250 Units) = $659,287.50

- Plaintiff Stout (1,250 Units) = $659,287.50

- Plaintiff Kothera (1,250 Units) = $659,287.50

- Plaintiff Nehra (6,250 Units) = $3,296,437.50

- Plaintiff Chang (6,250 Units) = $3,296,437.50

- Plaintiff Miller (1,250 Units) = $659,287.50

- Plaintiff Winkeler (1,250 Units) = $659,287.50

- Plaintiff Cook (500 Units) = $263,715.00

Plaintiffs may elect to recover actual damages under any of their four causes of action listed in the preceding paragraph, but the total amount of actual damages recoverable is capped at $10,812,315, and the total amount of actual damages recoverable by any of them is limited to the amounts stated for each immediately above. The Judgment entered by the Clerk will reflect these limitations on Plaintiffs' right to recover actual damages. The purpose of these limitations is to prevent double recovery for a single wrong.

Likewise, the Court has awarded punitive damages in the amount of $32,436,945 under Plaintiffs Fifth, Sixth and Seventh Causes of Action. Each Plaintiff is entitled to share in that sum in an amount equal to three times the respective Plaintiff's actual damages. That amount, for each Plaintiff states the maximum amount of punitive damages the Plaintiff may recover in this case. The amount of $32,436,945 is the maximum total amount of punitive damages recoverable by Plaintiffs as to the Fifth, Sixth, and Seventh causes of action. Plaintiffs may elect to recover punitive damages under any of their three causes of action in which they were awarded, but the total amount of punitive damages recoverable

is capped at $32,436,945. The Judgment entered by the Clerk will reflect these limitations on Plaintiffs' right to recover punitive damages arising under the Fifth, Sixth, and Seventh Causes of Action. The purpose of these limitations is to prevent double recovery for a single wrong.

***84** After careful consideration, the Court has determined that the Plaintiffs are not required to elect between recovery of treble damages under the Fourth Cause of Action and recovery of punitive damages under their common law causes of action, except as to recovery against Defendant ArborGen. Plaintiffs will not be required to elect between recovery of attorneys' fees awarded as damages under their Eighth Cause of Action and the statutory award of attorneys' fees received under their Fourth Cause of action under SCWPA because those two different causes of action address different wrongs committed by different Defendants such that allowing recovery of attorneys fees under both causes of action does not constitute double recovery for a single wrong. In fact, because this is a contingent fee case, the fees awarded under either or both causes of action combined fall far short of the amount of fees Plaintiffs' will be required to pay their counsel under their representation agreements.

It is appropriate that each Defendant found to have engaged in wrongdoing be held accountable for the damages that resulted from the Defendants' distinct wrongdoing.

PREJUDGMENT INTEREST & ATTORNEYS FEES

Plaintiffs have sought pre-judgment interest as part of their damages in this case under their Fourth Cause of Action (Violation of South Carolina's Payment of Wages Act), Fifth Cause of Action (Negligent Misrepresentation in reference to Section 552 of the Restatement Second of Torts), Sixth Cause of Action (Breach of Fiduciary Duty), and Seventh Cause of Action (Breach of Contract Accompanied by a Fraudulent Act). Also, Plaintiffs have moved this Court for an award of attorneys' fees and costs under their Fourth Cause of Action, Violation of South Carolina's Payment of Wages Act and as special damages imposed on them in seeking redress for the wrongs inflicted on them under their Eight Cause of Action, Civil Conspiracy.

Having reviewed Plaintiffs' motion for fees and costs, supported by the Affidavit of John P. Freeman, Esq., and based upon the evidence before the Court, this Court awards statutory attorneys' fees under Plaintiffs' Fourth Cause of Action and as special damages under Plaintiffs' Eighth Cause of Action in the amount of $5,051,700 pursuant to this Court's Order on Plaintiffs' Motion for Attorneys Fees and Costs being filed contemporaneously herewith.

Having reviewed Plaintiffs' motion for pre-judgment interest, the evidence before this Court and the fact that (1) Plaintiffs have properly pled pre-judgment interest as an element of damages under their Fourth, Fifth, Sixth and Seventh causes of action and (2) Plaintiffs damages became a sum certain and demandable as of June 1, 2010, this Court awards pre-judgment interest to the Plaintiffs collectively in the amount of $5,207,328.00 with each Plaintiff being entitled to a maximum proportionate pre-judgment interest recovery in accordance with their own specified damages sent forth in this Court's Order on Plaintiffs Motion for Pre-Judgment Interest being filed separately herewith.

PUNITIVE DAMAGES

In assessing its award of punitive damages under Plaintiffs causes of action for Breach of Fiduciary Duty, Breach of Contract Accompanied by a Fraudulent Act, and Civil Conspiracy, this Court has considered (a) the defendants' degree of culpability; (b) the duration of the conduct; (c) the defendants' awareness or concealment; (d) the existence of similar past conduct; (e) the likelihood that the award will deter others from such conduct; (f) whether the award is reasonably related to the harm likely to result from such conduct; (g) the defendants' ability to pay; and (h) other factors deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 550 (S.C. 1991).

This Court finds that certain Defendants' engaged in a concerted, organized campaign using deception to mislead Plaintiffs so ArborGen would not have to honor its Dot 3 Plan to the legacy employees. The Court concludes that the seriousness of this misconduct makes the punitive damages awarded by this Court in proportion to the severity of the offense.

***85** This Court has considered all the factors enumerated by *Gamble* above and finds that the conduct of the Defendants against whom punitive damages has been assessed have been ongoing since late 2001, early 2002 and continues today. The conduct has occurred not with just the named Plaintiffs, but other legacy employees hired into ArborGen from MWV and IP. The corporate Defendants, especially MWV, IP, Rubicon and ArborGen have the assets to pay the assessed punitive damages and such an award will likely deter MWV, IP, Rubicon, ArborGen and Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield and Wells from the same conduct in the future.

This Court finds the award of punitive damages as to ArborGen, MWV, IP, Rubicon and Defendants Burton, Moriarty, Andrews, Munson, O'Brien, Wallinger, Watkins, Barfield, and Wells to be reasonable and appropriate.

IT IS THEREFORE ORDERED that the Clerk of Court for Dorchester County enter Judgment against the Defendant ArborGen in the amount of $53,508,288.00 comprised of (1) actual damages in the amount of $10,812,315.00 under Plaintiffs Fourth, Fifth, Sixth and Seventh causes of action, (2) punitive damages in the amount of $32,436,945.00 under Plaintiffs Fifth, Sixth and Seventh Cause of Action, (3) pre-judgment interest in the amount of $5,207,328.00 under Plaintiffs Fourth Fifth, Sixth and Seventh causes of action, and (4) attorneys fees in the amount of $5,051,700.00 under Plaintiffs Eight Cause of Action.

IT IS THEREFORE ORDERED that the Clerk of Court for Dorchester County enter Judgment against Defendants MeadWestvaco Corporation, International Paper Company, and Rubicon, Ltd. in the amount of $48,456,588.00 comprised of (1) actual damages in the amount of $10,812,315.00 under Plaintiffs Fifth, Sixth and Seventh causes of action, (2) punitive damages in the amount of $32,436,945.00 under Plaintiffs Fifth, Sixth and Seventh Cause of Action, and (3) pre-judgment interest in the amount of $5,207,328.00 under Plaintiffs Fifth, Sixth and Seventh causes of action.

IT IS THEREFORE ORDERED that the Clerk of Court for Dorchester County enter Judgment against Defendants Bruce G. Burton, S. Luke Moriarty, Mike Andrews, Kenneth R. Munson, George O'Brien, Mark T. Watkins, Sr., R. Scott Wallinger, and Wayne A. Barfield in the amount of $53,508,288.00 comprised of (1) actual damages in the amount of $10,812,315.00 under Plaintiffs' Sixth cause of action, (2) punitive damages in the amount of $32,436,945.00 under Plaintiffs' Sixth Cause of Action, (3) pre-judgment interest in the amount of $5,207,328.00 under Plaintiffs' Sixth cause of action, and (4) special damages in the amount of $5,051,700.00 under Plaintiffs' Eight Cause of Action.

IT IS THEREFORE ORDERED that the Clerk of Court of Dorchester County enter Judgment against Defendants William D. Baughman and David A. Liebetreu in the amount of $16,019,643.00 comprised of (1) actual damages in the amount of $10,812,315 under Plaintiffs' Sixth cause of action, and (2) pre-judgment interest in the amount of $5,207,328.00 under Plaintiffs' Sixth Cause of Action.

IT IS THEREFORE ORDERED that the Clerk of Court of Dorchester County enter a Judgment against Defendant Barbara Wells in the amount of $20,278,800.00 comprised of (1) special damages in the amount of $5,051,700.00 under Plaintiffs' Eighth cause of action, and (2) punitive damages in the amount of $15,155,100.00 under Plaintiffs' Eighth Cause of Action.

IT IS FURTHER ORDERED that the maximum amount of recovery by the Plaintiffs' collectively is $53,508,288.00. Plaintiffs' recover actual damages under any of their four causes of action providing such a recovery, punitive damages under any of their three causes of action providing such a recovery, pre-judgment interest under any of their four causes of action providing such a recovery, and attorneys fees under their two causes of action providing such a recovery. Each

Plaintiff is limited to his or her share of the recovery as outlined in this Order and the Court's Orders on Plaintiffs' Motion for Fees and Costs and Plaintiffs' Motion for Pre-Judgment Interest being filed seperately herewith. The purpose of these limitations is to prevent double recovery for a single wrong.

***86 IT IS SO ORDERED** this *14th* day of December, 2015.

<<signature>>

Edgar W. Dickson

Presiding Judge

Footnotes

1 Plaintiffs' Fourth Amended Complaint also includes claims for Specific Performance, Declaratory Judgment, Promissory Estoppel and Injunction against Violating South Carolina Securities Laws. Plaintiffs have withdrawn these four causes of action during the course of trial and this Court makes no findings of fact or conclusions of law as to those claims.

2 A fourth company that participated in ArborGen's founding was a second New Zealand Company, Genesis Research and Development Corporation Ltd. Genesis was not a party to this lawsuit. Its ownership interest was acquired by the other three founders in 2005.

3 The provision in both the Dot 3 and Dot 7 Plans protected Plan participants from having their rights impaired without the participant's written consent: "The Board may at any time amend, alter, suspend, discontinue or terminate the Plan; provided that no amendment or termination of the Plan may, except as otherwise provided herein, adversely affect the rights of any Participant under any award granted under the Plan prior to the elective date of such amendment or termination in the absence of written consent to the change by the affected Participant." See section 9(b) of PX 42 (Dot 3 Plan), and PX 426 (Dot 7 Plan).

4 Mr. Burton testified as follows on the subject:

Q. When was the initial value for the equity of the company set at 100 million as of -- when was it set? Do you recall?

A. It was formally set officially in -- after the November board meeting in 2003, but it clearly bad been used many times over those years, so officially locked in, but it was — had been adopted right from when Bill Baughman started adopting it and we honored that. It was honored all the way through. TT 2439:16-23 (Burton).

The evidence reflects that employees hired prior to 2003 were given initial values for their units based on an ArborGen equity value of $100 million. Plaintiffs were hired slightly later. However, a report prepared by *Cont. from footnote 4.* Defendant Burton in 2010 (PX 428, p. 2) reflects that Plaintiffs and the 2002 hirees, such as Grant, Wells Cannistra all were deemed to have NVA units with exactly the same initial base price. This wouldn't be so unless Plaintiffs had started with initial values identical to that of Wells and the other 2002 hires. Thus, the initial value of Plaintiffs' units in the Dot 3 Plan is deemed to be $100 (.0001 percent of $100 million).

5 The purported justification for the failure to tender award agreements to Plaintiffs was that the initial value starting number for employees joining in early 2003 took a long time to figure out. This is an invalid justification since the evidence reflects that in 2002, the unit values for NVA units held by Plaintiffs ended up being the same as for those hired a few months earlier. See preceding footnote. There is simply no good reason for withholding from trusting employees an allegedly important document for many months that is (1) simple to prepare and (2) actually is being prepared and tendered to Dot 7 Plan employees.

6 Mr. Andrews' memo is another example of the Board's knowledge that NVA Plans had been distributed and that employees were already owners of units in 2002/2003.

7 *See* note 6, supra.

8 The Attachment 2 lists the date for the employees' award roster as of December 20, 2003. However, since Attachment 2 is attached to a report emailed February 23, 2003, the date in the attachment is obviously wrong; it should read December 20, 2002.

12 Mr. Munson testified, "[T]here was a little bit of cleanup on what you're calling Dot 7 and what's final approved, but in effect, they're the same." TT 826:21-25 (Munson).

13 Jim Grant testified he received his Dot 3 Plan after accepting his offer of employment with ArborGen in June 2002. Plaintiffs Clark, Foutz, Kothera, Winkeler, Chang, Miller and Cook testified to receiving their Dot 3 Plans after accepting offers

of employment with ArborGen in November 2002. Plaintiffs Nehra and Stout testified to receiving their Dot 3 Plan after accepting offers of employment with ArborGen in April 2003.

14 *See* Clark's testimony TT 1250:6-18; 1259:70-1260:2; 1260:11-1261:2; 1265:5-25; & 1306:11-1307:2: *see also* Kothera's testimony TT 1412:22-1413:10; & 1416:3-1419:14; *see also* Winkeler's testimony TT 1725:3-10; 1726:19-1728:2; & 1729:19-1730:20; and *see also* Foutz testimony TT 1837:5-1843:11; 1848:18-1850:5.

15 She later admitted to feeling some chagrin at the delay in providing employees statements of initial value. *See* PX 530 (Wells Depo. 57:2-9).

16 The data in PX 428 matches what employees were being told about the Appreciation Rights Plan when it was originated in 2010:

Q. Do you recall any financial discussions being made at the appreciation rights meeting about what the employees were going to get at different valuation levels of the company?

A. Yes, They threw out some hypothetical numbers saying if we did an IPO and we got 450, $420 million, that this would be what you would gel.

Q. Which was what?

A. If it was below, they put out some number, 420, 430, something like that, said if it was below this threshold, then the plan value is equal to zero. TT 1274:16-25 (Clark)

17 Under the Rollout Plan, each unit was worth one ten millionth of ArborGen's value, minus the adjusted base price. Assuming no adjustment and a $650 million value for ArborGen, each unit would be worth $65,00. Adjusting the $65.00 per-unit value for the base set by ArborGen, $42.43, gives a net value of $22.57 per unit. The difference between the $22.57 and the $19.73 net unit value set forth on PX 428, p. 3, arises because the $19.73 value is an assumed value as of 12/2010 and takes into account post June 1, 2010, hurdle rate factors that serve to erode the net value to employees. *See* PX 428, p. 3, para. 1.

18 Rubicon's presentation to its shareholders in December 2013 represents the value of ArborGen to be $660 million.

19 For example, Mr. Munson testified at trial:

Q. And, in fact, you don't think high liability risk has anything to do with money damages; you think it has to do with morale, right?

A. That's right. TT 884:3-6 (Munson).

20 For example, Defendant Barfield's testified: "[W]hen I think of liability, I think of it in terms of employee morale, engagement, stability of contracts, and licenses.... In the context of this conversation, to the best of my recollection, when we looked at liability, it was from an employee engagement standpoint, the possibility of losing employees. *See* PX 530 (Barfield Depo. 102:14-103:2).

21 *See* Dr. Nehra's testimony TT 402:10-13; 403:18-22; & 480:5-8; *see also* Dr. Chang's testimony TT 506:6-10; 514:8-20; 531:17-25; 533:23-24; 537:5-11; 538:7-14; 547:12-17; 548:21-549:4; 553:18-23; 555:16-556:2 & 563:22-23; *see also* Clark's testimony TT 1245:3-9; 1262:22-25; & 1266:6-17; *see also* Kothera testimony TT 1409:1-9; 1426:10-15; 1437:5-19; 1439:15-22; & 1532:23-1533:10; *see also* Stout testimony TT 1559:8-1561:5: *see also* Miller testimony TT 1581:14-1582:18; 1586:18-1587:15; 1588:8-11; 1592:17-1593:2; 1600:2-20; & 1610:19-1611:3; *see also* Cook testimony TT 1658:19-1659:19; 1661:12-1662:3; & 1663:6-14; *see also* Winkeler testimony TT 1730:25-1731:2; 1732:17-22; 1789:194790:3; & 1795:25-1796:20; and *see also* Foutz testimony TT 1829:14-1832:3 & 1855:2-11.

22 *See* Clark's testimony TT 1250:6-18; 1259:70-1260:2; 1260:11-1261:2; 1265:5-25; & 1306:11-1307:2; *see also* Kothera's testimony TT 1412:22-1413:10; & 1416:3-1419:14; *see also* Winkeler's testimony TT 1725:3-10; 1726:19-1728:2; & 1729:19-1730:20; and *see also* Foutz testimony TT 1837:5-1843:11; 1848:18-1850:5.

23 *See* Nehra testimony TT 396:10-398:22; *see also* Chang testimony TT 508:13-509:7; *see also* Clark testimony 1265:4-7; *see also* Kothera testimony 1552:13-1553:17; *see also* Stout testimony 1552:24-1553:20; *see also* Miller testimony TT 1586:6-1587:5; *see also* Cook testimony TT 1660:21-1662:3; *see also* Winkeler testimony TT 1735:15-24; TT 1795:20-24; & 1797:9-13; and *see also* Foutz testimony TT 1908:3-20.

24 This is not a case where the parties knowingly and voluntarily entered into two contracts addressing the same issues. In such cases a rule of construction sometimes is applied by which the later-in-time contracts terms will be held controlling. *Country Life Homes. Inc. v. Shaffer*, 2007 WL 333075 (Del. Ch. Jan. 31, 2007). This theory, which is premised on an assumption that the parties agreed to a rescission and substitution, has no application in a case such as this where the choice of keeping the rights conveyed under the Dot 3 Plan was never presented as an option to the Plaintiffs. It would be anomalous indeed to accept Defendants' position that the parties agreed on a rescission and substitution when Defendants steadfastly maintain they were never bound to the Dot 3 Plan in the first place.

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