

2011 WL 11543325 (Fla.Cir.Ct.) (Trial Pleading)
Circuit Court of Florida.
Fifteenth Judicial Circuit
Palm Beach County

Stanley ALEXANDER and Florence Alexander, Plaintiffs,

v.

VITACOST.COM, INC. a Delaware Corporation, Board of Directors of Vitacost.com, Inc., Ira Kerker, Individually and as Director and Ceo of Vitacost.com, Inc., Wayne Gorsek, Individually and as Director, former Ceo, and agent of Vitacost.com, Inc., Allen Josephs, Lawrence Pabst, Robert Trapp, David Ilfeld, and Marc Oppenheimer as Individual Directors of Vitacost.com, Inc., Defendants.

No. 502010CA011207.
September 24, 2011.

Amended Verified Complaint for Damages and Jury Trial Demand

[Kevin Patrick Donaghy](#), Donaghy Law, Attorney for Plaintiffs, Florida Bar No. 0968773, 195 Wekiva Springs Road, Suite 224, Longwood, Florida 3279, 407-478-6008, Fax 321-256-5148, kpdonaghy@gmail.com.

Plaintiffs, STANLEY ALEXANDER and FLORENCE ALEXANDER, file this **AMENDED COMPLAINT FOR DAMAGES AND JURY TRIAL DEMAND** by and through their undersigned counsel and hereby, sue Defendants, VITACOST.COM, INC. a Delaware Corporation, BOARD of DIRECTORS of TACOST.COM, INC., IRA KERKER, Director and CEO of VITACOST.COM, INC., WAYNE.GORSEK Director and former CEO of VITACOST.COM, INC., and ALLEN JOSEPHS, LAWRENCE PABST, ROBERT TRAPP, DAVID ILFELD, and MARC OPPENHEIMER as individual Directors of VITACOST.COM, INC. and state as follows:

PARTIES. JURISDICTION AND VENUE

1. This is an action for civil remedies under [F.S. 772.11](#) for actions which violate [Florida Statutes §825.103](#), Exploitation of a **Elderly** Persons; and an action for civil remedies under Florida Statute §571.211 Remedies Available in Cases of Unlawful Sale or Purchase under for actions which Violate [Florida Statute § 517.301](#) Fraudulent Transactions, Falsification or concealment of facts; Fraud in the Inducement; Unjust Enrichment; and Breach of Fiduciary Duty; and a Declaratory Judgment that the Arbitration Provision and Exculpatory Clause under the below described Stock Purchase Agreement is Null and Void due to Procedural and Substantive Unconscionability and Waiver.
2. Plaintiffs reserve the right to seek punitive damages against Defendants and Directors individually upon a showing of evidence pursuant to Florida Statute §786.72.
3. Venue is properly in Palm Beach County, Florida pursuant to Chapter 47, Florida Statutes.
4. Plaintiff, STANLEY ALEXANDER, is a natural person age 81 years, residing in Seminole County, Florida.
5. Plaintiff, FLORENCE ALEXANDER, is a natural person age 71 years, residing in Seminole County, Florida

6. Defendant, VITACOST.COM, INC., (hereafter “VITACOST or VITACOST.com”), is a Delaware Corporation, licensed and authorized to conduct business and conducting business in Florida with its principal place of business in Palm Beach County, Florida.

7. Defendant, BOARD of DIRECTORS of VITACOST.COM, INC. (hereafter “BOARD”), is authorized to conduct business and conducting business on behalf of VITACOST.COM, INC.

8. Defendant, IRA KERKER as CEO for VITACOST.COM, INC., (hereafter “KERKER”), was authorized to conduct business and was conducting business on behalf of VITACOST.COM.

9. Defendant WAYNE GORSEK as VITACOST Director, former CEO, and agent of VITACOST.COM, INC. (hereafter “GORSEK”) was authorized to conduct business and was conducting business on behalf of VITACOST.COM, INC.

10. Defendants ALLEN JOSEPHS, LAWRENCE PABST, ROBERT TRAPP, DAVID ILFELD, and MARC OPPENHEIMER as Directors of VITACOST.COM, INC. (hereafter “JOSEPHS”, “PABST”, “TRAPP”, “ILFELD”, and “OPPENHEIMER”) were authorized to conduct business and were conducting business on behalf of VITACOST.COM, INC. as members of the Board of Directors of Vitacost.com

11. Venue is proper in this jurisdiction due to Defendant, VITACOST's principal place of business being Palm Beach County, Florida and all Defendants actions were on behalf of Vitacost.com.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

12. Plaintiffs demand a Jury Trial on all Counts.

13. Plaintiffs request that this matter be advanced on the trial docket pursuant to [F.S. 772.11\(5\)](#) due to the Plaintiff's advanced age and infirmities.

14. Plaintiff STANLEYALEXANDER, 81 year-old high school graduate, was intentionally defrauded to enter into a STOCK PURCHASE AGREEMENT (Exhibit 1), based on misrepresentation, intentional omission of material facts and false material facts.

15. Plaintiff FLORENCE ALEXANDER, 71 year-old retired nurse and consultant, was intentionally defrauded to enter into a STOCK PURCHASE AGREEMENT (Exhibit 2) based on misrepresentation and intentional omission of material facts and false material facts.

16. VITACOST is in the business of manufacturing and selling various nutritional supplements, inclusive of health and wellness products and sold securities to fund its' business.

17. Plaintiffs entered into a business relationship with Defendants as an investor relative to the sale of securities. In 1997, Plaintiffs collectively invested \$90,000 of their last retirement savings.

18. On May 4, 2009, the unsophisticated, **elderly** Plaintiffs were prime targets for **abuse** because of their advanced age and precarious **financial** position.

19. The 400,000 VITACOST shares, the subject of this action, represented the last money of the **elderly** Plaintiffs' investments.

20. Plaintiffs first met GORSEK and JOSEPHS, M.D., VITACOST BOARD Member, in February, 1997 at a Money Show during which time FLORENCE ALEXANDER was suffering from severe arthritis pain.

21. When FLORENCE ALEXANDER informed GORSEK of her severe arthritis pain, GORSEK explained that his struggling business, NATURE'S WEALTH, (later renamed VITACOST.COM, INC. on December 18, 1999) had discovered a product for arthritis that would alleviate pain and revolutionize the way arthritis was treated.

22. GORSEK informed Plaintiffs that clinical trials were underway to prove the effectiveness of his arthritis product and that he would take his company public in 2 years. He stated that clinical trials were being conducted by JOSEPHS, MD, BOARD Member and Neurology Department Chief at the St. Barnabas Hospital in New Jersey. JOSEPHS concurred with GORSEK's account of the clinical trials at his medical institution and highly recommended the VITACOST products for the Plaintiffs condition and an investment.

23. GORSEK stated that if FLORENCE ALEXANDER provided the initial investment to get the Company started, she would receive each year an additional 10,000 shares during her lifetime and would be named a BOARD Member of his new Company. Realizing her advanced age, the offer of a lifetime share arrangement seemed reasonable to both parties.

24. FLORENCE ALEXANDER informed GORSEK that she would provide the initial capital to start his company only on the agreement that (1) GORSEK would take his Company public in 2 years, (2) she would receive 10,000 shares a year for life and that (3) she would be named on the BOARD. GORSEK agreed to these conditions and FLORENCE ALEXANDER wrote a personal check for \$90,000 that day-\$80,000 for FLORENCE ALEXANDER and \$10,000 for her husband, STANLEY ALEXANDER, representing 160,000 shares and 20,000 shares respectively. The \$90,000 investment provided the initial capital to start the company. All three of the conditions were intentionally misrepresented by GORSEK from the inception.

25. GORSEK verbally informed FLORENCE ALEXANDER that she was on the BOARD, but at no time did GORSEK invite FLORENCE ALEXANDER to a BOARD meeting as a member during the 12 years that FLORENCE ALEXANDER possessed the stock. A letter was sent to FLORENCE ALEXANDER as an Advisory Technical BOARD member requesting her "to bring on three new doctors for the year 1998 that would generate revenues in excess of \$3,000,000..." (Exhibit 3)

26. Due to her advanced age, failing health, trust relationship with GORSEK and his representation that she would be kept informed on a regular basis, FLORENCE ALEXANDER did not question as to why she was never invited to participate as a BOARD member.

27. GORSEK initially made good on his promise of the 10,000 shares for the first 2 years (10,000 shares January 22, 1998 (**Exhibit 4**) and 10,000 shares May 28, 1999 (Exhibit 5) and thereafter the promised 10,000 yearly additional shares were never given.

28. Numerous requests of GORSEK over the years for the promised 10,000 yearly shares failed to make GORSEK perform as promised. No additional 10,000 shares were ever given.

29. The 10,000 shares provided in 1998 and 1999 resulted in FLORENCE ALEXANDER's owning 180,000 VITACOST shares.

30. Sometimes in the early 2000s, the shares split 2 to 1 and FLORENCE ALEXANDER's holding increased to 360,000 (Exhibit 6) and STANLEY ALEXANDER's increased to 40,000 (Exhibit 7) - the amount of shares at issue in this action, a total of 400,000 shares owned by Plaintiffs.

31. Plaintiffs on a few occasions visited Boynton Beach, Florida and engaged in several conversations with GORSEK regarding their ailments. STANLEY ALEXANDER informed GORSEK of his advanced glaucoma disease and GORSEK recommended the VITACOST Ocupower product for eye health. GORSEK continued to recommend the VITACOST Arthripower for FLORENCE ALEXANDER's osteoarthritis, the generative disease associated with advanced age. Because of the medical assistance provided by GORSEK and JOSEPHS regarding the efficacy of the Company's products, and the fiduciary relationship

between investors and officers and directors in a corporation. Plaintiffs began to develop a feeling of trust and confidence with both GORSEK and JOSEPHS.

32. GORSEK and JOSEPHS at all times encouraged Plaintiffs to have faith in VITACOST as a sound investment and often told Plaintiffs that they would be kept abreast of the return on investment potential as it became known. A business relationship of trust and confidence developed between Plaintiffs and Defendants. Plaintiffs had no outside business advisors regarding this investment except GORSEK and VITACOST officers and directors.

33. On several occasions from 1999 until 2006, GORSEK and others requested that the ALEXANDER shares be redeemed. STANLEY AND FLORENCE ALEXANDER refused to tender their shares as it was important for them to reap the benefits of the promised Initial Public Offering. Since they were both **elderly** and retired, the maximum amount from their investment income was extremely important.

34. Plaintiffs were integral to the formation of VITACOST, GORSEK touted Plaintiffs at a 2008 Company party stating that they could not have started the Company without the \$90,000 investment of STANLEY and FLORENCE ALEXANDER.

35. From time to time in 2002 (**Exhibit 8**) and 2003 (**Exhibit 9**), Defendants attempted through the US mail to get Plaintiffs to sell their shares and each time Plaintiffs refused. Plaintiffs repeatedly told VITACOST officers and directors that their interest was in the promised Initial Public Offering.

36. STANLEY and FLORENCE ALEXANDER inquired of GORSEK and JOSEPHS on numerous occasions from 1999 until 2006 as to the estimate of the fair market value or expected price range of the stock and plans of VITACOST to go public. No accurate or reliable information was ever given in breach of the BOARD's fiduciary duty. At all times, Defendants knew estimates of the fair market value and price range of the shares.

37. On June 26, 2006, GORSEK first informed Plaintiffs that he planned to register for an initial public offering and he engaged Susquehanna **Financial** Group, LLLP to assist in taking VITACOST public. (**Exhibit 10**).

38. The June 26, 2006 letter indicated that if a lock up agreement was not executed the Shareholders could not participate in selling their shares, stating specifically *"If you do not sign the lock up agreement, you will not be offered the right to participate as a selling stockholder"*.

39. The decision to attempt to go public with GORSEK as CEO was flawed as GORSEK was barred by the SEC from being involved in Public Companies as an officer for previously defrauding investors (**Exhibit 11** initial litigation release charging Gorsek with Fraud). In *SEC v. Wayne Gorsek*, US District Court Central District of Illinois, C.A. 99 CV 3072 (JES) Judge Scott entered a final Judgment of Permanent Injunction and Other Relief against Gorsek restraining him from violating the antifraud provisions of the Federal Securities Laws, in addition to other penalties, Gorsek was prohibited from participating in any offering of a penny stock, including acting as a promoter, finder, consultant, or agent, based on the courts findings of fraud.

40. Plaintiffs were sent a Lock-up Agreement letter by US mail on June 26, 2006. The letter explained the purpose of a Lock-up Agreement. The Agreement bars the shareholders from selling their shares from the date of execution until 180 days after a Public Offering and provided notice to the Shareholders that VITACOST.com was going public. See Exhibit 12 June 27, 2006 Lock Up Agreement for Florence Alexander and Exhibit 13, June 27, 2006 Lock Up Agreement for Stanley Alexander.

41. Sometime in January, 2007, GORSEK first informed Plaintiffs verbally that VITACOST would not be going public and Plaintiffs assumed that the Lock-up Agreement expired without notice. No information was ever given to Plaintiffs by Defendants as to the fate of the June 27, 2006 Lock-up Agreement.

42. From time to time Plaintiffs continued to attempt to get up-to-date information regarding the plans of VITACOST to place an IPO with SEC but every time such inquiry was made, either there was no information given or the information that was provided proved to be false.

43. Plaintiffs were unaware that Gorsek was barred by the SEC for his prior investor fraud from taking any company public and from association with any broker dealer. See SEC Administrative Proceeding (Exhibit 14)

44. In taking, promoting and being the driving force behind taking VITACOST public, GORSEK deliberately violated U.S. Court and SEC orders.

45. VITACOST was a penny stock company and initially sold its shares for \$0.25 to Defendants.

46. VITACOST did not give Plaintiffs any information for aborting the IPO in 2006 except that the Company could not go public with GORSEK as its CEO and Chairman of the BOARD and; therefore, GORSEK was prohibited from taking the Company public and playing any administrative role in VITACOST's going public.

47. Plaintiffs were never given any specific details by GORSEK or VITACOST as to why VITACOST's CEO was barred by SEC from being involved with public companies.

48. Despite numerous inquiries as to the estimate of the fair market value or share price range of the stocks during the IPO planning, Defendants refused to provide information about the price range or fair market value to the Plaintiffs.

49. On January 29, 2007, GORSEK reportedly resigned as the VITACOST CEO and KERKER was subsequently named as the CEO of VITACOST. (Exhibit 15). While resigning as an officer and director, GORSEK retained indirect control by virtue of the amount of his holdings and his ability to call for a meeting to elect directors at any time.

50. Kerker sent a letter to Plaintiffs dated March 19, 2007 informing Plaintiffs that Vitacost.com was considering a registered initial public offering of its stock. (**Exhibit 16**) The Letter stated in pertinent part:

“Based on our discussions with the Underwriters, we also expect there to be an opportunity for you to participate by selling a portion of your shares in the IPO. However this process must first start with the filing of the registration statement with the Securities and Exchange Commission, and **we will not be able to file the registration statement until we receive signed lock up agreements from all our shareholders**” emphasis added.

Kerker by his letter and discussions informed Plaintiffs that the Lock Up Agreements were the necessary first step in preparing to go public and that without such agreements the company could not go public.

51. Plaintiffs signed the March 27, 2007 Lock-up Agreement. It also expired without VITACOST going public and without notice to Plaintiffs. A copy of the form of the letter is attached as **Exhibit 17**.

52. Vitacost had begun a pattern of sending a Lock-up Agreement, stating an IPO was imminent and then aborting the effort without providing any notice or explanation.

53. From the inception, regular reports regarding the estimate of the fair market values of the shares and the status of the IPO were not provided in breach of the BOAR's fiduciary duty.

54. Plaintiffs were never kept abreast on a yearly basis as to the value of their shares and plans of VITACOST to go public.

55. Intentional false and misleading statements or omissions of material facts demonstrated a pattern of lies, conspiracy and deceit from the very beginning of the Plaintiffs association with VITACOST with respect to VITACOST going public and the share value.

56. After executing the 2007 Lockup Agreement, in order to pay mounting expenses, STANELY ALEXANDER considered various ways of obtaining funds and had several conversations with KERKER as to the estimate of the fair market value or share price range of Plaintiffs' stocks and plans of VITACOST to go public. KERKER refused to provide the Plaintiffs information regarding fair market value of Vitacost.com shares or the status of any planned initial public offering.

57. Neither the Board or the Officers and Directors informed Plaintiffs as to any estimates of value of the Plaintiffs shares, despite repeated requests by Plaintiffs.

58. KERKER sent a letter through the US mail in 2008 informing Plaintiffs to come to the April, 2008 Annual Stockholders Meeting to receive the latest information regarding VITACOST.

59. At the Annual Stockholder meeting held in April 2008, neither KERKER nor any Board Member would provide any estimate of the fair market value or price range of VITACOST shares when asked by Plaintiffs.

60. During the years 1997 to 2009, Plaintiffs could not get any information regarding the estimate of the fair market value or price range of the VITACOST shares. In response to numerous attempts. Defendants stated that they did not have any information regarding the estimate of the fair market value or price range of VITACOST shares - concealment of a material fact since they were aggressively pursuing taking the Company public and certainly had prepared estimates of the value of the shares.

61. At the request of KERKER, on April 14, 2008, Plaintiffs attended the Annual Stockholders Meeting where KERKER and GORSEK were present. At that meeting, GORSEK and KERKER announced that VITACOST would not be going public.

62. At the April 14, 2008 Annual Stockholders Meeting KERKER and GORSEK reported that the BOARD was in negotiations with three firms to buy VITACOST.

63. GORSEK and KERKER announced at the April 14, 2008 meeting that it was not in the best interest of VITACOST to go public due to the volatile market conditions. **Exhibit 18, page 6.**

64. In response to Plaintiff's request regarding the estimate of the fair market share value in view of the impending purchase of VITACOST, GORSEK and KERKER lied and stated that the estimate of the fair market share value was not known.

65. During the April 14, 2008 meeting GORSEK elected himself as a continuing Director of VITACOST. (Exhibit 18 Pages 3-5).

66. The election of GORSEK's as a Board Member signaled to Plaintiff's that the Company was not going public as GORSEK was prohibited from acting as a Director of a Company going public.

67. At the April 14, 2008 Annual Stockholders Meeting, Plaintiffs informed GORSEK and KERKER of their dire **financial** situation where most of their retirement money had been lost due to a Ponzi scheme. Defendants, being acutely aware of Plaintiffs' desperate need for money to survive during Plaintiffs' waning years, continued the scheme to defraud Plaintiffs with renewed determination.

68. At the April 14, 2008 Annual Stockholders Meeting, Plaintiffs inquired as to the time of a potential sale and the payout estimate for their shares. GORSEK responded that they were working as hard as possible to close a sale of VITACOST to a private buyer. GORSEK stated that he did not know the range or estimate of the value of VITACOST shares.

69. GORSEK knew that any negotiations for a private sale of VITACOST required estimates of share value; therefore, Director GORSEK deliberately lied to the Plaintiffs.

70. GORSEK announced at the April 14, 2008 meeting that in addition to resuming his position as a VITACOST Director, he was hired as an agent of VITACOST in an administrative consultant role for approximately \$300,000 a year. The election of GORSEK as a Director while the Plaintiffs were present was a deceptive act which helped convince Plaintiffs that VITACOST would not be going public as part of a scheme on behalf of VITACOST, its directors and officers to deprive Plaintiffs of the value of their Stock.

71. At the April, 2008 Meeting, GORSEK and KERKER vowed to keep Plaintiffs informed and restated how valuable the Plaintiffs' contribution was during the past 12 years.

72. Plaintiffs left the meeting with a renewed feeling of trust and confidence that the BOARD would inform them of any change in the Company's status with respect to a private sale and Plaintiffs' potential payout in such a sale.

73. Unbeknown to Plaintiffs, **only sixteen days later following the April 14, 2008 Annual Stockholders Meeting, on April 30, 2008, Defendants filed a 2008 Annual Report with the state of Florida and intentionally omitted GORSEK as a Director of VITACOST in furtherance of the security fraud in taking VITACOST public (see Exhibit 32).** This filing signed by KERKER was in furtherance of the security fraud in anticipation of the future theft of the Plaintiffs' equity in VITACOST as it was intended to cover the deception in the event that the election of GORSEK as a Director was discovered at a later date.

74. Upon information and belief the election of GORSEK was a scheme and a show to convince Plaintiffs that VITACOST would not be going public.

75. From April 14, 2008 until May, 2009, no further information was received by Plaintiffs, no Lock-up Agreement was sent to Plaintiffs, and GORSEK remained as a Director on the BOARD bolstering the Plaintiffs belief that (1) VITACOST could only be sold to a private buyer, (2) no IPO would be submitted to the SEC.

76. Upon information and belief, sometime after April 14, 2008, Defendants with wanton disregard for the law and their fiduciary duty, sent Lock-up Agreements to other shareholders, directors and officers and specifically did not send Lock-up Agreements to the Plaintiffs and deliberately concealed the information that Lock-up Agreements were being sent to others shareholders. Plaintiffs were never informed about the latest Lock Up Agreement in order to defraud the Plaintiffs into believing that an IPO was not forthcoming. A draft of the Underwriter Agreement is attached hereto as **Exhibit 19**, which in several places references the utilization of Lock Up Agreements in the VITACOST IPO.

77. During the early months of 2009, Plaintiffs' **financial** situation deteriorated and calls were made back and forth between STANLEY ALEXANDER and KERKER. STANLEY ALEXANDER continued to request the estimate of the fair market value or price range of the shares and provided KERKER more information regarding Plaintiffs deepening **financial** crisis. No information was given about share price and KERKER continued to lie and say he had no access and knowledge regarding the estimate of the fair market value or share price range for Plaintiffs' shares.

78. KERKER was advised by telephone of the more serious deteriorating **financial** condition of Plaintiffs and vowed to keep Plaintiffs aware of changes within VITACOST.

79. At no time during the telephone calls in 2009 did KERKER advise Plaintiffs that the private sale to investors had been aborted.

80. During one of the last telephone calls, in response to an inquiry from STANLEY ALEXANDER, KERKER continued to lie when he said he could not give any estimate of the fair market value or share price range because he did not know it and that the information was unavailable.

81. During the telephone calls, KERKER asked STANLEY ALEXANDER to consider tendering his shares in order to help his mounting **financial** situation

82. Although the Plaintiffs were in a dire **financial** condition, STANLEY ALEXANDER told KERKER on several occasions that since he did not know the value of his shares he would not sell them and continued to request information from Kerker on the value of the shares.

83. STANLEY ALEXANDER continued to seek the share price in order to make an informed decision about selling his shares. KERKER encouraged the Plaintiffs to sell their shares back to VITACOST.

84. KERKER responded to STANLEY ALEXANDER's hesitancy in tendering his shares by telling STANLEY ALEXANDER to send a repurchase letter to Vitacost with Stanley Alexander's best estimate of the share value. Stanley Alexander is a high school graduate with no formal accounting or **finance** experience.

85. KERKER said that Vitacost would give STANLEY ALEXANDER the true fair market value of the Plaintiffs' shares in response to a repurchase letter and that the decision would be made by the Board of Directors.

86. KERKER told Stanley Alexander that sending a letter offering to sell the shares was a necessary step in having the Board evaluate the repurchase.

87. KERKER's asking the Plaintiffs to send the repurchase letter was an intricate part of the scheme to defraud the **elderly** Plaintiffs.

88. STANLEY ALEXANDER reluctantly followed KERKER's advice to ask Vitacost to purchase Plaintiffs' shares.

89. STANLEY ALEXANDER and FLORENCE ALEXANDER felt that since KERKER was an attorney and in a fiduciary relationship with them, KERKER would be honest and truthful regarding the information about VITACOST.

90. The Plaintiffs trusted KERKER when KERKER requested that they sell their shares to VITACOST and told the Plaintiffs to send a letter to VITACOST.

91. In response to KERKER's request, on March 26, 2009, Plaintiffs sent a letter through the US mail to Director JOSEPHS (Exhibit 20) and Director GORSEK (Exhibit 21) wherein Plaintiffs took an uneducated guess as to the value of the shares at \$2.25 per share. In the letter,

GORSEK was addressed as "Wayne F. Gorsek, Vitacost.com Board of Directors." confirming the belief of the Plaintiffs that GORSEK was on the Board as a Director.

92. STANLEY ALEXANDER and FLORENCE ALEXANDER trusted JOSEPHS and GORSEK since they as Officers and Directors of VITACOST owed a duty of good faith and fair dealing to their investors and since they had relied on their guidance and advice during the entire period of ownership in VITACOST.com and that they had also had many conversations regarding the Plaintiffs deteriorating health.

93. KERKER requested STANLEY AND FLORENCE ALEXANDER to come to Boynton Beach May 4, 2009 to discuss the purchase of their shares. No other information was given.

94. On May 4, 2009, in Boynton Beach, Plaintiffs were presented the STOCK PURCHASE AGREEMENTS. (Exhibits 1 and 2) which contained a stock purchase price of \$1.25 per share.

95. GORSEK held controlling interest of VITACOST from its inception of Plaintiffs' shareholdings in 1997 and throughout the 12 years Plaintiffs owned the stock. This time span included the time when the false estimate of the false fair market value was given to Plaintiffs by the BOARD in the STOCK PURCHASE AGREEMENT

96. During the May 4, 2009 meeting, Plaintiffs were informed by KERKER that VITACOST was having **financial** problems and had suffered some **financial** set-backs due the problems at a new plant that necessitated GORSEK going to the out-of-town plant to solve the problems.

97. Plaintiffs were deliberately provided misinformation regarding the declining **financial** condition of the Company when in fact the Company had increased sales and no major **financial** problems existed. Plaintiffs were given misinformation to create fear and induce them to tender their shares at any price due to the impending doom of the Company.

98. Plaintiffs feared for further loss of their investment based on the false dim report regarding VITACOST's **financial** condition from KERKER.

99. STANLEY ALEXANDER and FLORENCE ALEXANDER trusted KERKER, JOSEPHS and GORSEK since they had relied on them exclusively regarding the condition of VITACOST.com and that as officers and director they had a fiduciary duty of good faith and fair dealing with Plaintiffs.

100. At the May, 4, 2009 Meeting Plaintiffs were again told that VITACOST was not going public and that there were no buyers for the Company.

101. Since KERKER had asked Plaintiffs to sell their shares back to VITACOST, the Plaintiffs felt that there was no other course of action that would help in solving their **financial** problems. The Plaintiffs did not know that they were victims of security fraud and the price given was far below the fair market value.

102. At all times during the May 4, 2009 meeting, Plaintiffs believed based on Defendants' deceit, lies, intentional misrepresentations, false statements, and omission of material facts that (1) the value of \$1.25 as represented by the BOARD was the true estimate of the fair market value, (2) VITACOST might have to be sold to a private buyer, (3) there were no plans to take VITACOST public, (4) there were no plans to take VITACOST public since the SEC would not allow an IPO of VITACOST while GORSEK was still a director, (5) there were no lock up agreements provided to Plaintiffs or discussion of same so VITACOST could not be going public (6) VITACOST was in **financial** difficulty, and (7) the trust between VITACOST its officers and Directors and Plaintiffs was still warranted, and the officers and directors of VITACOST have a statutory and common law duty to manage the **elderly** persons property (the stock in VITACOST).

103. At all material times hereing the Officers and Directors owed the Plaintiffs a duty of good faith and fair dealing. Additionally VITACOST formally adopted code of conduct and ethics for its directors as early as June 11, 2006 (**Exhibit 30**) which Plaintiffs were justified in relying on.

104. Officers and Directors of companies are entrusted with managing the Company for the benefit of the stockholders.

105. On May 4, 2009, STANLEY ALEXANDER was suffering due to his age from an advanced stage of glaucoma and was visually impaired due to his increasingly blind condition.

106. On May 4, 2009 STANLEY ALEXANDER had difficulty reading the STOCK PURCHASE AGREEMENT and explained the same to the Defendants.
107. On May 4, 2009, both **elderly** Plaintiffs were physically exhausted at the meeting due to the strenuous car ride from their Longwood home to Boynton Beach, a trip of several hundred miles.
108. Suffering from exhaustion and poor vision due to glaucoma, on May 4, 2009, STANLEY ALEXANDER executed the STOCK PURCHASE AGREEMENT with grave difficulty. (Exhibit 1).
109. Defendants should not have allowed STANLEY ALEXANDER to execute the STOCK PURCHASE AGREEMENT since the Plaintiff had difficulty seeing the print on the AGREEMENT and could not read it.
110. Defendants took advantage of STANLEY ALEXANDER's disability. Defendants owed a fiduciary duty to the Plaintiff to protect his interest at all times; Defendants breached their fiduciary duty to the **elderly** Plaintiff.
111. Earlier on March 26, 2009, Plaintiff made a guess of \$2.25 for the share price, but the true fair market value known to the Defendants at that time was \$12.00.
112. On May 4, 2009, the BOARD intentionally presented \$1.25 as a false fair market value in the STOCK PURCHASE AGREEMENT as part of the scheme to defraud the **elderly** Plaintiffs that they knew were experiencing **financial** difficulties.
113. FLORENCE ALEXANDER questioned KERKER as to why the fair market value of \$1.25 provided by the BOARD was so far below Plaintiffs "guesstimate" of \$2.25. KERKER again lied and said he did not know the fair market value estimate or price range and that the price was a decision of the Board's estimate of fair market value.
114. FLORENCE ALEXANDER inquired to the information about the pending IPO words in the document. KERKER said that the lawyers required their standard language in the document and that they need not concern themselves about it that the company was not going public.
115. The STOCK PURCHASE AGREEMENT and the payoff check were presented together during the May 4, 2009 meeting. There was little time to read the complicated STOCK PURCHASE AGREEMENT since it was the end of the business day and VITACOST was closing.
116. The **elderly** Plaintiffs, who had no legal or **financial** training, did not have legal representation at the May 4, 2009 meeting.
117. The **elderly** Plaintiffs were never advised by the Defendants to have legal representation at the May 4, 2009 meeting.
118. KERKER lied when he said that the true fair market value would be given by the BOARD following the receipt of the repurchase letter.
119. KERKER lied when he said that he had no control over what fair market value the BOARD would provide for buying back the Plaintiffs' shares.
120. VITACOST and the VITACOST Directors sold Plaintiff's 400,000 shares for \$12.00 a share on September 23, 2009 unjustly enriching the Company and its Officers and Directors in the amount of \$4,300,000.
121. After accepting as truth the \$1.25 the fair market value provided by the VITACOST BOARD, STANLEY ALEXANDER discovered on the Internet the November 4, 2009 Press Release that VITACOST went public in September, 2009 with a \$12.00 fair market value (**See Exhibit 22**).

122. With malicious and sinister intentions on May 4, 2009 and knowing of Plaintiffs' **financial** duress and their disabilities due to their age, VITACOST intentionally induced the frail, **elderly** Plaintiffs through fear of losing, and misrepresentation to sell their shares for a fraction of the true value.

123. After giving Plaintiffs false information about the **financial** condition of VITACOST, KERKER presented the STOCK PURCHASE AGREEMENT with a false fair market value of \$1.25 along with a check for \$500,000 that grossly underpaid the 400,000 shares the **elderly** Plaintiffs owned.

124. Upon information and belief VITACOST already was in negotiations and or had agreements with underwriters, law firms and other parties in order to take VITACOST public prior to the May 4, 2009 meeting.

125. The Directors, KERKER and GORSEK were well aware that the price offered to Plaintiffs was a mere fraction of the planned price for taking VITACOST Public.

126. The November 4, 2009 Press Release provided the first information discovered by Plaintiffs that they had been intentionally defrauded through an intricate pattern of lies, deception, misrepresentation, and intentional omission of material facts perpetrated by VITACOST as it employed a consistent scheme and artifice to defraud Plaintiffs.

127. The discovery of the \$12.00 share price was made only four months after VITACOST intentionally and maliciously provided the false \$1.25 fair market value to the very **elderly** Plaintiffs who provided the \$90,000 investment to start the Company 11 years ago.

128. In view of the huge difference between the false value of \$1.25 provided by Defendants and the true fair market value of \$12.00, it is clear that intentional security fraud existed with the repurchase of the 400,000 shares of the **elderly** Plaintiffs.

129. VITACOST, its officers and Directors owed plaintiffs a duty of truthfulness with regard to the **financial** condition of VITACOST and the plans to take the Company public.

130. VITACOST filed an Amendment 3 to its Registration Statement consisting of 160 pages of **financial** and other information in order to take VITACOST public only 42 days after defrauding the Plaintiffs into selling their shares back to VITACOST (Exhibit 23).

131. Plaintiffs were told that there were no plans to take VITACOST public and this fact was bolstered by the fact that GORSEK had been elected to the Board and he could not be a Board Member if the Company was going public and there were no lock up agreements in place or at least none given to Plaintiffs prior to the May 4, 2009 Meeting.

132. Defendant clearly were deep into negotiations, preparations and plans to take VITACOST Public prior to defrauding the Plaintiffs on May 4, 2011 and concealed such information from Plaintiffs.

133. Had Plaintiffs known that VITACOST would file an IPO Registration Statement on June 12, 2009, only 42 days after they executed the STOCK PURCHASE AGREEMENT, STANLEY AND FLORENCE ALEXANDER would not have sold their shares for the false fair market value of \$1.25 on May 4, 2009. VITACOST DIRECTORS', KERKER's and GORSEK's lies and deception caused considerable damage to the **elderly** Plaintiffs and lost them \$4,300,000 in return on their long-term investment of 12 years.

134. Prior to Plaintiffs tendering their stock, Plaintiffs had not been provided any **financial** information since the prior April 2008 Board Meeting.

135. When Defendants through KERKER and the Board of Directors told Plaintiffs that \$1.25 was the best estimate of the value of the stock they were intentionally misleading Plaintiffs. The Stock was clearly valued much higher than \$1.25 and in fact Defendants own **Financial** Statements included much higher valuations in the registration statement and concealed the same from Plaintiffs. **(Exhibit 23-3rd Amendment to Registration Statement)**.

136. VITACOST through its Directors and Officers had filed a Registration Statement on June 20, 2007 **(Exhibit 24)**.

137. The Vitacost Registration Statement was amended on August 10, 2007 **(Exhibit 25)**.

138. The Vitacost Registration Statement was amended on September 18, 2007 (Exhibit 26)

139. VITACOST never included a price range in its Registration Statements or Amendments. See Letters from SEC dated July 19, 2007 (Exhibit 27), September 7, 2007 (Exhibit 28), and October 18, 2007 (Exhibit 29), all of which directed VITACOST to include the estimated price range and noted that omission was a violation.

140. VITACOST went public on September 24, 2009, at a price of \$12.00 per share enriching the Directors and Officers and VITACOST at the expense of the Plaintiffs.

141. The difference in the price paid for Plaintiff's shares and the public offering price was \$10.75 per share, resulting in damages to the Plaintiff's in the initial amount of Four Million Three Hundred Thousand and NO/100 Dollars (\$4,300,000).

142. Each of the Defendant's breached their duties of good faith, fair dealing and adhering to VITACOST'S own internal policies to their own benefit and the benefit of the Company.

143. To withhold extremely valuable and important information regarding the true nature of the company **finances**, to withhold and mislead the Plaintiffs as to the value of VITACOST STOCK and plans to go public from Plaintiffs, **elderly** investors, who had been with the company for 11 years is a breach of each Defendants duties of good faith and fair dealing.

144. Plaintiffs reliance on Defendants and their Agents, Officers and Directors was reasonable.

COUNT I-EXPLOITATION OF THE **ELDERLY AGAINST ALL
DEFENDANTS WITH REMEDIES AVAILABLE UNDER F.S. §772.11**

145. Paragraphs 1-144 are reincorporated herein as if fully set forth.

146. FLORID STATUTES 825.103 Exploitation of the **Elderly** makes it unlawful to:

*(a) Knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an **elderly** person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the **elderly** person or disabled adult of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the **elderly** person or disabled adult, by a person who:*

*1. Stands in a position of trust and confidence with the **elderly** person or disabled adult; or*

*2. Has a business relationship with the **elderly** person or disabled adult; or*

*(b) Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an **elderly** person's or disabled adult's funds, assets, or property with the intent to temporarily or permanently deprive the **elderly** person or disabled adult of*

*the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the **elderly** person or disabled adult, by a person who knows or reasonably should know that the **elderly** person or disabled adult lacks the capacity to consent.*

147. Plaintiffs were **elderly** as defined in [Florida Statute §825.101](#).

148. Plaintiff Stanley Alexander was over 80 years old at all times relevant to this Complaint.

149. Plaintiff Florence Alexander was over 70 years old at all times relevant to this Complaint.

150. Defendants took advantage of the frail, **elderly** Plaintiffs and committed fraud to induce them to sell their shares at a price grossly below the true value of their VITACOST shares.

151. Defendants knew that STANLEY ALEXANDER was suffering from glaucoma and could not easily see the small letters in the STOCK PURCHASE AGREEMENT (Exhibits 1, 2).

152. Defendants knew that FLORENCE ALEXANDER was subject to headaches due to her hypertension caused at times by her arthritic pain during the May 4, 2009 meeting in Boynton Beach, Fl. and the stress of the meeting.

153. At the time of the relinquishing of the securities as a repurchase, STANLEY ALEXANDER suffered from severe glaucoma that worsened as he aged. In order to assist him in reading, STANLEY uses a magnifying glass when reading; otherwise he is nearly legally blind. GORSEK was aware of STANLEY ALEXANDER's glaucoma and recommended the use of Ocupower, a VITACOST product. For several years Plaintiffs ordered Ocupower from VITACOST; therefore, VITACOST was aware of the aging condition and infirmity of the Plaintiff.

154. At the time of the relinquishing of the securities as a repurchase, FLORENCE ALEXANDER suffered from arthritis that constricted her movement, compromised her ability to drive and caused considerable pain. The condition worsened as she aged. GORSEK was aware of FLORENCE ALEXANDER's arthritis and recommended the use of Arthripower, a VITACOST product that eased pain. For several years Plaintiffs ordered Arthripower from VITACOST; therefore, VITACOST was aware of the aging condition and infirmity of the Plaintiff at the time that the STOCK PURCHASE AGREEMENT was presented.

155. VITACOST was aware on May 4, 2009 that STANLEY ALEXANDER suffered from severe glaucoma and could not clearly see all of the provisions in the STOCK PURCHASE AGREEMENT he signed due to the small letters and his lack of visual acuity. STANLEY ALEXANDER did not have his glasses or magnifying glass during the May 4, 2009 meeting when the STOCK PURCHASE AGREEMENT was executed. With increasing age, the Alexander's frequently forgot eyeglasses, magnifying glasses, and many other things when at home and especially when traveling.

156. FLORENCE ALEXANDER suffered from hypertension, a condition that causes headaches when one is stressed. Hypertension also worsens with age. During the May 4, 2009 severe headaches affected FLORENCE ALEXANDER due to the stressful situation created when she discovered the substantially lower share price of \$1.25 that was offered as the fair market value by the BOARD.

157. VITACOST was aware on May 4, 2009 that FLORENCE ALEXANDER was experiencing a headache and that she was unable to read and sign the STOCK PURCHASE AGREEMENT.

158. Defendant KERKER informed her that her husband, who had great difficulty reading the STOCK PURCHASE AGREEMENT could sign the agreement for Florence Alexander who was experiencing such a headache caused by her advanced age and hypertension that she could not read the Agreement.

159. On May 4, 2009, Defendants breached their fiduciary duty in not disclosing and deliberately concealing the true estimate of the fair market value or share price range in the upcoming Public offering of the VITACOST shares to be repurchased by VITACOST both Plaintiffs could have an informed decision in tendering their shares; thereby reducing stress on the **elderly** Plaintiffs. VITACOST actions were exploitive of the aging and frail Plaintiffs.

160. Notwithstanding STANLEY ALEXANDER's impaired vision, VITACOST allowed STANLEY ALEXANDER to sign his and FLORENCE ALEXANDER's STOCK PURCHASE AGREEMENT in furtherance of the fraud instead of performing its fiduciary duty and revealing the truth regarding the estimate of the fair market value or share price range of the security the day of repurchase.

161. Defendants in electing and allowing GORSEK on the Board of Directors, a condition Defendant knew would cause Plaintiffs to believe that VITACOST could not go public, intentionally deceived and misrepresented the intention of the Company to immediately go public.

162. Defendants, by and through their elected officer KERKER, knew that VITACOST was already deeply in preparation to go public and deliberately withheld this information from the Plaintiffs and lied to Plaintiffs telling them VITACOST would not be going public.

163. Defendants, by and through their elected officer KERKER, lied to Plaintiffs about the clause in the Purchase Agreement discussing going Public. Plaintiffs specifically asked if VITACOST was going public and KERKER told Plaintiffs the language in the Agreement was just boilerplate that the lawyers put in every agreement and that VITACOST was not going public.

164. Defendants failed to provide any lock up agreement to Plaintiffs in early 2009 which would have been normal and customary for a company going Public. VITACOST's prior correspondence (**Exhibit 10**) indicated that the Lock Up Agreements were a requirement of VITACOST going public.

165. In inducing the Plaintiffs to send a letter asking VITACOST to sell their shares, lying about the value of the VITACOST shares, offering to purchase the shares for a ridiculously low valuation when the Company was preparing to go public, lying about VITACOST's intention to go public, placing GORSEK on the Board in April 2008 (which would prevent VITACOST from going public), failing to provide a **financial** statement for FYE 2008, failing to provide Lock Up Agreement to Plaintiffs and misrepresenting the **financial** condition of VITACOST, Defendants, individually and through VITACOST and its Officer created a carefully constructed scheme to convince the Plaintiffs to sell their shares for a fraction of their worth causing initially Four Million Three Hundred Thousand in damages (\$4,300,000) to Plaintiffs. But for the deception, misstatements, intentional omission of materials facts, factual misrepresentations, deceit, false statements and unlawful schemes of Defendants, Plaintiffs would not have executed the STOCK PURCHASE AGREEMENT that caused them an economic loss in excess of \$4,300,000.

166. The **elderly** Plaintiffs suffered and continue to suffer injury as a result of Plaintiffs' reliance upon the misrepresentations of material facts, false statements, and the intentional omissions of material facts leading to Plaintiffs losing more than \$4,300,000 of their earned investment returns. Had the Plaintiffs known that the true value of the shares was \$12.00 or the range was \$11-13, they would not have entered into an agreement to sell their stocks at \$1.25 per share.

167. On May 4, 2009, the **elderly** Plaintiffs lacked the ability to consent because of their disabilities and the fraudulent nature of the STOCK PURCHASE AGREEMENT due to the concealment by GORSEK and the VITACOST Directors of the true share price and the aforementioned actions of Defendants.

168. Defendants, through the Officers, Directors and the Company knowingly, by deception and intimidation obtained the Plaintiffs stock based on fraud and misrepresentation and omission in violation of [F.S. §825.103](#).

169. Defendants stood in a position of trust and confidence with the Plaintiffs, based on their personal relationships, their common law duties as officers and directors and the VITACOST code of Conduct and Ethics.

170. Defendants had a long standing business relationship with the Plaintiffs that Defendants exploited in the Stock Purchase Agreements.

171. Defendants owed Plaintiff a fiduciary duty of honesty, faith and fair dealing that was breached by Defendants to knowingly deprive them of their property (VITACOST stock) at great damage to the Plaintiffs in excess of Four Million Three Hundred Thousand and no/100 Dollars.

172. Defendants actions deprived the **elderly** and disabled Plaintiffs from being able to provide informed consent to the Stock Purchase Agreement and Defendants were aware of this at the time of the Stock Purchase Agreement.

173. VITACOST directly benefited from the fraud perpetrated on the Alexanders.

174. The Officers and Directors of VITACOST directly benefited from the Fraud perpetrated on the Plaintiffs.

175. Plaintiffs have a cause of action for three times actual damages of Four Million Three Hundred Thousand (\$4,300,000.00) or a total of Twelve Million Nine Hundred Thousand and No/100 Dollars (\$12,900,000.00) pursuant to [F.S. §772.11](#),

176. Plaintiffs have filed a written demand pursuant to [F.S. 772.11](#) against all Defendants for a claim for three times the actual damages, i.e. Twelve Million Nine Hundred Thousand and No/100 Dollars (\$12, 900,000), and Defendants have had 30 days to consider such an offer prior to this Amended Complaint being filed.

177. Defendants have not availed themselves of the opportunity to settle this matter and made no offers to Plaintiffs.

178. Pursuant to 772.11(5) hereby requests that due to Plaintiffs advanced age and infirmities this matters be advanced on the docket

WHEREFORE, based on the above, Plaintiffs demand judgment for damages against Defendants and Directors individually including damages in the amount of Twelve Million Nine Hundred Thousand and NO/100 Dollars (\$12,900,000) plus punitive damages as this court sees fit plus costs and attorneys fees.

COUNT II-AGAINST ALL DEFENDANTS VIOLATION OF [FLORIDA STATUTE §517.301](#) FRAUDULENT TRANSACTION AND FALSIFICATION AND CONCEALMENT OF FACTS GIVING RISE TO REMEDIES UNDER FLORIDA STATUE §517.211

179. Paragraphs 1-144 are reincorporated herein as if fully set forth herein.

180. [FLORIDA STATUTE §517.301](#)-- Fraudulent Transactions; Falsification or Concealment of Facts states:

(1) It is unlawful and a violation of the provisions of this chapter for a person:

(a) In connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security, including any security exempted under the provisions of s. 517.051 and including any security sold in a transaction exempted under the provisions of s. 517.061 directly or indirectly:

1. To employ any device, scheme, or artifice to defraud;

2. To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or

3. To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a person.

(b) (omitted)

(c) In any matter within the jurisdiction of the office, to knowingly and willfully falsify, conceal, or cover up, by any trick, scheme, or device, a material fact, make any false, fictitious, or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry.

Florida Statute §517.301 is a criminal statute that may give rise to civil remedies for actions which violate 517.301 under Florida Statute §517.211 181. Florida Statutes §517.211 (2) provides in pertinent part:

(2) any person purchasing or selling a security in violation of s.517.301, and every director, officer, partner, or agent of or for the purchaser or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale or purchase, is jointly and severally liable to the person selling the security to or purchasing the security from such person in an action for rescission, if the plaintiff still owns the security, or for damages, if the plaintiff has sold the security...

(5) In an action for damages brought by a seller of a security or investment, the plaintiff shall recover an amount equal to the difference between:

(a). The value of the security at the time of the complaint, plus the amount of any income received by the defendant on the security; and

(b). The consideration received for the security, plus interest at the legal rate from the date of sale.

(6) In any action brought under this section, including an appeal, the court shall award reasonable attorneys fees to the prevailing party unless the court finds that the award of such fees would be unjust.

182. The VITACOST stock that is the subject of this action is a security subject to the dictates of the above statutes.

183. Defendants through the officers and Directors of VITACOST are all responsible for the actions and omission of their agents in connection with the Stock Purchase Agreement and all material events leading up to the execution of the Stock Purchase Agreement, further each VITACOST and its Officers and Directors benefited from the fraudulent repurchase of Plaintiffs stock.

184. Defendants employed a consistent planned scheme to defraud the Plaintiffs into selling their VITACOST stock to Defendants, including but not limited to the actions set forth in the foregoing paragraphs but also specifically including (i) Allowing GORSEK to be elected a DIRECTOR of VITACOST in contravention of SEC orders which sent the message that VITACOST would not be going public (ii) Failing to provide honest and complete answers to Plaintiffs repeated requests for the valuation of their stock (iii) Failing to inform Plaintiffs that VITACOST had already engaged specific underwriters prior to the entry of the Stock Purchase Agreements and failing to inform Plaintiffs that the VITACOST would be immediately going Public for an amount approximately 10 times the purchase price in the Stock Agreement, material omission (iv) Failing to present Plaintiffs with a Lock Up Agreement and/or delaying the delivery of Lock UP Agreements until after the Plaintiffs stock had been re-acquired by VITACOST (v) Inducing Plaintiffs to send a request to VITACOST in writing soliciting the repurchase of their shares (vi) Failing to present the Stock Purchase Agreement to Plaintiffs ever prior to the execution of the

Agreement in a rushed meeting at the end of the day at Defendants offices taking advantage of the **elderly** Plaintiff's infirmities and fear (vii) Consistently lying to Plaintiff regarding the value of the stock when the Board and the officers knew the value for accounting purposes (viii) Consistently withholding the estimate of share price range from SEC registration filings, until after the Plaintiffs VITACOST stock was acquired by Defendants.

185. The foregoing actions of Defendants constitutes a direct violation of [F.S. §517.301](#) by Defendants by actions which knowingly and intentionally used scheme and artifice and concerted actions in order to defraud Plaintiff of their property by material misstatements, omissions, misrepresentations and lies to induce Plaintiffs to sell their stock to VITACOST.

186. Plaintiffs have suffered damages in the amount of Four Million Three Hundred Thousand and No/100 (\$4,300.000) Dollars, plus interest from Defendants actions, the difference between the price paid to Plaintiffs and the Price the stock was sold for publicly 4 months later in connection with VITACOST going public.

187. Defendant actions constitute intentional misconduct such that pursuant to [F.S. §768.72](#) in that Defendants through its officers and agent had actual knowledge of the wrongfulness of their conduct and that there was a high probability of injury and damage to Plaintiffs, yet Defendants pursued this course of action. The actions were knowingly condoned and ratified by the Corporation and its Directors who knew or should have known of the wrongfulness of their actions.

WHEREFORE based on the above, Plaintiffs demand judgment for damages against Defendants and Officers and Directors individually for compensatory damages of Four Million Three Hundred Thousand (\$4,300,000.00) plus punitive damages of Twelve Million Nine Hundred Thousand and NO/100 Dollars (\$12,900,000) plus attorneys fees, costs and interest.

COUNT III FRAUD IN THE INDUCEMENT AGAINST ALL DEFENDANTS

188. Plaintiffs re-allege paragraphs 1-144, as if fully set forth herein.

189. Through intentional misrepresentation, concealment of material facts, lies, omission of material facts, and deceit, Defendants with wanton disregard for the law committed fraud and induced the **elderly**, unsophisticated Plaintiffs to execute a STOCK PURCHASE AGREEMENT.

190. Defendants took advantage of Plaintiffs and used the information that Plaintiffs were desperate and had suffered a severe **financial** loss to commit a fraud in the inducement.

191. Defendants either omitted facts or made willful misrepresentations to Plaintiffs, by and through it BOARD Directors and administrative staff, as to the fair market value of the shares that were held in the name of Plaintiffs.

192. Defendants through an intentional concealment of material facts, never disclosed after aborting the June 26, 2006 and March 19, 2007 Lock-up Agreements that a third Lock-up Agreement was forthcoming. This intentional omission of a material fact was largely responsible for the ill-fated exercising of the STOCK PURCHASE AGREEMENT by Plaintiffs.

193. Had Defendants sent a third Lock-up Agreement to Plaintiffs, Defendants would not have been able to perpetrate the fraud because the Plaintiffs would be aware that an IPO was forthcoming.

194. Defendants employed a consistent planned scheme to defraud the Plaintiffs into selling their VITACOST stock to Defendants, including but not limited to the actions set forth in the foregoing paragraphs but also specifically including (i) Allowing GORSEK to be elected a DIRECTOR of VITACOST in contravention of SEC orders which sent the message that VITACOST would not be going public in April 2008 (ii) Failing to provide honest and complete answers to Plaintiffs repeated requests for the valuation of their stock (iii) Failing to inform Plaintiffs that VITACOST had already engaged specific underwriters prior to the entry of the Stock Purchase Agreements and failing to inform Plaintiffs that the VITACOST would be

immediately going Public for an amount approximately 10 times the purchase price in the Stock Agreement, material omission (iv) Failing to present Plaintiffs with a Lock Up Agreement and/or delaying the delivery of Lock UP Agreements until after the Plaintiffs stock had been re-acquired by VITACOST (v) Inducing Plaintiffs to send a request to VITACOST in writing soliciting the repurchase of their shares (vi) Failing to present the Stock Purchase Agreement to Plaintiffs ever prior to the execution of the Agreement in a rushed meeting at the end of the day at Defendants offices taking advantage of the **elderly** Plaintiff's infirmities and fear (vii) Consistently lying to Plaintiff regarding the value of the stock when the Board and the officers knew the value for accounting purposes (viii) Consistently withholding the estimate of share price range from SEC registration filings until after the Plaintiffs VITACOST stock was acquired by Defendants.

195. Defendants misrepresented the **financial** condition of VITACOST on May 4, 2009 and lead Plaintiffs to believe that VITACOST was experiencing **financial** difficulties. This misrepresentation of a material fact was largely responsible, among other things, for the ill-fated exercising of the STOCK PURCHASE AGREEMENT by Plaintiffs because Plaintiffs feared for further loss of the value of their shares due to VITACOST **financial** problems reported by Defendants. VITACOST in fact was enjoying record sales.

196. Defendants provided false information at the April 14, 2008 Annual Stockholders Meeting when they informed Plaintiffs that VITACOST would not be going public, but instead might be sold privately. This misrepresentation of a material fact was largely responsible, among other things, for the fraudulently induced decision to exercise the STOCK PURCHASE AGREEMENT by Plaintiffs.

197. On May 4, 2009, Defendants knowingly provided a false "estimate of the fair market value" of \$1.25 in the STOCK PURCHASE AGREEMENT when they knew that the true price was \$12.00; thereby grossly misrepresenting the share price reported to Plaintiffs. The deliberate, malicious actions intentionally misrepresented a material fact.

198. At all times during the 12 years that Plaintiffs were investors, Defendants knew the estimate of the fair market value or price range of the shares and intentionally lied, misrepresented, omitted material facts and perpetrated a fraudulent scheme and conspiracy in furtherance of the security fraud.

199. The combination of these illegal acts caused Plaintiffs to sell their shares after 12 years of supporting the Company for 10 times less the shares worth causing considerable damage to the frail, **elderly** and infirm Plaintiffs during their twilight years.

200. Defendants' actions in making false and material misrepresentations were willful, wanton, malicious, and intentional in nature leading to a fraudulent inducement for Plaintiffs to execute the STOCK PURCHASE AGREEMENT.

201. Plaintiffs relied on the misrepresentations, lies, misstatements, omitted information and concealed material facts in arriving at the incorrect decision to relinquish their shares at a false estimate of the fair market value approximately 10 times less than their worth causing damage in excess of \$4,300,000.

202. Defendants perpetrated a dangerous, intentional fraud on the **elderly** Plaintiffs who were at the mercy of a convicted violator of SEC laws in reckless disregard of Federal sanctions in furtherance of the fraud, deceit misrepresentation of material facts, conspiracy and omission of material facts resulting in intentional fraudulent inducement.

203. Plaintiffs suffered and continue to suffer injury as a result of Plaintiffs' reliance upon the misrepresentations of material facts, false statements, and the intentional omissions of materia facts causing Plaintiffs to lose more than \$4,300,000 of their earned investment returns.

204. At all times during the repurchase of their shares, Plaintiffs believed that (1) VITACOST was suffering **financially** and the value of Plaintiffs' shares would decrease further in the future, (2) the Defendants had given the true share price based on the fair market value, and (3) the trust and confidence in VITACOST, its BOARD and Directors was warranted based on

their long standing personal relationship, the VITACOST code of Conduct and the duty of good faith and fair dealing between Officers, Directors and Shareholders.

205. But for the misstatements, intentional omission of materials facts, factual misrepresentations, deceit false statements and unlawful schemes of Defendants, Plaintiffs would not have executed the STOCK PURCHASE AGREEMENT that caused them an economic loss in excess of \$4,300,000.

206. Defendants intentionally misled Plaintiffs in order to defraud Plaintiffs out of their Property. Plaintiffs reliance on the Officers and Directors of VITACOST was actual and reasonable under the circumstances and such reliance caused significant damage to Plaintiffs to the benefit of Defendants which was the intention of the Defendants.

207. Defendant actions constitute intentional misconduct such that pursuant to [F.S. §768.72](#) in that Defendants through its officers and agent had actual knowledge of the wrongfulness of their conduct and that there was a high probability of injury and damage to Plaintiffs, yet Defendants pursued this course of action. The actions were knowingly condoned and ratified by the Corporation and its Directors who knew or should have known of the wrongfulness of their actions.

WHEREFORE based on the above, Plaintiffs demand judgment for damages against Defendants and Directors and Officers individually, compensatory damages of Four Million Three Hundred Thousand (\$4,300,000.00) plus punitive damages of Twelve Million Nine Hundred Thousand and NO/100 Dollars (\$12,900,000) plus attorneys fees, costs and interest.

COUNT IV - UNJUST ENRICHMENT AGAINST DEFENDANT VITACOST

208. Plaintiffs re-allege paragraphs 1-143.

209. The Plaintiff in reliance on the fraudulent actions of the Defendants entered into a Stock Purchase Agreement to sell their shares in VITACOST.

210. The Defendants through their officers and Directors were well aware that they were receiving stock valued at Four Million Eight Hundred Thousand and No/100 Dollars (\$4,800,000.00) from Plaintiffs for only Five Hundred Thousand and no/100 Dollars (500,000.00).

211. Defendant VITACOST has retained the benefit of such transaction and has sold shares equivalent to Plaintiff's shares for Four Million Eight Hundred Thousand and No/100 Dollars (\$4,800,000) within 4 months of fraudulently acquiring said shares from Plaintiffs.

212. This transaction directly benefited VITACOST and its remaining shareholders.

213. The circumstances and fraud perpetrated on Plaintiff by Defendants make it inequitable and unconscionable for Defendant VITACOST to retain the benefit without paying fair value for it.

214. From June 20, 2007 to July 28, 2009¹ Defendants intentionally concealed the estimate of the fair market value or share price range in violation of Rule 430A in SEC public documents filings.

215. Defendants simply omitted the estimate of the fair market value or share price range in SEC filings to deprive the market and Plaintiffs of the estimate of the fair market value or price range needed to make an informed decision.

216. The misrepresentation about the Company's **financial** condition made Plaintiffs fear for the **financial** safety of their investment since Plaintiffs relied on information from Defendants in making decisions regarding selling of their shares.

The Defendants knew the information was false and that the Plaintiffs would be damaged by their acts of deception, misrepresentation and concealment of material facts.

217. At all times during the intentional fraudulent acts committed by Defendants, Plaintiffs relied on the misstatements, deceptions, intentional omission of materials facts, factual misrepresentations, false statements and unlawful schemes in executing the STOCK PURCHASE AGREEMENT.

218. But for the misstatements, intentional omission of materials facts, factual misrepresentations, deceit, false statements and unlawful schemes of Defendants, the Plaintiffs would not have executed the STOCK PURCHASE AGREEMENT that caused them an economic loss in excess of \$4,300,000.

219. Had the Plaintiffs known that the true value of the shares was \$12.00 or the range was \$11-\$13, they would not have entered into a repurchased of their stocks at \$1.25 per share and Defendant VITACOST has been unjustly enriched in the difference between the Stock Purchase Agreement Price and the Price VITACOST went public at, \$12.00 per share.

220. Defendant actions constitute intentional misconduct such that pursuant to [F.S. §768.72](#) in that Defendants through its officers and agent had actual knowledge of the wrongfulness of their conduct and that there was a high probability of injury and damage to Plaintiffs, yet Defendants pursued this course of action. The actions were knowingly condoned and ratified by the Corporation and its Directors who knew or should have known of the wrongfulness of their actions.

WHEREFORE based on the above, Plaintiffs demand judgment for damages against Defendant VITACOST, compensatory damages of Four Million Three Hundred Thousand (\$4,300,000.00) plus punitive damages of Twelve Million Nine Hundred Thousand and NO/100 Dollars (\$12,900,000) plus attorneys fees, costs and interest.

COUNT V-BREACH OF FIDUCIARY DUTY OWED TO SHAREHOLDERS AGAINST ALL DEFENDANTS

221. Plaintiffs re-allege paragraphs 1- 144.

222. The Officers and Directors of VITACOST owed the shareholders a fiduciary duty of good faith and fair dealing.

223. Defendants breached their duty of good faith and fair dealing to their minority shareholders by, (i) inducing the Plaintiffs to send a letter asking VITACOST to sell their shares, lying about the value of the VITACOST shares, (ii) offering to purchase the shares for a ridiculously low valuation when the Company was preparing to go public, lying about VITACOST's intention to go public, (iv) placing GORSEK on the Board in April 2008 (which would prevent VITACOST from going public), (v) failing to provide a **financial** statement for FYE 2008, (vi) failing to provide Lock Up Agreement to Plaintiffs and misrepresenting the **financial** condition of VITACOST, all in an effort to defraud Plaintiffs out of the value of their assets.

224. Defendants, individually and through VITACOST and its Officer created a carefully constructed scheme to convince the Plaintiffs to sell their shares for a fraction of their worth causing initially Four Million Three Hundred Thousand in damages (\$4,300,000). But for the deception, misstatements, intentional omission of materials facts, factual misrepresentations, deceit, false statements and unlawful schemes of Defendants, constituting a breach of Defendants duty of good faith and fair dealing, Plaintiffs would not have executed the STOCK PURCHASE AGREEMENT that caused them an economic loss in excess of \$4,300,000.

225. Defendant actions constitute intentional misconduct such that pursuant to [F.S. §768.72](#) in that Defendants through its officers and agent had actual knowledge of the wrongfulness of their conduct and that there was a high probability of injury and damage to Plaintiffs, yet Defendants pursued this course of action. The actions were knowingly condoned and ratified by the Corporation and its Directors who knew or should have known of the wrongfulness of their actions.

WHEREFORE based on the above, Plaintiffs demand judgment for damages against Defendants for compensatory damages of Four Million Three Hundred Thousand (\$4,300,000.00) plus punitive damages of Twelve Million Nine Hundred Thousand and NO/100 Dollars (\$12,900,000) plus attorneys fees, costs and interest.

**COUNT VI - FRAUDULENT INDUCEMENT OF THE EXCULPATORY CLAUSE AND ARBITRATION
PROVISION OF THE STOCK PURCHASE AGREEMENT AGAINST ALL DEFENDANTS**

226. Plaintiff re-alleges paragraphs 1 - 144.

227. The exculpatory clause included in the Stock Purchase Agreement was planned to escape punishment for future misconduct of securities fraud. At all times, since his conviction in August, 2002 See **Exhibit 14**, GORSEK set on a course to disregard the Order of the U.S. District Court of Central Illinois and continue his illegal acts to defraud the public.

228. Instead of following the 2002 Court Order, GORSEK solicited investments for his penny stock Company in preparation to take VITACOST public. This action was in blatant violation of the Federal Court order and SEC sanctions.

229. In violation of SEC and Federal Court sanctions GORSEK, plotted and conspired with others to grow his penny stock business, VITACOST until such time as his Company was “ripe” to go public.

230. On June 21, 2006, as Chairman of the VITACOST BOARD and majority stockholder. GORSEK sent a Lock-up Agreement to Plaintiffs and other investors he solicited as a requirement of taking his Company public. This action was in violation of the prior Federal Court order.

231. Sometime in the third or fourth quarter of 2006, as Chairman of the VITACOST BOARD and majority stockholder, GORSEK sought permission from SEC for his penny stock company to go public in blatant disregard and violation of the his Federal sanctions. Apparently the SEC was not initially aware of GORSEK's Federal conviction and sanctions that prohibited him from taking a penny stock company public.

232. GORSEK was in a superior position to the unsophisticated **elderly** Plaintiffs and general public inasmuch as he had intimate knowledge of an exculpatory clause as part of the defense available in escaping punishment for security fraud since he had previously violated securities laws.

233. The exculpatory clause incorporated in the repurchase agreement was planned by GORSEK and the VITACOST Directors as a means to escape punishment for a future premeditated illegal act, obtaining Defendants shares fraudulently and reselling such shares at a greatly inflated price.

234. At all times since he took his Company public in violation of the Court order GORSEK's whereabouts have been unknown.

235. It is well established that unscrupulous security dealers prey on the **elderly** and often target them as easy marks for security fraud.

236. GORSEK knew of the increasingly frail conditions of the **elderly** Plaintiffs from 1997 to May 4, 2009 when the fraudulent STOCK PURCHASE AGREEMENT was presented.

237. GORSEK was acutely aware of the vulnerability of the Plaintiffs to **elderabuse** and fraud.

238. With malice aforethought and complete disregard for the law, GORSEK targeted the **elderly** Plaintiffs for security fraud.

239. Through a well-planned conspiracy, GORSEK and the Defendants embarked upon a 10- year pattern of misconduct intended to cause harm to the **elderly** Plaintiffs in order to gain personal unjust enrichment for themselves and VITACOST.

240. From the inception of the IPO filing in July 20, 2007, GORSEK with the Directors of VITACOST concealed the price range of the shares in SEC filings from July 20, 2007 until August 2009 (after the redemption date of May 4, 2009) in an intentional fraudulent scheme to repurchase shares at a lower price than the fair market value from the unknowing **elderly** and disabled Plaintiffs.

241. GORSEK and the VITACOST Directors at all times knew the fair market value and price range of the shares on a yearly basis but conspired to conceal that material fact from the Plaintiffs and general public in SEC filings in violation of public policy.

242. The omission of the price range in SEC filings was an intentional fraudulent act of the overall scheme to defraud the general public and the **elderly** Plaintiffs in the future.

243. For two years, from July 20, 2007 until August 24, 2009, GORSEK and the VITACOST Directors carried out the intentional misconduct of omitting the share price range in SEC filings in furtherance of security fraud.

244. The withholding of the Lock-up Agreement from the Plaintiffs was an intentional fraudulent act of the overall scheme in the plan to defraud the **elderly** Plaintiffs in the future.

245. Incorporating the exculpatory clause in the STOCK PURCHASE AGREEMENT was designed to escape punishment for future intentional misconduct of GORSEK and the VITACOST Directors.

246. The Plaintiffs did not fully understand the far-reaching import of the exculpatory clause in the STOCK PURCHASE AGREEMENT. Much of the language was in small print, ambiguous and difficult to read.

247. GORSEK, the BOARD and the individual VITACOST Directors sold Plaintiffs' shares at 10 times more than the Plaintiffs' payout on September 24, 2009, thus intentionally committing security fraud on the **elderly** Plaintiffs.

248. The personal enrichment of GORSEK and the individual Directors and VITACOST was the premeditated motive for the Defendants to commit security fraud.

249. The exculpatory clause is void since it is well settled in Florida law that a Defendant cannot contract against future intentional misconduct.

250. GORSEK and Defendants planned in the future to intentionally engage in the misconduct of selling the Plaintiffs' shares at a known value more than 10 times the repurchase price.

251. On September 24, 2009, only four months after the May 4, 2009 STOCK PURCHASE AGREEMENT was given to the **elderly**, Defendants consummated the illegal plot and sold Plaintiffs' shares.

252. The Plaintiffs did not know that the share price in the STOCK PURCHASE AGREEMENT was fraudulent at the time of execution.

253. Plaintiffs never know of the price range or fair market value of their shares prior to repurchase since these material facts had been intentionally concealed by the Defendants in spite of numerous requests for the information.

254. GORSEK and Defendants had a fiduciary duty to inform Plaintiffs of the true price range and fair market value of their shares prior to repurchase.

255. GORSEK and Defendants had a fiduciary duty to provide Plaintiffs with a Lock-up Agreement prior to the IPO which would have prevented the Plaintiffs from executing the STOCK PURCHASE AGREEMENT.

256. At all times, Defendants knew the STOCK PURCHASE AGREEMENT to be fraudulent.

257. GORSEK and Defendants had a moral, legal and fiduciary duty not to include an exculpatory clause in an agreement that they knew to be fraudulent.

258. GORSEK and Defendants had a fiduciary duty not to include an exculpatory clause in an agreement since they knew they would engage in intentional misconduct in the future. When the exculpatory clause was incorporated in the STOCK PURCHASE AGREEMENT, GORSEK and the Defendants knew that the share price in the STOCK PURCHASE AGREEMENT was fraudulent.

259. When the exculpatory clause was incorporated in the STOCK PURCHASE AGREEMENT, GORSEK and the Defendants intended to unjustly enrich themselves and escape punishment for future intentional misconduct.

260. When the exculpatory clause was incorporated in the STOCK PURCHASE AGREEMENT, GORSEK and the Defendants intended to damage the Plaintiffs.

261. When the exculpatory clause was incorporated in the STOCK PURCHASE AGREEMENT, GORSEK and the Defendants knew that the exculpatory clause was fraudulent.

262. The exculpatory clause should be declared void as a matter of public policy, particularly in matters such as the present case which involve public companies and public investment.

263. Defendants fraudulently induced Plaintiffs to execute the Arbitration Clause in the STOCK PURCHASE AGREEMENT that required JAMS use exclusively. (Exhibit 1, 2)

264. The Arbitration Clause is unenforceable because it fails on the grounds of both Procedural Unconscionability and Substantive Unconscionability.

265. Inclusion of an Arbitration Clause as a means of escaping punishment for future misconduct renders the Arbitration Clause null and void.

266. The Arbitration Clause itself is fraudulent because it was used to hide future misconduct by limiting discovery and punishment available through the court system.

267. Defendants knew that JAMS arbitration would limit discovery and therefore work in their favor to prevent the Plaintiffs from obtaining the documents necessary to show that Defendants knew the fair market value when they fraudulently induced Plaintiffs to execute the repurchase and accept a lower value.

268. Limited Discovery in this case where the majority shareholder/promotor/director/CEO GORSEK has engaged in a pattern of illegal activity would unconscionably be unfair to Plaintiffs

269. The **elderly** Plaintiffs had no previous knowledge of JAMS or rules regarding arbitration.

270. The **elderly** Plaintiffs could not read the clauses and therefore, did not understand the legal phrases regarding the Arbitration Clause.

271. The inclusion of the Arbitration Clause was a well planned scheme and an integral part of the overall security fraud perpetrated on the **elderly** Plaintiffs to hide their role in intentional future misconduct.

272. Defendant knew that the STOCK PURCHASE AGREEMENT contained provisions regarding the Arbitration Clause that were procedurally and substantively unconscionable.

273. As to Procedural Unconscionability, the Arbitration Clause requires the Plaintiffs to resolve disputes by the exclusive use of the JAMS/Endispute Company that does not have a Florida location making it impossible for the **elderly** Plaintiffs to travel to California, Washington, D.C., Washington State, Pennsylvania, Texas or the other states where JAMS Resolution Centers are located to resolve this case

274. As to Procedural Unconscionability, the JAMS/Endispute Company requires the parties to agree to 14 single pages of onerous rules that were not attached to the STOCK PURCHASE AGREEMENT; therefore, it was impossible to agree to them with informed consent.

275. As to Procedural Unconscionability, the 14 pages of JAMS rules are in small print, difficult to read and contain legalize that requires an attorney to interpret. These onerous terms and those stated before render the Arbitration Clause Procedurally Unconscionable.

276. As to Procedural Unconscionability, the Defendants did not explain the JAMS rules during the execution of the STOCK PURCHASE AGREEMENT; therefore **elderly** Plaintiffs had no idea of what they would be agreeing to in the future.

277. As to Procedural Unconscionability, STANLEY ALEXANDER had difficulty reading the small print of the Arbitration Clause due to his glaucoma.

278. Because of her headache caused by hypertension and stress, FLORENCE ALEXANDER, 71 years old, could not read the Arbitration Clause.

279. STANLEY ALEXANDER, 81 years of age, signed the Arbitration Clause while he was exhausted from a several hundred car ride at the end of the business day. STANLEY ALEXANDER did not have his glasses or magnifying glass and could not read much of the Arbitration Clause in the STOCK PURCHASE AGREEMENT. The meeting was less than an hour and there was insufficient time to thoroughly read the documents since the office was closing.

280. Because of the Plaintiffs' infirmities due to age and lack of legal training, the Arbitration Clause was difficult to understand. No explanation was given or any time allowed to rescind any actions taken that day.

281. No Plaintiffs' attorney was present during the meeting with whom the **elderly** Plaintiffs could confer.

282. The bargaining powers were unequal during the signing of the Arbitration Clause in the STOCK PURCHASE AGREEMENT because Defendants were the only ones who knew the fair market value.

283. Plaintiffs could not obtain an attorney due to the late hour in the out-of-town location.

284. Florida Courts consider the procedural unconscionability to be very important in enforcing arbitration clauses and refused to enforce an arbitration clause where the bargaining is uneven and no negotiations are possible, particularly as in the present case where the arbitration clause was presented on a "take it or leave it basis" and Plaintiffs had no reasonable opportunity to bargain with Defendants or participate in the drafting of the Agreement. Florida Courts find such Arbitration clauses to be unconscionable.

285. The Arbitration Clause fails due to the above Procedural Unconscionability.

286. The Arbitration Clause fails due to Substantive Unconscionability as stated below, in the instant case JAMS Rules and Procedures state:

“NOTICE: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to arbitration as the rules for that arbitration. If they are being used as the rules for arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials please contact JAMS at 949-224-1810.”

Based on the above statements, the Defendants had to receive permission from JAMS to include the JAMS' rules in the STOCK PURCHASE AGREEMENT -there is no showing of evidence that this was done.

287. Since all attempts to obtain the fair market value known by the Defendants before the execution of the STOCK PURCHASE AGREEMENT failed, the best means to obtain hidden documents to prove what the Defendants' knew and when they knew it would be required discovery in a court of law where they face immediate punishment for noncompliance not available through the arbitration system.

288. The use of an Arbitrator who is restricted by predetermined limits on discovery of the exclusive private company selected by the Defendants will put the Plaintiffs at an unfair disadvantage. The Plaintiffs have claimed fraud in the inducement lead by a person previously convicted of security fraud; therefore, the need to hide documents is greater than in the normal course of a civil suit claiming security fraud due to the potential of a criminal inquiry, indictment and second conviction. The criminal background of the lead Defendant requires the highest level of discovery that can be accorded. The restrictive language in the JAMS rules deprives the Plaintiffs of rights available in Florida courts.

289. Because of the egregious Substantive Unconscionability, the Arbitration Clause is unenforceable.

290. As this action involves securities and the sale and purchase of securities in a now public company, the exculpatory clause and the arbitration clause are unenforceable as matter of public policy, as should be void particularly in the case of securities sales.

291. Defendants in filing their prior Motions to Dismiss have waived any right to enforce the Arbitration provision and have allowed this matter to proceed.

WHEREFORE PLAINTIFFS seek an order declaring the Exculpatory Clause and the Arbitration Clause null and void and of no effect.

PLAINTIFF DEMANDS A JURY TRIAL ON ALL ISSUES.

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Footnotes

- [1](#) Form S-1 Registration Statement filed June 20, 2007
Form S-1 Response from SEC dated July 19,2007: "We note a number of blank spaces throughout your Registration Statement for information that you are not entitled to omit under Rule 430A such as the anticipated price range and information based on a bona fide estimate of public offering within that range"
1. SEC Amendment # 1- no price range information filed August 10, 2007 **SEC continued to ask for price**
 2. SEC Amendment # 2 - no price range information filed September 18, 2007 SEC continued to ask for price
 3. SEC Amendment # 3 - price range information filed June 12, 2009 SEC continued to ask for price
 4. SEC Amendment #4 - no price range information filed July 28, 2009 SEC continued to ask for price
 5. SEC Amendment # 5 - provided price range information of \$11-\$13,filed August 24, 2009 after intentionally providing misinformation to the Plaintiffs. 35

End of Document

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