

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
THE HONORABLE ROGER M. YOUNG, SR.

Appellate Case No.: 2020-000232

Charleston Laboratories, Inc.,

vs.

Womble, Carlyle, Sandridge & Rice, LLP,

RECORD ON APPEAL

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Invoice No.: 4686109
Re: Dr. Raymond Takigiku
Matter No.: 155480.010200

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Description of Expenses Billed:

<u>DATE</u>	<u>DESCRIPTION</u>		<u>AMOUNT</u>
11/24/17	GT Imaging Invoice 20171124-5492-1 Dated 11/24/17 - Re: Charleston_Takigiku (Relativity Hosting)	\$	370.44
11/24/17	GT Imaging Invoice 20171124-5492-1 Dated 11/24/17 - Re: Charleston_Takigiku (Relativity User Fees)	\$	75.00
		Total Expenses:	\$ 445.44

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	DEFENDANT WOMBLE, CARLYLE,
vs.	)	SANDRIDGE & RICE, LLP'S MOTION
	)	FOR SUMMARY JUDGMENT
Womble, Carlyle, Sandridge & Rice,	)	
LLP,	)	
	)	
Defendant.	)	
	)	

Defendant Womble, Carlyle, Sandridge & Rice, LLP (“Womble”) moves pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an Order granting summary judgment in its favor as to Plaintiff Charleston Laboratories, Inc.’s (“Charleston Labs”) Complaint on the ground that there are no genuine issues of material fact and Womble is entitled to judgment as a matter of law.

As is set forth in detail in Womble’s supporting memorandum, the Court should grant this motion for the following reasons:

1. Charleston Labs’ cause of action for legal malpractice fails as a matter of law because Charleston Labs is collaterally estopped from contending in this action that the agreements drafted by Womble were ambiguous, in conflict, did not work as intended, or were otherwise deficient, or that Womble failed to properly advise Charleston Labs about how to exercise its rights thereunder.
2. Charleston Labs’ cause of action for legal malpractice fails as a matter of law because Charleston Labs is judicially estopped from contending in this action that the agreements drafted by Womble were ambiguous, in conflict, did not work as intended, or were

otherwise deficient, or that Womble failed to properly advise Charleston Labs about how to exercise its rights thereunder.

3. Charleston Labs' cause of action for legal malpractice fails because Womble did not breach any duties owed to Charleston Labs as a matter of law.
4. Charleston Labs' cause of action for legal malpractice fails as a matter of law because the claim is barred by the statute of limitations.

In support of its motion, Womble relies upon the memorandum of law submitted with this motion, along with case law, statutory law, and any documents or affidavits which may be submitted prior to the hearing.

ROBINSON GRAY STEPP & LAFFITTE, LLC

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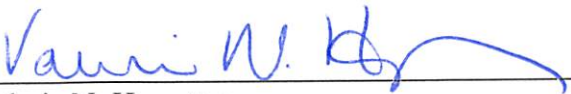
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>CERTIFICATE OF SERVICE</u>
Womble, Carlyle, Sandridge & Rice,	)	
LLP,	)	
	)	
Defendant.	)	
	)	

I, the undersigned legal assistant of the law offices of Robinson Gray Stepp & Laffitte, LLC, attorneys for Defendant Womble, Carlyle, Sandridge & Rice, LLP, do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Document: Motion for Summary Judgment

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August 19, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	DEFENDANT WOMBLE, CARLYLE,
vs.	)	SANDRIDGE & RICE, LLP'S
	)	MEMORANDUM IN SUPPORT OF
Womble, Carlyle, Sandridge & Rice,	)	MOTION FOR SUMMARY
LLP,	)	JUDGMENT
	)	
Defendant.	)	
	)	

Pursuant to Rule 56(c), SCRCP, Defendant Womble, Carlyle, Sandridge & Rice, LLP (“Womble”) seeks an order granting summary judgment in its favor as to Charleston Laboratories, Inc.’s (“Charleston Labs”) legal malpractice claim. Charleston Labs’ claim against Womble fails as a matter of law because (1) Charleston Labs is collaterally estopped from contending in this action that the agreements drafted by Womble were ambiguous, in conflict, did not work as intended, or were otherwise deficient, or that Womble failed to properly advise Charleston Labs about how to exercise its rights thereunder; (2) Charleston Labs is judicially estopped, due to positions it took in federal court in Florida, from contending in this action that the agreements drafted by Womble were ambiguous, in conflict, did not work as intended, or were otherwise deficient, or that Womble failed to properly advise Charleston Labs about how to exercise its rights thereunder; (3) Womble did not breach any duties owed to Charleston Labs as a matter of law; and (4) Charleston Labs’ claim is barred by the statute of limitations.

UNDISPUTED FACTS

This is a legal malpractice case. Charleston Labs alleges attorneys at Womble committed legal malpractice in drafting certain agreements for Charleston Labs and in assisting Charleston

Labs in exercising its rights under those agreements. This motion is based on the following undisputed facts.¹

Paul Bosse (“Bosse”), Ryan Baker (“Baker”), and Chris Goodwin (“Goodwin”) founded Charleston Labs in June 2007 as a “start-up pharmaceutical company . . . dedicated to the development of drugs which reduce opioid induced nausea and vomiting.” **Ex. B.** (Compl. ¶¶ 5-7). Bosse contacted Dean Rutley (“Rutley”), an attorney with Womble, for assistance in raising capital for the company. **Ex. B.** (Compl. ¶ 8). At Bosse’s request, Womble also incorporated Charleston Labs and prepared by-laws for the company. **Ex. A.** (Certificate of Incorporation and By-Laws).

When Charleston Labs was formed, the company consisted of three shareholders: Bosse, Baker, and Goodwin. **Ex. B.** (Compl. ¶ 7). Thereafter, in 2008, Charleston Labs hired three additional employees: Raymond Takigiku (“Takigiku”), Bernard Schachtel (“Schachtel”), and John Ameling (“Ameling”). **Ex. B.** (Compl. ¶ 12). Takigiku, Schachtel, and Ameling also became stockholders in the company. **Ex. B.** (Compl. ¶ 13). Collectively, Bosse, Baker, Goodwin, Takigiku, Schachtel, and Ameling were the “Founding Stockholders” of Charleston Labs. **Ex. B.** (Compl. ¶ 13).

Charleston Labs asked Womble to prepare documents that would reflect the ownership structure of Charleston Labs and that would “govern the relationships by and amongst the shareholders while they were employees with Charleston Labs and if their association with Charleston Labs terminated.” **Ex. B.** (Compl. ¶ 14). According to Charleston Labs, the company “sought a set of documents that would extend ownership to . . . Ameling, Schachtel,

¹ For purposes of this motion, the court can accept the factual allegations of Charleston Labs’ pleadings as true. In the event this motion is denied, however, Womble reserves the right to dispute those facts.

and Takigiku, while at the same time restricting the marketability and transferability of their shares until such time as they had achieved sufficient tenure with the company or in the event that their employment with Charleston Labs terminated.” **Ex. B.** (Compl. ¶ 17).

Rutley advised Charleston Labs that a Stock Restriction Agreement (“SRA”) would accomplish Charleston Labs’ objectives with respect to the new employee-shareholders. **Ex. B.** (Compl. ¶ 19). Rutley and David Baddour (“Baddour”), another Womble attorney, drafted the SRA. **Ex. C.** (Stock Restriction Agreement). The SRA was between Charleston Labs and the three new employees (Ameling, Schachtel, and Takigiku). **Ex. C.** Under the SRA, Charleston Labs could repurchase the employee’s shares in the company if the employee resigned or was terminated for cause. **Ex. C.** The right to repurchase under the SRA was subject to a vesting schedule that over time decreased the number of shares Charleston Labs could repurchase. **Ex. C.** The repurchase price under the SRA was \$.01 per share. **Ex. C.**

At around the same time, a potential Charleston Labs investor suggested to Bosse that the company should also have an agreement among all the shareholders. The potential investor presented a proposed Stockholders Agreement (“SHA”) to Charleston Labs, which Bosse provided to Womble. **Ex. D.** (Landmark email to Bosse attaching the SHA). Womble revised the SHA at Bosse’s request. **Ex. E.** (Email from Bosse to Baddour requesting Baddour to revise the SHA). The SHA was an agreement among all six stockholders (including the three who were not parties to the SRA) and Charleston Labs. **Ex. F.** (Stockholders Agreement). Under the SHA, Charleston Labs had the right to repurchase “any or all” shares held by a stockholder if that individual ceased to be an employee of the company “for any reason.” **Ex. F.** The price for shares purchased pursuant to the SHA was “fair value,” as determined by the Charleston Labs Board of Directors. **Ex. F.**

In May 2008, Takigiku, as a new employee and shareholder of Charleston Labs, was issued 210 shares of common stock in the company. **Ex. G.** (Takigiku's 210 Share Stock Certificate). Takigiku signed both the SRA and the SHA at the same time. **Ex. C.;** **Ex. F.** Charleston Labs issued Takigiku a stock certificate, the reverse of which indicated that his shares were subject to repurchase rights contained in both the SRA and the SHA. **Ex. G.** In September 2008, Takigiku's 210 shares were converted to 420,000 by a forward split of the Charleston Labs' stock. **Ex. H.** (Takigiku's 420 Share Stock Certificate). Charleston Labs issued Takigiku a new stock certificate, which again noted that his stock was subject to the terms of both the SRA and the SHA. **Ex. H.**

In March 2010, Charleston Labs terminated Takigiku's employment with the company. **Ex. I.** (Termination Letter). On March 19, 2010, the company sent Takigiku a letter drafted by Baddour informing him of his termination for cause. **Ex. I.** On March 22, 2010, Bosse, as the sole member of Charleston Labs' Board of Directors, determined the Fair Value of Takigiku's shares pursuant to the SHA to be \$.000005 per share (fully diluted), for a total value of \$2.10. **Ex. J.** (3/22/2010 Board Meeting Minutes). This was the equivalent of the \$.01 per share par value of the 210 shares as originally issued. By letter dated March 26, 2010, the company sent Takigiku a check for \$2.10 to repurchase all his shares under the SHA. **Ex. K.** (3/26/10 Letter to Takigiku). Womble reviewed and approved a draft of the March 26 letter. **Ex. B.** (Compl. ¶¶ 48-49).

In September 2015, more than five years after his termination, Takigiku (through counsel) claimed he was still a shareholder in the company and demanded to inspect the books and records of Charleston Labs. **Ex. L.** (9/22/15 Demand Letter). Charleston Labs denied that Takigiku was a shareholder and refused his demand. **Ex. M.** (George Scott's email response to

Demand Letter). In November 2015, Charleston Labs filed a declaratory judgment lawsuit in Florida state court, which was then removed to the United States District Court for the Southern District of Florida, seeking an order that Charleston Labs had repurchased all Takigiku's shares and that Takigiku was no longer a shareholder of the company. **Ex. N.** (Third Amended Complaint for Declaratory Relief). Approximately ten months after Charleston Labs filed suit, the court granted summary judgment in Charleston Labs' favor. The court found the SHA and SRA were not ambiguous, and created concurrent rights in Charleston Labs to repurchase the shares. **Ex. O.** (Order on Motions for Summary Judgment). The court further found Charleston Labs "materially complied with all the requirements of the SHA in exercising its repurchase rights." *Id.* at 9-14. Takigiku appealed the summary judgment order, and while the appeal was pending, Takigiku and Charleston Labs entered into a settlement pursuant to which Charleston Labs paid Takigiku \$250,000 for a release of claims. **Ex. P.** (Settlement Agreement and Release dated 1/13/2017).

Charleston Labs then brought this legal malpractice case against Womble, alleging negligence by Womble because the SRA and SHA were ambiguous and unclear and because Womble failed to advise Charleston Labs how properly to exercise its right to repurchase Takigiku's shares under those agreements. Charleston Labs makes these allegations in the present case despite having taken exactly the opposite positions in the Florida litigation; despite having prevailed in the Florida litigation; and despite the order of the Florida court holding directly to the contrary of the present allegations. Not only are Charleston Labs' claims barred by collateral and judicial estoppel, the undisputed evidence shows that Womble did not breach any duty to Charleston Labs and Charleston Labs did not file its claim in a timely manner.

For the reasons set forth in greater detail below, Charleston Labs' claim against Womble fails as a matter of law and Womble is entitled to summary judgment in its favor.

LEGAL STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; *Adamson v. Richland Cnty. Sch. Dist. One*, 332 S.C. 121, 124, 503 S.E.2d 752, 753 (Ct. App. 1998). "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ." *Priest v. Brown*, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct. App. 1990). "It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine." *Id.* Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRPC; *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct. App. 2001).

Applying this standard to the present case, Womble is entitled to summary judgment in its favor and the immediate end to this litigation.

ARGUMENTS

I. Charleston Labs' claim is barred by collateral estoppel.

Collateral estoppel “prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.” *Crosby v. Prysmian Communications Cables & Sys., USA, LLC*, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012) (quoting *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009)). Collateral estoppel involves issue preclusion rather than claim preclusion. Collateral estoppel prevents the relitigation of issues “regardless of whether the claims in the first and subsequent lawsuits are the same.” *Carolina Renewal, Inc. v. South Carolina Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *S.C. Prop. & Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). “While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.” *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782; *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008) (“The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action.”). “[T]he identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel.” *Carolina Renewal*, 385 S.C. at 555, 684 S.E.2d at 782.

In this case, Charleston Labs is collaterally estopped from re-litigating the issues litigated, actually determined, and necessary to support the judgment in the Florida case against Takigiku. In the Florida case, Charleston Labs contended and the court determined that the SRA and the SHA were not ambiguous; that the SRA and the SHA created concurrent rights; and that Charleston Labs validly exercised its right to repurchase all of Takigiku's shares pursuant to the SHA. **Ex. Q.** (Charleston Labs' Motion for Summary Judgment in the Florida action); **Ex. R.** (Charleston Labs' Statement of Undisputed Facts in the Florida action); **Ex. S.** (Charleston Labs' Reply to Takigiku's Response to Charleston's Motion for Summary Judgment). The federal court agreed and made the following findings as matters of law in its order granting summary judgment in favor of Charleston Labs:

- (1) "the repurchase provisions of the SHA are valid and enforceable independent of the SRA" (**Ex. O** Order on Motions for Summary Judgment p. 6.);
- (2) "there is no reasonable dispute that [Charleston Labs] complied with the SHA's repurchase procedures" (*Id.*);
- (3) "[Takigiku] never identified any ambiguity in the repurchase rights created by the [SHA and the SRA]" (*Id.* at 7.);
- (4) "Under the concurrent-rights construction, [Charleston Labs] would have the option to exercise its rights under the SHA to purchase all shares at Fair Value. Alternatively, by exercising its rights under both Agreements upon [Takigiku]'s resignation or termination for cause, [Charleston Labs] could pay only a *de minimus* amount for the Restricted Shares under the SRA and Fair Value for the Unrestricted Shares under the SHA" (*Id.*);
- (5) "[Charleston Labs] established that it materially complied with all of the requirements of the SHA in exercising its repurchase rights." (*Id.* at 9).

In this case, Charleston Labs seeks to establish facts and relitigate issues that are contrary to the issues litigated and decided in the Florida case. The doctrine of collateral estoppel

prevents that attempt. In this case, Charleston Labs alleges Womble was negligent because the SRA and the SHA were ambiguous and unclear. **Ex. B.** (Compl. ¶65). Charleston Labs also claims Womble was negligent in the advice it provided to the company concerning the exercise of its rights under those documents. *Id.* Specifically, Charleston Labs claims Womble failed to:

- (1) draft the SHA to expressly reference the SRA and which document or provisions would control in the event of a dispute between them (*Id.*);
- (2) draft the SRA to expressly reference the SHA and which document or provisions would control in the event of a dispute between them (*Id.*);
- (3) explicitly state in the SHA that Charleston Labs' rights under the SHA were concurrent with, and in no way limited by, the rights under the SRA (*Id.*);
- (4) explicitly state in the SRA that Charleston Labs' rights under the SRA were concurrent with, and in no way limited by, the rights under the SHA (*Id.*);
- (5) make clear that the "for any reason" separation language of the SHA was not limited by the "for cause" language of the SRA (*Id.*); and
- (6) advise Charleston Labs to make express reference to the agreement on which it relied at the time of Takigiku's separation from employment. (*Id.*).

Each of the elements of collateral estoppel is satisfied in this case with respect to each of those issues. First, each of the issues identified above was actually litigated and determined by the Florida court in granting summary judgment in favor of Charleston Labs. The court expressly found that the documents created concurrent rights and that Charleston Labs could exercise its rights under either agreement, thus obviating the necessity and advisability of language about which agreement would "control." The court expressly found that Takigiku, in challenging the SRA and the SHA, failed to identify any ambiguity in the documents and the

court itself found no ambiguity. The court expressly found that Charleston Labs properly exercised its right to repurchase all Takigiku's shares pursuant to the terms of the SHA, precluding the present contention that Womble's advice on that issue was deficient. It is also important to note that the court made these determination on cross motions for summary judgment, and entered its order as a matter of law based on the unambiguous language of the agreements themselves as drafted by Womble, and without any parol or other external evidence. Therefore, the first and second elements of collateral estoppel are satisfied.

Moreover, the Florida court's determination of these issues was necessary to support the judgment in favor of Charleston Labs. At issue in the Florida case was whether Charleston Labs had repurchased all Takigiku's shares in the company or whether Takigiku remained a shareholder. To make that determination, it was necessary for the court to decide whether the SRA and the SHA gave Charleston Labs the right to repurchase all Takigiku's shares and, if so, whether Charleston Labs validly exercised that right.

In support of its legal malpractice claim against Womble, Charleston Labs seeks to re-litigate issues actually and necessarily litigated and determined in the Florida case. Charleston Labs asks this Court to find that the agreements are defective because they did not reference each other and did not establish concurrent rights. Further, it asks this Court to find the letters exercising Charleston Labs' rights to repurchase the shares were deficient because they did not reference the SHA. These issues were already decided in the prior action, and cannot be relitigated here. There can be no further dispute that the agreements are clear, unambiguous, and create concurrent rights, just as was intended. The present claim for malpractice is entirely grounded on contentions that are directly to the contrary of what the Florida court has already litigated and determined. Charleston Labs is bound by those determinations, and may not now

contend otherwise. The doctrine of collateral estoppel plainly bars Charleston Labs from relitigating these issues and, as a result, Womble is entitled to summary judgment in its favor.

II. Charleston Labs' claim is barred by judicial estoppel.

“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.” *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 725 S.E.2d 676, 680 (2012) (quoting *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)); see also *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir. 1998).

It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895); see also *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 43, 577 S.E.2d 202, 208-09 (2003) (citing *Zimmerman v. Cent. Union Bank*, 194 S.C. 518, 532 8 S.E.2d 359, 365 (1940) (quoting *Davis*)). “When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477. “Judicial estoppel is invoked in these circumstances to prevent the party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process.” *Allen v. Zurich Ins. Co.*, 667 F.2d 1162 (4th Cir. 1982). Judicial estoppel, therefore, “sustains the truth-seeking function of the courts.” *Hayne*, 327 S.C. at 252, 489 S.E.2d at 477.

The elements of judicial estoppel are as follows:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

While judicial estoppel requires intentional conduct, it does not require fraud. Intentionality is necessary because “courts will not apply judicial estoppel when a party's prior position was based on inadvertence or mistake.” *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir. 1996) (quotation marks and citation omitted); *Folio v. City of Clarksburg, W.Va.*, 134 F.3d 1211, 1218 (4th Cir. 1998) (noting the doctrine requires that “the party to be estopped must have acted intentionally, not inadvertently”); *Zurich Ins. Co.*, 667 F.2d at 1167-68 (holding judicial estoppel barred a party’s arguments without finding the party fraudulently asserted different positions).

“Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion.” *Hawkins*, 353 S.C. at 43, 577 S.E.2d at 208; *see also Quinn*, 343 S.C. at 416, 540 S.E.2d at 476-77 (J. Anderson concurring) (citing *City of New York v. Black Garter*, 179 Misc. 2d 597, 599-600, 685 N.Y.S.2d 606, 607-08 (Sup. Ct. 1999) (“The doctrine rests upon the principle that a litigant ‘should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise[.]’”).

In this case, each of the elements of judicial estoppel is satisfied. Charleston Labs has intentionally taken positions in this litigation completely contrary to the positions it took in the related Florida case. The following chart illustrates the principal inconsistencies.

Charleston Labs' Position in Florida	Charleston Labs' Position in this Case
“[T]he [SHA] and the SRA are not ambiguous.” Ex. Q. (Charleston Labs’ Motion for Sum. Judg. p. 18.).	“[Womble] drafted ambiguity, confusion and conflict into the Agreement which [Womble] prepared.” Ex. B. (Compl. ¶ 33).
“Both the [SHA] and the SRA provide that they ‘supersede’ other <u>prior</u> (<u>not</u> contemporaneous) agreements relating to the matters therein.” Ex. R. (Charleston Labs’ Statement of Undisputed Facts ¶ 11.). “[T]he [SHA] and the SRA gave [Plaintiff] <u>concurrent</u> rights to repurchase the Shares, and neither obviated the other, as specifically acknowledged by Takigiku in 2008.” Ex. Q. (Charleston Labs’ Motion for Sum. Judge. p. 3). “[T]he [SHA] and the SRA must be read together, creating concurrent rights of [Plaintiff] to repurchase all or some of Takigiku’s Shares upon the occurrence of certain events for a stated price, all as set forth in the agreements, respectively.” <i>Id.</i> at p. 8-9.	“In preparing the two documents, [Womble] failed to include any language in the SRA that made reference to the SHA and integrating and explaining any inconsistent provisions or which identified which provisions would control in the event of a dispute regarding the two agreements.” <i>Id.</i> at ¶ 31.
“Following the termination of Takigiku’s employment, [Plaintiff] exercised its right under the [SHA] to repurchase all of Takigiku’s Shares for “Fair Value” (as defined and calculated in accordance with the [SHA]).” Ex. N. (Third Amended Complaint at ¶ 24.). “The argument that a reader of the Tender Letter could not determine under which agreement [Plaintiff] exercised its rights to purchase the shares is specious. . . . Takigiku was on notice that the company was exercising its rights under the SHA.” Ex. S. (Charleston Labs’ Reply to Takigiku’s Motion for Sum. Judg. p. 9.). “[Plaintiff] materially complied with the repurchase procedures set forth in the [SHA] <u>and</u> the SRA, such that it properly repurchased the Shares upon tendering \$2.10 to Takigiku. . . .” Ex. Q. (CL Motion for Sum. Judg. p. 3.). “[A]s a result of the termination of Takigiku’s	Correspondence to Takigiku reviewed and approved by Womble “failed to make reference to either the SHA or SRA” and Womble “failed to advise [Plaintiff] of the importance of making clear which Agreement was being utilized for purposes of determining Takigiku’s post-employment ownership rights.” <i>Id.</i> at ¶ 49.

employment, and the repurchase by [Plaintiff] of the Shares, Takigiku was no longer a shareholder of [Plaintiff] as of March 26, 2010, and has not been a shareholder of [Plaintiff] since at the latest March 26, 2010.” Ex. N. (Third Amended Complaint at ¶ 27.).	
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Charleston Labs was successful in maintaining its positions in the Florida action and benefitted from the positions it took in that case as evidenced by the summary judgment order entered in its favor. It may not now change its tune in order to pursue a claim against Womble.

Moreover, this is not a case in which the inconsistent positions taken by Charleston Labs are the result of inadvertence or mistake. In an effort to prevail in both this case and in the Florida case, Charleston Labs is intentionally advocating inconsistent positions, which is exactly what the well-established law of judicial estoppel prohibits. Charleston Labs cannot now assert inconsistent positions simply because its interests have changed. *See Hayne Fed. Credit Union*, 327 S.C. at 252, 489 S.E.2d at 477 (“When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.”).

The doctrine of judicial estoppel bars Charleston Labs from taking inconsistent positions in this litigation from the positions it took in the Florida case. As a result, Charleston Labs cannot now assert ambiguity or other purported deficiencies in the agreements or the ineffective exercise of its rights thereunder as the basis of its legal malpractice claim against Womble and Womble is entitled to summary judgment in its favor.

III. Charleston Labs’ claim is barred as a matter of law because Womble did not breach the standard of care.

Even if the Court determines Charleston Labs’ legal malpractice claim is not barred by collateral or judicial estoppel, the complaint still fails as a matter of law because Womble did not

breach any duty owed to Charleston Labs. To prevail in a cause of action for legal malpractice, the plaintiff must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). An attorney owes the client a duty of care “to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.” *Johnson v. Alexander*, 413 S.C. 196, 201, 775 S.E.2d 697, 790 (2015). In this case, the undisputed facts established the Womble met the applicable standard of care.

First, the Florida litigation establishes conclusively that the SHA and the SRA as drafted by Womble were unambiguous and created the rights that Charleston Labs wanted. The Florida litigation also conclusively establishes that Charleston Labs, acting on advice from Womble, properly exercised its right to acquire all of Takigiku’s shares under the SHA. There can be no breach of the standard of care as a matter of law when the lawyer’s work and advice are determined to have been correct in all respects. In short, the decision of the federal court in Florida necessarily precludes a finding that Womble failed to meet the standard of care in drafting the documents and advising Charleston Labs about how to exercise its rights thereunder.

Second, the standard of care for attorneys in South Carolina does not require lawyers to exercise perfection when drafting legal documents or advising a client regarding those documents. On its face, the standard’s reference to “the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession” is inconsistent with the notion that a lawyer is a guarantor of his work or is required to render his services with perfection. *Johnson*, 413 S.C. at 201, 775 S.E.2d at 790.

Charleston Labs is asking this court to find negligence just because of the assertion of an incorrect claim regarding the agreements. South Carolina has expressly rejected the use of hindsight analysis to determine breach of the standard of care for lawyers. In *Harris Teeter*, 390 S.C. at 282, 701 S.E.2d at 745, for example, our Supreme Court addressed the relationship between a “bad result” and a professional malpractice claim. The Court noted that, in retrospect, the attorney could have presented different or better arguments in the underlying action, but warned “hindsight is not the measuring stick. A case can always be tried ‘better.’” The Court elucidated,

Of course, any professional negligence claim involves a bad result. We reject as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care. To do so would change the landscape of our malpractice law, for all professionals. We adhere to the principle that the exercise of a professional's judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.

Id. at 291, 701 S.E.2d at 750.

If a bad result alone cannot be the basis of a malpractice claim, a good result certainly cannot be. Under Charleston Labs’ reasoning, any lawyer who drafts a document guarantees the client that it cannot be challenged, and is guilty of malpractice if anybody does so, regardless of the outcome of the dispute. There is not only no South Carolina law that supports this argument, it is contrary to the plain language of the standard of care applicable to lawyers in South Carolina. See *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 27, 531 S.E.2d 282, 286 (2000) (holding the Court of Appeals erred in creating a new cause of action for legal malpractice based on breach of express warranty to obtain a specific result, noting “the breach of express warranty theory would change the current standard of care for attorneys. Attorneys

would be held strictly liable for failing to satisfy the alleged warranty, no matter how much care, skill, knowledge, and diligence was exercised in attempt to achieve the result”).

Similarly, courts in other jurisdiction have rejected the contention, as Charleston Labs’ asserts here, that the standard of care requires an attorney to draft litigation-proof documents. In *Calvert v. Scharf*, 217 W. Va. 684, 687, 619 S.E.2d 197, 200 (2005), the lawyer drafted a will and other trust documents for a testator. *Id.* After the testator’s death, the executor of the testator’s estate and trustee of her trust filed a declaratory judgment action against the beneficiaries to determine whether the will was properly drafted. *Id.* Thereafter, the beneficiaries brought a malpractice action against the drafting attorney, seeking in part the amount they were obligated to pay to settle the declaratory judgment action. *Id.* The Supreme Court of West Virginia “wholeheartedly” rejected the beneficiaries’ “contention that they are entitled to damages merely because they were called into court by virtue of the declaratory judgment action.” *Id.* at 695, 619 S.E.2d at 208. The Court found that “[a]dopting such a rule as proposed by the [beneficiaries] would require lawyers to draft litigation-proof documents. The result would be an excessive potential for liability that would place an extraordinarily unreasonable burden upon the legal profession.” *Id.*

Similar to *Calvert*, Charleston Labs is claiming “to be entitled to damages simply because [it was] called into court.” This is exactly the claim that the West Virginia Court “wholeheartedly” rejected. *Id.* Courts in other jurisdictions have agreed. *See, e.g., Ventura Cty. Humane Soc’y v. Holloway*, 40 Cal. App. 3d 897, 904-05, 115 Cal. Rptr. 464, 469 (Ct. App. 1974) (finding the standard of care does not require an attorney to draft “litigation-proof” documents); *Blair v. Ing*, 95 Haw. 247, 259, 21 P.3d 452, 464 (2001) (same). Finding that Womble can be liable to Charleston Labs in this case would equate to a finding that a lawyer is

required to draft litigation-proof documents. Such a finding would be inconsistent with South Carolina's requirement that lawyers "render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." Therefore, the Court should enter summary judgment in favor of Womble.

IV. Charleston Labs' claim is barred by the statute of limitations.

Finally, Womble is entitled to summary judgment because Charleston Labs' claim is barred by the statute of limitations. The statute of limitations expired well before Charleston Labs commenced this action against Womble. The statute of limitations for a legal malpractice cause of action is three years. S.C. Code Ann. § 15-3-530; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 535, 787 S.E.2d 485, 489 (2016) ("The statute of limitations for a legal malpractice action is three years."). Under South Carolina law, the statute of limitations begins to run when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535; *see also Dean v. Ruscon*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). "The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed." *Id.* The date on which a plaintiff should have discovered the facts giving rise to a cause of action is an objective question. *Graham v. Welsh, Roberts & Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013).

Charleston Labs claims in this case that it was injured because of the “uncertainty” regarding whether the company had reacquired all Takigiku’s shares, and was forced to file the Florida DJ to resolve that issue following his reappearance in 2015. Womble disputes that Charleston Labs was injured by any such uncertainty or that Takigiku’s unfounded assertion that he remained a shareholder was Womble’s fault. Nonetheless, to the extent that Charleston Labs is correct that it may base a legal malpractice claim on the uncertainty resulting from the existence of an invalid claim by Takigiku, Charleston Labs knew or should have known no later than 2010 that uncertainty existed and that a claim by Takigiku was possible. In March 2010, Baddour sent Paul Bosse an email advising him that Dr. T could assert a claim to still own at least a portion of his stock notwithstanding the repurchase: “As we’ve discussed, if [Takigiku] doesn’t agree to the package (and the contingent \$70k payment) it is likely that he’ll have a claim on the vested portion of his stock. If [Charleston Labs] does nothing to change the status quo, it is likely that [Takigiku] will simply sit tight and do nothing, until such time as the stock becomes worth something, which is when he’ll file suit.”). **Ex. T.** (3/25/10 Email from Baddour to Bosse).

Conversations about the uncertain status of Takigiku’s shares continued with Bosse thereafter. In March of 2011 Mitchell Ryan, a non-Womble attorney for Charleston Labs, and Baddour discussed whether Charleston Labs could “get Ray’s shares back.” **Ex. U.** (Emails exchanged between Mitchell Ryan and Baddour). Baddour copied Bosse on this correspondence. **Ex. U.** Charleston Labs paid both Womble and Ryan for work related to this issue, and therefore incurred costs that it could claim as damages under its view of the law. Thus, all the elements of what Charleston Labs now contends is a valid legal malpractice claim (the invasion of its right to agreements that cannot be the subject of a claim, and costs incurred

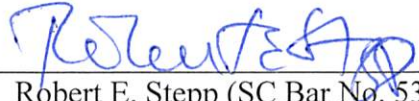
related to the claim) existed from at least March of 2011, and were known to Charleston Labs from that date forward. Accordingly, the statute of limitations on Charleston Labs' claim that Womble's drafting of the agreements and handling of the repurchase created proximately caused the company to suffer damages, began to run in 2010 or 2011, and expired no later than March 2014. Charleston Labs did not file this case until July 2017. As a result, Charleston Labs' legal malpractice claim against Womble is barred as a matter of law and Womble is entitled to summary judgment in its favor.

CONCLUSION

The uncontested facts and well-established law require this Court to grant Womble's Motion for Summary Judgment. Charleston Labs' claim is barred by collateral and judicial estoppel because it cannot now allege or attempt to establish facts or re-litigate issues that are contrary to findings by the Florida court. Nor can it assert positions which are inconsistent with the positions it asserted in the Florida action. Because, as the Florida court concluded, the SRA and SHA were unambiguous and worked as intended, Womble did not breach the standard of care and was not the proximate cause of Charleston Labs' alleged damages. Furthermore, the legal malpractice claim is barred by the statute of limitations. For the reasons set forth in detail above, Womble respectfully requests this Court grant its Motion for Summary Judgment.

[Signature Page Follows]

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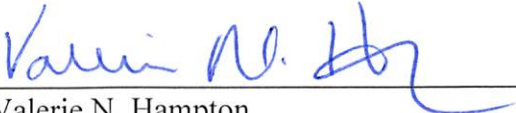
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>CERTIFICATE OF SERVICE</u>
Womble, Carlyle, Sandridge & Rice,	)	
LLP,	)	
	)	
Defendant.	)	
	)	

I, the undersigned legal assistant of the law offices of Robinson Gray Stepp & Laffitte, LLC, attorneys for Defendant Womble, Carlyle, Sandridge & Rice, LLP, do hereby certify that I have served all counsel in this action with a copy of the document specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Document: Memorandum in Support of Motion for Summary Judgment

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August 19, 2019

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
ACTION NUMBER: 2017-CP-10-3768

Charleston Laboratories, Inc.)

Plaintiff,)

v.)

Womble, Carlyle, Sandridge & Rice,)
LLP,)

Defendant.)

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO SUMMARY
JUDGMENT**

Summary of Argument

Charleston Laboratories, Inc. ("Charleston Labs") has brought this legal malpractice claim against Womble, Carlyle, Sandridge and Rice, LLP ("Womble") after spending nearly \$2,000,000.00 in an underlying case in an effort to have a United States District Court in Florida determine the rights and obligations of its shareholders under certain corporate documents which were prepared by Womble. Charleston Labs "won" the underlying case, as a result of which Womble contends that its malpractice claim is barred. Womble is incorrect in that:

- a. It was Womble's malpractice that necessitated the filing of a declaratory judgment action in Florida in the first place;
- b. While Womble points to the result in the Florida litigation as a vindication of its malpractice, Womble fails to appreciate that a) its advice was never a subject matter of the underlying case and no findings regarding Womble's advice were ever made; b) Womble's malpractice placed Charleston Labs in a precarious legal position requiring the institution of legal action to clarify rights that would have otherwise been made clear but for Womble's malpractice; c) Charleston Labs returned to Womble to seek assistance in December of 2015, when the underlying controversy arose and was

- shockingly turned away; d) the filing of the Florida declaration action itself was an act in mitigation of the damage that had been inflicted and was to be inflicted on Charleston Labs as a direct and proximate result of Womble's conduct; and e) but for the excellent legal counsel that Charleston Labs received through its new counsel, Greenberg Traurig, the damages claimed in this action would greatly exceed the costs associated with the prosecution and settlement of the underlying case which are the damages now claimed.
- c. Judicial estoppel does not preclude the claims herein because Charleston Labs is not taking factually inconsistent positions, Charleston Labs is not "playing fast and loose" with the Court, Charleston Labs has not engaged in an intentional effort to mislead any Court and Charleston Labs has done nothing in any Court to gain an advantage over Womble;
 - d. Collateral and/or equitable estoppel are inapplicable and do not represent a bar to the present action in that the claims advanced by Charleston Labs herein do not seek to relitigate any matter previously determined in the underlying action;
 - e. The statute of limitations is not a bar to the present action as the legal malpractice claim did not accrue until September 22, 2015, at the earliest and this action was filed well within the statute of limitations on July 24, 2017; and
 - f. The millions of dollars that Charleston Labs spent in mitigation of the harm caused by Womble's negligence are recoverable damages in malpractice.

Background Facts

This is a legal malpractice case in which Charleston Labs contends that it was forced to engage in expensive litigation in order to clarify the ownership structure of its company as a direct

result of errors committed by Womble in the drafting of a Shareholder's Agreement ("SHA") and a Stock Redemption Agreement ("SRA") which pertained to the ownership of shares in the company by its former employee / shareholder, Dr. Raymond Takigiku ("Dr. T"). The Complaint also alleges that Womble was negligent in its advice surrounding the redemption of Dr. T's stock upon his departure from the company. The Complaint is factually rich and supported in part by the affidavit of expert witness, Dr. Greg Adams.

The following facts are operative to the analysis of the present motion. Unless specifically noted as "**DISPUTED**," the facts set forth hereinbelow are undisputed and are supported by the discovery taken to date.

- a. Charleston Labs engaged Womble as its legal counsel on June 6, 2007, for the purpose of providing "general corporate legal advice, venture capital financing, and other matters that [it] may request from time to time." Womble Engagement Letter, **Exhibit 1**.
- b. Dean Rutley ("Rutley"), a partner at Womble, formed Charleston Labs as a privately-held Delaware corporation on June 27, 2007. Charleston Labs was authorized to issue up to 3000 common shares of stock at a par value of \$0.001. Delaware Certificate of Incorporation, **Exhibit 2**.
- c. The three original founders of Charleston Labs were G. Paul Bosse III ("Bosse"), Ryan Baker ("Baker"), and Chris Goodwin ("Goodwin"). (Complaint, para. 7).
- d. At the time of the formation of Charleston Labs, Womble prepared no agreement that controlled the relationship between the owners. Deposition of George Scott,¹

¹ Prior to his role as in-house counsel for Charleston Labs, attorney George Scott was employed as an associate attorney with Womble. It was in this role that he was first introduced to Charleston Labs and Paul Bosse. Following his employment with Womble, Scott was briefly employed with Greenberg Traurig before accepting his current post as in-house counsel to Charleston Labs.

Charleston Labs 30(b)(6), p. 244, ll. 8-12. (**NOTE:** Womble drafted By-laws, but did not prepare or recommend a shareholder's agreement or other similar document to control the relationship between the owners of the company).

- e. As a start-up pharmaceutical company, Charleston Labs' initial research was dedicated to the development of drugs which reduce opioid induced nausea and vomiting in opioid pharmaceuticals. (Complaint, para. 6).
- f. Rutley focused his early efforts with Charleston Labs on seeking venture capital for the upstart company in order to fund the launch of its developmental CL-108 analgesic opioid drug. Rutley had previously assisted "dozens and dozens of clients on venture capital transactions" which ranged from "\$500,000.00 to 20 million, 30 million." Deposition of Dean Rutley, p. 29, l. 22 – p. 30, l. 7.
- g. Rutley prepared for distribution to his venture capital contacts a "Charleston Laboratories Executive Summary" that lauded Charleston Labs' leadership team and which forecasted that upon FDA approval of its CL-108 drug, Charleston Labs' projected revenues would range from \$600,000,000.00 in Year 1 to \$1,209,000,000.00 in Year 5. December 10, 2007, email with attached Executive Summary, **Exhibit 3**.
- h. As Charleston Labs continued in its efforts to develop CL-108, it hired three new employees in 2008, each of whom was promised an ownership interest in the Company: Dr. T., Bernard Schachtel ("Schachtel") and John Ameling ("Ameling"). Complaint, para. 12.
- i. **DISPUTED:** Bosse was resistant to Rutley's early efforts to continue to attempt to raise capital through venture financing because he did not want to saddle his

fledgling company with debt and/or to give up a great deal of early equity. When Bosse pushed back against Rutley's efforts to obtain venture capital, Bosse perceived that he and Charleston Labs were "passed off" from Rutley to attorney David Baddour ("Baddour"). Deposition of Paul Bosse, p. 24, ll. 2-14. (Womble disputes that Charleston Labs was "passed off" from Rutley to Baddour).

- j. At the time, Baddour was an associate with Womble in its Raleigh, NC office. Baddour was first admitted to practice law in 2002.
- k. In or around April, 2008, Charleston Labs was approached by a venture capital firm known as Landmark Pegasus ("Landmark"). As a condition of any investment in Charleston Laboratories, Landmark recognized that Charleston Labs had no contract controlling the relationship between shareholders and provided Charleston Labs with a proposed Stockholder Agreement. See April 9, 2008, email from Landmark to Bosse attached hereto as **Exhibit 4**.
- l. While no deal was made with Landmark, Bosse liked the idea of a Stockholder's Agreement and forwarded the proposed agreement to Baddour for the purpose of adopting a similar agreement for Charleston Labs. See April 9, 2008, email from Bosse to Baddour attached hereto as **Exhibit 5**.
- m. Prior to Bosse raising the issue with Baddour, Womble had never recommended to Charleston Labs that it adopt an agreement to regulate the relationship between its shareholders.
- n. Having received no reply from Baddour, Bosse again emailed Baddour on May 20, 2008, inquiring about the status of a shareholder agreement. See May 20, 2008, email from Bosse to Baddour attached hereto as **Exhibit 6**.

- o. In response to Bosse's email, Baddour forwarded a proposed Stock Restriction Agreement ("SRA") (as opposed to a Shareholder's Agreement). See May 20, 2008, email from Baddour to Bosse attached hereto as **Exhibit 7**.
- p. Unlike the proposed Stockholder's Agreement ("SHA") that originated from Landmark, the SRA began as a Womble template document. Deposition of Baddour, p. 78, ll. 14-24.
- q. Rather than having one document to control the relationship between shareholders (SRA or SHA), Womble recommended that Charleston Labs have the new shareholders (T, Schachtel and Ameling) sign an SRA and that all shareholders sign an SHA. To that end, Womble made 150 changes to the SHA which was first drafted by Landmark. See May 22, 2008, Redline Report attached hereto as **Exhibit 8**.
- r. Both the SRA and the SHA defined the right of Charleston Labs to repurchase the shares of an owner upon their departure from employment with Charleston Labs. The SHA is attached hereto as **Exhibit 9** and the SRA is attached hereto as **Exhibit 10**.
- s. In the event of a separation from employment, the SHA provided Charleston Labs the right to repurchase **ALL SHARES** at the then prevailing fair value as determined by the Board of Directors.
- t. In the event of a separation from employment, the SRA provided Charleston Labs the right to repurchase **UNVESTED SHARES** at the price of \$0.001 per share based upon a vesting schedule.
- u. The SHA does not make reference to the SRA.

- v. The SRA does not make reference to the SHA.
- w. The SRA provides that it is the “entire agreement” between the parties on the “subject matter” and that it “supersedes and renders null and void all other prior oral or written agreements.”
- x. The SHA provides that it is the “entire agreement” between the parties on the “subject matter” and that it “supersedes and renders null and void all other prior oral or written agreements.”
- y. The SHA and SRA provide different and conflicting rights on the same subject matter.
- z. On May 30, 2008, Dr. T executed an SHA.
- aa. On May 30, 2008, Dr. T also executed an SRA.
- bb. On May 30, 2008, Charleston Labs issued Share Certificate Number 12 to Dr. T evidencing his ownership of 210 shares in Charleston Labs. Share Certificate Number 12 attached hereto as **Exhibit 11**.
- cc. On the back of Share Certificate Number 12 restrictive language makes reference to both the SHA and the SRA.
- dd. At or near the same time that Dr. T executed his SRA and SHA, shareholder Schachtel had engaged attorney Charles Kaufman (“Kaufman”) to review the documents. Kaufman was confused by the operation of the two documents and emailed questions to Rutley.
- ee. By email dated June 16, 2008, Rutley explained to Kaufman in part that: “The simple structure is that ALL vested shares are for the employee to KEEP and the unvested shares are paid over time for service in the vesting period. Thus,

termination of the employment relationship for ANY reasons will result in the employee keeping ALL shares that are vested and just a stoppage of any further vesting.” Rutley email, June 16, 2008, attached hereto as **Exhibit 12** and emphasis supplied.

- ff. **DISPUTED:** Rutley’s explanation is incorrect in that it does not explain that the company retains the right to repurchase ALL shares under the SHA. **NOTE:** Plaintiff contends that this is direct evidence of Womble’s misunderstanding of the operation of the documents which later manifests itself at the time of the attempted repurchase of Dr. T’s ownership. This contention is disputed.
- gg. On September 25, 2008, Charleston Labs issued a forward stock split of 2,000:1, as a result of which Dr. T’s Share Certificate Number 12 for 210 shares was retired in exchange for Share Certificate Number 14 for 420,000 shares. Stock Split and Share Certificate Number 14 are attached hereto as **Exhibit 13**.
- hh. After September 25, 2008, the relationship between Charleston Labs and Dr. T soured.
- ii. Dr. T was absent for approximately 10 months and had associated with a competitive company known as SIDIS. Furthermore, Charleston Labs feared that Dr. T had transferred or attempted to transfer his ownership in the company to SIDIS. Deposition of George Scott, p. 182, l. 18 – p. 186, l. 6.
- jj. In or around March, 2010, Charleston Labs made the decision to separate with Dr. T.

- kk. On or about March 16, 2010, Bosse called Baddour to explain the situation and to ask for legal assistance in terminating Dr. T and reacquiring his ownership in the company.
- ll. Following the conversation, Baddour emailed Rutley, attaching only the SRA, and relayed the conversation. In part, Baddour reported: "They need to get rid of Ray T, their COO, but they want to take all of his stock back (vested and unvested)." See Email, Baddour to Rutley, March 16, 2010, attached hereto as **Exhibit 14**.
- mm. As of March 16, 2010, the only document which would have permitted the reacquisition of **ALL OF DR. T's STOCK was the SHA**. Dr. T was partially vested under the SRA.
- nn. Charleston Labs sought Womble's legal advice in drafting the letter terminating Dr. T's employment. See Bosse Email to Baddour, March 17, 2010, attached hereto as **Exhibit 15**.
- oo. On March 17, 2010, Bosse drafted an initial rough draft of the termination letter which he shared with Baddour seeking legal advice with regard to the "Severance section as it relates to the stock" and on "other sections as you see fit."
- pp. After receiving advice and modifications from legal counsel, Charleston Labs issued a termination letter to Dr. T on March 22, 2010. In part, the letter explained that Dr. T's shares were going to be repurchased for \$2.10, in what appears to be an attempted reference to the SRA. **NOTE:** Again, only the SHA would have permitted a repurchase of all shares at the time as Dr. T was partially vested under the SRA. A copy of the Termination Letter is attached hereto as **Exhibit 16**.

- qq. Also, on March 22, 2010, Womble prepared for Charleston Labs a draft letter and a Redemption and Release Agreement for Charleston Labs to send to Dr. T in order to redeem his shares. A copy of the letter and Redemption and Release Agreement are attached hereto as **Exhibit 17**.
- rr. The letter does not reference the SHA or the SRA.
- ss. The letter does reference the enclosed Redemption and Release Agreement.
- tt. The Redemption and Release Agreement references the SRA, but does not reference the SHA.
- uu. On March 25, 2010, Baddour advised Bosse that “if Ray (Dr. T) doesn’t agree to the package (and the contingent \$70k payment) it is likely that he’ll have a claim on the vested portion of his stock.” See Email from Baddour to Bosse, March 25, 2010, attached hereto as **Exhibit 18**.
- vv. **DISPUTED:** Charleston Labs points to the above email as further evidence that Womble did not understand or appreciate at the time that only the SHA permitted the repurchase of all shares at any time following separation and that through the correct exercise of rights under the SHA, Dr. T would have no legitimate claims whatsoever.
- ww. On March 26, 2010, Charleston Labs sent a final version of the draft redemption letter and Redemption and Settlement Agreement. Like the draft version, the letter does not make reference to the SRA or the SHA. Like the draft version, the Redemption and Settlement Agreement makes reference to the SRA, but not the SHA. The Redemption and Settlement Agreement refers to Dr. T’s employment being terminated “for cause” which features only in the SRA. Final copies of the

letter and Redemption and Settlement Agreement are attached hereto as **Exhibit 19**.

- xx. Baddour testified that he orally recommended to Bosse to include a reference in the letter to the SHA as it would have been the “best practice,” although reference was not required. Charleston Labs denies having received any such advice. Deposition of David Baddour, p. 136, l. 12 – p. 137, l. 3.
- yy. Dr. T did not accept the Redemption and Release Agreement.
- zz. Having received no reply from Dr. T, Baddour advised Charleston Labs that it should “sit tight.” Womble further advised Charleston Labs to continue raising money. See Baddour to Bosse Email, April 27, 2010, attached hereto as **Exhibit 20**. See also Baddour to Bosse Email, May 6, 2010 attached hereto as **Exhibit 21**: “Dean’s strong recommendation is to just ignore Ray and focus on closing your next round. If you want to fight with Ray once you have funding, that would be a different story.”
- aaa. While Womble maintains in this action that the filing of a declaratory judgment to clarify the rights of Charleston Labs vis a vis Dr. T’s shares was unnecessary, as early as May 7, 2010, Womble told Dr. T’s legal counsel that “Charleston Labs is willing to file suit and take any actions necessary to make this situation right, from their perspective.” See Baddour to Willbrand Email, May 7, 2010, attached hereto as **Exhibit 22**.
- bbb. Rutley’s advice was further emphasized in a subsequent email, in which he advised his client: “... my strong advice is to leave this issue alone until AFTER you have

raised your next round.” Rutley to Baddour (cc to Bosse) Email, May 18, 2010, attached hereto as **Exhibit 23**.

ccc. The uncertainty of Dr. T’s shares persisted following the attempted redemption. In fact, on March 10, 2011, Baddour emailed that “Clearly there is uncertainty about the legal status of those shares.” Baddour to Ryan (cc to Bosse) Email, March 10, 2011, attached hereto as **Exhibit 24**. In his deposition in this action, Baddour later denied that there was ever uncertainty as to the status of Dr. T’s shares. Deposition of David Baddour, p. 170, ll. 3-9.

ddd. On March 15, 2011, Womble assisted Charleston Labs in revising its cap table in order to clear up the uncertainty. In the Common Stock Transfer Ledger, Womble referred to Dr. T’s shares as having been “Repurchased by the Corporation.” See March 15, 2011, Cap Table attached hereto as **Exhibit 25**.

eee. **DISPUTED:** Womble points to these early communications as possible trigger dates for the running of the statute of limitations. To point to these communications as potential triggers is to misunderstand the nature of the present case in its entirety. Even if the emails suggest that Charleston Labs was on notice that it had potential claims against Dr. T (and we do not believe that the emails so indicate), it is fundamentally different to suggest that the emails would also place a reasonable and active client of Womble’s on notice that its counsel had committed legal malpractice. This is discussed in greater detail in the argument below.

fff. In or around May, 2011, the responsibility for Charleston Labs as a client of Womble was once again passed internally between lawyers, this time from David Baddour to attorney Karl Knoll (“Knoll”).

ggg. After Bosse asked Knoll questions about the status of the stock and the new cap table, Knoll called Baddour and left a voicemail in which he told Baddour that:

- i. As it related to Charleston Labs, Knoll's goal was to keep "defending the team" (referring to Womble);
- ii. Knoll believed the best strategy going forward was to "hang in there and protect our reputation" and to "protect each other;"
- iii. "I got your back;"
- iv. Knoll had "written them off as a client;" and
- v. Knoll didn't believe "their crap [was] worth worrying about." A Native audio file of the voicemail has been exchanged during discovery, is attached as **Exhibit 026** and will be presented at the time of hearing; therefore, it is hereby incorporated by reference if transcribe herein verbatim.

hhh. **DISPUTED:** Womble had a duty to advise its client of its own errors and/or of the client's right to review their conduct for potential legal malpractice. Womble and its attorneys decided instead on a strategy of protecting one another. Suffice it to say, no Womble attorney ever suggested to Charleston Labs that the legal uncertainty regarding the status of Dr. T's shares had anything to do with their own potential legal malpractice.

iii. When Bosse continued to express confusion and to seek Womble's advice, internally Charleston Labs was referenced as the "worst kind of client" and the firm planned to "distance ourselves before something bad happens." Knoll to Baddour Email, May 26, 2011, attached hereto as **Exhibit 27**.

- jjj. In July, 2012, Womble assisted Charleston Labs in preparing a Disclosure Statement in conjunction with the proposed issuance of securities. Knoll recommended that the Disclosure Statement include the following statement: "The company is presently considering pursuing a declaratory judgment action as to the aforementioned 280,000 shares." (NOTE: Referencing Dr. T's vested shares). See Redline Draft Disclosure Statement, attached hereto as **Exhibit 28**.
- kkk. **DISPUTED:** Again, Womble insists in defense of this legal malpractice action that it gave appropriate advice in the drafting of the SHA and the SRA, that it gave appropriate advice in the redemption of Dr. T's shares and that the documents it prepared worked exactly as intended such that there was never uncertainty about the legal status of Dr. T's shares. Womble further takes the position that the filing of a declaratory judgment action was unnecessary and was ultimately confirmatory of its position that it acted within the standard of care at all times. However, it was Womble who first suggested that a declaratory judgment action may be necessary to clarify the rights in Dr. T's shares and it is the central contention of this lawsuit that no such action would have been necessary with a properly documented exercise of rights at the time of the repurchase of Dr. T's shares. The legal uncertainty surrounding the ownership of the shares and the subsequent declaratory judgment action ARE the injuries suffered by Charleston Labs as a direct and proximate cause of Womble's negligence. The fact that Charleston Labs "won" after expending nearly \$2,000,000.00, does not negate the fact of its injury. It merely mitigates against the scope of the loss.

- lll. Charleston Labs continued to work hard and to progress its CL-108 drug through the FDA approval process.
- mmm. On or about August 6, 2014, Charleston Labs entered into a \$650,000,000.00 distribution deal for its developmental drug.
- nnn. On September 22, 2015, Dr. T resurfaced with legal counsel asserting his ownership and demanding the rights of a shareholder. See Bray & Long Letter, September 22, 2015, attached hereto as **Exhibit 29**.
- ooo. Having received a communication from Dr. T's legal counsel, George Scott attempted to communicate with Womble in order to obtain the file and relevant documents related to the 2010 attempted repurchase of the Dr. T shares.
- ppp. On December 1, 2015, George Scott emailed Dean Rutley asking for all correspondence between Womble and Dr. T regarding the exercise of the right to repurchase. A copy of the email is attached hereto as **Exhibit 30**.
- qqq. When Scott's requests for assistance went unanswered, he decided to stop by Rutley's office (which was nearby his home) and to ask Rutley personally for help in obtaining the file as they were prior professional colleagues.
- rrr. **DISPUTED:** When Scott visited Rutley's office, Rutley threatened to call security if Scott did not leave the office. Deposition of George Scott, p. 267, l. 7 – p. 268, l. 17.
- sss. Charleston Labs then hired Greenberg Traurig ("GT") to assist in addressing the issue with Dr. T. GT's team was led by attorney Bridgette Berry ("Berry").
- ttt. Charleston Labs expressed many concerns and issues regarding the possibility that Dr. T had a valid claim of ownership, including:

- i. The potential that Charleston Labs would make misrepresentations regarding its ownership to government agencies or others;
 - ii. Potential securities violations;
 - iii. Concern among other shareholders; and
 - iv. Dr. T's possible alignment with competitors, including Nigel Ferry;
Deposition of Bridgette Berry, p. 61, l. 11 – p. 62, l. 16.
- uuu. Berry devised a plan and strategy to resolve the “many, many issues raised by the [SHA and SRA]”. Most significantly, Berry came up with the legal strategy to argue that the documents were concurrent, as a result of which each did not cancel the other by virtue of the competing “entireties clauses” in the SRA and SHA.
Deposition of Bridgette Berry, p. 30, ll. 2-15.
- vvv. Rutley and Womble were not helpful to Berry and GT. Deposition of Bridgette Berry, p. 31, ll. 2 – 9.
- www. Berry advised Charleston Labs to bring the declaratory judgment action, which is also what Womble had recommended. Deposition of Bridgette Berry, p. 75, l. 19 – p. 76, l. 5.
- xxx. The declaratory judgment action was necessary because Charleston Labs was suffering damages in the form of a) potential securities issues; b) potential issues related to the relationship with its other stockholders; c) potential issues related to Dr. T's right of access to books and records, including proprietary and confidential information; and e) the potential that proprietary information could be released to SIDIS, a competitor of Charleston Labs. Deposition of Bridgette Berry, p. 76, l. 19 – p. 77, l. 16.

yyy. On the issue of ambiguity in the SRA and SHA, Brigitte Berry offered the following testimony:

- i. “And so, for example, if there had been a provision in the stockholders agreement -- and these are just examples and just based upon my recollection, not having reviewed all of the documents that you have, only what you have provided to me in this binder today, to refresh my recollection -- for example, if the stockholders agreement had been drafted with a place for Charleston to sign and Charleston had signed, that would have taken care of one issue. If the stockholders agreement had had a sentence, for example, that said, some stockholder -- some stockholders or founding stockholders may also be entering into a separate stock restriction agreement on this date, and these two documents shall be read together, and that the company and/or that the company has rights to repurchase all stock for fair value under this stockholders agreement and concurrently the right to repurchase some shares for whatever the amount was that was stated, which was a nominal amount, that would have resolved those issues and there would not have been a bona fide dispute, and, therefore, no need for the litigation or at least no need for the litigation on those issues.”

Deposition of Bridgette Berry, p. 101, l. 18 – p. 103, l. 15

- ii. “There clearly was an issue relating to the stockholders agreement and the stock restriction agreement and who was the rightful owner of what once had been Dr. T’s shares. So, yes, I, on behalf of Greenberg Traurig,

conducted a lot of investigation on that. Yes, I did. Deposition of Bridgette Berry, p. 118, ll. 10-15.

- iii. “When I got the order granting summary judgment, I was very happy. And until I got that order, it could have, you know – I mean, we all know as litigators, it could go – we – the – we fought very, very, very hard to win that litigation. There were many issues raised by the documents.”

Deposition of Bridgette Berry, p. 71, ll. 9 -14.

zzz. Charleston Labs filed a Declaratory Judgment Action in United States District Court in Florida. A copy of the Third Amended Complaint is attached hereto as **Exhibit 31**.

aaaa. After full discovery and briefing, the Court issued an Order Granting Summary Judgment in favor of Charleston Labs. A copy of the Order is attached hereto as **Exhibit 32**.

bbbb. Dr. T vowed to appeal the Order. Subsequently, Charleston Labs entered into a settlement with Dr. T in which it paid the sum of \$250,000.00 in order to avoid the continued cost and risk of appeals and further litigation. A copy of the Settlement Agreement is attached hereto as **Exhibit 33**.

cccc. Over the course of the litigation, Charleston Labs paid \$1,569,462.43 in attorneys’ fees and costs. A copy of the GT invoices are attached as **Exhibit 34**.

dddd. This legal malpractice action was commenced on July 24, 2017.

Legal Argument

Through the related doctrines of res judicata, collateral estoppel and judicial estoppel, Womble would urge the Court that the Complaint in the present action fails because a) Charleston

Labs was victorious in its dispute with Dr. T and b) Charleston Labs is taking factual positions in the present action which are inconsistent with those taken in the underlying litigation. In short, Womble contends that Charleston Labs' victory against Dr. T in related litigation inoculates the firm from its own malpractice, even though the cost of "victory" for Charleston Labs was approximately \$2,000,000.00. Womble also contends that the present claims are barred because Womble did not breach any duties to Charleston Labs and because the present action was commenced outside of the statute of limitations by the statute of limitations. Womble is simply wrong.

While Womble cherry picks the Complaint in the underlying action between Charleston Labs and Dr. T in search of alleged inconsistencies with the Complaint in the present action, it ignores the following about the underlying action:

- The underlying action was a federal declaratory judgment action brought pursuant to 28 U.S.C. 2201 and Federal Rule of Civil Procedure 57.
- By its very nature (and by Federal law), the declaratory judgment action involved an "actual controversy" between the parties which required a court to "declare the rights and other legal relations of [the] interested parties." 28 U.S.C. 2201.
- The Complaint in the underlying action alleges expressly that: "The parties are in a **bona fide dispute** with regard to the ownership Shares, and related rights and responsibilities, and Charleston seeks a declaration that it is the sole owner of the Shares." Third Amended Complaint, *Charleston Labs. v. Dr. T*, para. 36, **Exhibit 31** hereto.
- The Complaint in the underlying action alleges expressly that: "The relief sought from the Court is not merely the giving of legal advice or to answer questions propounded

from curiosity.” Third Amended Complaint, *Charleston Labs. v. Dr. T*, para. 36, **Exhibit 31** hereto.

- Berry, lead counsel for Charleston Labs in the underlying case, has testified that there were “many issues” with the SRA and SHA which necessitated the filing of the declaratory judgment action. Deposition of Bridgette Berry, p. 71, ll. 9 -14.

The Complaint in the underlying case never alleged that Dr. T’s claim of ownership following the attempted redemption of his shares was frivolous. Likewise, a review of the ECF record in the underlying action will demonstrate that there was never a motion to dismiss, nor a motion for sanctions in the underlying action. ECF Report attached hereto as **Exhibit 35**. To the contrary, the Complaint in the underlying action acknowledged the existence of a bona fide dispute which require judicial intervention to resolve. In fact, the Order on Motions for Summary Judgment in the underlying action provides that “in order to **harmonize**” the SHA and the SRA, the Court determined that the documents created concurrent rights (adopting the GT argument). See Order on Motions for Summary Judgment attached hereto as **Exhibit 32**. Just as there was darkness before there was light, in the matter of Charleston Labs and its post-employment relationship with Dr. T, there was disharmony before there was harmony. In this case, harmony required judicial intervention and the expenditure of nearly \$2,000,000.00 as a direct result of the negligence of Womble.

The question therefore is simple: Why was Charleston Labs in a bona fide dispute over the ownership shares of its company after it hired Womble to draft the controlling corporate agreements and to coordinate Dr. T’s departure from the company for the express purpose of avoiding disputes? To put it otherwise, why was there disharmony? The bona fide dispute did not arise because Dr. T took frivolous positions which were not supported by fact or law. To the

contrary, Womble was first sloppy in its drafting of the SHA and SRA. Even so, the errors in drafting the SRA and SHA were effectively victimless crimes until the time came to separate employment with Dr. T and to exercise rights under either or both documents. Womble compounded its original drafting errors by providing erroneous advice in the redemption of Dr. T's shares which created a bona fide dispute as to the true ownership of the Dr. T shares after his separation from employment. The erroneous advice appears to have been a byproduct of the very confusion Womble created in first drafting the SRA and SHA – **Womble confused itself**. Rather than drafting certainty and precision into Charleston Labs' corporate documents, Womble planted the seeds of a dispute that cost the company approximately \$2,000,000.00 to resolve, all of which would have been avoided but for Womble's negligence.

1. Judicial Estoppel Does Not Apply

“The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see also John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir.1995) (stating goal of judicial estoppel ‘is to prevent a party from playing ‘**fast and loose**’ with the courts, and to protect the essential integrity of the process.’). As explicitly embraced by our supreme court, ‘[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.’ *Hayne*, 327 S.C. at 251, 489 S.E.2d at 477. ‘When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.’ *Id.* However, the *Hayne* court only adopted the doctrine **as it applies to facts, not law**. *Cothran v. Brown*, 350 S.C. 352, 357, 566 S.E.2d 548, 551 (2002) [Emphasis Added]. The doctrine does not apply here:

- a. Any contention that Charleston Labs “misrepresented facts to gain an advantage” is completely without merit. Charleston Labs did not pay \$2,000,000.00 in mitigation of Womble’s malpractice to clarify rights which should have been set forth clearly in the documents prepared by Womble for the purpose of gaining an advantage over Womble or any other party;
- b. Any contention that Charleston Labs is “playing fast and loose” with the judicial system is preposterous;
- c. Even if Charleston Labs took the position that the SRA controlled over the SHA in the underlying litigation and/or that the agreements were unambiguous, any such position was purely legal and not factual:
 - i. The light was red is a factual allegation;
 - ii. The Defendant was at fault in the accident is a legal argument.
 - iii. The SRA provides for the redemption of shares is a factual allegation;
 - iv. The SRA controls over the SHA is a legal argument.
 - v. The “fact” alleged by Charleston Labs in the underlying action was the “fact” that it found itself in a bona fide dispute. As alleged in the present action, this fact represented a risk of significant harm to the company if not resolved through litigation.²

The test for the application of judicial estoppel is an equitable test that requires Womble to demonstrate to the satisfaction of the Court five (5) factors:

- (1) two inconsistent positions must be taken by the same party or parties in privity with each other;

² “If Dr. T was correct, then, among other negative consequences for Charleston, it had raised substantial working capital through offerings which misstated the corporate ownership structure.” Complaint, para. 58.

- (2) the two inconsistent positions were both made pursuant to sworn statements;
- (3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
- (4) the inconsistency must be part of an intentional effort to mislead the court; and
- (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position. *Quinn v. Sharon Corp.*, 343 S.C. 411, 422, 540 S.E.2d 474, 480 (2000) [Citation omitted]

Charleston Labs denies that it has taken inconsistent factual positions between the underlying action and the present action. The position in the underlying case was clear – Charleston Labs was in a bona fide dispute over the ownership rights of its company. Even if there was an inconsistency (which Charleston Labs rejects), Womble fails to point to any alleged inconsistency in sworn statements as required by the legal test. More importantly, absent the naked allegations of Womble, there is nothing in the record to support a finding that Charleston Labs has sought intentionally to mislead any Court. In the underlying case, Charleston Labs simply urged the Court to accept its legal argument and its legal position as to why it exercised a proper redemption of Dr. T's shares. In the present action, Charleston Labs complains that with proper drafting and adherence to the standard of care, it would not have been necessary to undertake an expensive legal process to make clear that which should have been made clear through the representation of Womble.

Not only are the criteria of judicial estoppel lacking in the present case, the policy behind the rule is likewise not implicated. The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants. *Brown*, at 554, citing *Case of Canavan*, 432 Mass. 304, 733 N.E.2d 1042 (2000). To state it otherwise, the purpose of the doctrine is not to protect litigants

from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. *Quinn v. Sharon Corp.*, 343 S.C. 411, 414, 540 S.E.2d 474, 475 (2000) [Citation omitted]. “Deceit and dishonesty are anathema of justice... Judicial estoppel guarantees the protection of the judiciary from the perversion created by a party’s inconsistent and untruthful averments.” *Id.*, at 423, 480. All efforts to knit-pick the two Complaints aside, there is simply nothing in the record before the Court to suggest that Charleston Labs used the underlying case in a deceitful, perverse or manipulative manner to deceive the Court and/or to gain an advantage.

To amplify the point, exactly what “advantage” is it that Charleston Labs seeks to exploit here to the disadvantage of Womble? Charleston Labs was placed in a precarious legal position by the negligence of Womble. Charleston Labs faced claims from an alleged shareholder whose shares it long ago sought to redeem, which shareholder was now working with a competitor and was demanding to see the books and records of the company. Charleston Labs was harmed and it sought to mitigate the harm through the commencement of a declaratory judgment action. The action was hard fought and expensive. In the end and through the assistance of skilled legal counsel at GT, Charleston Labs prevailed in convincing a court that the sloppiness and imprecision of its prior efforts notwithstanding, its attempt to redeem Dr. T’s shares was legally sufficient. The fact that Charleston Labs was able to obtain relief from the adverse consequence in which it found itself may affect the amount of harm it suffered through Womble’s negligence, but it does not negate the fact of the injury. See *Safine v. Sinnott*, 15 Cal.App.4th 614 (1993):

The point, again, is not whether the client ultimately is able to obtain relief. Rather, the point is that the attorney’s negligence placed the client in a position where he found it necessary to seek relief, whether through application to the trial court, as here, or through an appeal. That the client was able to obtain temporary or permanent relief from the adverse judgment resulting from attorney negligence may affect the amount of

damages, but it does not negate the fact of injury.

Charleston Labs did not play fast and loose. Charleston Labs has not taken inconsistent factual positions. Charleston Labs has done nothing to gain an unfair advantage over Womble – and the suggestion to the contrary is simply preposterous. Charleston Labs did not want uncertainty regarding the status of its ownership. Charleston Labs did not want to file a declaratory judgment action to make clear that which its legal counsel at Womble was paid to make clear in the first place. Charleston Labs did not pay nearly \$2,000,000.00 in the underlying litigation to vindicate Womble. The doctrine of judicial estoppel does not apply.

2. Equitable / Collateral Estoppel Does Not Apply

Through the related concepts of equitable and/or collateral estoppel, Womble likewise advances the position that the Plaintiff's claims in the present action are barred by matters litigated in the underlying case. Again, Womble is incorrect. Central to its confusion over this issue, Womble suggests to the Court that it is necessary for Charleston Labs to re-litigate matters which were already litigated in the underlying action and/or that Charleston Labs seeks such a re-litigation. Nothing could be further from the truth. Charleston Labs does not seek to contest any finding of the Court in the underlying matter, nor is such a contest necessary for Charleston Labs to prevail on its claims. The present matter is not complicated:

- a. Womble drafted corporate documents addressing the same subject matter which did not cross reference one another;
- b. The SRA and the SHA contained materially different rights, duties and obligations;
- c. Womble advised Charleston Labs on the language to use in separating Dr. T's ownership, and Charleston Labs relied on the advice;
- d. Womble's advice on how to redeem Dr. T's shares was negligent;

- e. After his separation, Dr. T took a legal position regarding his ownership rights;
- f. After his separation, Charleston Labs took an opposing legal position with regard to Dr. T's rights;
- g. A bona fide dispute arose;
- h. Having relied on Womble's advice, Charleston Labs was forced to file a declaratory judgment action to mitigate against the devastating consequences which would have occurred if Dr. T's interpretation of the SHA and SRA and the attempted redemption of his shares controlled;
- i. Charleston Labs spent nearly \$2,000,000.00 seeking to clarify that which Womble was paid to make clear.

These issues are not subject to re-litigation in the present action. The sole question presented in this action is whether Womble deviated from the accepted standard of care in its preparation of the corporate documents and/or in its advice surrounding the separation of Dr. T. These issues were not litigated in the underlying case and Womble can point to no finding of the Court in the underlying action that speaks to these matters. To contend that because Charleston Labs "won" the underlying action, it must now lose the present case, is to ignore Womble's role in creating the circumstances that necessitated the underlying litigation in the first place. In point of fact, Womble's negligence placed Charleston Labs in an untenable position: if Dr. T was correct, Charleston Labs faced a potentially devastating contingent liability for having misrepresented to investors and/or to government agencies the correct ownership structure of the company. Moreover, Dr. T had demonstrated his disloyalty, had joined a competitor company and was then demanding the rights of a shareholder to inspect books and records. Additionally, on a going forward basis, how was Charleston Labs to have certainty in its existing ownership

structure? How was Charleston Labs to raise additional money? Etc., etc., etc. Not only does the declaratory judgment fail to provide Womble cover in the present action, the declaratory judgment was necessitated as an effort to mitigate the ongoing harm that Charleston Labs was experiencing because of Womble's malpractice. Collateral estoppel does not insulated Womble from its own negligence.

3. **Legal Fees Incurred in Mitigation of Malpractice are Recoverable Damages**

Womble's argument seems to suggest that because Charleston Labs ultimately prevailed in the underlying litigation, Womble could not have been negligent in the advice it provided to its client. The fact pattern of this case is not unique. A common legal malpractice case arises in real estate transactions in which a purchaser of property is forced to defend a claim by a third party after a closing attorney has certified the title. If the property owner prevails in a legal challenge to the title, the victory does not vindicate the certifying attorney of malpractice. To the contrary, the fees and expenses incurred in such a setting form the basis of recoverable damages in legal malpractice:

- "The client's injury may be the expense of retaining another attorney. Such damages can result from an attempt to avoid or minimize the consequences of the former attorney's negligence. The negligence may be erroneous advice or an incorrect document, which allegedly resulting in the expense of defending a challenge to that advice or to a document prepared by the lawyer." Legal Malpractice, Smith and Mallen, Section 21:6, Direct damages – Attorneys fees and related expenses. (2011 Edition).
- "The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct. For

example, if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer."

Restatement of the Law Third, The Law Governing Lawyers, Volume 1, Section 53, Causation and Damages. The American Law Institute.

These examples are directly analogous here. The ownership of Charleston Labs was evidenced by its stock. Womble was engaged initially to draft documents to make clear the rights, duties and obligations upon a future transfer of stock. Womble's negligence in the preparation of the corporate control documents created a cloud on the "title" to the stock. Womble's negligence in drafting the "title" documents was compounded by its imprecise advice surrounding Charleston Labs' execution of its rights to regain possession of the stock. A dispute between the parties ensued which was nothing more than a suit to quiet title to the contested shares. Charleston Labs was forced to incur legal expenses to defend its title to the contested shares and the expense of having done so is recoverable in malpractice.

In *Shealy v. Walters*, 273 S.C. 330, 256 S.E.2d 739 (1979), James Haskell Shealy sued James Walters for malpractice in the handling of a real estate transaction. The intended transfer of property to Shealy took place through a tortured series of events that culminated in Walters erasing the name of one grantee of the property and substituting Shealy's company (S.H.J.) as the grantee. Shealy later found himself embroiled in litigation surrounding the title to the property. In an action to quiet the title, it was found that the title to Shealy was defective. The court further found that Shealy was harmed, but that Walters was not the proximate cause of the harm because ultimately his errors did not alter the vesting of the title in Shealy's adversary. Following the suit to quiet title, Shealy sued Walters for malpractice. In defense, Walters argued, in part, estoppel

based upon the ruling in the quiet title action that Walters' action did not proximately cause harm. The trial court entered judgment for Walters and Shealy appealed. The South Carolina Supreme Court reversed and found that the legal malpractice case was one for the jury notwithstanding the prior decision which appeared to vindicate Walters. The following discussion by the Court is instructive to the present case:

Counsel for Walters, in an effort to sustain Judge Cobb's order, argues that nothing Walters did or failed to do was the real or proximate cause of the damages which Shealy sustained. He submits that the Judge Nicholson order was incorrect and that counsel for Shealy should have appealed. The order of Judge Nicholson is not subject to attack in this action. It is presumptively correct, but whether it is correct or incorrect is of no real consequence in this action. That order settled a dispute between Ellis and Shealy. The order declared title in Ellis. Even if the order is incorrect, it does not mean that Shealy has good title. This is an action in tort and is not one for the purpose of trying title to land. This court makes no intimation relative to ownership of the property.

Counsel for Walters argues that Shealy is not without hope of recovery; he submits that Shealy may now bring an action against Rockie Realty, Inc. ... He submits that after prevailing in an action against Rockie Realty, Inc., he would then be in a position to bring an action against Ellis and acquire title to the property, notwithstanding the order of Judge Nicholson.

All of this is inconsistent with the fee simple marketable title Shealy had the right to expect. We think it inescapable that the predicament in which Shealy finds himself at this time was proximately caused by the delicts of Walters. But for the Walters erasure, there would have been no suit by Ellis and Shealy would have the land. Judge Nicholson's order was not an intervening cause which insulated Walters from liability.

Shealy should not have been called upon to defend the action; he was brought into the court solely because the grantee in the deed was improperly substituted. He should not now be called upon, as argued by Walters' counsel, to bring two, or even one lawsuit in quest of good title. The lower court erred in failing to find that the negligence of Walters proximately caused injuries to Shealy. We think that plaintiff has proved all elements of his case as a matter of law, so that if the matter had been tried before a jury a directed verdict would have been in order. The only reasonable inference to be drawn from the whole of the evidence is that Shealy suffered damages which were proximately caused by the negligence of Walters. It is of no comfort to Walters that there may have been, arguably, other causes of the injuries. It is a sufficient basis for recovery if a defendant's conduct is a

contributing proximate cause.

Like Shealy, Charleston Labs' lawsuit to declare the rights, obligations and duties of its shareholders is inconsistent with fee simple title to Dr. T's shares in the company which Charleston Labs had the right to expect. Charleston Labs should not have been forced to initiate litigation to clarify its ownership interests. Charleston Labs availed itself of the judicial process solely because the transfer of shares was contestable. Womble's negligence made the transfer contestable. The only reasonable inference to be drawn from the record before this Court is that Charleston Labs suffered damages as a direct and proximate result of the negligence of Womble.

4. Womble Deviated from the Standard of Care

This is perhaps the easiest of the Womble arguments to refute. See the attached affidavit and deposition testimony of Plaintiff's expert, Dr. Greg Adams, which lists the many particulars of negligence committed by Womble in both the drafting of the SRA and SHA and in the subsequent attempt to exercise rights under either instrument in order to redeem the shares of Dr. T. **Exhibit 36.** Through Womble's experts, all of Dr. Adams' opinions are contested, all of which creates material issues of fact in dispute. Although this should dispose of the subject matter, Womble advances a number of red herring arguments on the standard of care which require a brief rebuttal.

Hindsight. First, Womble cites *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 701 S.E.2d 742 (2016) for the proposition that a "bad result" cannot be the basis of a malpractice suit and that looking in "hindsight," every case can be tried better. In *Harris Teeter*, the client criticized trial counsel's strategy in defending a commercial claim after the client lost a sizable arbitration award. Specifically, the client questioned why the attorney failed to address certain factors of the

Kiriakides test regarding the materiality of a tenant's breach of a lease so as to justify the landlord's decision to terminate. Womble did not litigate any matter for Charleston Labs. Charleston Labs does not complain about a "bad result" obtained through litigation by its trial counsel. To the contrary, Charleston Labs received an amazing result in litigation that was handled by GT, which litigation was made necessary by the negligence of Womble. Womble is not being criticized through the lens of hindsight. Womble is being criticized for deviating from the standard of care in both the drafting of the SHA and SRA and in the advice surrounding the exercise of rights to redeem Dr. T's ownership. *Harris Teeter* is misapplied here.

Litigation Proof Documents. Womble cautions the Court that Charleston Labs seeks a standard that requires attorneys to draft "litigation proof documents." Implicit in the argument is that Dr. T took a legal position that was without merit (i.e. a play on Judge Sol Wachtler's oft-cited saying that district attorneys can convince grand juries to "indict a ham sandwich"). No one suggests that Womble had a duty to draft litigation proof documents. Moreover, the malpractice is not in the fact that the documents were subject to judicial scrutiny. The malpractice truly exists in the fact that the client gave Womble one clear directive: to get back **ALL OF DR. T's SHARES**. At the time of the directive (and by virtue of earlier negligence), there existed two documents which addressed the ability to redeem shares – one document created the right to repurchase all shares (SHA) and one document created the right to repurchase only unvested shares (SRA). In drafting the letter to Dr. T by which the redemption was exercised, neither document was expressly identified. The redemption letter to Dr. T was accompanied by a proposed Settlement Agreement which referenced ONLY the SRA (i.e. the wrong document). The tender was rejected and uncertainty ensued over the ownership of the stock. Again, it's not that the

documents should have been made “litigation proof.” It’s that Womble did not understand its own documents and provided negligent advice on their operation.

Curiously, Womble cites *Calvert v. Scharf*, 217 W.Va. 684, 687, 619 S.E.2d 197, 200 (2005), in support of its “litigation proof” document argument. *Calvert* is a West Virginia case in which a declaratory judgment action was filed to clarify the intent of a Will and the drafting lawyer was later sued in malpractice for damages associated with the expense of the declaratory judgment action. In rejecting the declaratory judgment action itself as a basis of damage, the *Calvert* court feared the adoption of a standard requiring the drafting of litigation proof instruments. For the same reasons *Harris Teeter* is inapplicable, so too is *Calvert*. Again, the poor drafting of the SRA and SHA here were definitely negligent, but acted as merely the seeds of the ultimate malpractice. The malpractice itself ripened when it became time to exercise rights to recapture Dr. T’s shares and Womble (apparently confused by its own documents as Womble incorrectly focused only on the SRA) provided negligent advice which defeated or diminished Charleston Labs’ rights under the agreements.

Furthermore, South Carolina has authority in the trusts and estates realm that is more applicable here than that provided by our friends in West Virginia. It had been the well-settled law of South Carolina for as long as there are reported decisions that the beneficiaries of a testamentary instrument have no standing to bring a claim of legal malpractice against the drafting attorney. The rule was changed by *Fabian v. Lindsey*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014): “In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent.” By analogy here, it was Womble’s negligent advice in how to exercise rights in order to redeem ALL of Dr. T’s ownership which

defeated or diminished Charleston Labs' intent, both at the time of its execution of the SRA and SHA and the time of the exercise of its rights thereunder.

Charleston Labs urges the Court to reject the mischaracterization of its action by Womble through which Womble attempts to play the victim card as having been unfairly accused and judged by an unfair, albeit nonexistent, standard. Charleston Labs is the victim. Womble was negligent – not by a standard of perfection or hindsight, but rather by a standard of reasonable care.

5. The Statute of Limitations Began to Run on September 22, 2015

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005). Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a person of common *526 knowledge and experience on notice that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989); *see* S.C. Code Ann. § 15-3-535 (2005) (“[A]ll actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.”). “This standard as to when the limitations period begins to run is *objective* rather than subjective.” *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. “Therefore, the statutory period of limitations begins to run when a person *could or* **490 *should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either

the potential claim or of the facts giving rise thereto.” *Id.* A cause of action does not accrue until all elements of the cause of action are present.

Womble’s argument on the statute of limitations sounds eerily similar to, “you messed up – you trusted us.” This is true because there is a wide chasm between arguing that Charleston Labs knew it had the option to file a declaratory judgment action against Dr. T, versus Charleston Labs knew that its then present and active legal counsel had committed legal malpractice. If Womble believed that it committed malpractice in the drafting of the SHA and SRA and/or in the handling of the redemption of Dr. T’s shares, its fiduciary duties to Charleston Labs would have required Womble to advise its client a) of the potential conflict of interest, b) of the potential error or claim and c) of the advisability of having Womble’s conduct reviewed by an independent attorney. Not only did Womble fail to give any such advice, it advised Charleston Labs to do nothing vis a vis Dr. T, to continue raising money and to wait and see what, if anything, Dr. T chose to do in the future. Implicit in the advice given by Womble was not the suggestion that it had committed malpractice, but rather the suggestion that it was impossible to prevent Dr. T from taking a frivolous position regarding his ownership. Not only was there nothing here to place a reasonable person on notice of a potential claim of malpractice against Charleston Labs’ legal team, the team itself perpetuated Charleston Labs’ ignorance by advancing the point of view that you couldn’t stop Dr. T from “suing a ham sandwich.”

Furthermore, while Charleston Labs complains that it was harmed in the sense that it was lost in a sea of uncertainty and that it was exposed to contingent liabilities following the botched Dr. T redemption, uncertainty and contingent liabilities are not legally cognizable damages. Charleston Labs was first damaged when Womble refused to assist it in responding to Dr. T when he resurfaced with legal counsel of his own on September 22, 2015. As a result, Charleston Labs

was forced to engage other counsel to respond to Dr. T's position and it was through other counsel that the decision was made to undertake the declaratory judgment action. This was the first time that Charleston Labs suffered legally cognizable harm such that all elements of the cause of action for legal malpractice were present AND Charleston Labs knew or should have known of the errors as they were made clear to Charleston Labs through its successor counsel.

Conclusion

Charleston Labs hired Womble to prepare corporate control documents to define the rights, duties and obligations of the company and its shareholders. In drafting the documents, it was Womble's task to anticipate disputes, to draft precision and to ensure clarity of ownership amongst Charleston's shareholders. Instead, Womble drafted confusion. Womble's negligence was compounded when Charleston Labs sought to redeem the stock of Dr. T. In reliance on Womble's advice, Charleston Labs executed its repurchase rights without clear reference to a controlling corporate document. All of this culminated in a bona fide dispute over the ownership rights in the allegedly redeemed shares. The dispute required a judicial resolution which was accomplished through the filing of a declaratory judgment action. After the expenditure of nearly \$2,000,000.00 in legal fees and expenses, Charleston Labs was able to secure a court order which declared that it was the rightful holder of the contested shares. Charleston Labs' "victory" is by no means a vindication of Womble. To the contrary, the expenditure of \$2,000,000.00 to make clear through court intervention that which Womble was tasked to make clear through the preparation of proper corporate control documents is an indictment of Womble's prior representation and the essence of the malpractice claim which it now faces.

Charleston Labs has not played "fast and loose" with any Court. Charleston Labs was forced into the untenable position of initiating litigation in order to mitigate the malpractice of its

counsel. Charleston Labs has done nothing to manipulate the system to gain an advantage over Womble or any other party. Womble's allegations in that vein are outrageous and offensive. In the present action, Charleston Labs seeks nothing more than to recover damages which it proximately suffered because of the negligence of its attorneys. Despite its protestations to the contrary, asking Womble to stand behind its legal advice is no perversion of the legal process. Similarly, Charleston Labs rejects the argument that it should have known that Womble committed legal malpractice during the time that Womble continued to represent the company and failed to advise its client of the desirability of reviewing its conduct with independent legal counsel. You trust us long enough for the statute to expire is an outrageous legal position. Charleston Labs respectfully requests that Womble's motion for summary judgment be denied.³

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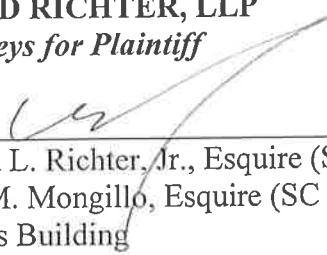
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³ Attached hereto as **Exhibits** are the complete deposition transcripts of Rutley (Exhibit 037), Baddour (Exhibit 038), Bosse (Exhibit 039), Scott (Exhibit 040), Berry (Exhibit 041), and Dr. Adams (Exhibit 042) which are hereby incorporated by reference as if written verbatim herein. In addition, Plaintiffs will utilize a Power Point presentation at the September 26, 2019 summary judgment hearing which will simultaneously be provided to the Court and it shall be part of Charleston Lab's argument and evidence in opposition to Womble's motion for summary judgment.

Charleston, South Carolina

September 23, 2019

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
ACTION NUMBER: 2017-CP-10-3768

Charleston Laboratories, Inc.)

Plaintiff,)

v.)

Womble, Carlyle, Sandridge & Rice,)
LLP,)

Defendant.)

CERTIFICATE OF SERVICE

I, Lisa M. Lescord, the undersigned paralegal at Bland Richter, LLP, attorney for the Plaintiffs, do hereby certify that I have served upon the Defendants in the above referenced matter, by forwarding a copy of the same, via email and/or first class mail postage prepaid, unless otherwise stated below, to the following counsel listed below:

Documents:

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT

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Charleston, South Carolina
September 23, 2019



Lisa M. Lescord
Paralegal

2019 SEP 23 AM 11:16
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

Daiichi Press Release

8/7/14

Charleston Laboratories and Daiichi Sankyo Announce Collaboration to Develop and Commercialize Novel, Fixed-Dose Combination Hydrocodone Products for Pain and

Charleston Laboratories to receive \$200m split evenly between cash upfront and a near term milestone, with additional \$450m in milestone payments connected to filing and approval of its novel fixed-dose hydrocodone products in the United States

Charleston Laboratories and Daiichi Sankyo will collaborate on development and commercialization; Charleston will supply all products and retain an option to co-promote in the United States

owned subsidiary LOCL Pharma, Inc., and Daiichi Sankyo announced today that the parties have entered into a strategic collaboration for the development and U.S. commercialization of Charleston Laboratories' novel hydrocodone combination products, including CL-108, being studied for the treatment of moderate to severe acute pain as well as the reduction of Opioid-Induced Nausea and Vomiting (OINV).

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	DEFENDANT WOMBLE, CARLYLE,
vs.	)	SANDRIDGE & RICE, LLP'S MOTION
	)	FOR RECONSIDERATION
Womble, Carlyle, Sandridge & Rice,	)	(HEARING REQUESTED)
LLP,	)	
	)	
Defendant.	)	
	)	

Defendant Womble, Carlyle, Sandridge & Rice, LLP moves pursuant to Rule 59(e), SCRPC, and other applicable common law principles, statutes, rules, and authorities for reconsideration of the Court's October 22, 2019 Order denying Defendant's Motion for Summary Judgment. Specifically, Defendant respectfully seeks reconsideration, alteration, or amendment of the Court's October 22 Order on the ground that the controlling legal principles and the record before the Court, even when construed in the light most favorable to the Plaintiff as the non-moving party, preclude a cause of action for legal malpractice against Defendant.

The specific grounds for this Motion are as follows:

1. The Court erred in failing to address Defendant's argument that under controlling South Carolina precedent, a lawyer who prepares documents that are not ambiguous, do not conflict with each other, work as they were intended to work, and cause the client to prevail against a subsequent challenge to their effectiveness has not breached any duty to the client as a matter of law and is not liable for legal malpractice.
2. The Court erred in denying the motion for summary judgment on the ground that "[i]f the draftsmanship of the documents was a contributing proximate cause of their damages, [Charleston Labs is] entitled to have their case heard by a jury" when
 - (a) there is no evidence that the documents were poorly drafted and, to the contrary, the Florida court concluded as a matter of law that the documents were effective

to permit the repurchase of the shares at issue and that Charleston Labs had complied with the required procedure to do so;

- (b) there is no evidence that the drafting of the agreements was the cause in fact of the claim made by Dr. T;
 - (c) the Florida court ruled in favor of Charleston Labs based on the documents as drafted and executed, concluded that the claims made by Dr. T were completely meritless, and found no genuine issues of material fact and that Plaintiff was entitled to judgment as a matter of law;
 - (d) such a ruling erroneously infers negligence from the fact that a claim was made and subjects Defendant to liability merely on that basis, which is expressly contrary to South Carolina law;
 - (e) such a ruling employs the very sort of hindsight analysis that is expressly prohibited under *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 701 S.E.2d 742 (2010); and
 - (f) such a ruling makes lawyers guarantors that no subsequent claim will be made regarding their work and makes lawyers liable for the costs of defending even a meritless claim, including claims such as the one presented here that was ultimately defeated because of the lawyer's work.
3. The Court erred in concluding collateral estoppel does not bar this action as a matter of law when to establish its claim for legal malpractice, Plaintiff must relitigate issues already finally decided in the Florida action—*i.e.* that the agreements were not ambiguous, the agreements created concurrent rights, and Plaintiff validly exercised its right to repurchase all of Dr. T's shares.
 4. The Court erred in conflating the doctrines of collateral estoppel and judicial estoppel and in concluding judicial estoppel does not bar Plaintiff's claim when Plaintiff's claim for legal malpractice is based upon allegations of fact that are completely and intentionally inconsistent with the positions it took in the Florida action.
 5. The Court erred in concluding that a genuine issue of fact exists with respect to when Plaintiff knew or should have known that Dr. T might have a claim to some or all of his stock when it is undisputed that Plaintiff had actual notice of such a potential claim in March 2010, which is far more than three years before this action was brought; and the Court erred by failing to identify the issue of fact.

Defendant respectfully asserts the above-referenced aspects of the presented record, applicable law, and arguments were overlooked or not properly recognized or addressed by the Court. Thus, Defendant requests that this Court withdraw its prior order and issue an order

granting summary judgment in its favor as a matter of law. The basis for this request is more fully set forth in the memorandum of law submitted with this Motion. Defendant requests the Court hold a hearing to permit the Court to determine whether the Court should alter, amend, or set aside its Order.

ROBINSON GRAY STEPP & LAFFITTE, LLC

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Columbia, South Carolina
October 31, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	DEFENDANT WOMBLE, CARLYLE,
vs.	)	SANDRIDGE & RICE, LLP'S
	)	MEMOMANDUM OF LAW IN
Womble, Carlyle, Sandridge & Rice,	)	SUPPORT OF MOTION FOR
LLP,	)	RECONSIDERATION
	)	
Defendant.	)	
	)	
	)	

Pursuant to Rule 59(e), SCRPC and other applicable common law principles, statutes, rules, and authorities, Defendant moves for reconsideration of the Court's October 22, 2019 Order denying Defendant's Motion for Summary Judgment. Defendant is entitled to an Order granting this Motion for Reconsideration and granting summary judgment in its favor as a matter of law. In denying the motion for summary judgment, the Court misapprehended or overlooked controlling South Carolina legal principles that operate to preclude any liability against Defendant in this case.

There is no legal basis to permit a claim for the recovery of legal fees and costs for the defense of a meritless claim by a third party when a court has determined the documents that are the subject of the claim are unambiguous and work exactly as intended, and the documents were the reason the client prevailed in the claim. In denying the motion for summary judgment, the Court has abrogated fundamental legal principles that establish the duties lawyers owe to their clients, the preclusive effect of previously litigated and determined issues, and the essential elements of proximate cause. As a result of the Court's ruling, Defendant is made a guarantor that its legal work will never be subjected to even a meritless challenge and is exposed to liability based

entirely on the subsequent conduct of third parties over whom it has no control. This result is incorrect as a matter of law. Accordingly, the Court should grant this motion and issue a new order granting summary judgment in favor of Defendant.

STANDARD

A Rule 59(e) motion provides a vehicle through which a party may (1) request that the circuit court reconsider matters properly encompassed in a decision on the merits or “alter or amend” its judgment, or (2) attempt to obtain a ruling on issues or arguments previously raised to the court. *See Elam v. S.C. Dep’t Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 779 (2004). A party may file a Rule 59(e) motion when it believes the court “misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Id.* at 24, 602 S.E.2d at 780.

ARGUMENT

- I. **The Court erred in failing to address Defendant’s argument that under controlling South Carolina precedent, a lawyer who prepares documents that are not ambiguous, do not conflict with each other, work as they were intended to work, and cause the client to prevail against a subsequent challenge to their effectiveness has not breached any duty to the client as a matter of law and is not liable for legal malpractice.**

The Court’s order does not address the authorities cited by Defendant that establish that lawyers who prepare documents that are unambiguous, work as intended, and cause the client to prevail in a subsequent dispute with a third party are not liable simply because a subsequent claim was made. In South Carolina, an attorney only owes the client a duty of care to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010); *Holy Loch Distributors v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). In *Harris Teeter*, the South Carolina Supreme Court expressly held that an attorney is not an insurer

of the outcome of a case, stating “[w]e reject as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care.” 390 S.C. at 291, 701 S.E.2d at 750. Likewise, in *Holy Loch*, the Supreme Court held lawyers are not warrantors of specific results. 340 S.C. at 27, 531 S.E.2d at 286 (holding that in South Carolina, no cause of action exists for legal malpractice based on breach of express warranty to obtain a specific result). These holdings preclude as a matter of law a claim such as the one in this case, which is solely premised on the fact that a subsequent claim was made. If lawyers are not guarantors of the *outcome* of a subsequent claim, they cannot, as a matter of law, be guarantors that *there will be no* subsequent claim. Similarly, if liability may not be predicated on a *bad result*, it cannot as matter of law be based *on a good one*.

Second, the Court’s ruling in the October 22 Order employs the very sort of hindsight analysis that is expressly prohibited. In *Harris Teeter*, the Supreme Court specifically stated that “[i]n assessing liability, a court should never measure a professional's performance through the lens of hindsight.” 390 S.C. at 291, 701 S.E.2d at 750. In the October 22 Order, this court directly contravenes this prohibition, reasoning that a breach of the duty either did or may have occurred solely because Charleston Labs was “called upon” to defend Dr. T’s claims that he was a shareholder, and assumes without any analysis that Dr. T’s claims were made because of the way the documents were drafted and not—as the Florida court conclusively established—in spite of the way they were drafted.

Third, the Order contravenes the established rule in South Carolina that a lawyer is not liable even if his work might have been “better.” *Id.* at 293, 701 S.E. 2d at 751 (holding that case can always be tried “better”). In denying the motion, the Court apparently is assuming that even though the documents were unambiguous and worked as intended, they could have been “better” by being prepared in an unspecified way that would have prevented Dr. T from making his already

meritless claims. But such an assumption is flawed both factually and legally. Factually, this assumption requires the documents to be “more unambiguous,” which is akin to “less pregnant.” There is no evidence factually of how the documents could have been made “more unambiguous,” or, as is discussed in more detail below, that any such differences would have prevented Dr. T from subsequently claiming to be a shareholder. Legally, the assumption is flawed because under *Harris Teeter* a lawyer cannot be liable just because his work could have been “better.” This assumption by the Court has the effect of superimposing a *perfection* standard on top of the already erroneous duty as a *guarantor*.

There is no case in South Carolina that holds that the duty of care requires lawyers to produce documents that will avoid all future disputes, at least so long as the documents are clear, unambiguous, work as intended, and are the very reason that the client prevailed. *Harris Teeter*, *Holy Loch*, and other cases previously cited by Defendant prohibit such a result. Other courts have expressly rejected this argument. *See Calvert v. Scharf*, 217 W. Va. 684, 687, 619 S.E.2d 197, 200 (2005) (rejecting the argument that a client in a legal malpractice action against its attorney is entitled to damages merely because the client was called into court by virtue of a declaratory judgment action based on a dispute regarding language in a legal document prepared by the attorney). To permit this case to proceed under the undisputed facts presented here flies in the face of established South Carolina law, and the motion for summary judgment should have been granted on this basis.

II. The Court erred in denying the motion for summary judgment on the ground that “[i]f the draftsmanship of the documents was a contributing proximate cause of their damages, [Charleston Labs is] entitled to have their case heard by a jury.”

This statement by the Court is incorrect for several reasons. First, as discussed above, it omits any consideration of whether there has been a breach of duty as a predicate to the issue of

proximate cause. *See Stokes Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016) (reciting that a claim for legal malpractice requires that damages be proximately caused by breach of duty by the attorney).

Second, the record before this Court on summary judgment does not include any evidence that the documents were poorly drafted. To the contrary, the Florida court specifically examined the documents at issue and held as a matter of law that they were effective to permit Charleston Labs to repurchase the shares at issue and that Charleston Labs had complied with the required procedure to do so. In granting summary judgment to Charleston Labs, the Florida Court found that Dr. T's claims against Charleston Labs were meritless—concluding that there were no genuine issues of material fact and no legal principals upon which Dr. T could prevail. Because these agreements were unambiguous and legally effective *as drafted*, there cannot have been any breach of duty, and the drafting of these agreements cannot have proximately caused any harm to the Charleston Labs.

Third, the Court's recitation regarding the existence of proximate cause in this case overlooks both of its essential elements. To prove proximate cause, Charleston Labs must show both causation in fact and legal cause. *Eadie v. Krause*, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct. App. 2008) (citing *Sims v. Hall*, 357 S.C. 288, 298, 592 S.E.2d 315, 320 (Ct. App. 2003)). "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id.* "Legal cause is proved by establishing foreseeability." *Id.* "When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability." *Id.* (citing *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968)).

There is no evidence that the drafting of the agreements was the cause in fact of the claim made by Dr. T. Specifically, Charleston Labs has not and cannot establish that "but for" the way

the SRA and SHA were drafted, Dr. T would not have made a claim that he still owned shares in Charleston Labs. There is no evidence—and it cannot be reasonably inferred—that any other form of the agreements would have prevented Dr. T from making a spurious claim to be a shareholder with \$450 million at stake. As noted in the Florida Court’s order granting summary judgment, the positions taken by Dr. T were inconsistent with the documents and not supported by his own sworn testimony. In fact, most of Dr. T’s arguments in the Florida litigation had nothing to do with the language of the agreements. For example, in the Florida case, Dr. T argued that he was still a shareholder, among other reasons, because: (a) certain language in the Series B offering documents estopped Charleston labs to contend otherwise; (b) Charleston Labs did not calculate the fair value of his shares in good faith; (c) he never surrendered the stock certificate and therefore the repurchase was ineffective; (d) Charleston Labs never executed the SHA; (e) he never cashed the check for \$2.10; (f) he never signed the Redemption and Settlement Agreement; and (g) because his termination for cause was wrongful. *See* Ex. S to Defendant’s Motion for Summary Judgment.

None of these arguments have anything to do with the language of the SRA and the SHA, and the fact that Dr. T. made these arguments is directly contrary to the assertion that “poor draftsmanship” was the cause in fact of his claim. There is no testimony in this record from Dr. T that if the documents had been different, he would not have claimed to be shareholder. This is fatal to Charleston Labs’ contention regarding proximate cause and exposes a fallacy in the Court’s conclusion that an implied connection between the documents and Dr. T’s claims establishes the cause in fact element of proximate cause. Because Charleston Labs has not established in this case that Dr. T would not have claimed ownership in Charleston Labs if different language had been used in the agreements, and because the undisputed evidence is to the contrary, Charleston Labs cannot establish cause in fact and the claim should be dismissed.

The Court's order also overlooks the legal cause element of proximate cause. Charleston Labs cannot prove legal cause because the record establishes Defendant could not have foreseen in 2008 that Dr. T would claim the SRA superseded the SHA when (1) that was not Dr. T's understanding at the time of execution; (2) nothing in the agreements supports such a claim; (3) there is no legal principle that supports such a claim; (4) the claim was contrary to existing law; and (5) such a construction would lead to an absurd result. A lawyer is not called upon under the standard of care to anticipate incorrect legal arguments that a third party may possibly make one day. Moreover, even if Defendant did foresee any claim by any shareholder, all Defendant could do was provide Charleston Labs with documents that would withstand the challenge. As evidenced by the Florida Order, Defendant provided Charleston Labs with documents which withstood legal challenge.

III. The Court erred in concluding collateral estoppel does not bar this action as a matter of law because to establish its claim for legal malpractice, Charleston Labs must relitigate issues already finally decided in the Florida action—i.e. that the agreements were not ambiguous, the agreements created concurrent rights, and Charleston Labs validly exercised its right to repurchase all of Dr. T's shares.

Collateral estoppel prevents the re-litigation of issues “regardless of whether the claims in the first and subsequent lawsuits are the same.” *Carolina Renewal, Inc. v. South Carolina Dep’t of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). In the Florida action, Charleston Labs contended—and the Florida Court determined—the SRA and the SHA were not ambiguous and created concurrent rights, and Charleston Labs validly exercised its right to repurchase all of Dr. T's shares pursuant to the SHA. These conclusions are binding on Charleston Labs in this legal malpractice action and preclude a finding of liability as a matter of law pursuant to the doctrine of collateral estoppel. Charleston Labs may not now assert that the documents were ambiguous and contradictory as the basis for a claim of legal malpractice when those issue have

already been determined in a proceeding to which Charleston Labs was not only a party, it was the party urging the court to make those findings. Because Charleston Labs may not now claim to the contrary, the entire factual premise of its legal malpractice claim collapses. *See* Complaint ¶¶ 28, 29. This is exactly what the doctrine of collateral estoppel is designed to prevent. Accordingly, the Court erred in not granting summary judgment on this basis.

IV. The Court erred in conflating the doctrines of collateral estoppel and judicial estoppel and in concluding judicial estoppel does not bar Charleston Labs’ claim where Charleston Labs’ claim for legal malpractice is based upon allegations of fact that are completely and intentionally inconsistent with the positions it took in the Florida action.

The Court erroneously conflates the doctrines of collateral and judicial estoppel in its October 22 Order. *See Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (noting the circumstances under which judicial estoppel may appropriately be invoked may be found even if collateral estoppel does not apply). In this case, Charleston Labs is collaterally estopped from relitigating issues in order to support its malpractice claim. Charleston Labs is judicially estopped from taking contradictory and inconsistent positions in order to support its malpractice claim.

“Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). Judicial estoppel’s “essential function and justification is to prevent the use of ‘intentional self-contradiction . . . as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.’” *Allen*, 667 F.2d at 1167 (quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)).

Charleston Labs’ current allegations—and the crux of its legal malpractice action—that the documents are ambiguous and were poorly drafted are completely inconsistent with its allegations in the Florida action. Charleston Labs’ hypocritical pleadings represent a classic case of

“intentional self-contradiction,” regardless of how the Court views the nature of the positions taken. The reason for the inconsistency is obvious: Charleston Labs wants to have it both ways. It wanted the Florida Court to find that the documents were not ambiguous, and it wants this Court to find that they are. Charleston Labs’ inconsistency is the very essence of what judicial estoppel bars. *See Allen*, 667 F.2d at 1168 (holding a plaintiff’s claim was barred by judicial estoppel because he was estopped from taking different positions as to whether he was a joint venturer or an employee); *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (affirming summary judgment in favor of the defendant because judicial estoppel barred the plaintiff incorporator in action against the corporation from taking inconsistent positions regarding whether he had authority to bind a corporation or ownership of the corporation); *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 221 (D.S.C. 1996), *aff’d*, 133 F.3d 915 (4th Cir. 1997) (affirming summary judgment in favor of the defendant, holding judicial estoppel barred the plaintiff employee in an action against an employer from taking inconsistent positions on whether she was totally disabled or a qualified person under the American with Disabilities Act); *Bank of Am., N.A. v. Bethea*, Op. No. 2017-UP-261 at *2 (S.C. Ct. App. June 28, 2017) (affirming grant of summary judgment in favor of a bank in a foreclosure action, holding judicial estoppel barred homeowner from taking insistent positions as to whether a mobile home was real or personal property); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Manufacturers & Traders Tr. Co.*, 137 F. App’x 529, 531 (4th Cir. 2005) (affirming the grant of summary judgment to the defendants, holding judicial estoppel barred the plaintiff’s claim because the plaintiff could not take inconsistent positions as to whether entities were “real entities” or “fictitious persons”).

- V. The Court erred in concluding that a genuine issue of fact exists with respect to when Plaintiff knew or should have known that Dr. T might have a claim to some or all of his stock when it is undisputed that Plaintiff had actual notice of such a**

potential claim in March 2010, which is far more than three years before this action was brought; and the Court erred by failing to identify the issue of fact.

In denying summary judgment, this Court stated, “[a]s to the status of the statute of limitations argument, the Court finds there is a genuine issue of material fact as to when the [Charleston Labs] knew or should have known they were on notice of a potential claim by Dr. T that was caused by Defendant’s representation.” The Court does not identify what issues of fact exist that prevent the Court from determining when Charleston Labs knew or should have known that they had a claim. Respectfully, the undisputed record before the Court clearly establishes when Charleston Labs either knew or should have known that a claim existed.

"The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009).

In March 2010, David Baddour sent Paul Bosse an email advising him that Dr. T could assert a claim to still own at least a portion of his stock notwithstanding the repurchase. Thereafter, in 2011, Charleston Labs paid Defendant and other lawyers to investigate the status of Dr. T’s stock. Therefore, the possibility of a claim by Dr. T that he continued to own his shares of stock, which is the exact injury being alleged in this malpractice lawsuit, was known to Charleston Labs in March of 2010 or, at the latest, the following year in 2011. Whether Baddour was correct is immaterial for purposes of starting the clock for the statute of limitations because Charleston Labs’ theory is not dependent on the validity of the claim, but merely on its existence.

CONCLUSION

For the foregoing reasons and based upon the applicable case and statutory law and the entire record presented to this Court, even when viewed in the light most favorable to Charleston

Labs as the non-moving party, Charleston Labs has failed to present competent evidence of the necessary elements of a legal malpractice claim. Therefore, Defendant requests its Motion for Reconsideration be granted and requests the Court issue an Order granting its Motion for Summary Judgment and dismissing with prejudice this action.

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Columbia, South Carolina
October 31, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NUMBER: 2017-CP-10-3768
Charleston Laboratories, Inc.	)	
	)	
Plaintiff,	)	
	)	PLAINTIFF'S BRIEF ON
v.	)	STATUTE OF LIMITATIONS
	)	
Womble, Carlyle, Sandridge & Rice,	)	
LLP,	)	
	)	
Defendant.	)	

SUMMARY STATEMENT

The statute of limitations in a legal malpractice is three years from the date that the client knew or should have known of the existence of a claim against the attorney. While the defense has urged the Court that the Plaintiff knew or should have known of uncertainty surrounding its attempt to recapture the shares in Charleston Laboratories, Inc. ("Charleston Labs") once held by Dr. Ray Takigiku ("Dr. T"), it is impossible to infer from any such knowledge that the client therefore knew that its lawyer had committed malpractice. This is especially true where Womble Carlyle ("Womble") continued to represent Charleston Labs after the recapture, repeatedly assured Charleston Labs that the shares were properly recovered and NEVER advised Charleston Labs that it had committed error and/or that Charleston Labs should seek a review of Womble's conduct by independent legal counsel. The statute of limitations in the present case began to run when Dr. T resurfaced in September, 2015 and asserted his rights as an alleged shareholder of Charleston Labs.

INTRODUCTION

On August 19, 2019, Defendant filed a motion for summary judgment with a supporting memorandum. In part, the Defendant moved for summary judgment on the grounds that “Charleston Labs’ cause of action for legal malpractice fails as a matter of law because the claim is barred by the statute of limitations.” On September 23, 2019, Plaintiff filed a thirty-seven page memorandum in opposition to summary judgment with forty-two exhibits¹.

On September 27, 2019, the Court held a motion hearing that lasted approximately three hours. Both parties argued their positions with extensive presentations. Throughout the arguments, the Court made numerous inquiries of counsel, including pointed questions about the issue of the statute of limitations. It was one of the most fair and substantive State court hearings Plaintiff’s attorneys have ever participated in and we are confident Opposing Counsel would agree. Each side had a full and fair opportunity to make their legal arguments and present their evidence.

On October 22, 2019, the Court denied Defendant’s summary judgment motion (“Order”). In that Order the Court ruled that, “[a]s to the status of statute of limitations argument, the Court finds there is a **genuine issue of material fact** as to when the Plaintiffs knew or should have known they were on notice of a potential claim by Dr. T that was caused by Defendant’s representation.” (Emphasis supplied.) On October 31, 2019, Defendant filed a Motion to Reconsider.

On December 5, 2019, the Court denied Defendant’s Motion to Reconsider, but requested the parties to submit written briefs “on the issue of the applicability of the statute of limitations only.” In this Order, the Court stated that “[t]he issue should include a discussion of the dates

¹ These same exhibits are hereby incorporated by reference for use in this brief.

mentioned in the affidavit of Plaintiff's expert Professor Gregory Adams dated July 7, 2017, which was filed with the original Summons and Complaint."²

This brief addresses the issue of the statute of limitations and will illustrate why the Court was correct in its December 5, 2019 Order and should once again deny Defendant's misplaced motion for summary judgment as a matter of law.

STATUTE OF LIMITATIONS

1. Professor Adams' Affidavit

In accordance with the statutory requirement of an expert affidavit in conjunction with filing a claim of professional negligence, Professor Adams filed his affidavit with the original Summons and Complaint prior to the beginning of discovery. Extensive discovery has since been conducted and it firmly establishes and confirms the key date in Professor Adams' affidavit as the trigger date for any running of the statute of limitations defense: **SEPTEMBER 2015**. On page five of his affidavit, Dr. Adams swears and affirms that, "[i]n September 2015, Raymond Takigiku ("Dr. T") asserted that he was still a shareholder in Charleston Labs because Charleston Labs had not properly repurchased his shares ..." The critical fact that Dr. T resurfaced in 2015 has now been firmly established in discovery.

What also has been established *beyond a reasonable doubt* is that Womble drafted the 3/15/2011 Plaintiff's "Stockholder Ledger" which unequivocally states that all of Dr. T's shares had been "Repurchased by the Corporation [on] 3/26/2010 per Article 2 of the Stockholders' Agreement ("SHA") dated May 30, 2008."³ By and through this critical document, Womble informed Charleston Labs in 2011 that Womble had correctly and successfully facilitated the

² Attached hereto as **Exhibit A** and incorporated by reference is Professor Adams July 7, 2017 affidavit.

³ See WBD_CHLAB 0014134-35 the Womble drafted "Stockholder Ledger" attached as **Exhibit B** and incorporated by reference.

repurchase of Dr. T's shares by Charleston Labs in 2010. David Baddour testified in support of the exact same position in his deposition:

Baddour, David - Vol. 1, (Page 165:6 to 165:15)

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6 Q. Well, I'm asking you as of March of
7 2011, did you believe that the 420,000 shares
8 should properly be reflected as being returned
9 back into the company treasury?
10 A. **Our position was definitely that the**
11 **shares had been repurchased.** They were not --
12 they wouldn't automatically go back into the
13 option pool. We had to -- we would have had to do
14 something to put -- to increase the size of the
15 pool otherwise. (Emphasis supplied.)

There can be no mistake about Baddour's use of the word "definitely." This was the conclusive legal advice provided by Womble to its client, Charleston Labs, which in 2011 did not have in-house corporate counsel. Clearly, Womble's legal advice was that they did everything right to reacquire the Dr. T shares, so much so that Charleston Labs could actively seek to sell Dr. T's 420,000 "repurchased" shares. The purpose of the Womble drafted 2011 "Stockholder Ledger" was precisely to enable the sale of Dr. T's repurchased shares.

Out of the nearly half a million pages of production and native files that have been produced in this case, and out of the hundreds and hundreds of lines of testimony that have been transcribed, the Stockholder Ledger combined with the Baddour testimony eviscerates Womble's renewed plea for summary judgment as a matter of law.

"Summary judgment is a **drastic remedy**, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (Ct. App. 2001) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Montgomery v. CXS Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). In determining whether a genuine issue of fact exists; a court must assume as true the evidence of the nonmoving party and **draw all reasonable inferences in favor of that party**. *Id.* In cases where the applicable burden of proof is

preponderance of the evidence, "the non-moving party is only required to submit **a mere scintilla of evidence in order to withstand a motion for summary judgment.**" *Hancock v. Mid-South Mgt. Co., Inc.*, 381 S.C. 326, 330-1, 673 S.E.2d 801, 803 (2009). (Emphasis supplied)

The only reasonable inference to be drawn here is that Charleston Labs reasonably relied on its legal counsel in believing that it had recaptured Dr. T's shares. There is simply no inference available to suggest that the client should have suspected malpractice by its learned legal counsel. Furthermore, a claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005). Under the discovery rule, the limitations period commences when the facts and circumstances of an injury would put a **person of common knowledge and experience on notice** that some claim against another party might exist. *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989) (Emphasis supplied.) "This standard as to when the limitations period begins to run is **objective rather than subjective.**" *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. (Emphasis supplied.) "Therefore, the statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Id.* A cause of action does not accrue until all elements of the cause of action are present. "Under the discovery rule, the statutory limitations period begins to run from the date when **the injury** resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence." *Gillman v. City of Beaufort*, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006).

In its repeated pleas to the Court, Womble seeks an inference that if the prospect of a future declaratory judgment action was discussed with Charleston Labs, then the client was placed on notice that its legal team had committed malpractice in failing to secure clear title to the Dr. T shares. As a result, Womble places on par knowledge of a potential declaratory judgment with knowledge of malpractice. In doing so, Womble ignores the fact that it told its client repeatedly that Charleston Labs successfully recovered the shares, ignores the fact that Womble continued to represent Charleston Labs and ignores the fact that Womble NEVER told its client that Womble may have committed professional errors in the manner in which the shares were recovered or that Charleston Labs may want to have Womble's conduct reviewed by independent legal counsel. More importantly, even if one could equate the discussion of a potential and theoretical declaratory judgment action with knowledge of legal malpractice (which we reject), it is impossible to maintain that the cause of action for legal malpractice accrued without injury. Clearly, injury did not occur here until Dr. T resurfaced to claim his shareholder rights in September, 2015 and Charleston Labs undertook expensive legal action to quiet title to the Dr. T shares. Rather than spot the inferences to Womble, the inference that must be given to Charleston Labs is the inference that it had the right to rely on its legal counsel and that it did in fact rely on the advice of its counsel that all of Dr T's shares had been successfully repurchased via the SHA and not the Stock Repurchase Agreement ("SRA").

This inference is further bolstered by Charleston Labs' March 22, 2010 minutes, which were reviewed by Womble, in which Charleston Labs "RESOLVED that the Corporation will repurchase all of the Common Stock currently held by the Corporation's former Chief Operating Officer, Ray Takigiku, pursuant to Article 2.2(a) of the Corporation's Stockholders Agreement."⁴

⁴ See WBD_CHLAB 0024371 attached hereto as **Exhibit C**.

Just like in the 2011 “Stockholder Ledger,” Article 2 of the SHA is referenced in these 2010 corporate minutes. Thus, two times in writing, in 2010 and 2011, Womble advised its client that all of Dr. T’s shares have been successfully repurchased via the SHA. The inference must be that Charleston Labs relied on this written advice.⁵ Again, there is no evidence to suggest that Charleston Labs suspected error by its attorneys until after its efforts to secure Womble’s help in September, 2015 were rudely rebuffed by Dean Rutley who threatened to call security on Charleston Labs’ in-house legal counsel, George Scott.

The second inference that must be given to Charleston Labs is that a common person with common knowledge and experience would have no reason to doubt the written advice of their legal counsel; thus, the statute of limitations cannot begin until Charleston Labs’ receipt of Dr. T’s September 2015 letter refuting Womble’s definitive “position.”⁶

By the time Dr. T surfaced in 2015, Charleston Labs had hired in house corporate counsel, George Scott (“Scott”). Scott requested Womble represent Charleston Labs in 2015 but that request was denied when Womble attorney Dean Rutley threatened to call security on Scott.⁷ At that point in time, Charleston Labs hired Greenberg Traurig and was faced with a legal dilemma.

⁵ Any conflicting advice from Womble in 2010 that Dr. T had rights under the SRA is gutted by these two documents and as a matter of law Charleston Labs had the right to rely on Womble’s 2011 position that the SHA controlled over the SRA as is seen in the “Stockholder Ledger.” In other words, Womble’s true advice was only a crazy man, Dr. T, would bring a future lawsuit under the SRA and ignore the SHA that he signed.

⁶ Womble’s motion seeks to REVERSE South Carolina summary judgment precedent and give them, *as the moving party*, the **inference** that in 2010 they advised Charleston Labs Dr. T may have a claim. Womble then seeks a **second inference** to ignore the fact that they never stated the reason Dr. T may have a claim is because they committed legal malpractice. Next, Womble seeks a **third inference** that the Court should assume that a lay client should know that Womble made a mistake. The **fourth inference** Womble seeks is for the Court to ignore the ethical rule that Womble had a duty to immediately inform Charleston Labs if they thought they had committed legal malpractice. The **fifth inference** Womble seeks to ignore is the SHA language written in the 2010 minutes and 2011 Stockholders’ Ledger. The final and **sixth inference** Womble seeks is that any and all subsequent referrals to Dr. T’s shares inoculates it as per the previous inferences. This is not the law in South Carolina. Womble gets no benefit of the doubt, Womble gets no disputed facts put on its side of the ledger, and Womble gets zero point zero inferences. Instead this is Womble’s potential jury argument on its statute of limitations defense. Charleston Labs believes that Womble seeks the drastic remedy of summary judgment because, while it has every right to put forth this theory to a jury after its Summary Judgment is denied for a second time, it lacks the fortitude to do so.

⁷ See Scott as Charleston Labs 30(b)(6) representative 12/4/18 deposition p. 208, l. 14-15.

They could wait for Dr. T to file his threatened legal action or they could file a declaratory judgment action in a venue and forum they deemed beneficial to Charleston Labs. Consequently, Charleston Labs was faced with the classic race to the courthouse against Dr. T. Charleston Labs won.

It was at this point in time that Charleston Labs broke with Womble's 2010 email recommendation to "sit tight."⁸ Therefore, Charleston Labs' statute of limitations begins to run in September 2015 for the following reasons:

- (1) Dr. T made a claim;
- (2) Scott reviewed Womble's 2010 repurchase documents and determined that Womble may have committed legal malpractice in that Womble's 3/15/2011 "Stockholder Ledger" was not accurate and requests Womble to represent Charleston Labs going forward;⁹
- (3) Womble attorney Dean Rutley threatened to call security on Scott; and,
- (4) Charleston Labs could no longer "sit tight" and allow Dr. T to gain a tactical advantage by filing in a venue and forum that was perceived to be detrimental to Charleston Labs.

Consequently, Dr. Adams' filed affidavit is correct when it states that, "[t]o resolve this dispute about whether Raymond Takigiku was still a shareholder in Charleston Labs, Charleston Labs retained Greenberg Traurig law firm and in November 2015 filed a declaratory judgment action against Takigiku." Charleston Labs had to hire Greenberg Traurig because Womble made a mistake, never told the client about it, and refused to clean up its own mess.

⁸ See Exhibit 20 to Plaintiff's Memorandum in Opposition to Summary Judgment a 4/27/2010 "sit tight" email from Womble attorney David Baddour to Charleston Labs CEO Paul Bosse. The inference from this email is that Womble did nothing wrong and it is also attached hereto as **Exhibit D**.

⁹ See Scott as Charleston Labs 30(b)(6) representative 12/4/18 deposition p. 264, l. 24 – p.268, l. 8.

2. The Statute of Limitations Began to Run on September 22, 2015¹⁰

Womble's argument on the statute of limitations sounds eerily similar to, "you messed up – you trusted us." This is true because there is a wide chasm between arguing that Charleston Labs knew it had the option to file a declaratory judgment action against Dr. T, versus Charleston Labs knew that its then present and active legal counsel had committed legal malpractice. If Womble believed that it committed malpractice in the drafting of the SHA and SRA **in 2008** and/or in the handling of the redemption of Dr. T's shares **in 2010**, its fiduciary duties to Charleston Labs would have required Womble to advise its client a) of the potential conflict of interest, b) of the potential error or claim, and c) of the advisability of having Womble's conduct reviewed by an independent attorney. Not only did Womble fail to give any such advice, it advised Charleston Labs to do nothing vis a vis Dr. T, to continue raising money and to wait and see what, if anything, Dr. T chose to do in the future. *If a well-respected law firm such as Womble did not believe it did anything wrong in 2008 or 2010, why would the law require a lay person, such as Charleston Labs', CEO Paul Bosse to suspect legal malpractice?* The simple answer is it doesn't.

Implicit in the advice given by Womble was not the suggestion that it had committed malpractice, but rather the suggestion that it was impossible to prevent Dr. T from taking a frivolous position regarding his ownership. This is the inference that Charleston Labs is entitled to under the law. In addition, not only was there nothing here to place a reasonable person on notice of a potential claim of malpractice against Charleston Labs' legal team, the team itself perpetuated Charleston Labs' ignorance by advancing the point of view that you couldn't stop Dr. T from "suing a ham sandwich."

¹⁰ The Complaint in this matter was filed on July 24, 2017 well within the three year statute of limitations period.

Furthermore, while Charleston Labs complains that it was harmed in the sense that it was lost in a sea of uncertainty and that it was exposed to contingent liabilities following the botched Dr. T redemption, uncertainty and contingent liabilities are not legally cognizable damages. Charleston Labs was first damaged when Womble refused to assist it in responding to Dr. T when he resurfaced with legal counsel of his own on September 22, 2015. As a result, Charleston Labs was forced to engage other counsel to respond to Dr. T's position and it was through other counsel that the decision was made to undertake the declaratory judgment action. This was the first time that Charleston Labs suffered legally cognizable harm such that all elements of the cause of action for legal malpractice were present AND Charleston Labs knew or should have known of the errors as they were made clear to Charleston Labs through its successor counsel.

CONCLUSION

It is ironic that Womble, which has steadfastly maintained it never committed legal malpractice at any time in this matter, now relies on a "yeah but" statute of limitations defense which holds as follows: Yeah but if we did commit legal malpractice our lay client should have divined it sooner.¹¹ That is not the law in South Carolina.

The documents and testimony are clear and demonstrably defeat Womble's motion for summary judgment concerning the statute of limitations. This evidence, plus the disputed facts and the inferences required from them, demonstrate that there is still "a genuine issue of material fact as to when Charleston Labs knew or should have known they were on notice of a potential claim by Dr. T that was caused by Womble's representation." Therefore, Charleston Labs respectfully requests that Womble's motion for summary judgment be denied yet again.

¹¹ Womble needs to pick a horse to ride at trial. Are they going to argue they did not commit legal malpractice or are they going to argue the "Yeah but" defense to the jury?

Charleston, South Carolina

January 6, 2020

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Charleston Laboratories, Inc. v. Womble, Carlyle, Sandridge & Rice, L.L.P.

Civil Action Number: 2017-CP-10-3768

EXHIBIT A

PLAINTIFF'S BRIEF ON STATUTE OF LIMITATIONS

STATE SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

ACTION NO: 2017-CP-10- 3768

Charleston Laboratories, Inc.,
Plaintiff,
vs.
Womble, Carlyle, Sandridge & Rice, LLP,
Defendant.

AFFIDAVIT OF
EXPERT OPINION OF
DR. GREGORY B. ADAMS

PERSONALLY APPEARED before me Gregory B. Adams who, being duly sworn, deposes and says that:

1. It is my expert opinion, held to a reasonable degree of professional certainty, that the complaint in this matter alleges facts establishing that the defendant law firm, Womble, Carlyle, Sandridge & Rice, LLP, [WCSR] and its lawyers Dean Wayne Rutley and David B. Baddour had attorney-client relationships with plaintiff Charleston Laboratories, Inc. [Charleston Labs] and owed it professional and fiduciary duties, which defendant breached, failing to adhere to the standard of care required of lawyers; some of these negligent acts and the factual basis for them are set forth below:
 - A. Defendant and its lawyers Dean Rutley and David Baddour owed professional, legal, ethical, and fiduciary duties to plaintiff Charleston Labs throughout the events forming the basis for this lawsuit:
 - i. Shortly after its incorporation in June 2007, Charleston Labs retained defendant WCSR and its partner Dean Rutley to provide the legal advice and services it needed as a new business,

including corporate organization, documentation, and securities as well as assisting it in raising capital. WCSR continued to provide corporate legal advice and services to Charleston Labs for more than seven years, until late 2014.

- ii. On May 20, 2008 defendant WCSR, through its lawyers Rutley and Baddour, undertook to advise Charleston Labs how to protect its interests when it hired three new at-will employees, John Ameling, Bernard Schachtel, and Raymond Takigiku, who were all to become shareholders in Charleston Labs, along with its founders, G. Paul Bosse III, Ryan Baker, and Chris Goodwin.
 - a. Defendant WCSR, through its associate Baddour, advised Charleston Labs that its interests could be protected through the execution of two contracts that WCSR would draft for it:
 - (1) a Stockholders' Agreement (SHA) between all six of the "Founding Stockholders"—Bosse, Baker, and Goodwin as well as newcomers Ameling, Schachtel, and Takigiku, and
 - (2) a Stock Restriction Agreement (SRA) executed by newcomers Ameling, Schachtel, and Takigiku.
 - b. Over the next ten days Baddour spent eight hours drafting and revising the SHA and SRA and advising Charleston Labs, through its CEO Bosse, about the proper content of the agreements and their execution.

- c. On May 30, 2008, as advised by WCSR, the SHA and SRA WCSR drafted were executed and made effective as of May 30, 2008.
- d. The SHA and the SRA drafted by WCSR were inconsistent and their relationship was unclear.
 - (1) Although the agreements had overlapping sets of parties (both agreements affected the company's legal relationships with newcomers Ameling, Schachtel, and Takigiku, but only the SHA applied to Bosse, Baker, and Goodwin – who were not parties to the SRA) and
 - (2) although both the SHA and the SRA gave Charleston Labs rights to repurchase shares of its stock from Ameling, Schachtel, and Takigiku and
 - (3) although the triggering events and repurchase price terms differed between the two agreements,
 - (4) neither agreement referred to the other or contained any provision governing the relationship with contemporaneous agreements;
 - (5) instead, both the SHA and the SRA merely contained a standard integration clause superseding all prior written and oral agreements.
- e. Also on May 30, 2008, Charleston Labs issued 210 shares of common stock to Takigiku for an aggregate price of \$2.10 (\$0.01 per share) evidenced by Charleston Labs

Stock Certificate No. 12. The reverse side of Stock Certificate No. 12 indicated that the shares were subject to the transfer restrictions and rights of repurchase contained in both the SHA and SRA.

- f. On September 25, 2008, Takigiku's 210 shares were automatically converted into 420,000 shares of common stock upon consummation of a 2,000-to-1 forward split. Charleston Labs marked Stock Certificate No. 12 "Cancelled" and replaced it with Stock Certificate No. 14, representing the 420,000 shares of converted stock belonging to Takigiku.
- iii. On March 16, 2010 defendant WCSR, through its lawyers Rutley and Baddour, undertook to advise Charleston Labs about the termination of Raymond Takigiku and the repurchase of his shares in the company.
 - a. On March 19, 2010, after consultation with and following the legal advice of WCSR, Charleston Labs sent Takigiku a letter terminating him for cause. This letter had been reviewed, analyzed, and revised by WCSR, and Charleston Labs' CEO Bosse had discussed it with and received correspondence from WCSR lawyer Baddour.
 - b. On March 26, 2010, after consultation with and following the legal advice of WCSR, Charleston Labs sent Takigiku a letter exercising its right to repurchase his shares. Enclosed with the letter was a check for \$2.10 in full payment for

his shares and a Redemption and Settlement Agreement prepared by WCSR, which referred to the SRA but not the SHA. This letter, too, had been reviewed, analyzed, and revised by WCSR, and Charleston Labs' CEO Bosse had discussed it with and received correspondence from WCSR lawyer Baddour.

- iv. WCSR continued to advise and provide legal services to Charleston Labs through 2014. The most recent WCSR Statement for Services Rendered to Charleston Labs that I have reviewed is dated December 19, 2014.
 - v. I have been informed, and the Complaint alleges, that Charleston Labs has paid all of the amounts billed it by WCSR throughout the seven years that WCSR and its lawyers had ongoing attorney-client relationships with the company.
- B. In September 2015, Raymond Takigiku asserted that he was still a shareholder in Charleston Labs because Charleston Labs had not properly repurchased his shares under the terms of the SHA and the SRA.
- i. Takigiku claimed that the SRA limited Charleston Labs' repurchase rights and that it had no right to repurchase his shares under the terms of the SHA.
 - ii. Takigiku also claimed that, even if Charleston Labs had the right to repurchase his shares under the SHA, the company had not effectively exercised that right because neither of the March 2010 letters referred to the SHA or purported to exercise rights under it

(and the Redemption and Settlement Agreement accompanying the March 26 letter referred to the SRA, not the SHA).

- C. To resolve this dispute about whether Raymond Takigiku was still a shareholder in Charleston Labs, Charleston Labs retained the Greenberg Traurig law firm and in November 2015 filed a declaratory judgment action against Takigiku. Takigiku filed a counter-claim. On September 12, 2016 U.S. District Judge James I. Cohn granted Charleston Labs' motion for summary judgment and denied Takigiku's motion for summary judgment, ruling that Takigiku was not a shareholder in Charleston Labs because his shares had been repurchased in March 2010. Charleston Labs spent a considerable amount of money to resolve this dispute; the Complaint in this action alleges that the litigation cost to Charleston Labs was almost \$2,000,000.00.
- D. The claim asserted by Takigiku, resulting in the federal court litigation and legal expenses, was based on (1) the terms of the 2008 SRA and SHA and (2) the wording of the March 2010 letters and the attached Redemption and Settlement Agreement. All of these documents were drafted or revised by WCSR. All were analyzed by WCSR lawyers. All were used by Charleston Labs because WCSR advised it to use them, assuring it that these documents were appropriate to achieve its legal goals and meet its legal needs.
- E. It is my expert opinion that WCSR and its lawyers owed their client Charleston Labs professional, fiduciary, and contractual duties of competence, diligence, and communication. WCSR was obligated to render its legal advice and services to Charleston Labs with the degree of

skill, care, knowledge, and judgment usually possessed and exercised by members of the legal profession. “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.1, S.C. Rules of Professional Conduct, S.C.A.C.R. 407.

- F. It is my expert opinion that WCSR and its lawyers violated their duties to their client Charleston Labs by violating the standard of care governing them and in rendering legal advice and services to Charleston Labs while failing to exercise the degree of skill, care, legal knowledge, thoroughness, preparation, and judgment reasonably necessary for the representation and usually possessed and exercised by members of the legal profession. Some of the breaches by WCSR and its lawyers include
- i. creating ambiguity and legal uncertainty regarding their client’s rights by drafting the SRA and SHA as contemporaneous agreements without assuring their consistency and clarifying their relationship,
 - (1) although the agreements had overlapping sets of parties (both agreements affected the company’s legal relationships with newcomers Ameling, Schachtel, and Takigiku, but only the SHA applied to Bosse, Baker, and Goodwin – who were not parties to the SRA), and
 - (2) although both the SHA and the SRA gave Charleston Labs rights to repurchase shares of its stock from Ameling, Schachtel, and Takigiku, and

- (3) although the triggering events and repurchase price terms differed between the two agreements.
 - (4) Both agreements should have explicitly referred to the other and contained provisions governing their relationship as contemporaneous agreements.
 - (5) Once the SHA and SRA had been executed and the shares issued, the rights of Charleston Labs should have been clear.
 - ii. In failing to draft the March 2010 letters terminating Takigiku and repurchasing his shares to explicitly, unambiguously specify the rights being exercised by Charleston Labs and the source of those rights and in failing to correctly refer to the SHA – not the SRA – in the attached Redemption and Settlement Agreement.
 - iii. In creating ambiguity in the agreements and uncertainty in Charleston Labs' exercise of its rights under them, leading to costly litigation that would have been unnecessary and unlikely had WCSR fulfilled its duties to its client.
- G. It is my expert opinion that these violations of duty by WCSR and its lawyers proximately caused substantial damage to their client Charleston Labs. It is more likely than not that there would have been no litigation between Charleston Labs and Takigiku had they not breached these duties, and even if there had been claims by Takigiku or litigation, it most certainly would have been much less expensive.
- 2. My resumé, attached as Exhibit A, demonstrates why federal and state courts, including the South Carolina Supreme Court and Court of Appeals, have held

that I am qualified as an expert witness and thus to execute the affidavit required by South Carolina Code of Laws § 15-36-100, which does not require me to state all negligent acts, omissions, or wrongdoing by defendant.

- A. I am a tenured law professor at the University of South Carolina School of Law, where I have been teaching since 1978. My subjects of expertise include lawyers' ethics, professional responsibility, and fiduciary duties.
- B. I have earned a J.S.D. (Doctor of Juridical Science) and an LL.M. from Columbia University, as well as my J.D. from Louisiana State University.
- C. Federal and state courts in South Carolina have recognized my expertise, including the South Carolina Supreme Court in *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding that I am qualified as an expert witness and that my expert testimony was accurate and proper) and *Smith v. Haynsworth, Marion, McKay & Guerard*, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding that I am qualified as an expert witness on issues of lawyers' duties and it was reversible error to rule otherwise), and the Court of Appeals in *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004) (holding it was reversible error to discount my expert opinion in a legal malpractice case and to refuse to give it efficacy). Additionally, three South Carolina Attorneys General, the South Carolina Secretary of State, and the United States Attorney for the District of South Carolina have relied upon my expertise to guide and assist them in significant criminal investigations and prosecutions, and the United States Securities and Exchange Commission has retained me as an expert witness on lawyers' duties.

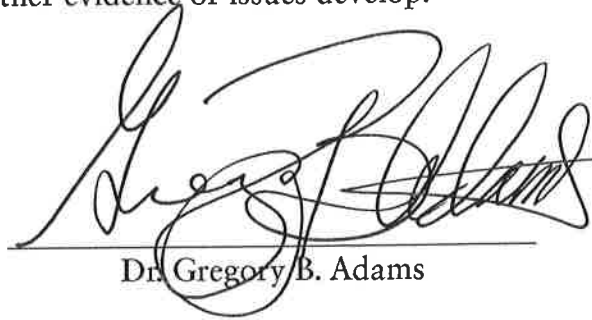
3. I hold all of the expert opinions I have expressed in this affidavit to a reasonable degree of legal certainty; the results are more probable than not.
4. I have been retained as an expert witness by counsel for plaintiff. My expert opinions are based upon the allegations of the complaint, which I assume to be true because they are supported by substantial, incontrovertible evidence which I have reviewed. This evidence is the kind usually relied upon by experts in this field and includes
 - A. the WSCR invoices to Charleston Labs from November 29, 2007 to December 19, 2014;
 - B. the September 12, 2016 Order on Motions for Summary Judgment of U.S. District Judge James I. Cohn in *Charleston Laboratories, Inc. v. Dr. Raymond Takigiku* and the docket, pleadings, and motions in that case;
 - C. the May 30, 2008 Stockholders Agreement (SHA);
 - D. the May 30, 2008 Stock Restriction Agreement (SRA) of Raymond Takigiku;
 - E. Charleston Labs Stock Certificate No. 12 and corporate records associated with it;
 - F. Charleston Labs Stock Certificate No. 14 and corporate records associated with it;
 - G. the March 19, 2010 letter of Charleston Labs to Takigiku terminating him with cause;
 - H. the March 26, 2010 letter of Charleston Labs to Takigiku paying him for his shares of stock and enclosing the Redemption and Settlement

Agreement;

- I. the Redemption and Settlement Agreement sent by Charleston Labs to the March 19, 2010 letter of Charleston Labs to Takigiku with the March 26, 2010 letter.

5. Because of the preliminary nature of this case, these opinions are subject to expansion and modification as further evidence or issues develop.

Further the affiant sayeth not.


Dr. Gregory B. Adams

Sworn to and subscribed before me
this 7th day of July 2017.


Notary Public for South Carolina
My Commission Expires: 4/9/2023



DR. GREGORY B. ADAMS

UNIVERSITY OF SOUTH CAROLINA SCHOOL OF LAW
1525 Senate Street, Columbia, South Carolina 29208

PROFESSIONAL EXPERIENCE

Law Professor (tenured), University of South Carolina, 1978–present.

SUBJECTS TAUGHT: Professional Responsibility; Ethical Issues in Criminal Practice; Judicial Ethics; Legal Profession; Legal Technology; Contracts; Corporate Law; Business Planning; Agency, Partnership & Limited Liability Companies; Antitrust; International Business Law; European Union Law.

Associate, University of South Carolina Rule of Law Consortium (2011-present).

Founding Director, Program on Judicial Ethics, Selection, Accountability, and Independence, University of South Carolina School of Law (2003-12).

Visiting Professor of Law, Pskov Volny University, Pskov, Russia, Spring 2001.

Visiting Professor of Law, University of Southampton, Southampton, England, Fall 1989.

Visiting Professor of Law, Rutgers University, Newark, NJ, 1983-1984.

Stagiaire, Commission of the European Communities (European Union), Brussels, Belgium, 1979.

Research Associate, Institute of European Studies, University of Brussels (U.L.B.), 1979.

Visiting Scholar, Faculté de Droit, Université Catholique de Louvain, Louvain-la-Neuve, Belgium, 1978.

Assistant Professor, Southern University School of Law, 1975-1977.

Consultant, Louisiana Legislative Council, 1976-1977.

Attorney with Breazeale, Sachse & Wilson, Baton Rouge, LA, 1973-1975.

Admitted to Practice by the Louisiana Supreme Court on October 5, 1973.

EDUCATION

J.S.D. 1986

Columbia University School of Law New York, New York

Dissertation: Control of Monopoly Power in Europe and the United States

LL.M. 1979

Columbia University School of Law New York, New York

Thesis: E.E.C. and U.S. Antitrust Regulation of Monopolists' Refusals to Deal

Jervey Fellow in Foreign Law, Parker School, Columbia University, 1977-1979.

J.D. 1973

Louisiana State University Law Center Baton Rouge, LA

Order of the Coif; Louisiana Law Review; Moot Court Board; Winner, Robert Lee Tullis Moot Court Competition before the Louisiana Supreme Court.

B.S. 1977

Louisiana State University Baton Rouge, LA

Phi Kappa Phi

College of Arts & Science, Vanderbilt University Nashville, TN 1966-1968

HONORS AND RECOGNITION

Outstanding Faculty Publications Award, University of South Carolina School of Law
(April 2006, Book, Runner Up)
Louisiana State University Law Center Hall of Fame
Twenty Year Who's Who Honoree
Who's Who in the World
Who's Who in America
Who's Who in American Law
Who's Who in American Education
Who's Who in the South and Southwest
Who's Who of Emerging Leaders in America
Who's Who in Law Education
Dictionary of Int'l Biography (Cambridge, U.K.)
State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) (holding GBA qualified as an expert witness and that GBA's expert testimony was accurate and proper)
Smith v. Haynsworth, Marion, McKay & Guerard, 322 S.C. 433, 472 S.E.2d 612 (1996) (holding GBA qualified as an expert witness; reversible error to rule otherwise)
Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App., 2004) (holding it was reversible error to discount GBA's expert opinion and fail to give it efficacy)
Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676 (Ct. App., 1989) ("excellent discussion of the ramifications of these statutes" in "Litigation of Corporate Law Disputes After the Recent Amendments of the Corporate Code," in Current Issues in Civil Litigation, S.C. Bar Continuing Judicial Legal Education Seminar 1989)

PUBLICATIONS

South Carolina Corporate Practice Manual (2nd ed. 2005, S.C. Bar) (lead author, coauthors: Burkhard, Cleveland, Clark, Hellwig, Merline).
"Reflections on the Reactions to Proposed Rule 8.5: Consensus of Failure," 36 S. Texas Law Review 1101 (1995).
"Introductory Remarks to the Conference on the Commercialization of the Legal Profession," 45 S.C. L. Rev. 883 (1994) (with Nathan M. Crystal).
Report of the Proceedings, Conference on the Commercialization of the Legal Profession (with Nathan M. Crystal), authored: "Summary of Discussion of Frankel Paper," 45 S.C.L. Rev. 901; "Summary of Discussion of Palay/Galanter Paper," 45 S.C.L. Rev. 929; "Summary of Discussion of Martyn Paper," 45 S.C.L. Rev. 961; "Summary of Discussion of Dimitriou Paper," 45 S.C.L. Rev. 999 (1994).
"The Ethical Lawyer," occasional column in the S.C. Trial Lawyer Bulletin beginning 1994.
"Suing Corporations and Those Behind Them," 1992 S.C. Trial Lawyer Bulletin 17.
South Carolina Corporate Practice Manual (S.C. Bar, 1989) (with Cleveland, Burkhard, McWilliams).
"European and American Antitrust Regulation of Pricing by Monopolists," 18 Vanderbilt Journal of Trans. Law 1 (1985).
"Antitrust Constraints on Single-Firm Refusals to Deal by Monopolists in the European Economic Community and the United States," 20 Texas Int'l L. J. 1 (1985).
"The 1981 Revision of the South Carolina Business Corporation Act," 33 S.C. L. Rev. 405 (1982).
"Inheritance Taxation of Trusts," in 11 L. Oppenheim & S. Ingram, Louisiana Civil Law Treatise, Trusts (1977).

PUBLIC SERVICE

Member, American Bar Association Ethics and Professionalism Committee, A.B.A. Law Practice Division (2015-2018).

Member, American Bar Association Law Practice Futures Initiative, A.B.A. Law Practice Division (2015-2016).

Expert Witness, United States Securities and Exchange Commission, *U.S. S.E.C. v. Staples* (2013)

Invited Expert Witness, Judicial Merit Selection Study Committee, SC Senate (9/17/07)

Member, S.C. Bar, Professional Responsibility Committee, 1993-2012 (chair or member of numerous subcommittees, including Ethics 2000 Subcommittee; presented Ethics 2000 recommendations to S.C. Bar House of Delegates).

Member, S.C. Bar, Unauthorized Practice Committee, 1994, 2000-2003.

Member, S.C. Bar, Technology Committee, 1996-1998.

Ethics Consultant, South Carolina Association for Justice, 1994-2014.

Co-Founder and Vice-President, South Carolina Association of Ethics Counsel, 2000-present.

Expert Witness and advisor to the South Carolina Attorney General in the criminal investigation and prosecutions for securities fraud in connection with the failure of Carolina Investors and HomeGold Financial, 2003-2008.

Expert Consultant for the South Carolina Department of Natural Resources, re: piercing the corporate veil, 2000

Expert Consultant for the South Carolina Department of Health and Environmental Control, re: piercing the corporate veil to impose environmental liability under CERCLA, 1997-1999.

Reporter, South Carolina Uniform Commercial Code Article 2A (South Carolina Law Institute at the request of the South Carolina General Assembly, 1996-2001).

Expert Witness and advisor to the South Carolina Attorney General in criminal prosecution of John O'Quinn, Esq. for unauthorized practice of law and illegal solicitation, 1996-1997.

Co-Reporter, Conference on the Commercialization of the Legal Profession, Charleston, S.C., May 1993.

Expert Witness for the United States before the Federal Grand Jury investigating securities fraud, May 1993.

Member, Governing Board, Center for Law, the Legal Profession, and Public Policy, 1991-93, 1998-2000.

Member, Blue Ribbon Committee on Corporate Law, South Carolina Secretary of State, 1991-95.

Securities Law Expert for the South Carolina Attorney General in connection with the bankruptcy of Patriots Point Associates, 1989-91.

Advisor to the S.C. Deputy Securities Commissioner and the S.C. Senate Judiciary Committee on Corporate Law issues.

Co-Reporter, South Carolina Business Corporation Act of 1988 (South Carolina Law Institute for the South Carolina General Assembly, 1986-88).

Member, Louisiana State Law Institute, Civil Code Revision Committee, 1975-1977.

PRESENTATIONS

- "Cyber-Ethics for Lawyers," Workers Injury Law and Advocacy Group Regional Conference, Atlanta, GA (3/27/17) (with Paula J. Frederick, Esq., General Counsel, State Bar of Georgia)
- "Operational Cyber-Security for Lawyers," WFG Winter Underwriting Seminar, Columbia, SC (2/7/17)
- "Cyber-Fraud, Cyber-Ethics, Cyber-Liability, Cyber-Security," S.C. Bar LEAPP Law Office Management School, Columbia, SC (2/7/17)
- "Cyber-Ethics, Cyber-Security, Cyber-Liability, and Cyber-Insurance for Lawyers and Law Firms," Sixth Annual Everything You Need To Know About Ethics, S.C.A.E.C. - S.C. Bar CLE, Columbia, SC (1/13/17)
- "Ethical Issues in Criminal Cases: *Slager & Roof*," Twenty-first Annual Charleston County Probate Court Seminar, The Mills House Wyndham Grand Hotel, Charleston, SC (12/16/16)
- "Getting Clients Ethically While Promoting Our Profession," Florence County Bar (11/30/16)
- "Technology for Safe and Sane Lawyering," S.C. Bar LEAPP Law Office Management School (9/29/16)
- "Regulating Unauthorized Multijurisdictional Virtual Law Practice," S.C. Law School (2/22/16)
- "Practice-Specific Concerns Regarding Cyber Attacks," Panel Moderator, Cyber Attacks & Civil Liability, S.C. Law Review Symposium (2/5/16)
- "Highlights from the Technology and Law Seminar: Why Do I Have To Understand This Stuff?," Fifth Annual Everything You Need To Know About Ethics, S.C.A.E.C. - S.C. Bar CLE, Columbia, SC (1/15/16)
- "Future Ethics for Lawyers in the Age of the Jetsons," Twentieth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/17/15)
- "Ethical Management of Technology: Survival Techniques for Lawyers and Law Firms," Technology Techniques & Security for Litigators and Transactional Lawyers, S.C. Bar CLE, Columbia, SC (12/10/15)
- "The Ethics of Technology in Law Practice," Technology Techniques & Security for Litigators and Transactional Lawyers, S.C. Bar CLE, Columbia, SC (12/10/15)
- "Technology for Safe & Sane Lawyering," S.C. Bar LEAPP Law Office Management School (10/1/15)
- "Cybersecurity Ethics: Encryption for Solo Lawyers and Small Law Firms," LPM-TECH CONFERENCE 2015, S.C. Bar Solo & Small Firm Section, Columbia, SC (9/18/05)
- "Minister of Justice, Guardian of the Constitution," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (6/1/15)
- "Ethics for Criminal Defense Counsel in the Age of Social Media and the Internet," Federal Public Defender Seminar for Criminal Justice Act Attorneys (5/8/15)
- "Ethics of Lawyers Working for Nonprofits & Serving on Nonprofit Boards," South Carolina Nonprofit Corporate Update, S.C. Bar CLE, Columbia, SC (2/5/15)
- "Ethics of Confidentiality Online: Cybersecurity & Encryption," Fourth Annual Everything You Need To Know About Ethics, S.C.A.E.C. - S.C. Bar CLE, Columbia, SC (1/16/15)
- "*Fabian v. Lindsay*: Lawyers' Liability to Intended Beneficiaries," with Professor S. Alan Medlin, Nineteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/14)
- "Cybersecurity: Lawyers Safely Using Smartphones, Email, and the Cloud in the Age of International Hackers and Government Spies," S.C. Bar CLE, Columbia, SC (8/26/14)
- "Ethics for Prosecutors," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (6/30/14)
- "Modification of Fees and Other Contract Questions: Rules 1.8 and 1.5," Third Annual Everything

- You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/17/14)
- "Modification of Fee Agreements During the Representation: Ethical Duties, Fiduciary Duties, Contract Law," Eighteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/12/13)
- "Legal Ethics and Social Media: How to Stay Out of Trouble and Protect Your Lawyer's Law License," Palmetto Paralegal Association Seminar, Columbia, SC (10/16/13)
- "Professional Responsibility for Prosecutors," 14th Circuit Solicitor's Office Career Prosecutor Program and Externship, Bluffton, SC (May 29-30, 2013)
- "War of the Roses & Roses, LLC: The Sequel - When Partners Leave the Firm," Everything You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/18/13)
- "Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account, and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," Seventeenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/6/12)
- "Getting Paid, Keeping the Money, and Safeguarding Your License: How to Manage Your Cash Flow, Trust Account, and Bottom Line Under the New Rules Without Inviting a Visit from Disciplinary Authorities," S.C. Association for Justice, Auto Torts Seminar, Buckhead Ritz Carlton, Atlanta, GA (12/1/12)
- "Mike Nifong - Aberrational Rogue?," U.S.C. Law School Symposium on Prosecutorial Ethics and Duties, Columbia, SC (3/16/12)
- "How to Get Paid Now!," Everything You Need To Know About Ethics, S.C.A.E.C.-S.C. Bar CLE, Columbia, SC (1/13/12)
- "Current Professional Responsibility Issues for Litigators," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (1/6/12)
- "Fiduciary Duties of Estate Planning & Probate Lawyers: General Principles and S.C. Cases," Sixteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/11)
- "Advanced Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/5/11)
- "Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/16/10)
- "Ethics for Legislative Attorneys," South Carolina General Assembly, Columbia, SC (10/6/10)
- "Current Ethical Issues and Trends," York County Bar Association Ethics CLE, Panel with S.C. Supreme Court Justice Costa M. Pleicones and S.C. Disciplinary Counsel Lesley M. Coggiola, Esq., Rock Hill, SC (3/12/10)
- "Lawyers in the Crosshairs: Recent South Carolina Cases of Concern to Estate Planning and Probate Lawyers," Fourteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/15/09)
- "Judicial Ethics for S.C. Workers' Compensation Commissioners," S.C. Workers' Compensation Commission Continuing Judicial Ethics Seminar, Columbia, SC (11/17/09)
- "Regulating Lawyer Behavior Through Recent South Carolina Tort Cases: Issues of Lawyer Ethics, Professionalism, and Liability," S.C. Tort Law Update, S.C. Bar CLE, U.S.C. Law School (11/13/09)
- "Lawyers' Ethical Responsibilities and the Torture Memoranda," Amnesty International Panel Discussion, University of South Carolina, Columbia, SC (4/15/09)
- "The 'Of Counsel' Agreement," S.C. Bar Annual Convention, Myrtle Beach, SC (1/24/09)
- "Ethical Duties in Family Estate Planning," Thirteenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/11/08)

- "Teaching Professional Responsibility in U.S. Law Schools," Southeastern Ass'n of Law Schools, Ritz Carlton, Palm Beach, FL (7/31/08)
- "Judicial Selection in the United States," S.C. Supreme Court Teachers Institute, Columbia, SC (6/23/08)
- "Corporate Lawyers as Fiduciaries," S.C. Bar Annual Convention, Charleston, SC (1/25/08)
- "My Heroes Have Always Been Lawyers and They Still Are, It Seems," Twelfth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, SC (12/13/07)
- "Prosecutorial Ethics: Was the Duke Lacrosse Case an Aberration or the Tip of the Iceberg?," SCTLA Annual Convention, Hilton Head Island (8/3/07).
- "Malpractice Liability of Estate-Planning Lawyers," Eleventh Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/7/06).
- "Ethics for Trial Lawyers: How to Avoid Those Hidden Land Mines," S.C.T.L.A. Auto Torts Seminar XXIX, Ritz-Carlton, Buckhead, Atlanta, GA (12/2/06).
- "Ethical Issues for the Sports Attorney-Agent: Lessons from *Vortex v. Ware*," International Sport and Entertainment Management Conference, Metropolitan Convention Center, Columbia, SC (11/9/06).
- "Ethics in Workers Comp Practice: Negotiation," ASCCAWC Annual Convention, Grove Park Inn, Asheville, NC (11/4/06).
- "Probate Judges and Lawyers: Prohibition of *Ex Parte* Communications," Fourteenth Annual Probate Bench/Bar Conference, Columbia, SC (9/15/06).
- "The Future Regulation of Lawyer Advertising Under the Proposed S.C. Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/4/06).
- "Free Speech and Judicial Selection: Implications of *White v. Republican Party*," Southeastern Association of Law Schools, The Breakers Hotel, Palm Beach, FL (7/20/06).
- "The New South Carolina Rules of Professional Conduct," Tenth Annual Charleston County Probate Court Seminar, The Mills House Hotel, Charleston, S.C. (12/15/05).
- "Ethical Use of Discovery Under the Workers' Compensation Act; Contact with Employer Witnesses; Use of Subpoenas in a Workers' Compensation Case; Frivolous Defenses: What to do About Them," ASCCAWC Annual Meeting, Grove Park Inn, Asheville, N.C. (11/4/05).
- "Applying the SC Code of Judicial Conduct to Workers' Compensation Commissioners: Lessons for Lawyers Practicing Before the Commission," SCWCEA Educational Conference CLE, Marriott Myrtle Beach Resort (10/24/05).
- "The New SC Rules of Professional Conduct: You Really Can't Do THAT Anymore!," SCWCEA Educational Conference, Marriott Myrtle Beach Resort (10/24/05).
- "Newly Revised Frivolous Procedures Act & Other Ethical Issues," SCTLA Tort Reform Seminar, Columbia, S.C. (10/14/05).
- Moderator and Coordinator, S.C. Corporate Practice Seminar, S.C. Bar CLE, U.S.C. Law School (9/30/05). Speaker: "Ethical Issues in S.C. Corporate Law for the General Practitioner and the Corporate Lawyer:
Ethical Issues Presented by Choices of Control Devices
Ethical Issues Arising from Threats of Owner Liability
The Big Ethical Question: Who Is The Client?"
- "The Code of Judicial Conduct: Does It Effect How We Practice Workers' Comp?," S.C. Bar CLE, U.S.C. Law School (8/26/05).
- "Ethics Seminar: The New Rules of Professional Conduct," SCTLA Annual Convention, Hilton Head Island (8/5/05).
- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E.

- Ethics Seminar, Richland County Bar Association (11/5/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Charleston, S.C. (8/18/04).
- "The New S.C. Lawyers' Oath," C.L.E. Seminar, S.C. Bar, Charleston, S.C. (6/25/04).
- "Judicial Ethics Review," J.C.L.E. Ethics Seminar, S.C. Court Administration Magistrates' Training Program, Columbia, S.C. (4/23/04).
- "Ethics 2000 and Lawyers' Fees," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel, Columbia, S.C. (11/15/03).
- "The Ethical Implications of *Brown v. Bi-Lo*," S.C. Workers Comp. Educational Ass'n Educational Conference, Kingston Plantation, Myrtle Beach, S.C. (10/20/03).
- "Ethics 2000: The New Rules of Professional Conduct & Multi-Jurisdictional Practice of Law," C.L.E. Ethics Seminar, Investors Title Insurance Co. Seminars (9/17/03 Rock Hill, 9/12/03 Hilton Head).
- "Ethics 2000: The New Rules of Professional Conduct — You Can't Do That Anymore!," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/8/03).
- "Political & Legal Ethics: The Pitfalls to Avoid," C.L.E. Ethics Seminar, S.C. Bar Annual Convention (Young Lawyers Division) (1/24/03).
- "Recent Developments in Legal Ethics," C.L.E. Ethics Seminar, S.C. Bar & S.C. Association of Ethics Counsel (12/14/02).
- "Current Ethical Issues in Real Estate Practice," C.L.E. Ethics Seminar, Security Title Insurance Company (11/8/02).
- "Ethics of Attorney's Fees for Domestic Law Attorneys," C.L.E. Ethics Seminar, S.C. Bar (9/20/02).
- "Discovery Abuse and Litigation Ethics," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/3/02).
- "Discovery Abuse, Litigation Ethics, Supervision and Other Horrors," C.L.E. Ethics Seminar, S.C.T.L.A. Convention, Hilton Head, S.C. (8/2/02).
- "Ethical Issues in Attorney Marketing Under the Amended Rules," C.L.E. Ethics Seminar, S.C. Bar (7/26/02).
- "Ethics in the Practice of Criminal Law," C.L.E. Ethics Seminar, S.C. Bar (5/10/02).
- "Professional Ethics in the Real World: Communication with Witnesses," C.L.E. Ethics Seminar, Ass'n S.C. Claimants' Attorneys for Workers Comp. (5/3/02).
- "Lawyers and Paralegals Practicing Law When and Where They Shouldn't," C.L.E. Ethics Seminar, S.C. Bar and South Carolina Ass'n of Ethics Counsel (12/15/01).
- "Proposed Disclosure Rule and Goods Funds Statute in South Carolina," C.L.E. Ethics Seminar, S.C. Bar (8/17/01).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/3/01).
- "Ethical Perils for Family Practitioners: Keeping Your License and Keeping Your Practice," C.L.E. Ethics Seminar, S.C. Bar (12/2/00).
- "Ethical Issues in Workers Compensation Practice," C.L.E. Ethics Seminar, S.C. Workers' Comp. Educational Ass'n, Kingston Plantation, Myrtle Beach, S.C. (10/23/00).
- "The Things That Make Paralegals Indispensable: Technology and the Future of the Practice of Law," Paralegal Continuing Education Seminar, S.C.T.L.A. Convention (8/5/00).
- "Recent Developments in Ethics and Professional Responsibility," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/4/00).

- "The Internet - Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," SC Defense Trial Attorney's Association & SC Claim Manager's Association CLE at Grove Park Inn, Asheville, N.C. (7/29/00).
- "The Internet - Legal Ethics in Cyberspace: Marketing on the Web and Communicating Via Email Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (4/28/00).
- "The Responsibility of Administrative Law Judges to Control Unethical and Unprofessional Conduct by Lawyers: Ethical Prohibitions, Remedies and Sanctions," ALJ CLE Seminar, Southern States Association of Administrative Law Judges (3/17/00).
- "S.C. Appellate Procedure: The New Relationship Between the Supreme Court and the Court of Appeals," Paralegal Continuing Education Seminar, Ass'n S.C. Claimant Attorneys for Workers Comp., Asheville, N.C. (1/22/00).
- "Professionalism: Advertising Ethically Under the Amended S.C. Rules of Professional Conduct," C.L.E. Ethics Seminar, S.C. Bar (1/14/00).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/11/99).
- "Hot Issues in Ethics: Marketing Under the Rules of Professional Conduct and the Amended South Carolina Rules Governing Advertising," C.L.E. Ethics Seminar, S.C. Bar (10/29/99).
- "Ethical and Professional Responsibility Issues in Litigation: Discovery Abuse," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (12/12/98).
- "Multi-Jurisdictional Practice of Law: *Pro Hac Vice* Admission and Unauthorized Practice," C.L.E. Ethics Seminar, S.C. Bar (12/8/98).
- "Discovery Abuse: Bane of Professionalism? Ethical Prohibitions & Court-Ordered Sanctions," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/14/98).
- "*Hedgepath* & *McCormick* and the Ethics of Ex-Parte Communication with Treating Physicians," Workers Comp. C.L.E. Seminar, S.C.T.L.A. Convention (8/14/98).
- "Legal Ethics for a Multi-State Law Firm," C.L.E. for a Major S.C. Law Firm (8/8/98).
- "Prudent Ethical Conduct after *Hedgepath*," Medical Staff, McLeod Hospital, Florence, S.C. (4/6/98).
- "What is the Effect of *Hedgepath* on Doctors' Duties to Workers' Comp Patients?" S.C. Workers Comp. Educational Ass'n Annual Meeting, Charleston, S.C. (2/22/98).
- "Confidentiality, Privilege, and the Attorney as Witness, Gossip, or Snitch," C.L.E. Ethics Seminar, S.C. Bar and Univ. of South Carolina School of Law (1/10/98).
- "Law Firm Breakups and Departing Lawyers," C.L.E. Ethics Seminar, S.C. Bar and University of South Carolina School of Law (12/13/97).
- "*Hedgepath* & Lawyers' Professional Conduct: Implications in Workers' Compensation Proceedings," C.L.E. Seminar, The Association of South Carolina Claimant Attorneys, Asheville, N.C. (11/14/97).
- "Ethics: Judicial Immunity for Administrative Law Judges," J.C.L.E. Seminar, Chief Administrative Law Judges Conference, Charleston, SC (11/6/97).
- "*Hedgepath* and the Rules of Professional Conduct: Who Can We (and They) Talk to Now?" C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/15/97).
- "Ways to Get in Trouble: Old and New," C.L.E. Ethics Seminar, U.S.C. School of Law (12/7/96).
- "Ethics for the Modern Lawyer on the Information Superhighway," C.L.E. Ethics Seminar, S.C.T.L.A. Convention (8/9/96).
- "Mobile Lawyers and Mobile Clients," C.L.E. Ethics Seminar, U.S.C. School of Law (12/95).

- "Constitutional Restrictions on Regulation of Lawyer Advertising," House of Delegates, S.C. Bar(1/21/94).
- "Ethical Issues Facing Law Firms," C.L.E. Seminar, University of South Carolina School of Law (1/9/93).
- "Ethical Issues in Office Practice," C.L.E. Seminar, University of South Carolina School of Law (12/5/92).
- "Lawyer Television Advertising: A Video Presentation," U.S.C. Law School Faculty Ethics C.L.E. (10/22/92).
- "The Ethical Dilemma of Corporate Counsel," C.L.E. Seminar, Farm Credit Sys. General Counsels Conference (10/7/92).
- "Lawyer Advertising-The Great Debate," Moderator, C.L.E. Ethics Seminar, S.C.T.L.A. Conv. (8/14/92).
- "Civil Litigation," in Ethical Issues in Litigation, C.L.E. Seminar, University of South Carolina School of Law (1/11/92).
- "Shareholders' Rights in Disputes with a Corporation and those in Control," in Planning for Business Corporations: A Guide for General Practitioners, C.L.E. Seminar (1/3/92).
- "Ethical Issues in Civil Litigation," Legal Ethics and Professional Responsibility, C.L.E. Seminar (12/6/91).
- "A Walk Through the New South Carolina Rules of Professional Conduct," C.L.E., U.S.C. School of Law (1/12/91).
- "Corporate Litigation and Liabilities of Corporations, Directors, Officers, and Shareholders after the 1988 Revision of the South Carolina Business Corporation Act," in Current Issues in Civil Litigation, a C.J.E. Seminar (4/14/89).
- "Fundamental Corporate Changes and Dissenters' Rights under the South Carolina Business Corporation Act of 1988," in The New South Carolina Corporation Act, C.L.E. Seminar (12/16/88).

AMICUS CURIAE BRIEFS DRAFTED

- Ex Parte Strom, in re Collins Entertainment Corp. v. Columbia "20" Truck Stop*, 343 S.C. 257, 539 S.E.2d 699 (2000) (establishing that attorney's duties to client continued until court granted motion relieving attorney as counsel of record).
- Linder v. Insurance Claims Consultants*, 348 S.C. 477, 560 S.E.2d 612 (2002) (on behalf of the S.C. Bar, clarifying scope of activities constituting the practice of law).
- Brown v. Bi-Lo*, 354 S.C. 436, 581 S.E.2d 836 (2003) (on behalf of the S.C. Trial Lawyers Association, protecting the confidentiality of physician-patient relationship).

UNIVERSITY AND COMMUNITY SERVICE

Parliamentarian, University of South Carolina School of Law Faculty, 2004-2007, 2008-2014.
Member, Dean Review Committee for the Dean of the College of Criminal Justice, 2003.
Member, Faculty Manual Revision Committee, Faculty Senate, University of South Carolina, 1998-1999.
Parliamentarian, University of South Carolina Faculty, 1997-2004.
Member, Steering Committee, University of South Carolina Faculty Senate, 1997-2004.
Faculty Senator, University of South Carolina, 1983-1985, 1995-1998, 2000-2003.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1995-1996.
Faculty Advisor, ABA National Appellate Advocacy Competition Team, University of South Carolina School of Law, 1982-1983 (winner Regional Competition).
Faculty Advisor, National Moot Court Team, University of South Carolina School of Law, 1980-1981.
Committee Chairman, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1996-2003.
Scoutmaster & Founder, BSA Troop 788, St. David's Episcopal Church, Columbia, SC 1992-1996.
Assistant Scoutmaster, Committee Chairman, Committee Member, BSA Troop 388, Windsor United Methodist Church, Columbia, SC 1986-1992.
Junior Warden, Vestry, St. David's Episcopal Church, Columbia, SC 1984-1987.
Chorister, Good Shepherd Episcopal Church, Columbia, SC 1999-2004.
Chorister, St. David's Episcopal Church, Columbia, SC 1984-1998.
Chairman, Christian Education Committee, St. Michael and All Angels Episcopal Church, Columbia, SC 1981-1983.
President, Richland Northeast High School P.T.S.O., Columbia, SC 1992-1997.
Member, Richland School District Two Strategic Planning Committee, Columbia, SC 1995-96.
Member, Richland School District Two Ridge View High School Planning Committee, Columbia, SC 1993-1994.

Charleston Laboratories, Inc. v. Womble, Carlyle, Sandridge & Rice, L.L.P.

Civil Action Number: 2017-CP-10-3768

EXHIBIT B

PLAINTIFF'S BRIEF ON STATUTE OF LIMITATIONS

-CONFIDENTIAL-

(Filed Under Seal)

Charleston Laboratories, Inc. v. Womble, Carlyle, Sandridge & Rice, L.L.P.

Civil Action Number: 2017-CP-10-3768

EXHIBIT C

PLAINTIFF'S BRIEF ON STATUTE OF LIMITATIONS

-CONFIDENTIAL-

(Filed Under Seal)

Charleston Laboratories, Inc. v. Womble, Carlyle, Sandridge & Rice, L.L.P.

Civil Action Number: 2017-CP-10-3768

EXHIBIT D

PLAINTIFF'S BRIEF ON STATUTE OF LIMITATIONS

-CONFIDENTIAL-

(Filed Under Seal)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	IN THE NINTH JUDICIAL CIRCUIT
	)	
Charleston Laboratories, Inc.,	)	Civil Action No.: 2017-CP-10-3768
	)	
Plaintiff,	)	
	)	<u>DEFENDANT’S SUPPLEMENTAL</u>
vs.	)	<u>BRIEF ON STATUTE OF</u>
	)	<u>LIMITATIONS ISSUES</u>
Womble, Carlyle, Sandridge & Rice,	)	
LLP,	)	
	)	
Defendant.	)	
	)	

Defendant Womble Carlyle Sandridge & Rice, LLP (“Womble”) submits this supplemental brief on issues relating to the statute of limitations pursuant to the Court’s Order of December 5, 2019. For the reasons set out below, summary judgment should be awarded to Womble because this case was brought well beyond the applicable statute of limitations.

OVERVIEW OF THE ISSUE

Plaintiff Charleston Laboratories, Inc. (“Charleston Labs”) claims Womble breached the standard of care owed to Charleston Labs as its client by failing to (1) draft certain agreements in a way that gave Charleston Labs the unchallengeable right to repurchase Dr. T’s shares in the company under certain conditions; and (2) advise Charleston Labs how to exercise its rights under those agreements in a way that precluded a subsequent claim by Dr. T to still be a shareholder after the repurchase right was exercised. Plaintiff itself frames the issue this way:

The present matter is not complicated:

- a. Womble drafted corporate documents addressing the same subject matter which did not cross reference one another;
- b. The SRA and the SHA contained materially different rights, duties and obligations;

- c. Womble advised Charleston Labs on the language to use in separating Dr. T's ownership, and Charleston Labs relied on this advice;
- d. Womble's advice on how to redeem Dr. T's shares was negligent;
- e. After separation, Dr. T took a legal position regarding his ownership rights;
- f. After his separation, Charleston Labs took an opposing legal position with regard to Dr. T's rights;
- g. A bona fide dispute arose;
- h. Having relied on Womble's advice, Charleston Labs was forced to file a declaratory judgment action to mitigate against the devastating consequences which would have occurred if Dr. T's interpretation of the SHA and SRA and the attempted redemption of his shares controlled;
- i. Charleston Labs spent nearly \$2,000,000.00 seeking to clarify that which Womble was paid to make clear.

Plain. Memo in Opp. to Def. Mtn for Sum. Judg. pp. 25-26.

Charleston Labs thus places the responsibility for Dr. T's legal position squarely on Womble's shoulders. In Plaintiff's view, Dr. T could still claim to be a shareholder only because Womble had failed to properly prepare the documents and advise Charleston Labs how to exercise its rights.¹ Therefore, for purposes of the statute of limitations, the issue can be stated as follows: When was Charleston Labs aware that a bona fide dispute existed as to the status of Dr. T's shares, thereby creating "the devastating consequences" to Charleston Labs if Dr. T's position was correct? The answer is not later than May 18, 2010, when Dr. T's lawyer advised Charleston Labs that it was Dr. T's position that he owned "4.25% of the fully diluted equity under a worst case

¹ Although Womble disputes Plaintiff's theories regarding the standard of care, duty, proximate cause, and other essential elements of a claim for legal malpractice, for purposes of the present motion, the Court should accept Plaintiffs' views on these issues as uncontested. "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). Womble does not otherwise concede any element of the cause of action.

characterization of this situation.”² See **Ex. A.** (May 18, 2010 email from David Willbrand to David Baddour). This formal expression of Dr. T’s position should have come as no surprise to Charleston Labs because on March 25, 2010, David Baddour of Womble had told Charleston Labs’ CEO and sole Board member, Paul Bosse:

As we’ve discussed, if [Dr. T] doesn’t agree to the package (and the contingent \$70k payment) it is likely that he’ll have a claim on the vested portion of his stock. If [Charleston Labs] does nothing to change the status quo, it is likely that [Dr. T] will simply sit tight and do nothing, until such time as the stock becomes worth something, which is when he’ll file suit.

See **Ex. B.** (March 25, 2010 Email from David Baddour to Paul Bosse).

When these uncontested facts are viewed in the context of well-established South Carolina law on the statute of limitations, it is clear that this case was filed well after the statute had expired, and Womble is entitled to summary judgment on this issue.

ARGUMENT

I. The Law of the Statute of Limitations.

“Statutes of limitations are not simply technicalities.” Kelly v. Logan, Jolley & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). “On the contrary, they have long been respected as fundamental to a well-ordered judicial system.” Id. “Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.” Id. “One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights.” Id. (citations omitted). “Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.” Id. “Statutes of limitations are, indeed,

² This email was sent to David Baddour as Charleston Labs’ attorney, who immediately

fundamental to our judicial system.” Id. (citation omitted); Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016). The Court should therefore carefully consider the facts and applicable law and grant summary judgment to Womble because this case was filed well beyond the statute of limitations.

The statute of limitations for the cause of action alleged in the complaint is three years. S.C. Code Ann. § 15-3-530; Stokes-Craven Holding Corp., 416 S.C. at 525, 787 S.E.2d at 489 (“The statute of limitations for a legal malpractice action is three years.”). Under South Carolina law, the statute of limitations begins to run when “the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” S.C. Code Ann. § 15-3-535; see also Dean v. Ruscon, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist.” Gibson v. Bank of America, N.A., 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). “The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed.” Id.

The date on which a plaintiff should have discovered the facts giving rise to a cause of action is an objective question. Graham v. Welsh, Roberts & Amburn, LLP, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013). In other words, whether the particular plaintiff actually knew he had a claim is not the test. “Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.” Bayle v. S.C. Dep’t of

forwarded it to Paul Bosse, CEO of Charleston Labs. See Ex. C.

Transp., 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). “If, on the date of injury, a plaintiff knows or should know that he had some claim against someone else, the statute of limitations begins to run for all claims based upon that injury.” Wiggins v. Edwards, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (internal citations omitted).

Moreover, a plaintiff’s ignorance of the “full extent of the damage is immaterial” in setting the accrual date. Dean, 321 S.C. at 363, 468 S.E.2d at 647.

[O]nce a reasonable person has reason to believe that some right of his has been invaded or that some claim against another party might exist, the requirement of reasonable diligence to investigate this information further takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all.

Binkley v. Burry, 352 S.C. 286, 297-98, 573 S.E.2d 838, 844-45 (Ct. App. 2002) (internal quotations omitted). As noted above, the statute of limitations begins to run from the point of some injury and “not when advice of counsel is sought or full-blown theory of recovery is developed.” Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

The test to determine when the clock starts is simple: “[T]he statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence.” Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 370-71, 597 S.E.2d 27, 29 (Ct. App. 2004). The statute begins to run when a party should realize his injury may be attributable to some other party’s action. Republic Contracting Corp. v. S.C. Dep’t of Highway & Pub. Transp., 332 S.C. 197, 209, 503 S.E.2d 761, 767 (1998).

II. Application of Controlling Legal Principles to the Facts of this Case.

Two straightforward rules that are controlling in this case are embedded in these legal principles:

1. The statute begins to run when the plaintiff knows or should know that he has some claim against another party. Gibson; Bayle.
2. Knowledge of some injury attributable to a third party will start the statute. Johnston; Binkley; Wiggins.

In applying these rules, there could be some doubt about when the statute begins to run when a party is aware of a claim but has not been injured; or conversely, when a party has been injured but does not know that the injury is attributable to the actions of a third party. See, e.g., Kimmer v. Wright 396 S.C. 53, 719 S.E.2d 265 (Ct. App. 2011) (opinion vacated 12/5/13) (majority opinion relying on Binkley to hold that the statute of limitation began to run on notice of the claim even without an injury; dissenting opinion distinguishing Binkley on the basis that the existence of the easement itself was the damage and therefore started the clock).³

However, there is no doubt in the present case. The uncontested facts establish that Charleston Labs was aware—or should have been aware—that it had a claim against Womble AND that it had suffered an injury attributable to Womble in 2010, seven years prior to the filing of this case.

A. When did Charleston Labs know that it had a claim against Womble?

In considering the application of the statute of limitations to this case, it is important to keep in mind that Charleston Labs' claim is NOT based on whether Dr. T's assertion of ownership was correct or incorrect.⁴ Rather, Charleston Labs claims that because of Womble's work, it was possible for Dr. T *to claim* that the company had not repurchased his shares, thus requiring Charleston Labs to file a declaratory judgment action "to resolve the dispute." **Compl.** ¶ 59. Further, Charleston Labs has consistently maintained that it relied entirely on Womble to prepare

³ Binkley is discussed more fully in section II(c) below.

⁴ If this were the claim, Womble would be entitled to summary judgment because of the Florida

the agreements and to provide advice as to how to utilize the agreements to preclude Dr. T's ability to contest the repurchase. **Compl.** ¶ 35, 36. Therefore, Charleston Labs clearly knew or objectively should have known that Womble had breached what Charleston Labs regarded as the standard of care when David Baddour told Charleston Labs that Dr. T could make a claim to at least some of his shares,⁵ but at the latest then when Dr. T actually asserted a claim to own 4.25% of the company.⁶

Again, the basis of the suit against Womble is not that Dr. T was correct, but simply that he could make such a claim. Thus, after the repurchase, when Charleston Labs became aware in May 2010 that Dr. T was claiming to still own 4.25% of the stock, it inarguably was aware of circumstances that “would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist” because Dr. T's assertion of ownership was only possible because Womble had failed in its alleged duty to preclude such a dispute. Bayle, 344 S.C. at 123, 542 S.E.2d at 740. That is all that is necessary to have started the clock on the statute.

B. When was Charleston Labs on notice of an injury?

To the extent that notice of the claim by itself is not sufficient to have started the statute, Charleston Labs was also well aware in 2010 that it had suffered an injury resulting from what it considered to be Womble's breach of the standard of care. The following statements by Charleston Labs demonstrate that the company has consistently maintained and conceded that it was injured by the uncertainty regarding the status of Dr. T's shares that resulted from Womble's

order holding that Charleston labs had properly repurchased his shares.

⁵ **Ex. B.**

⁶ **Ex. A.** (May 18, 2010 email from David Willbrand to David Baddour).

failure to properly draft the documents and provide proper advice about how to exercise its rights thereunder:

- “Womble’s malpractice placed Charleston Labs in a precarious legal position requiring the institution of legal action to clarify rights that would have been made clear but for Womble’s malpractice.” **Plain. Memo in Opp. to Def. Mtn for Sum. Judg.** p. 1.
- “The legal uncertainty surrounding the ownership of the shares and the subsequent declaratory judgment action ARE the injuries suffered by Charleston Labs as a direct and proximate cause of Womble’s negligence.” **Id.** at 14.
- “Just as there was darkness before there was light, in the matter of Charleston Labs’ post-employment relationship with Dr. T, there was disharmony before there was harmony. In this case harmony required judicial intervention” **Id.** at 20.
- “The ownership of Charleston Labs was evidenced by its stock Womble’s negligence in drafting the corporate control documents created a cloud on the “title” to the stock A dispute between the parties ensued which was nothing more than a suit to quiet title to the contested shares. **Id.** at 28.
- “Charleston Labs availed itself of the judicial process solely because the transfer of shares was contestable.” **Id.** at 29.
- “CL . . . was lost in a sea of uncertainty and . . . was exposed to contingent liabilities following the botched Dr. T redemption” **Id.** at 34.
- “[T]he filing of the Florida declaration action itself was an act in mitigation of the damage that had been inflicted and was to be inflicted on Charleston Labs as a direct and proximate result of Womble’s conduct.” **Id.** at 1.

Additionally, Dr. T actually threatened to sue Charleston Labs in May 2010:

“[Dr. T] realizes that the Company could stir the pot with the threat of a lawsuit, or the filing of one, and that’s a cost and distraction he doesn’t want. *But similarly, he could do the same vis-a-vis the company and can’t imagine the company would want that cost or distraction either, especially while raising money.*”

Ex. A (May 18, 2010 email from Willbrand to Baddour) (emphasis added).

Charleston Labs argues that notwithstanding that it was manifestly injured by the “uncertainty” surrounding Dr. T’s shares, and the “devastating consequences” to the company if he were correct, and the overt threat of a lawsuit by Dr. T, the statute of limitations did not begin

to run because “uncertainty and contingent liabilities are not legally cognizable damages.” **Plain. Memo in Opp. to Def. Mtn for Sum. Judg.** p. 34. However, Plaintiff’s effort to avoid the statute of limitations on this ground is incorrect legally and factually.

C. The “cloud on the title” to Dr. T’s shares started the clock for the statute of limitations.

Under controlling South Carolina legal principles, the “cloud on the title” to Dr. T’s shares alone was an injury more than sufficient to start the statute of limitations running even if no economic losses had yet occurred. In Binkley v. Burry, our Court of Appeals addresses precisely this situation. 352 S.C. at 297-98, 573 S.E.2d at 844-45. In that case, the plaintiffs purchased real property. Their attorneys took exception to a flood impoundment easement in the title report but did not explain the implications of the easement or how it might affect the plaintiffs’ use and enjoyment of the property. The flood impoundment easement was a “cloud on the title” to the property, but the plaintiffs did not inquire about the effect of the easement at closing. Five years after the closing, a flood occurred, and the plaintiffs discovered that a great deal of their property was under water, which the easement permitted to be impounded there. Id. at 297-98, 573 S.E.2d at 841. The plaintiffs then sued the attorneys for failing to explain the consequences of the easement prior to closing.

The trial court granted summary judgment in favor of the defendant attorneys based on the statute of limitations, and the Court of Appeals affirmed the dismissal of the claim. The Court of Appeals first noted that the plaintiffs “had actual notice of a risk of flooding to their property” at the time of closing, which was more than three years prior to the date they sued the attorneys. Id. at 297-98, 573 S.E.2d at 844. The Court rejected precisely the argument that Charleston Labs makes in the present case, stating:

Finally, we reject the Binkley's argument that knowledge of the easement was insufficient to provide them with notice that they may have sustained damages. An easement by its very nature involves the right to encroach on someone else's property. Moreover, once a reasonable person has some reason to believe 'that some right of his has been invaded or that some claim against another party might exist,' the requirement of reasonable diligence to investigate this information takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may not be forthcoming at all.

Id. Thus, the cause of action for legal malpractice accrued and the statute started to run when the plaintiffs became aware of a risk that a third party might have the right to encroach on their property, even if at that point an actual encroachment had not yet occurred and plaintiffs had not sustained any monetary damages.

That is exactly the situation in the present case. The "cloud on the title" to Dr. T's shares was just like the easement that burdened the Binkleys' property. Both represent an infringement of a right claimed by the client: to be free of the right of encroachment for the Binkleys, and to be free of the risk of a claim for Charleston Labs. The Binkleys could not wait more than three years to see if a flood actually occurred before making their legal malpractice claim. Likewise, once it was aware of the risk that Dr. T could make a claim and had in fact asserted a right to 4.25% of the company's shares, Charleston Labs could not wait to see if Dr. T was going to take any further action before making its claim against Womble for permitting the cloud on the title to exist. It is the existence of that risk, not whether Dr. T was correct or not, that reflects Womble's alleged breach of duty. The clock started at that point, even if there was the possibility, as in Binkley, that Charleston Labs might not ultimately incur monetary damage as a result of the risk.

Another factually and legally analogous case is Roberts v. Drew, 2014 WL 3532985 (S.C.

Ct. App. 2015).⁷ In that case the plaintiff/client sued his lawyer for failing to advise him that title to the property he bought was unmarketable because it subjected the plaintiff to “litigation on the claims of others who have outstanding interests.” The trial court granted the defendant’s motion for summary judgment based on the expiration of the statute of limitations. In affirming the award of summary judgment, the Court of Appeals held the plaintiff/client “was aware . . . that his acquisition of Lot 12 subjected him to litigation on the claims of others with outstanding property interests” more than three years prior to the filing of the legal malpractice claim, and therefore the statute of limitation had expired prior to the filing of the malpractice suit. The awareness of the risk of litigation started the clock, not the subsequent litigation itself. Here, as in Roberts, Charleston Labs was aware that its title to Dr. T’s shares was subject to the claim of Dr. T to still own all or part of them, and that he had threatened to file suit against to pursue his rights. That “cloud on the title” to Dr. T’s shares was the injury that started the statute of limitations, which expired more than four years prior to this suit being brought.

Finally, the fact that Charleston Labs asserts that the costs of the Florida declaratory judgment action for which it now seeks recovery were “in mitigation” of its damages is itself an admission that it had suffered injuries prior to the filing of that action. **Plain. Memo in Opp. to Def. Mtn for Sum. Judg.** p. 2 (“[T]he filing of the Florida declaration action was itself an act in mitigation of the damage that had been inflicted and was to be inflicted on Charleston Labs as a direct and proximate result of Womble’s conduct.”). The very concept of “mitigation” distinguishes between damages and the actions taken to avoid them. “A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the

⁷This is an unpublished opinion but represents the straightforward application of noncontroversial legal principles to a legal malpractice action based upon an alleged “cloud on

law does not require him to exert himself unreasonably or incur substantial expense to avoid damages.” Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A., 287 S.C. 338, 338 S.E.2d 343 (Ct. App. 1985). The damage that Charleston Labs was trying to mitigate was the uncertainty relating to Dr. T’s shares. But if that uncertainty and associated risk were not damage, there would have been nothing to mitigate.

D. Even if uncertainty alone was insufficient to start the clock, Charleston Labs had incurred compensable monetary damages for which recovery was possible.

To the extent that measurable economic loss is necessary to start the statute, however, there is undisputed evidence that Charleston Labs incurred economic losses that were in its view proximately caused by Womble’s breach of the standard of care long before Dr. T asked to inspect the books in September 2015:

- Charleston Labs paid Womble for doing the allegedly substandard work on the SRA and the SHA in 2008 and for advising about how to exercise its right to repurchase Dr. T’s shares in 2010. **Compl.** ¶ 54 (alleging that Charleston Labs paid Womble for all legal service provided).
- Charleston Labs paid Womble to deal with Dr. T’s lawyer when he appeared in 2010 claiming that Dr. T still owned 4.25% of the company as a “worst case” situation. **Id.**
- Charleston Labs paid Womble to advise it as to how to deal with Dr. T after he refused to sign the settlement agreement containing a release. **Id.**
- Charleston Labs paid Womble to prepare the disclosure statement that it sent to investors regarding whether the company had repurchased all of Dr. T’s shares. **Id.**
- Charleston Labs engaged other counsel, Mitchell Ryan, in 2011 (six years before this suit was filed) to look at the issues regarding the status of Dr. T’s shares in connection with preparing its books for its auditors, **Ex. D** (emails between Baddour and Ryan) and to “explore and pursue any and all available avenues of legal recourse” against Dr. T, **Ex. E** (May 24, 2011 draft letter from Ryan to Dr. T); see also **Ex. F** (email from Bosse to Frederic Smith stating “We ultimately tried to reach a mutual position with Ray - - that Womble handled unsuccessfully - - and then a 2nd outside counsel [Mitchell Ryan]we hired

the title” to plaintiff’s property. As such it is instructive, even if not controlling.

to look further into the situation agreed that the Company repurchased Ray's stock that vested per the executed shareholder's Agreement section 2.2.(v)").

Fees and costs incurred by a client for legal services that were regarded as beneath the standard of care are recoverable as damages in a legal malpractice action. See, e.g., Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771, 773 (2010) (holding that restitution and disgorgement are remedies for a claim of breach of fiduciary duty). Thus, Charleston Labs had incurred recoverable monetary damages and could have sued Womble for the disgorgement of fees as soon as it became aware that Dr. T could still claim to be a shareholder.

The fact that in 2010 Charleston Labs may not have yet determined the full amount of its damage is immaterial. See Dean v. Ruscon, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996) (holding that "the fact that the injured party may not comprehend the full extent of the damage is immaterial"); see also Johnston v. Bowen, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (holding the statute of limitations begins to run from the point of *some injury* and "not when advice of counsel is sought or full-blown theory of recovery is developed"(emphasis added)); Young v. S.C. Dep't of Corr., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999) (holding "the law is clear that the statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury"); Farley v. CSX Transp., Inc. 144 F. App'x 962, 963-64 (4th Cir. 2005) ("South Carolina law does not allow the plaintiff to wait until he ascertains the full extent of the damage, but instead requires that a plaintiff promptly investigate the existence of a claim when the facts and circumstances place the plaintiff on notice."); Binkley, at 297-98, 573 S.E.2d at 844-45 (holding the duty of due diligence "takes precedence over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all").

Charleston Labs had incurred compensable monetary injuries in 2010, more than four years prior to filing suit against Womble in July 2017, which was more than sufficient to begin the running of the statute of limitations.

E. Charleston Labs could have filed the DJ sooner, but chose not to.

There is nothing unreasonable or unfairly prejudicial to Charleston Labs from the application of this well-established rule to bar the present case. The damages that Charleston Labs seeks to recover result from the declaratory judgment action it voluntarily filed as the plaintiff in 2015. Nothing prevented Charleston Labs from voluntarily filing that action much earlier in order to liquidate its damages prior the expiration of the statute of limitations, and thereby seek to recover those costs as damages from Womble. In fact, as evidenced below, Charleston Labs threatened to file suit against Dr. T on multiple occasions:

- In his March 26, 2010 letter to Dr. T transmitting the \$2.10 check for the repurchase of Dr. T's shares and offering the Redemption and Settlement Agreement, Paul Bosse told Dr. T that "[i]f we do not receive a response from you by [April 5, 2010] we will assume that you do not intend to cooperate and we will pursue all other legal remedies at our disposal." **Ex. G** (March 26, 2010 letter from Bosse to Dr. T with settlement agreement).
- In a May 7, 2010 email, Womble told Dr. T's legal counsel that "Charleston Labs is willing to file suit and take any necessary actions to make this situation right, from their perspective."). **Ex. H** (May 7, 2010 email from Baddour to Willbrand).
- In the July 2012 Disclosure Statement prepared for potential investors, Charleston Labs said that "[t]he company is presently considering pursuing a declaratory judgment action as to the aforementioned 280,000 shares." **Ex. I** (July 2012 Disclosure Schedule).
- In his response to the demand by Dr. T's new counsel to examine the books of Charleston Labs in 2015, George Scott, general counsel to the company, wrote that "at this time, the Company has refrained from pursuing rectifying the issues this has caused the Company. However, the Company is prepared to revisit such restraint" **Ex. J** (October 8, 2015 email from George Scott to Bray Long).

As Plaintiff itself says, "Charleston Labs availed itself of the judicial process solely because the transfer of shares was contestable." **Plain. Memo in Opp. to Def. Mtn for Sum.**

Judg. p. 29. But Charleston Labs was well aware not only that that the transfer was contestable but was actually being contested by Dr. T from at least May 2010. Plaintiff repeatedly refers to the issues with Dr. T as a “bona fide dispute” that necessitated the filing of the Florida action. **See, e.g., Plain. Memo in Opp. to Def. Mtn for Sum. Judg.** pp. 17, 19, 20, 23, 26, 35. But that “bona fide dispute” had existed and been known to Charleston Labs since 2010. To the extent that the “bona fide dispute” required Charleston Labs to file a declaratory judgment action, it not only could and should have been filed much earlier, just as Charleston Labs had frequently threatened to do.

Thus, the money damages “in mitigation” of the prior injuries that Charleston Labs now seeks to recover could have been incurred by Charleston Labs well within the time limit. The fact that it “refrained from pursuing rectifying the issues” does not toll the statute. If that were true, Charleston Labs could unilaterally extend the statute indefinitely by simply waiting to incur further costs that it seeks to recover from its lawyers. A unilateral ability to extend the statute indefinitely would be directly contrary to the purposes of the statute to stimulate activity, punish negligence, and promote repose, and should not be recognized by the Court. Stokes-Craven Holding Corp., 416 S.C. at 526, 787 S.E.2d at 488.

F. Charleston Labs could have sought equitable indemnification by Womble as a remedy.

In addition to a claim for money damages, Charleston Labs could also have sought equitable indemnification by Womble as a remedy for Womble’s alleged breach of duty. South Carolina has long recognized the principle of equitable indemnification. See Stuck v. Pioneer Logging Machinery, Inc., 279 S.C. 22, 301 S.E.2d 552 (1983); Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971). “Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party. A right to indemnity

may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party.” Town of Winnsboro v. Wiedeman-Singleton, Inc. (Winnsboro I), 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct.App.1990), aff’d, 307 S.C. 128, 414 S.E.2d 118 (1992) (Winnsboro II) (citation omitted). In Stuck, our Supreme Court explained:

We note that the modern trend concerning the right to indemnity is to look to principles of equity. According to equitable principles, a right of indemnity exists whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join.

279 S.C. 22, 24, 301 S.E.2d at 553. See also Vermeer Carolina’s Inc. v. Wood/Chuck Chipper Corp., 336 S.C. 53, 336 S.E.2d 301, 305 (Ct. App. 1999).

In 2010, all the elements necessary for a claim of equitable indemnification in favor of Charleston Labs were present. Charleston Labs could have alleged that it was exposed to costs, expenses and potential liabilities as a result of Dr. T’s “bona fide” claim through no fault of its own as a result of Womble’s alleged negligence. The attorney/client relationship between Womble and Charleston Labs and its attendant duties would satisfy the requirement of a relationship creating an obligation to indemnify. In fact, Charleston Labs’ present claim is in essence a claim for equitable indemnification as to its costs and expenses in dealing with Dr. T but made after the fact and in the form of money damages instead of being made in advance as a claim for indemnification. Charleston Labs could have filed suit against Womble within the period of limitations without any prejudice to its ability to recover for all its costs and expenses resulting from Dr. T’s legal position.

III. The Statute of Limitation Was Not Tolled.

The Court’s order specifically asks the parties to address the dates mentioned in Greg Adams’ expert affidavit. The two dates of possible relevance to the application of the statute of

limitations to this action in that affidavit are December 19, 2014, which is the date that Womble ceased to represent Charleston Labs; and September 2015, which is the date that Charleston Labs filed the Florida declaratory judgment action. Neither of those dates changes the foregoing analysis.

A. The date that Womble ceased to represent Charleston Labs has no bearing on the application of the statute because South Carolina has not adopted the continuous representation rule.

The date that Womble last performed legal services for Charleston Labs is not relevant to the application of the statute because South Carolina has not adopted the “continuous representation” rule. In some jurisdictions, the statute of limitations for a legal malpractice action is tolled so long as the defendant attorney continues to represent the client/plaintiff. See, e.g., 3 Ronald E. Mallen & Allison Martin Rhodes, Legal Malpractice, § 23:45 (2015) (discussing state cases which have adopted the majority and minority positions regarding the continuous-representation rule).

The plaintiff in Epstein v. Brown urged the South Carolina Supreme Court to adopt the rule, but the Court rejected the argument. 363 S.C. 372, 377, 610 S.E.2d 816, 818 (2005) (“We decline to adopt the continuous representation rule in the context of a legal malpractice claim and adhere, instead, to the discovery rule set forth by the Legislature.”). Stokes-Craven Holding Corp. subsequently overruled Epstein. 416 S.C. 517, 787 S.E.2d 485 (2016). In reversing Epstein, however, Stokes-Craven Holding Corp. did not adopt the continuous representation rule. The Court in Stokes-Craven Holding Corp. instead held that when a legal malpractice claim arises *out of a failed lawsuit*, an appeal of the unfavorable verdict stays the legal malpractice cause of action because of the operation of SCACR 241(a), which automatically stays the matter decided in the trial court, and SCACR 205, which divests the trial court of jurisdiction over matters affected by

the appeal. See also, Personal Care, Inc. v. Theos, 426 S.C. 78, 825 S.E.2d 281 Ct. App. 2019 (confirming that Stokes-Craven Holding Corp. did not reinstate the continuous representation rule and applying the discovery rule). This “stay” of the statute does not change the fact that it begins to run upon discovery of the claim and/or the injury, as discussed above. Thus, the date that Womble ceased to represent Charleston Labs has no bearing on the application of the statute in this case.

B. The date Charleston Labs filed the Declaratory Judgment (“DJ”) action is not controlling.

Likewise, the date that Charleston Labs filed the Florida declaratory judgment action is not controlling. As discussed above, Charleston Labs had long been aware that Womble had breached what Charleston Labs asserts is the standard of care and had in fact suffered compensable injuries as a result, thereby satisfying both variants of the South Carolina rule regarding the statute. Charleston Labs could have filed the DJ at any time after being made aware of Dr. T’s legal position regarding his ownership of the shares in 2010 or could have sued Womble for legal malpractice upon learning of the existence of a “bona fide dispute.” As has been repeated many times in the applicable case law, the statute of limitations begins to run from the point of some injury and “not when advice of counsel is sought or a full-blown theory of recovery is developed.” Johnston, 313 S.C. at 64, 437 S.E.2d at 47. There was no impediment for Charleston Lab to file a legal malpractice action in 2010, and there was no tolling of the statute because Charleston Labs elected to wait.

Of particular relevance to the issues in the present case is Personal Care, 426 S.C. 78, 825 S.E.2d 281. Personal Care is a legal malpractice case in which the trial court held that the claim was barred by the statute of limitations. In affirming the dismissal of the case, the Court of Appeals confirmed that Stokes-Craven Holding Corp. did not adopt the continuous

representation rule or a “bright line rule” that the statute begins to run on legal malpractice claims from the date an adverse judgment is entered against the client. 426 S.C. at 88, 825 S.E.2d at 286. Instead, the court held that Personal Care’s legal malpractice claim arose, and the injuries were suffered when the defendant lawyer sent a letter to the plaintiff that became the basis for the subsequent defamation claim—not when the defamation claim was actually brought or the date on which it was settled. With respect to the injuries, the court noted that the client alleged “that it was forced to spend additional funds and commit time and other resources to mitigate the damages” caused by the lawyers’ errors. The court then held that the client “reasonably ought to have discovered that it was injured by [its lawyer’s] letter, not when the lawsuit settled.” *Id.* at 89, 825 S.E.2d at 287.

The holding in Personal Care is completely consistent with the facts of the present case. Charleston Labs knew or reasonably should have known that it was injured when it became aware in May 2010 that Dr. T still claimed to be a shareholder and threatened to sue Charleston Labs in furtherance of that claim, all of which required the company to commit “time and other resources” to mitigate the “devastating consequences” of that claim. The statute had long since run when Charleston Labs finally decided years later to retain counsel to challenge that position or when judgment was entered in the Florida DJ action.

The date that the Florida DJ action was filed therefore does not affect the operation of the statute of limitation in this case.

C. There is no basis for estoppel or equitable tolling.

Charleston Labs had not pleaded either estoppel or equitable tolling as reasons to avoid the application of the statute, and the Courts should therefore not entertain such new arguments at

this stage of the case. But for the sake of completeness in this supplemental brief, Womble will address these issues.

Equitable estoppel applies when a defendant acts to delay the plaintiff in filing suit and then asserts the statute of limitations as a defense. “A defendant will be estopped to assert the statute of limitations in bar of a plaintiff’s claim when the delay that otherwise would give operation to the statute has been *induced by the defendant’s conduct*.” Magnolia N. Prop. Owners’ Ass’n, Inc. v. Heritage Comms., Inc., 397 S.C. 348, 373, 725 S.E.2d 112, 125 (Ct. App. 2012). “The doctrine is . . . most clearly applicable where the aggrieved party’s delay in bringing suit was caused by his opponent’s intentional misrepresentation, but [it] is sufficient that the aggrieved party reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.” Id.

“Equitable tolling is judicially created; it stems from the judiciary’s inherent power to formulate rules of procedure where justice demands it.” Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). “The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use.” Id. “Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control.” Id. Courts have recognized that it may apply when “to deny it would permit one party to suffer a gross wrong at the hands of the other.” Id. at 33. The doctrine is used “sparingly and only when the interests of justice compel its use.” Id.

Neither estoppel nor equitable tolling applies in this case. Womble never made any misrepresentations to Charleston Labs, and certainly never attempted to dissuade Charleston Labs from asserting a claim against it. Womble was always forthright with Charleston Labs regarding the uncertainty about Dr. T’s shares. Furthermore, Charleston Labs can point to no evidence that

it delayed filing this suit because of anything Womble did or did not do. Although Womble did advise Charleston Labs not to sue Dr. T in 2010, advising not to sue Dr. T is far different from inducing Charleston Labs not to sue Womble. Whether Charleston Labs should sue Womble never came up and was never discussed.

Charleston Labs argues that “[i]f Womble believed that it had committed malpractice . . . its fiduciary duties to its client would have required Womble to advise its client a) of the potential conflict of interest; b) the potential error or claim; and c) of the advisability of having Womble’s conduct reviewed by an independent attorney.” **Plain. Memo in Opp. to Def. Mtn for Sum. Judg.** p. 34. Plaintiff’s argument is legally erroneous and irrelevant. First, Charleston Labs cites no authority for the existence of these purported duties and there are none that support this assertion. Second, the test is not when Womble thought there was a claim. Womble did not then and does not today believe that it committed malpractice or failed Charleston Labs in any way. The proper test for purposes of the statute of limitations is when *Charleston Labs* objectively knew or should have known that it had a claim. Given that Charleston Labs asserts Womble was under a duty to create documents and assist it in repurchasing Dr. T’s stock in a way that precluded even a claim by him to the contrary, Charleston Labs cannot argue it was not or should not have been aware that Womble had breached that purported duty in 2010 without regard to the necessity of any input from Womble.

Nor does Womble’s advice to Charleston Labs to wait before pursuing a claim against Dr. T toll the statute or create any type of estoppel. First, Womble did not advise its client not to sue Womble or attempt to dissuade its client in any way from taking action for the alleged breach of duty. So, the whole conversation about when to sue Dr. T is not pertinent to this issue. Second, there is no evidence that Charleston Labs delayed filing this action because of anything Womble

did. Third, Charleston Labs is guilty of speaking out of both sides of its mouth as to the advice about suing Dr. T. It is Charleston Labs' position in this case that *Womble recommended that it file the DJ*. See Plain. Memo in Opp. to Def. Mtn for Sum. Judg. p. 14 (“[I]t was Womble who first suggested that a declaratory judgment action may be necessary to clarify the rights in Dr. T’s shares”); id. at 16 (“Berry advised Charleston Labs to bring the declaratory judgment action, which is also what Womble had recommended.”); id. at 11 (“While Womble maintains that the filing of a declaratory judgment action to clarify the rights of Charleston Labs vis a vis Dr. T was unnecessary, as early as May 7, 2010, Womble told Dr. T’s legal counsel that “Charleston labs is willing to file suit and take any necessary actions to make this situation right, from their perspective.”). So, as Charleston Labs itself contends, Womble did not try to dissuade it from filing a declaratory judgment action, and in fact had had recommended it.

Further, as Charleston Labs also concedes, Womble’s advice was only to delay action against Dr. T until after the next round of financing was completed. See Plain. Memo in Opp. to Def. Mtn for Sum. Judg. pp. 11-12 (“If you want to fight Ray once you have funding, that would be a different story.”); **Ex. K** (May 6, 2010 email from Baddour to Bosse, stating “Dean’s strong recommendation is to just ignore Ray and focus on closing your next round.”); **Ex. L** (May 18, 2010 email from Rutley to Baddour with copy to Bosse, stating “[M]y strong advice is to leave this issue alone until AFTER you have raised your next round.”). There is no evidence that Womble advised Charleston Labs never to confront Dr. T, much less Womble itself.

Moreover, Charleston Labs’ hired attorney Mitchell Ryan in May 2011 “to explore and pursue any and all available avenues of legal recourse” against Dr. T unless he acknowledged that the Company had repurchased his shares in March 2010. **Ex. E** (May 24, 2011 draft letter from Mitchell Ryan to Dr. T). Ryan prepared a demand letter to Dr. T threatening suit unless Dr. T

signed and returned a Redemption and Settlement Agreement that Ryan had prepared within thirty days. **Id.** Charleston Labs elected not to send this demand. In explaining its failure to pursue relief against Dr. T at that time, Charleston Labs' general counsel George Scott acknowledged "Womble's comments [that] you have to file this action in order to clarify these things," but testified that Charleston Labs had "played defense with our books and records" and decided to "just go forward" without the demand to Dr. T. See Ex. M. (30(b)(6) deposition of Charleston Labs p. 107 l. 17 - p. 108 l. 5). Charleston Labs thus concedes that its failure to bring suit against Dr. T in 2011 was *contrary* to Womble's advice, not *because* of Womble's advice.

Finally, as discussed in detail above, Charleston Labs could have sought equitable indemnification from Womble before actually incurring any costs with respect the subsequent declaratory judgment action, so that any delay in filing the DJ was not prejudicial to Charleston Labs' rights against Womble.

There is therefore no basis to find that the running of the statute of limitations was tolled or that Womble is estopped to assert it as a defense, and the Court should not decline to apply the law on either basis.

IV. There Are No Issues of Material Fact That Preclude Summary Judgment.

There are no issues of material fact that preclude summary judgment in favor of Womble on the ground that Charleston Lab's claim is barred by the statute of limitations.

- The March 25, 2010 date on which Charleston Labs received notice that Dr. T might have a claim is uncontroverted. See Ex. B.
- The May 18, 2010 email from Dr. T's lawyer in which he says that Dr. T claims to own 4.25% of Charleston Labs as a 'worst case' scenario is not disputed. See Ex. C.
- That Charleston Labs was aware of a "cloud on title" to Dr. T's shares as early as 2010 is not in doubt.

- That Charleston Labs paid Womble for the work in preparing the agreements in 2008, in advising Charleston Labs how to use them in 2010, in dealing with Dr. T's lawyer later in 2010, and in preparing the disclosure to potential investors about Dr. T's claim in 2011 is not at issue.
- That Charleston Labs contemplated filing a declaratory judgment action against Dr. T as early as 2010 is uncontroverted.
- That Charleston Labs therefore was aware in 2010 both of a claim against Womble for breaching its duties relating to the agreements and the "botched repurchase," and that Charleston Labs has been injured both by the uncertainty regarding those shares and by the expenditure of fees and costs relating to that uncertainty is beyond argument.
- There is no evidence to support an argument for estoppel or equitable tolling of the statute.
- Finally, it is undisputed that this case was not filed until seven years after Charleston Labs was aware of a claim against Womble and compensable injuries resulting therefrom.

There is therefore no impediment to entry of judgment in favor of Womble pursuant to SCRCP 56.

CONCLUSION

On May 18, 2010, Charleston Labs was aware that Dr. T claimed to own 4.25% of the company notwithstanding the repurchase of his shares, creating an uncertainty about the ownership of the company that Charleston Labs now describes as "devastating." Charleston Labs lays the blame for that uncertainty on Womble, and only Womble. Yet despite knowing that Womble failed to foreclose Dr. T's position by the terms of the SRA and the SHA, and had "botched" the repurchase, Charleston Labs did nothing. It did not act to recover fees it had paid Womble for work that it contends was beneath the standard of care; it did not seek to recover additional fees paid to Womble and others as a result of the claim by Dr. T.; it did not ask this court to intervene to require Womble to indemnify it against any further costs and expenses relating to Dr. T's claim to be a shareholder; and it did not take action against Dr. T to resolve "the cloud on the title," despite threatening on multiple occasions to do so. Instead it chose to wait for

seven years before claiming that Womble breached its duty and had committed legal malpractice. But Charleston Labs' decision to wait did not toll the statute of limitation or excuse its failure to act in a timely manner to assert its claims. Young v. S.C. Dep't of Corr., 333 S.C. 714, 720, 511 S.E.2d 413, 416 (Ct. App. 1999) (holding that "the law is clear the statute of limitations is not tolled during the period of time in which a plaintiff is merely unaware of the extent of an actionable injury"). The filing of this claim in July 2017 was more than four years outside the statute.

South Carolina law requires the dismissal of this case and the Court should grant summary judgment to Womble.

ROBINSON GRAY STEPP & LAFFITTE, LLC

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Columbia, South Carolina
 January 6, 2020

EXHIBIT A

Message

From: Willbrand, David [David.Willbrand@thompsonhine.com]
Sent: 5/18/2010 11:27:46 AM
To: Baddour, David [dbaddour@wcsr.com]
CC: Willbrand, David [David.Willbrand@thompsonhine.com]
Subject: RE: 10 Charleston/Takigiku Conversation

David -

Thanks. At this point, this cap table will do. I also appreciate you taking the time last week to speak with me about your perspective on the capitalization of the company.

I have a few quick questions:

1. The proffered March 2010 Redemption and Settlement Agreement and Release provides for the repurchase by the Company of 420,000 common shares, the entirety of Ray's equity interest in the Company (I presume his 210 common shares became 420,000 in a 2,000:1 split, correct?). Am I correct in understanding the Company's most recent offer to be, in lieu of the conditional \$70,000 severance payment, that the Company repurchase 330,000 common shares (at the de minimis purchase price) and Ray would retain 90,000 common shares, which 90,000 common shares would be subject to a proxy in favor of the CEO? And those 90,000 common shares would represent 1.5% of the post-settlement common and 1.37% of the fully-diluted equity, per your calculations, correct?
2. That aside, the May 30, 2008 Stock Restriction Agreement provides that Ray's 210 common shares are subject to a stepped buyback. If employment is terminated between May 30, 2009 and May 30, 2010, the Company can buy back 70 common shares - which, on a 2,000:1 split basis, equates to 140,000 common shares. That would leave 280,000 common shares in Ray's hands, or 4.67% of the post-settlement common and 4.25% of the fully-diluted equity. On what basis do you believe that the Company is entitled to a full repurchase (even a for-cause termination (which Ray vigorously contests, as you know) is subject to this step process)?
3. While Ray has provided me with the Series A documentation, the Stock Restriction Agreement and the 83(b) election (which shows a purchase price of \$0.01 for the 210 common shares), I have been provided nothing relating to the manner in which Ray's \$20,000 investment was handled, and Ray says he has nothing in this regard. To the extent you or the Company has any paper evidencing this structure, and given its personal importance to the management team, I would presume there is a paper trail, I would appreciate a copy. But that point aside:

As Ray sees it, given his position at 4.25% of the fully-diluted equity under a worst-case characterization of this situation, his original offer of (1) the conditional \$70,000 severance payment, plus (2) a 2% nondilutable interest [or] a 3.5% equity interest plus additional equity credit for the \$20,000 investment, seems reasonable. He realizes that the Company could stir the pot with the threat of a lawsuit, or the filing of one, and that's a cost and a distraction he doesn't want. But similarly, he could do the same vis-a-vis the Company and can't imagine the Company would want that cost or distraction, either, especially while raising money. Bottom line - there is a deal that can get done, now, that saves both sides headaches, as presented previously by Ray and rearticulated in this paragraph.

Thanks, David. Appreciate your help here. If there is something material here that I have missed, overlooked or am not aware of, please advise. Otherwise, it would be great to push this to closure this week.

Cheers,
DW

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Thompson Hine LLP
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(513) 240-3001 (Mobile)
David.Willbrand@ThompsonHine.com
Other Contact Information: [Online Profile](#)

EXHIBIT B

Message

From: Baddour, David [/O=FIRM/OU=FIRM/CN=RECIPIENTS/CN=D_BADDOUR]
Sent: 3/25/2010 6:20:31 PM
To: Paul Bosse [pbosse@charlestonlabs.com]
CC: Rutley, Dean [DRutley@wcsr.com]
Subject: FW: Ray Takigiku
Attachments: Charleston Laboratories - Takigiku Package.DOC; Charleston Labs - Takigiku Redemption and Release Agmt - v2.DOC

Paul,

Please see attached.

As we've discussed, if Ray doesn't agree to the package (and the contingent \$70k payment) it is likely that he'll have a claim on the vested portion of his stock. If CL does nothing to change the status quo, it is likely that Ray will simply sit tight and do nothing, until such time as the stock becomes worth something, which is when he'll file suit. Again, the worst case scenario seems to be that he'll ultimately be entitled to the vested portion of his stock.

Keep us posted.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 |
dbaddour@wcsr.com

From: Paul Bosse [mailto:pbosse@charlestonlabs.com]
Sent: Thursday, March 25, 2010 3:59 PM
To: Baddour, David
Subject: Ray Takigiku

David,

Attached... Please revise edit as you see fit..

Best,

Paul Bosse
CEO & President
Charleston Laboratories Inc
www.charlestonlabs.com
(843)577-2626 (Office)
(843)628-1061 (Fax)
(843)364-3256 (Cell)
PBosse@Charlestonlabs.Com

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EXHIBIT C

Message

From: Baddour, David [/O=FIRM/OU=FIRM/CN=RECIPIENTS/CN=D_BADDOUR]
Sent: 5/18/2010 11:34:36 AM
To: Ryan Baker [rbaker@charlestonlabs.com]
CC: Paul Bosse [pbosse@charlestonlabs.com]; Rutley, Dean [DRutley@wcsr.com]
Subject: FW: 10 Charleston/Takigiku Conversation

FYI. Are you available to discuss, this afternoon?

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 |
dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Tuesday, May 18, 2010 11:28 AM
To: Baddour, David
Cc: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

David -

Thanks. At this point, this cap table will do. I also appreciate you taking the time last week to speak with me about your perspective on the capitalization of the company.

I have a few quick questions:

1. The proffered March 2010 Redemption and Settlement Agreement and Release provides for the repurchase by the Company of 420,000 common shares, the entirety of Ray's equity interest in the Company (I presume his 210 common shares became 420,000 in a 2,000:1 split, correct?). Am I correct in understanding the Company's most recent offer to be, in lieu of the conditional \$70,000 severance payment, that the Company repurchase 330,000 common shares (at the de minimis purchase price) and Ray would retain 90,000 common shares, which 90,000 common shares would be subject to a proxy in favor of the CEO? And those 90,000 common shares would represent 1.5% of the post-settlement common and 1.37% of the fully-diluted equity, per your calculations, correct?
2. That aside, the May 30, 2008 Stock Restriction Agreement provides that Ray's 210 common shares are subject to a stepped buyback. If employment is terminated between May 30, 2009 and May 30, 2010, the Company can buy back 70 common shares - which, on a 2,000:1 split basis, equates to 140,000 common shares. That would leave 280,000 common shares in Ray's hands, or 4.67% of the post-settlement common and 4.25% of the fully-diluted equity. On what basis do you believe that the Company is entitled to a full repurchase (even a for-cause termination (which Ray vigorously contests, as you know) is subject to this step process)?
3. While Ray has provided me with the Series A documentation, the Stock Restriction Agreement and the 83(b) election (which shows a purchase price of \$0.01 for the 210 common shares), I have been provided nothing relating to the manner in which Ray's \$20,000 investment was handled, and Ray says he has nothing in this regard. To the extent you or the Company has any paper evidencing this structure, and given its personal importance to the management team, I would presume there is a paper trail, I would appreciate a copy. But that point aside:

As Ray sees it, given his position at 4.25% of the fully-diluted equity under a worst-case characterization of this situation, his original offer of (1) the conditional \$70,000 severance payment, plus (2) a 2% nondilutable interest [or] a 3.5% equity interest plus additional equity credit for the \$20,000 investment, seems reasonable. He realizes that the Company could stir the pot with the threat of a lawsuit, or the filing of one, and that's a cost and a distraction he doesn't want. But similarly, he could do the same vis-a-vis the Company and can't imagine the Company would want that cost or distraction,

either, especially while raising money. Bottom line - there is a deal that can get done, now, that saves both sides headaches, as presented previously by Ray and rearticulated in this paragraph.

Thanks, David. Appreciate your help here. If there is something material here that I have missed, overlooked or am not aware of, please advise. Otherwise, it would be great to push this to closure this week.

Cheers,
DW

David J. Willbrand
Thompson Hine LLP
(513) 352-6646 (Office)
(513) 240-3001 (Mobile)
David.Willbrand@ThompsonHine.com
Other Contact Information: [Online Profile](#)

From: Baddour, David [<mailto:dbaddour@wcsr.com>]
Sent: Monday, May 10, 2010 3:32 PM
To: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

David,

I discussed briefly with my client; please see attached which I hope is useful to you.

Best regards,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 |
dbaddour@wcsr.com

From: Willbrand, David [<mailto:David.Willbrand@thompsonhine.com>]
Sent: Friday, May 07, 2010 12:33 PM
To: Baddour, David
Subject: RE: 10 Charleston/Takigiku Conversation

could i please see a detailed cap table? i don't want to go the books and records route, etc. i am not looking to kick over a hornet's nest, i just need to be able to see how this fits together. thanks

From: Baddour, David [<mailto:dbaddour@wcsr.com>]
Sent: Friday, May 07, 2010 11:57 AM
To: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

I hope this helps.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Friday, May 07, 2010 11:37 AM
To: Baddour, David
Subject: RE: 10 Charleston/Takigiku Conversation

could you shoot me the spreadsheet? thanks

From: Baddour, David [mailto:dbaddour@wcsr.com]
Sent: Friday, May 07, 2010 11:36 AM
To: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

David,

I am confident Ray knows and understands this, but so you are on the same page as the rest of us: the 1.5% is based on the original grant, which was before the Series A and future option pool. The original (post-split) cap table had Ray with 420,000 restricted common shares out of 6 million, or 7%. The offer is that he'll keep 90,000 shares ($1.5/7.0 * 420,000$).

FYI, currently there are 585,000 Series A outstanding, 5,670,000 common outstanding (assuming Ray has 90,000), and 800,000 common reserved for a future option pool.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Friday, May 07, 2010 10:40 AM
To: Baddour, David
Cc: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

thanks, david. before i speak with my client, can you please send a cap table to me so that i can see how this fits together? many thanks.

From: Baddour, David [mailto:dbaddour@wcsr.com]
Sent: Friday, May 07, 2010 10:32 AM

To: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

David,

Thank you for your e-mail. I've discussed with our client very briefly, as they clearly can't accept the offer below, which would put Ray in a significantly better position than he is now (not to mention all the founders) even if none of Charleston Labs potential claims against Ray (fraud, securities law violations, etc.) are upheld. Charleston Labs is willing to file suit and take any actions necessary to make this situation right, from their perspective.

However, they recognize that doing so will cost money and take time, which is why they are willing to discuss settlement. In addition to the offer they have already made, CL is willing to make one alternative proposal: Ray can have 1.5%, which will be treated just like all of the other founders' equity except that Ray will need to grant CL an irrevocable proxy to vote the stock.

In sum, Ray can either have the conditional/contingent cash severance payment per the initial offer or he can have 1.5% common stock, non-voting. Let me know if Ray would like to pursue either of the alternatives.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Thursday, May 06, 2010 11:07 AM
To: Baddour, David
Cc: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

Hi David -

I apologize for the delay in getting back to you after our call. After some discussion on our end, here is where we sit. I welcome your thoughts and appreciate your openness to this discussion.

1. The agreement is phrased and structured as a mutual voluntary separation with typical mutual releases, mutual nondisparagement clauses, etc.
2. The conditional/contingent cash severance payment is ok as originally presented by your client.
3. My understanding is that Ray's ownership position is 3.5%. Ray would like to either (1) hold on to his equity, or (2) if your client has a strong preference for reacquiring the equity, then Ray would agree to that in exchange for a carve-out which would deliver to him 2% (nondilutable) of the proceeds available for distribution to the shareholders in a liquidity event.
4. The acknowledgement and reaffirmation of Ray's equity holdings tied to his \$20,000 investment.

I hope this helps gets us closer to closure. Thanks for your consideration.

DW

From: Baddour, David [mailto:dbaddour@wcsr.com]
Sent: Monday, April 12, 2010 8:17 AM
To: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

David,

With apologies, this morning at 10 does not work. Can we pick a time later in the week?

Best regards,

David Baddour

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 |
Facsimile: 919-484-2090 | dbaddour@wcsr.com

-----Original Appointment-----

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Monday, April 12, 2010 8:14 AM
To: Baddour, David
Subject: Updated: 10 Charleston/Takigiku Conversation
When: Monday, April 12, 2010 10:00 AM-10:30 AM (GMT-05:00) Eastern Time (US & Canada).
Where: Call DW @ 513-352-6646

Thanks for your email. Does this work for you?

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EXHIBIT D

RYAN & RYAN, LLC
Attorneys at Law
3300 Woodward Avenue
Post Office Box 4082
Muscle Shoals, Alabama 35662
T 256.381.7673
F 256-263-4272
mitchell@ryan-lawyers.com

From: Baddour, David [<mailto:dbaddour@wcsr.com>]
Sent: Thursday, March 10, 2011 8:23 AM
To: Mitchell S. Ryan
Cc: Paul Bosse
Subject: RE: Charleston Labs - Revised Cap Table for Auditor (Feb 2011).xlsx

Mitchell,

Please find attached the revised cap table.

To answer your questions below:

- 1) To reserve stock for the plan, we need board approval. We are preparing an Equity Incentive Plan (which will permit the Company to issue up to 1.22 million of Common Stock awards) and board consent resolutions approving the same, which Paul can sign as sole director. BUT PLEASE NOTE: in order for the Company to grant qualified "Incentive Stock Options" to employees (recall that ISOs are tax favored), the Internal Revenue Code requires stockholder approval of the plan as well. As such, we are also drafting stockholder consent resolutions for Paul and the rest of the stockholders. Paul and the management team collectively clearly control this vote and can approve it without going to the Series A investors. However under DE law if the stockholders take corporate action by less than unanimous consent, the Company is required to promptly notify the stockholders who didn't vote of the action taken. In short, at a minimum Paul will need to notify the Series A investors that the stockholders have approved an Equity Incentive Plan. I am happy to discuss in greater detail with you and/or Paul as necessary.
- 2) I have removed the note regarding the reservation of shares for the Option Pool. The Series A Purchase Agreement does state that the Company has reserved 800,000 shares of Common for the equity pool. However, there is no prohibition against increasing the size of the pool. (Normally this anti-dilution protection would be in the Certificate of Incorporation, along with a host of other Series A protective provisions.) So from a corporate law perspective, it is fine to increase the size of the Option Pool. From a securities law perspective (meaning, "we told the investors that the pool was 800,000 and now we're increasing it to 1.22 million, which has the potential to dilute them") I am certainly comfortable as well assuming we do in fact get Ray's shares back. In other words, all we've done is to shift Ray's 420,000 shares from his line to the Option Pool line on the cap table, thus there has been no net dilution. To be clear, even if we ultimately do not get all of Ray's shares back, we still have a strong argument that there is no securities law issue, given that the corporate documents clearly permit us to increase the size of the pool. (By the way, see paragraph 2(b) clause (v) of the Accredited Investor Questionnaire and Supplemental Representation that each Series A investor signed, per which they acknowledge that the Series A stock "will be subject to dilution if additional capital stock is sold.")
- 3) I'll ask our paralegal to update the common stock ledger.

Let me know if you'd like to discuss.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 |
dbaddour@wcsr.com

From: Mitchell S. Ryan [mailto:mitchell@ryan-lawyers.com]
Sent: Tuesday, March 08, 2011 7:17 PM
To: Baddour, David
Subject: Charleston Labs - Revised Cap Table for Auditor (Feb 2011).xlsx

David,

Please disregard the version of the cap table I sent you earlier. Attached is the latest iteration. From my perspective, the only outstanding issue with it is the note re: the option pool. I haven't reviewed the Series A docs in detail, but I'm assuming they said the option pool would be restricted to 10% of the total common shares (i.e., 800K shares). As you know, Paul wants to include Ray's 420K in the option pool. (1) What do we need to do in order to make that happen? (2) What would you do with the aforementioned note in the cap table to account for this?

On a related note, assuming you're good with the current version of the cap table, can you revise the common stock ledger to be consistent with the cap table? That is, can you revise it to reflect the fact that the company repurchased all 420K of Ray's shares on March 26, 2010?

Let me know what you think.

Thanks,

Mitchell

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EXHIBIT E

May 24, 2011

Via Certified and Electronic Mail

Ray Takigiku P.h.D
632 Russell Street
Covington, KY 41011

RE: Charleston Laboratories, Inc.

Dear Ray;

I am an attorney representing Charleston Laboratories, Inc. ("Charleston Labs" or "the Company"). I have been hired to explore and pursue any and all available avenues of legal recourse against you in connection with certain actions and omissions as a Charleston Labs officer and founding stockholder. You may be held liable for breach of contract, breach of fiduciary duty, fraudulent misrepresentation, fraudulent suppression, conversion, tortious interference with business relations and conspiracy. Such claims arise from your extensive and extraordinary record of malfeasance as an officer of Charleston Labs – a record which includes, but is not limited to, the following:

- Your prohibited assignment to SIDIS of your equity stake in Charleston Labs.
- Your fraudulent misrepresentation to Charleston Labs CEO Paul Bosse, in or around July 2008, that your mandatory capital contribution¹ to the Company was funded entirely with personal monies and no portion of the funds were provided by one or more third parties.
- Your repeated attempts, beginning in or around May 2009, to convince one or more fellow Charleston Labs officers that the Company was destined for failure and to abandon their work with the Company.

¹ As you have known from the outset, the Founders' initial capital contributions were not loans to the Company nor were they offered in exchange for any equity in the Company. Instead, these contributions were made to demonstrate a good faith commitment to Charleston Labs, primarily to assist in the Company's efforts to attract investors. This fact has been attested to in writing by every other Charleston Labs Founder.

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- Your involvement in publicly representing Charleston Labs to be a portfolio company of SIDIS, conduct that involved clear violations of U.S. Securities laws.
- Your undertaking to serve as the CEO of Bexion Pharmaceuticals (which included a commitment to dedicate 100% of your time and efforts to Bexion-related work) in or around August 2009, while still an officer of Charleston Labs.
- Your refusal to disclose your conflicting employment with Bexion to the Company's Board of Directors.
- Your total abandonment of Charleston Labs-related work beginning in or around August 2009 and continuing until your March 2010 termination.
- Your overall pattern and practice of subordinating the interests of Charleston Labs to those of SIDIS, Bexion and other SIDIS-affiliated companies.

While the Company is prepared to file suit against you, I have been authorized to offer you the opportunity to settle this matter and avoid lengthy, stressful and expensive litigation. Enclosed with this letter is a Redemption Agreement and Release acknowledging the fact that all 210 pre-recapitalization shares of Charleston Labs common stock you once owned were effectively repurchased by the Company in March 2010. Please execute the Release and return to me **within thirty (30) days** of the date of this letter or the Company will have no choice but to file suit.

For your benefit, allow me to recap some of the relevant facts and events regarding this stock. On or around May 30, 2008, you signed a Stockholders Agreement with Charleston Labs. In numerous sections of the Stockholders Agreement – including Articles 1.1, 1.3, 2.1, and 2.2 – the unauthorized pledge, transfer or assignment of Charleston Labs common stock is expressly prohibited. Specifically, Article 2.2 reads in relevant part:

2.2 Right to Purchase Upon Certain Other Events

(a.) The Company's Right to Purchase. The Company shall have the right to purchase any or all of the Shares held by a Founding Stockholder (including his transferees hereunder) [...] after the Company and the Purchasing Founding Stockholder receives notice [...] of the occurrence of any of the following events:

- (v) the Terminating Founding Stockholder sells, pledges, encumbers, hypothecates or otherwise transfers any interest in, or purports to sell, pledge, encumber, hypothecate or otherwise transfer any interest in, any of his or her Shares, except as permitted by and in full compliance with the terms of this Agreement.

Subsequent to your signing the Stockholders Agreement, you did or purported to transfer, assign or pledge to SIDIS some or all of your Charleston Labs common stock. In doing so, you breached the express terms of the Stockholders Agreement and, pursuant to the above-quoted provision, entitled the Company to repurchase in full your equity in Charleston Labs.

In a letter dated March 26, 2010, Charleston Labs Founder and CEO Paul Bosse gave you formal written notice of the for-cause termination of your employment with the Company. In this same letter, Bosse noted that the Company was exercising its option to repurchase the entirety of your Charleston Labs equity and, to that end, enclosed a check for \$2.10.

Again, I have enclosed with this letter a Redemption Agreement and Release. Please execute the Release and return to me **within thirty (30) days** of the date of this letter. If you fail to respond before June 23, 2011, we will file suit seeking compensatory and punitive damages, as well as all costs of litigation, including attorney's fees.

I look forward to hearing from you.

Sincerely,

Mitchell S. Ryan

REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE

THIS REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE (this "Agreement"), made and entered into as of the ____ day of March, 2010, is by and between Ray Takigiku (the "Stockholder"), and Charleston Laboratories, Inc., a Delaware corporation (the "Company").

RECITALS

A. The Stockholder is the holder of stock certificate no. 14, representing 420,000 of the Company's common stock, par value \$0.001 per share (the "Common Stock"). The Stockholder is a party to that certain Stock Restriction Agreement dated May 30, 2008, pursuant to which the Common Stock is subject to vesting.

B. On March 19, 2010 the Stockholder's employment with the Company was terminated for cause, and the Company believes it has several causes of action against the Stockholder. Nevertheless, the Company and the Stockholder desire to resolve any and all disputes as provided herein.

C. The Stockholder desires to sell to the Company, and the Company desires to purchase and redeem from the Stockholder, all of the Stockholder's Common Stock on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Redemption and Contingent Severance Payment.

- (a) The Company hereby purchases and redeems from the Stockholder, and the Stockholder hereby sells, transfers and conveys to the Company, all of the Stockholder's right, title and interest in and to the Common Stock for the Purchase Price specified in Section 2 of this Agreement.
- (b) As a contingent severance payment, upon the closing by the Company of either (A) a convertible preferred stock financing in which the Company issues shares of convertible preferred stock with an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) or (B) a sale of all or substantially all of the assets of the Company for an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) (either (A) or (B) being referred to hereinafter as a "Qualified Transaction"), the Company agrees to pay to the Stockholder Seventy Thousand Dollars (\$70,000.00). Such payment will be made within sixty (60) days following the closing of the Qualified Transaction.

Section 2. Purchase Price. The purchase price for the Common Stock is \$0.01 per share of pre-recapitalization common stock (or \$0.000005 per share of Common Stock), and the

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aggregate purchase price for all the Stockholder's Common Stock is \$2.10 (the "Purchase Price"), the receipt of which is hereby acknowledged by the Stockholder.

Section 3. Closing; Deliveries. The closing of the purchase and redemption of the Common Stock contemplated hereby (the "Closing") shall take place concurrently with the execution and delivery of this Agreement by the parties hereto. Stock certificate no. 14 representing the Common Stock is hereby delivered by the Stockholder to the Company, properly endorsed by the Stockholder or accompanied by a duly executed stock power of attorney, in either case with signature guaranteed, for transfer of the Stockholder's Common Stock to the Company.

Section 4. Acknowledgments. Stockholder hereby acknowledges that: (i) the Purchase Price, together with the Release described in Section 7 below, represents full, fair and adequate consideration for the redemption and purchase of the Stockholder's Common Stock and represents a value mutually determined by the Stockholder and the Company; (ii) the Stockholder is familiar with the business, operations and financial condition of the Company and its subsidiaries and the Stockholder understands the prospects and industry of the Company and its subsidiaries; (iii) the Stockholder has taken such due diligence actions as the Stockholder deems necessary or appropriate; (iv) the Stockholder has consulted with legal counsel, tax advisors or other third parties of the Stockholder's choice in connection with the transactions contemplated hereby; (v) the Stockholder has the capacity to evaluate the merits and risks of the transactions contemplated by this Agreement and to protect the Stockholder's interests in connection with such transactions; (vi) no representations, warranties or tax or legal advice have been made or given to the Stockholder by the Company or any of its agents, representatives, attorneys, officers, directors or employees to induce the Stockholder to enter into this Agreement, other than those expressly set forth herein; (vii) the Stockholder has not relied upon any representation, warranty or tax or legal advice of the Company or any of its agents, representatives, attorneys, officers, directors, or employees in making the Stockholder's decision to enter into this Agreement, other than those expressly set forth herein; and (viii) upon the Closing, the Stockholder will no longer be a stockholder of, or own any interest in, the Company.

Section 5. Representations and Warranties of the Stockholder. The Stockholder represents and warrants to the Company of the date hereof as follows (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement): (i) the Stockholder is the record and beneficial owner of the Common Stock and has valid title to the Common Stock; (ii) the Common Stock is free and clear of any security interests, pledges, claims, liens, encumbrances, charges and assessments, restrictive agreements and other restrictions, preemptive or similar rights, and any other rights or interests of any nature whatsoever; (iii) the Common Stock represents all the equity interest or other ownership rights that the Stockholder has in the Company; (iv) the Stockholder has full legal right, power, authority and legal capacity to enter into this Agreement and sell, assign, convey and transfer the Common Stock to the Company; (v) this Agreement constitutes the valid and binding obligation of the Stockholder, enforceable against the Stockholder in accordance with its terms; (vi) the Common Stock is not subject to any restrictions on transferability that have not been waived, and may be sold, assigned, conveyed and transferred to the Company in accordance with the terms of this Agreement; (vii) the execution, delivery and performance of this Agreement, and the consummation by the Stockholder of the transactions contemplated

hereby have been duly authorized by all necessary limited liability company action on the part of the Stockholder; and (viii) the Stockholder's execution and delivery of this Agreement and the performance of the Stockholder's obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which the Stockholder is a party or by which the Stockholder or the Stockholder's property is bound.

Section 6. Representation and Warranty of the Company. The Company represents and warrants to the Stockholder as of the date hereof (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement) that: (i) it has full legal right, power and authority to enter into this Agreement and redeem and purchase the Common Stock from the Stockholder; (ii) this Agreement constitutes the valid and binding obligation of the Company, enforceable against the Company in accordance with its terms; and (iii) its execution and delivery of this Agreement and the performance of its obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which it is a party or by which its property is bound.

Section 7. Releases and Non-disparagement.

(a) Release by the Stockholder.

- (i) The Stockholder, for itself and for its heirs, legal representatives, administrators, executors, successors and assigns, hereby releases and forever discharges the Company, and each of their respective individual, joint or mutual, past, present and future representatives, parent companies, affiliates, stockholders, managers, members, directors, officers, employees (both current and former), partners, controlling persons, subsidiaries, insurers, attorneys, successors and assigns (individually, a "**Releasee**" and collectively, the "**Releasees**") from any and all claims, demands, proceedings, causes of action, orders, obligations, damages, interest, contracts, agreements, debts, liabilities, attorneys' fees and expenses, whatsoever, whether in law or equity, whether known or unknown, suspected or unsuspected in connection with the Stockholder's ownership of the Company's Common Stock or its status as a stockholder of the Company (collectively, "**Claims**"), relating to the Company, its subsidiaries or their respective businesses or securities which the Stockholder now has, has ever had or may hereafter have against the respective Releasees arising contemporaneously with or prior to the date hereof or on account of or arising out of any matter, cause or event occurring contemporaneously with or prior to the date hereof.
- (ii) In executing this Agreement, the Stockholder acknowledges that it has been informed that the Company and/or their subsidiaries may from time to time enter into agreements for additional types of financing, including without limitation recapitalizations, mergers and initial public offerings of capital stock of the Company and/or their subsidiaries, and also may

pursue acquisitions or enter into agreements for the sale of the Company and/or their subsidiaries or all or a portion of the Company's and/or their subsidiaries' assets, which may result in or reflect an increase in equity value or enterprise value, and that any and all claims arising from or relating to such transactions or such increases in equity value or enterprise value (without limitation) are encompassed within the scope of this release, and that the sole exceptions to the scope of this release are for claims arising after the date hereof directly under this Agreement in accordance with its terms.

- (iii) The Stockholder hereby irrevocably covenants to refrain from, directly or indirectly, asserting any Claim, or commencing, instituting or causing to be commenced, any proceeding of any kind against any Releasee, based upon any matter released hereby.

(b) Release by the Company.

- (i) The Company, for itself and for its legal representatives, administrators, successors and assigns, hereby releases and forever discharges the Stockholder from any and all claims, demands, proceedings, causes of action, orders, obligations, damages, interest, contracts, agreements, debts, liabilities, attorneys' fees and expenses, whatsoever, whether in law or equity, whether known or unknown, suspected or unsuspected in connection with the Stockholder's employment by the Company as an officer arising contemporaneously with or prior to the date hereof or on account of or arising out of any matter, cause or event occurring contemporaneously with or prior to the date hereof.
- (ii) The Company hereby irrevocably covenants to refrain from, directly or indirectly, asserting any claim, or commencing, instituting or causing to be commenced, any proceeding of any kind against any the Stockholder, based upon any matter released hereby.

- (c) Non-disparagement. The Stockholder shall not make any disparaging remarks, or any remarks that could reasonably be construed as disparaging, regarding the Company or any of its affiliates, or their officers, directors, employees, partners, or agents. The Stockholder shall not take any action or provide information or issue statements, to the media or otherwise, or cause anyone else to take any action or provide information or issue statements, to the media or otherwise, regarding the Company or any of its affiliates or their officers, directors, employees, partners, or agents.

- (d) If any provision of the release contained in this Section 7 is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of such release will remain in full force and effect. Any provision of the release contained in this Section 7 held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

Section 9. Further Assurances. The Stockholder hereby agrees to from time to time execute and deliver, or cause to be executed and delivered, such additional or further documents, instruments, certificates and agreements, and do or cause to be done such further acts, as the Company may reasonably request for the purpose of effectively carrying out the transaction contemplated by this Agreement.

Section 10. Assignment; Binding Effect. This Agreement may not be assigned by the Stockholder, whether by operation of law or otherwise, without the express prior written consent of the Company. This Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, administrators, executors, personal and legal representatives, successors and permitted assigns.

Section 11. Entire Agreement; Amendment. This Agreement and the exhibits attached hereto represent the entire understanding and agreement between the parties with respect to the subject matter hereof and shall supersede any prior agreements and understandings between the parties with respect to that subject matter. This Agreement may not be amended, modified or changed, in whole or in part, except by a written instrument signed by both of the parties hereto.

Section 12. Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the substantive laws of the State of Delaware, without regard to principles governing conflicts of law.

Section 13. Counterparts. Any number of counterparts of this Agreement may be executed, and each counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement. The facsimile signature of either party to this Agreement for purposes of execution or otherwise, is to be considered as an original signature, and the document transmitted is to be considered to have the same binding effect as an original signature on an original document.

Section 14. Interpretation. In the event of any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

Section 15. Section Headings. The section headings contained herein are for convenience of reference only and are not to be considered in interpreting or construing this Agreement.

Section 16. Effective Date. The purchase, redemption, sale, transfer and conveyance of the Redemption Shares contemplated hereby shall be effective as of the date of this Agreement.

[Signature Page Follows]

PL-0027077

ROA-3662

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by a duly authorized person, or has set their hand, as of the day and year first above written.

STOCKHOLDER:

Ray Takigiku

COMPANY:

Charleston Laboratories, Inc.

By: _____
Paul Bosse, CEO and President

STOCK POWER

FOR VALUE RECEIVED, I, Ray Takigiku, do hereby sell, assign and transfer to Charleston Laboratories, Inc., a Delaware corporation, four hundred twenty (420,000) shares of Common Stock of Charleston Laboratories, Inc. a corporation organized under the laws of the State of Delaware (the "Corporation"), represented on the books of the Corporation as Certificate No. 14 (the "Shares") and do hereby irrevocably constitute and appoint Paul Bosse as my true and lawful attorney to sell, assign and transfer the Shares, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that said attorney or substitutes shall lawfully do by virtue hereof.

Dated: March ____, 2010

Signature: _____

Printed Name: Ray Takigiku

EXHIBIT F

From: Paul Bosse <pbosse@charlestonlabs.com>
Sent: Monday, September 15, 2014 12:16 PM
To: Smith, Jr., Frederic L.
Cc: Grissom, Christopher R.; Black, Dylan C.
Subject: RE: Charleston Laboratories, Inc
Attachments: John Ameling - Affidavit for Ray Takigiku Termination _1_.pdf; Charleston Labs - Demand Letter to Takigiku (second draft).docx

Frederic,

1. Affidavit from John Ameling – who is current CL employee that was privy to Ray's actions.
2. Demand Letter that a 2nd law firm drafted (that was never sent) but thought it might help with background

We ultimately tried to reach a mutual position with Ray – that Womble Carlyle handled unsuccessfully – and then a 2nd outside counsel we hired to look further into the situation agreed that the Company repurchased Ray's stock that vested per the executed Shareholders Agreements section 2.2 (v).

Paul Bosse
President & Chief Executive Officer
Charleston Laboratories Inc
www.charlestonlabs.com
(561)748-2111 (Office)
(843)628-1061 (Fax)
(843)364-3256 (Cell)
PBosse@Charlestonlabs.Com

****The information contained in this communication is confidential, may be subject to legal privileges, may constitute inside information, and is intended only for the use of the addressee. It is the property of Charleston Laboratories, Inc. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify Charleston Laboratories immediately by return e-mail and destroy this communication and all copies thereof, including all attachments.

From: Paul Bosse [mailto:pbosse@charlestonlabs.com]
Sent: Monday, September 15, 2014 12:01 PM
To: 'Smith, Jr., Frederic L.'
Cc: 'Grissom, Christopher R.'; 'Black, Dylan C.'
Subject: RE: Charleston Laboratories, Inc
Importance: High

Fredric,

1. Receipt Letters were sent via Certified mail
2. Certified mail Receipt
3. Ray Instruction Letter following Termination
4. Ray Redemption and Release
5. Ray Stock Power

Paul Bosse
President & Chief Executive Officer
Charleston Laboratories Inc
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From: Paul Bosse [<mailto:pbosse@charlestonlabs.com>]
Sent: Monday, September 15, 2014 11:56 AM
To: 'Smith, Jr., Frederic L.'
Cc: 'Grissom, Christopher R.'; 'Black, Dylan C.'
Subject: RE: Charleston Laboratories, Inc.
Importance: High

Fredric,

Good morning –

I will be sending the documents over several emails that will help enclose the issue with a current Shareholder – Chuck Scheper who invested through his trust. Chuck is the current Chairman of Ray Takigiku's company Bexion (www.bexionpharma.com). Ray is the employee we terminated with cause. Additionally, Chuck Scheper is the brother of Margret Van Gilse who serves as the BD director for Bexion. Once Ray was terminated, we ceased all communication with the Scheper's.

1. By Laws
2. Executed Stockholders Agreement
3. Ray Restricted Stock Agreement
4. BOD Ray Termination
5. Ray Termination Letter

More to follow....

Paul Bosse
President & Chief Executive Officer
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www.charlestonlabs.com
(561)748-2111 (Office)
(843)628-1061 (Fax)
(843)364-3256 (Cell)
PBosse@Charlestonlabs.Com

EXHIBIT G



Executive Offices
65 Gadsden St. Ste 201
Charleston, SC 29401
843-577-2626

March 26, 2010

VIA CERTIFIED MAIL

Ray Takigiku P.h.D
632 Russell Street
Covington, KY 41011

**Re: Termination of Employment / Redemption and Settlement Agreement /
Stock Power**

Dear Ray:

On Friday March 19th your employment was terminated with cause. Please find enclosed a check in the amount of \$2.10, which the company hereby tenders as payment in full for your equity.

In addition, please find enclosed two copies of a Redemption and Settlement Agreement and a single copy of a Stock Power. The settlement package described in the Redemption and Settlement Agreement includes a severance payment to you in the amount of \$70,000, which will be payable upon the closing of a qualified financing. This package is non-negotiable. Please sign one copy of the Redemption and Settlement Agreement and the Stock Power and return both to us, in order to finalize our relationship.

I need these documents signed and returned no later than April 5th 2010. If we do not receive a response from you by then, we will assume you do not intend to cooperate and we will pursue all other legal remedies at our disposal.

Sincerely,

PB

Paul Bosse
CEO, President and Sole Director
Charleston Laboratories, Inc.

cc: Ryan Baker, Chief Financial Officer
John F. Ameling, VP of Regulatory Affairs
Bernard Schachtel, M.D., Chief Scientific Officer
David Baddour, Womble Carlyle Sandridge & Rice

Confidential

T001517

ROA-3669

REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE

THIS REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE (this "Agreement"), made and entered into as of the ____ day of March, 2010, is by and between Ray Takigiku (the "Stockholder"), and Charleston Laboratories, Inc., a Delaware corporation (the "Company").

RECITALS

A. The Stockholder is the holder of stock certificate no. 14, representing 420,000 of the Company's common stock, par value \$0.001 per share (the "Common Stock"). The Stockholder is a party to that certain Stock Restriction Agreement dated May 30, 2008, pursuant to which the Common Stock is subject to vesting.

B. On March 19, 2010 the Stockholder's employment with the Company was terminated for cause, and the Company believes it has several causes of action against the Stockholder. Nevertheless, the Company and the Stockholder desire to resolve any and all disputes as provided herein.

C. The Stockholder desires to sell to the Company, and the Company desires to purchase and redeem from the Stockholder, all of the Stockholder's Common Stock on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Redemption and Contingent Severance Payment.

- (a) The Company hereby purchases and redeems from the Stockholder, and the Stockholder hereby sells, transfers and conveys to the Company, all of the Stockholder's right, title and interest in and to the Common Stock for the Purchase Price specified in Section 2 of this Agreement.
- (b) As a contingent severance payment, upon the closing by the Company of either (A) a convertible preferred stock financing in which the Company issues shares of convertible preferred stock with an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) or (B) a sale of all or substantially all of the assets of the Company for an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) (either (A) or (B) being referred to hereinafter as a "Qualified Transaction"), the Company agrees to pay to the Stockholder Seventy Thousand Dollars (\$70,000.00). Such payment will be made within sixty (60) days following the closing of the Qualified Transaction.

Section 2. Purchase Price. The purchase price for the Common Stock is \$0.01 per share of pre-recapitalization common stock (or \$0.000005 per share of Common Stock), and the

aggregate purchase price for all the Stockholder's Common Stock is \$2.10 (the "Purchase Price"), the receipt of which is hereby acknowledged by the Stockholder.

Section 3. Closing; Deliveries. The closing of the purchase and redemption of the Common Stock contemplated hereby (the "Closing") shall take place concurrently with the execution and delivery of this Agreement by the parties hereto. Stock certificate no. 14 representing the Common Stock is hereby delivered by the Stockholder to the Company, properly endorsed by the Stockholder or accompanied by a duly executed stock power of attorney, in either case with signature guaranteed, for transfer of the Stockholder's Common Stock to the Company.

Section 4. Acknowledgments. Stockholder hereby acknowledges that: (i) the Purchase Price, together with the Release described in Section 7 below, represents full, fair and adequate consideration for the redemption and purchase of the Stockholder's Common Stock and represents a value mutually determined by the Stockholder and the Company; (ii) the Stockholder is familiar with the business, operations and financial condition of the Company and its subsidiaries and the Stockholder understands the prospects and industry of the Company and its subsidiaries; (iii) the Stockholder has taken such due diligence actions as the Stockholder deems necessary or appropriate; (iv) the Stockholder has consulted with legal counsel, tax advisors or other third parties of the Stockholder's choice in connection with the transactions contemplated hereby; (v) the Stockholder has the capacity to evaluate the merits and risks of the transactions contemplated by this Agreement and to protect the Stockholder's interests in connection with such transactions; (vi) no representations, warranties or tax or legal advice have been made or given to the Stockholder by the Company or any of its agents, representatives, attorneys, officers, directors or employees to induce the Stockholder to enter into this Agreement, other than those expressly set forth herein; (vii) the Stockholder has not relied upon any representation, warranty or tax or legal advice of the Company or any of its agents, representatives, attorneys, officers, directors, or employees in making the Stockholder's decision to enter into this Agreement, other than those expressly set forth herein; and (viii) upon the Closing, the Stockholder will no longer be a stockholder of, or own any interest in, the Company.

Section 5. Representations and Warranties of the Stockholder. The Stockholder represents and warrants to the Company of the date hereof as follows (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement): (i) the Stockholder is the record and beneficial owner of the Common Stock and has valid title to the Common Stock; (ii) the Common Stock is free and clear of any security interests, pledges, claims, liens, encumbrances, charges and assessments, restrictive agreements and other restrictions, preemptive or similar rights, and any other rights or interests of any nature whatsoever; (iii) the Common Stock represents all the equity interest or other ownership rights that the Stockholder has in the Company; (iv) the Stockholder has full legal right, power, authority and legal capacity to enter into this Agreement and sell, assign, convey and transfer the Common Stock to the Company; (v) this Agreement constitutes the valid and binding obligation of the Stockholder, enforceable against the Stockholder in accordance with its terms; (vi) the Common Stock is not subject to any restrictions on transferability that have not been waived, and may be sold, assigned, conveyed and transferred to the Company in accordance with the terms of this Agreement; (vii) the execution, delivery and performance of this Agreement, and the consummation by the Stockholder of the transactions contemplated

hereby have been duly authorized by all necessary limited liability company action on the part of the Stockholder; and (viii) the Stockholder's execution and delivery of this Agreement and the performance of the Stockholder's obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which the Stockholder is a party or by which the Stockholder or the Stockholder's property is bound.

Section 6. Representation and Warranty of the Company. The Company represents and warrants to the Stockholder as of the date hereof (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement) that: (i) it has full legal right, power and authority to enter into this Agreement and redeem and purchase the Common Stock from the Stockholder; (ii) this Agreement constitutes the valid and binding obligation of the Company, enforceable against the Company in accordance with its terms; and (iii) its execution and delivery of this Agreement and the performance of its obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which it is a party or by which its property is bound.

Section 7. Releases and Non-disparagement.

(a) Release by the Stockholder.

- (i) The Stockholder, for itself and for its heirs, legal representatives, administrators, executors, successors and assigns, hereby releases and forever discharges the Company, and each of their respective individual, joint or mutual, past, present and future representatives, parent companies, affiliates, stockholders, managers, members, directors, officers, employees (both current and former), partners, controlling persons, subsidiaries, insurers, attorneys, successors and assigns (individually, a "Releasee" and collectively, the "Releasees") from any and all claims, demands, proceedings, causes of action, orders, obligations, damages, interest, contracts, agreements, debts, liabilities, attorneys' fees and expenses, whatsoever, whether in law or equity, whether known or unknown, suspected or unsuspected in connection with the Stockholder's ownership of the Company's Common Stock or its status as a stockholder of the Company (collectively, "Claims"), relating to the Company, its subsidiaries or their respective businesses or securities which the Stockholder now has, has ever had or may hereafter have against the respective Releasees arising contemporaneously with or prior to the date hereof or on account of or arising out of any matter, cause or event occurring contemporaneously with or prior to the date hereof.
- (ii) In executing this Agreement, the Stockholder acknowledges that it has been informed that the Company and/or their subsidiaries may from time to time enter into agreements for additional types of financing, including without limitation recapitalizations, mergers and initial public offerings of capital stock of the Company and/or their subsidiaries, and also may

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by a duly authorized person, or has set their hand, as of the day and year first above written.

STOCKHOLDER:

Ray Takigiku

COMPANY:

Charleston Laboratories, Inc.

By: PB
Paul Bosse, CEO and President

REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE

THIS REDEMPTION AND SETTLEMENT AGREEMENT AND RELEASE (this "**Agreement**"), made and entered into as of the ____ day of March, 2010, is by and between Ray Takigiku (the "**Stockholder**"), and Charleston Laboratories, Inc., a Delaware corporation (the "**Company**").

RECITALS

A. The Stockholder is the holder of stock certificate no. 14, representing 420,000 of the Company's common stock, par value \$0.001 per share (the "**Common Stock**"). The Stockholder is a party to that certain Stock Restriction Agreement dated May 30, 2008, pursuant to which the Common Stock is subject to vesting.

B. On March 19, 2010 the Stockholder's employment with the Company was terminated for cause, and the Company believes it has several causes of action against the Stockholder. Nevertheless, the Company and the Stockholder desire to resolve any and all disputes as provided herein.

C. The Stockholder desires to sell to the Company, and the Company desires to purchase and redeem from the Stockholder, all of the Stockholder's Common Stock on the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

Section 1. Redemption and Contingent Severance Payment.

- (a) The Company hereby purchases and redeems from the Stockholder, and the Stockholder hereby sells, transfers and conveys to the Company, all of the Stockholder's right, title and interest in and to the Common Stock for the Purchase Price specified in Section 2 of this Agreement.
- (b) As a contingent severance payment, upon the closing by the Company of either (A) a convertible preferred stock financing in which the Company issues shares of convertible preferred stock with an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) or (B) a sale of all or substantially all of the assets of the Company for an aggregate purchase price equal to or greater than Five Million Dollars (\$5,000,000.00) (either (A) or (B) being referred to hereinafter as a "Qualified Transaction"), the Company agrees to pay to the Stockholder Seventy Thousand Dollars (\$70,000.00). Such payment will be made within sixty (60) days following the closing of the Qualified Transaction.

Section 2. Purchase Price. The purchase price for the Common Stock is \$0.01 per share of pre-recapitalization common stock (or \$0.000005 per share of Common Stock), and the

aggregate purchase price for all the Stockholder's Common Stock is \$2.10 (the "Purchase Price"), the receipt of which is hereby acknowledged by the Stockholder.

Section 3. Closing; Deliveries. The closing of the purchase and redemption of the Common Stock contemplated hereby (the "Closing") shall take place concurrently with the execution and delivery of this Agreement by the parties hereto. Stock certificate no. 14 representing the Common Stock is hereby delivered by the Stockholder to the Company, properly endorsed by the Stockholder or accompanied by a duly executed stock power of attorney, in either case with signature guaranteed, for transfer of the Stockholder's Common Stock to the Company.

Section 4. Acknowledgments. Stockholder hereby acknowledges that: (i) the Purchase Price, together with the Release described in Section 7 below, represents full, fair and adequate consideration for the redemption and purchase of the Stockholder's Common Stock and represents a value mutually determined by the Stockholder and the Company; (ii) the Stockholder is familiar with the business, operations and financial condition of the Company and its subsidiaries and the Stockholder understands the prospects and industry of the Company and its subsidiaries; (iii) the Stockholder has taken such due diligence actions as the Stockholder deems necessary or appropriate; (iv) the Stockholder has consulted with legal counsel, tax advisors or other third parties of the Stockholder's choice in connection with the transactions contemplated hereby; (v) the Stockholder has the capacity to evaluate the merits and risks of the transactions contemplated by this Agreement and to protect the Stockholder's interests in connection with such transactions; (vi) no representations, warranties or tax or legal advice have been made or given to the Stockholder by the Company or any of its agents, representatives, attorneys, officers, directors or employees to induce the Stockholder to enter into this Agreement, other than those expressly set forth herein; (vii) the Stockholder has not relied upon any representation, warranty or tax or legal advice of the Company or any of its agents, representatives, attorneys, officers, directors, or employees in making the Stockholder's decision to enter into this Agreement, other than those expressly set forth herein; and (viii) upon the Closing, the Stockholder will no longer be a stockholder of, or own any interest in, the Company.

Section 5. Representations and Warranties of the Stockholder. The Stockholder represents and warrants to the Company of the date hereof as follows (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement): (i) the Stockholder is the record and beneficial owner of the Common Stock and has valid title to the Common Stock; (ii) the Common Stock is free and clear of any security interests, pledges, claims, liens, encumbrances, charges and assessments, restrictive agreements and other restrictions, preemptive or similar rights, and any other rights or interests of any nature whatsoever; (iii) the Common Stock represents all the equity interest or other ownership rights that the Stockholder has in the Company; (iv) the Stockholder has full legal right, power, authority and legal capacity to enter into this Agreement and sell, assign, convey and transfer the Common Stock to the Company; (v) this Agreement constitutes the valid and binding obligation of the Stockholder, enforceable against the Stockholder in accordance with its terms; (vi) the Common Stock is not subject to any restrictions on transferability that have not been waived, and may be sold, assigned, conveyed and transferred to the Company in accordance with the terms of this Agreement; (vii) the execution, delivery and performance of this Agreement, and the consummation by the Stockholder of the transactions contemplated

hereby have been duly authorized by all necessary limited liability company action on the part of the Stockholder; and (viii) the Stockholder's execution and delivery of this Agreement and the performance of the Stockholder's obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which the Stockholder is a party or by which the Stockholder or the Stockholder's property is bound.

Section 6. Representation and Warranty of the Company. The Company represents and warrants to the Stockholder as of the date hereof (which representations and warranties shall survive the sale, transfer and conveyance of the Common Stock to the Company pursuant to this Agreement) that: (i) it has full legal right, power and authority to enter into this Agreement and redeem and purchase the Common Stock from the Stockholder; (ii) this Agreement constitutes the valid and binding obligation of the Company, enforceable against the Company in accordance with its terms; and (iii) its execution and delivery of this Agreement and the performance of its obligations hereunder does not and will not conflict with, violate, result in a breach of, or constitute a default under any agreement, contract, instrument or other arrangement to which it is a party or by which its property is bound.

Section 7. Releases and Non-disparagement.

(a) Release by the Stockholder.

- (i) The Stockholder, for itself and for its heirs, legal representatives, administrators, executors, successors and assigns, hereby releases and forever discharges the Company, and each of their respective individual, joint or mutual, past, present and future representatives, parent companies, affiliates, stockholders, managers, members, directors, officers, employees (both current and former), partners, controlling persons, subsidiaries, insurers, attorneys, successors and assigns (individually, a "Releasee" and collectively, the "Releasees") from any and all claims, demands, proceedings, causes of action, orders, obligations, damages, interest, contracts, agreements, debts, liabilities, attorneys' fees and expenses, whatsoever, whether in law or equity, whether known or unknown, suspected or unsuspected in connection with the Stockholder's ownership of the Company's Common Stock or its status as a stockholder of the Company (collectively, "Claims"), relating to the Company, its subsidiaries or their respective businesses or securities which the Stockholder now has, has ever had or may hereafter have against the respective Releasees arising contemporaneously with or prior to the date hereof or on account of or arising out of any matter, cause or event occurring contemporaneously with or prior to the date hereof.
- (ii) In executing this Agreement, the Stockholder acknowledges that it has been informed that the Company and/or their subsidiaries may from time to time enter into agreements for additional types of financing, including without limitation recapitalizations, mergers and initial public offerings of capital stock of the Company and/or their subsidiaries, and also may

pursue acquisitions or enter into agreements for the sale of the Company and/or their subsidiaries or all or a portion of the Company's and/or their subsidiaries' assets, which may result in or reflect an increase in equity value or enterprise value, and that any and all claims arising from or relating to such transactions or such increases in equity value or enterprise value (without limitation) are encompassed within the scope of this release, and that the sole exceptions to the scope of this release are for claims arising after the date hereof directly under this Agreement in accordance with its terms.

- (iii) The Stockholder hereby irrevocably covenants to refrain from, directly or indirectly, asserting any Claim, or commencing, instituting or causing to be commenced, any proceeding of any kind against any Releasee, based upon any matter released hereby.

(b) Release by the Company.

- (i) The Company, for itself and for its legal representatives, administrators, successors and assigns, hereby releases and forever discharges the Stockholder from any and all claims, demands, proceedings, causes of action, orders, obligations, damages, interest, contracts, agreements, debts, liabilities, attorneys' fees and expenses, whatsoever, whether in law or equity, whether known or unknown, suspected or unsuspected in connection with the Stockholder's employment by the Company as an officer arising contemporaneously with or prior to the date hereof or on account of or arising out of any matter, cause or event occurring contemporaneously with or prior to the date hereof.
- (ii) The Company hereby irrevocably covenants to refrain from, directly or indirectly, asserting any claim, or commencing, instituting or causing to be commenced, any proceeding of any kind against any the Stockholder, based upon any matter released hereby.

- (c) Non-disparagement. The Stockholder shall not make any disparaging remarks, or any remarks that could reasonably be construed as disparaging, regarding the Company or any of its affiliates, or their officers, directors, employees, partners, or agents. The Stockholder shall not take any action or provide information or issue statements, to the media or otherwise, or cause anyone else to take any action or provide information or issue statements, to the media or otherwise, regarding the Company or any of its affiliates or their officers, directors, employees, partners, or agents.
- (d) If any provision of the release contained in this Section 7 is held invalid or unenforceable by any court of competent jurisdiction, the other provisions of such release will remain in full force and effect. Any provision of the release contained in this Section 7 held invalid or unenforceable only in part or degree will remain in full force and effect to the extent not held invalid or unenforceable.

Section 9. Further Assurances. The Stockholder hereby agrees to from time to time execute and deliver, or cause to be executed and delivered, such additional or further documents, instruments, certificates and agreements, and do or cause to be done such further acts, as the Company may reasonably request for the purpose of effectively carrying out the transaction contemplated by this Agreement.

Section 10. Assignment; Binding Effect. This Agreement may not be assigned by the Stockholder, whether by operation of law or otherwise, without the express prior written consent of the Company. This Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, administrators, executors, personal and legal representatives, successors and permitted assigns.

Section 11. Entire Agreement; Amendment. This Agreement and the exhibits attached hereto represent the entire understanding and agreement between the parties with respect to the subject matter hereof and shall supersede any prior agreements and understandings between the parties with respect to that subject matter. This Agreement may not be amended, modified or changed, in whole or in part, except by a written instrument signed by both of the parties hereto.

Section 12. Governing Law. This Agreement shall be governed by and construed and enforced in accordance with the substantive laws of the State of Delaware, without regard to principles governing conflicts of law.

Section 13. Counterparts. Any number of counterparts of this Agreement may be executed, and each counterpart shall be deemed to be an original instrument, but all such counterparts together shall constitute but one agreement. The facsimile signature of either party to this Agreement for purposes of execution or otherwise, is to be considered as an original signature, and the document transmitted is to be considered to have the same binding effect as an original signature on an original document.

Section 14. Interpretation. In the event of any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

Section 15. Section Headings. The section headings contained herein are for convenience of reference only and are not to be considered in interpreting or construing this Agreement.

Section 16. Effective Date. The purchase, redemption, sale, transfer and conveyance of the Redemption Shares contemplated hereby shall be effective as of the date of this Agreement.

[Signature Page Follows]

IN WITNESS WHEREOF, each of the parties hereto has caused this Agreement to be executed by a duly authorized person, or has set their hand, as of the day and year first above written.

STOCKHOLDER:

Ray Takigiku

COMPANY:

Charleston Laboratories, Inc.

By: PB
Paul Bosse, CEO and President

STOCK POWER

FOR VALUE RECEIVED, I, Ray Takigiku, do hereby sell, assign and transfer to Charleston Laboratories, Inc., a Delaware corporation, four hundred twenty (420,000) shares of Common Stock of Charleston Laboratories, Inc. a corporation organized under the laws of the State of Delaware (the "Corporation"), represented on the books of the Corporation as Certificate No. 14 (the "Shares") and do hereby irrevocably constitute and appoint Paul Bosse as my true and lawful attorney to sell, assign and transfer the Shares, and for that purpose to make and execute all necessary acts of assignment and transfer thereof, and to substitute one or more persons with like full power, hereby ratifying and confirming all that said attorney or substitutes shall lawfully do by virtue hereof.

Dated: March ____, 2010

Signature: _____

Printed Name: Ray Takigiku

CHARLESTON LABORATORIES, INC.

648 CLEARVIEW DRIVE
CHARLESTON, SC 29412

1155

87-778/532
BRANCH 10769

DATE 3/25/10

PAY
TO THE
ORDER OF

RAY TAILGIZIKU

\$ 2.¹⁰

TWO - DOLLARS AND $\frac{10}{100}$

DOLLARS

 Security
Features
Only on
Back.



WACHOVIA
Wachovia Bank, N.A.
wachovia.com

FOR

PB

MP

T001529

ROA-3681

EXHIBIT H

Message

From: Baddour, David [/O=FIRM/OU=FIRM/CN=RECIPIENTS/CN=D_BADDOUR]
Sent: 5/7/2010 10:32:19 AM
To: David Willbrand [david.willbrand@thompsonhine.com]
Subject: RE: 10 Charleston/Takigiku Conversation

David,

Thank you for your e-mail. I've discussed with our client very briefly, as they clearly can't accept the offer below, which would put Ray in a significantly better position than he is now (not to mention all the founders) even if none of Charleston Labs potential claims against Ray (fraud, securities law violations, etc.) are upheld. Charleston Labs is willing to file suit and take any actions necessary to make this situation right, from their perspective.

However, they recognize that doing so will cost money and take time, which is why they are willing to discuss settlement. In addition to the offer they have already made, CL is willing to make one alternative proposal: Ray can have 1.5%, which will be treated just like all of the other founders' equity except that Ray will need to grant CL an irrevocable proxy to vote the stock.

In sum, Ray can either have the conditional/contingent cash severance payment per the initial offer or he can have 1.5% common stock, non-voting. Let me know if Ray would like to pursue either of the alternatives.

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Thursday, May 06, 2010 11:07 AM
To: Baddour, David
Cc: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

Hi David -

I apologize for the delay in getting back to you after our call. After some discussion on our end, here is where we sit. I welcome your thoughts and appreciate your openness to this discussion.

1. The agreement is phrased and structured as a mutual voluntary separation with typical mutual releases, mutual nondisparagement clauses, etc.
2. The conditional/contingent cash severance payment is ok as originally presented by your client.
3. My understanding is that Ray's ownership position is 3.5%. Ray would like to either (1) hold on to his equity, or (2) if your client has a strong preference for reacquiring the equity, then Ray would agree to that in exchange for a carve-out which would deliver to him 2% (nondilutable) of the proceeds available for distribution to the shareholders in a liquidity event.
4. The acknowledgement and reaffirmation of Ray's equity holdings tied to his \$20,000 investment.

I hope this helps gets us closer to closure. Thanks for your consideration.

DW

EXHIBIT I

Disclosure Schedule

July/September 10, 201208

Schedule of Exceptions to Series BA Preferred Stock Purchase Agreement, dated as of July September 26, 201208 (the "Stock Purchase Agreement"), by and between Charleston Laboratories, Inc. (the "Company") and the purchasers named therein (the "Purchasers"). All capitalized terms used in this Schedule of Exceptions that are not otherwise defined in this Schedule of Exceptions will have the meanings ascribed to such terms in the Stock Purchase Agreement. **Any matter disclosed in any Section of this Schedule of Exceptions will be deemed to have been disclosed under each other applicable Section of this Schedule of Exceptions notwithstanding the fact that such other Section may not be referenced in the Schedule of Exceptions.**

Section Explanation 2.2(d) Capitalization

Common Stock held by Founders	56,290,000
Series A Preferred Stock Authorized	1,585,200,000
Series B Preferred Stock Authorized	??
Common Stock Reserved for Option Pool	800,000
TOTAL	8,000,000

Note: The company's former COO, Ray Takigiku, was issued 210 shares of common stock on 5/30/08. These shares were subsequently included in a 2000 for 1 stock split on 9/25/08, leaving Takigiku with 420,000 shares of fully diluted stock. On March 19, 2010, Mr. Takigiku's employment was terminated. On March 26, 2010, the company tendered payment for all 420,000 of Takigiku's shares pursuant to the repurchase provision found in Article 2.2 of the Stockholders Agreement. While Takigiku has conceded that the company was entitled to repurchase 140,000 of his 420,000 shares pursuant to the Stock Restriction Agreement and its accompanying Vesting Schedule, Takigiku disputes the company's ownership of the remaining 280,000 shares. For present purposes, all 420,000 shares previously owned by Takigiku have been earmarked for inclusion in the option pool and are included as such in the above table. The company is presently considering pursuing a declaratory judgment action as to the aforementioned 280,000 shares. Of the 6,000,000 shares of Common Stock held by founders, an aggregate of 840,000 shares currently are subject to repurchase by the Company at \$0.01 per share in the event the holder thereof resigns or is terminated for cause, pursuant to the provisions of a stock restriction agreement signed by each of Bernard P. Schachtel (360,000 shares), Ray Takigiku (210,000 shares) and John F. Ameling (270,000 shares).

Such restrictions vest annually in three equal installments beginning on May 30, 2009, provided that (i) in the event of a "change in control" the Company's right to repurchase fifty percent (50%) of the number of restricted shares then subject to repurchase by the Company shall expire and be of no further force or effect, and (ii) any of the restricted shares then subject to repurchase by the Company shall expire and be of no further force or effect if the holder's employment is terminated by the

Comment [CL11]: Karl - Do you want to revise this word? He was not an employee rather a founder who was terminated. Just don't want people to read employee here and then in the sections below see we have no employees.

EXHIBIT J

To: jlong@braylong.com[jlong@braylong.com]
From: Scott, George A. (Assoc-NVA-CP)
Sent: Thur 10/8/2015 8:38:52 PM (UTC)
Subject: FW: RT Bray & Long
[Bray & Long, PLLC.PDF](#)

Mr. Long,

As legal counsel for Charleston Laboratories, Inc. (the "Company"), I am in receipt of your letter to the Company dated September 22, 2015. Per your direction, I am writing to you in response to such letter.

Dr. Takigiku's employment with the Company was effectively terminated for cause on or about March 16, 2010. As a result of such termination, among other things, Dr. Takigiku is not a shareholder of the Company, and has not been since on or about March 26, 2010. It is unclear by what you mean in your letter when you state "CLI's ineffective attempt to terminate Dr. Takigiku's employment", but we assume you do not hold the understanding that Dr. Takigiku is still employed with the Company. Regardless, as discussed, he is not. Therefore, the Company will not provide the information requested in your letter as such information is the Company's confidential information, and it does not disclose such information to outside parties. Moreover, even if Dr. Takigiku was a shareholder of the Company, which the Company denies, the Company would not share such information with Dr. Takigiku as the Company has evidence to support a reasonable belief that Dr. Takigiku would use such confidential information for improper purposes. As it is our view that such purposes involve serious issues, the Company desires to not be associated therewith. Therefore, at this time, the Company has refrained from pursuing rectifying the issues this has caused the Company. However, the Company is prepared to revisit such restraint in order to clarify any misunderstanding of Dr. Takigiku status with the Company.

Cheers,

George A. Scott, Jr., JD, MBA

Greenberg Traurig, LLP | 1750 Tysons Boulevard, Suite 1000 | McLean, VA 22102
Tel 703.749.1303 Cell: 703.559.0699
scottga@gtlaw.com | www.gtlaw.com



ALBANY • AMSTERDAM • ATLANTA • AUSTIN • BOSTON • CHICAGO • DALLAS • DELAWARE • DENVER • FORT LAUDERDALE • HOUSTON • LAS VEGAS • LONDON*
• LOS ANGELES • MEXICO CITY* • MIAMI • NEW JERSEY • NEW YORK • NORTHERN VIRGINIA • ORANGE COUNTY • ORLANDO • PALM BEACH COUNTY • PHILADELPHIA •
PHOENIX • SACRAMENTO • SAN FRANCISCO • SEOUL* • SHANGHAI • SILICON VALLEY • TALLAHASSEE • TAMPA • TEL AVIV* • WARSAW* • WASHINGTON, D.C. •
WESTCHESTER COUNTY

*LONDON: OPERATES AS GREENBERG TRAURIG MAHER LLP; MEXICO CITY: OPERATES AS GREENBERG TRAURIG, S.C.; SEOUL: OPERATED BY GREENBERG TRAURIG LLP FOREIGN LEGAL
CONSULTANT OFFICE; TEL AVIV: A BRANCH OF GREENBERG TRAURIG, P.A., FLORIDA, USA; WARSAW: OPERATES AS GREENBERG TRAURIG GRZESIAK SP.K.

From: Paul Bosse [<mailto:pbosse@charlestonlabs.com>]

Sent: Thursday, September 24, 2015 3:31 PM

To: Scott, George A. (Assoc-NVA-CP)

Subject: RE: RT Bray & Long

Attached...

Paul Bosse
President & Chief Executive Officer
Charleston Laboratories Inc
www.charlestonlabs.com
(561)748-2111 (Office)
(843)628-1061 (Fax)
(843)364-3256 (Cell)
PBosse@Charlestonlabs.Com

****The information contained in this communication is confidential, may be subject to legal privileges, may constitute inside information, and is intended only for the use of the addressee. It is the property of Charleston Laboratories, Inc. Unauthorized use, disclosure or copying of this communication or any part thereof is strictly prohibited and may be unlawful. If you have received this communication in error, please notify Charleston Laboratories immediately by return e-mail and destroy this communication and all copies thereof, including all attachments.

ROA-3687

EXHIBIT K

Message

From: Baddour, David [/O=FIRM/OU=FIRM/CN=RECIPIENTS/CN=D_BADDOUR]
Sent: 5/6/2010 11:29:33 AM
To: Paul Bosse [pbosse@charlestonlabs.com]
CC: Rutley, Dean [DRutley@wcsr.com]
Subject: FW: 10 Charleston/Takigiku Conversation

Paul,

Just chatted with Dean; he has to run, but thinks the counteroffer below is dead on arrival. (It is a better deal than Ray has currently, probably.) Your original offer was cash (described in 2 below) in exchange for giving up the stock. Below they are asking for both, which they obviously can't have. If you do decide to give him some stock, it obviously can't be nondilutable (it should dilute just like any other founder's stock).

Dean's strong recommendation is to just ignore Ray and focus on closing your next round. If you want to fight with Ray once you have funding, that would be a different story.

(Just got your message; thanks for letting me know it was a disconnection. I have to leave now, but am available to discuss tomorrow if you like.)

Best,

David

David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com

From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]
Sent: Thursday, May 06, 2010 11:07 AM
To: Baddour, David
Cc: Willbrand, David
Subject: RE: 10 Charleston/Takigiku Conversation

Hi David -

I apologize for the delay in getting back to you after our call. After some discussion on our end, here is where we sit. I welcome your thoughts and appreciate your openness to this discussion.

1. The agreement is phrased and structured as a mutual voluntary separation with typical mutual releases, mutual nondisparagement clauses, etc.
2. The conditional/contingent cash severance payment is ok as originally presented by your client.
3. My understanding is that Ray's ownership position is 3.5%. Ray would like to either (1) hold on to his equity, or (2) if your client has a strong preference for reacquiring the equity, then Ray would agree to that in exchange for a carve-out which would deliver to him 2% (nondilutable) of the proceeds available for distribution to the shareholders in a liquidity event.
4. The acknowledgement and reaffirmation of Ray's equity holdings tied to his \$20,000 investment.

I hope this helps gets us closer to closure. Thanks for your consideration.

DW

EXHIBIT L

Message

From: Rutley, Dean [/O=FIRM/OU=FIRM/CN=RECIPIENTS/CN=D_RUTLEY]
Sent: 5/18/2010 1:59:18 PM
To: 'Ryan Baker' [rbaker@charlestonlabs.com]; Baddour, David [dbaddour@wcsr.com]
CC: 'Paul Bosse' [pbosse@charlestonlabs.com]
Subject: RE: FW: 10 Charleston/Takigiku Conversation

Unless you can get a company favorable deal prior to closing, my strong advice is to leave this issue alone until **AFTER** you have raised your next round. Then look at negotiations with Ray and his counsel. If early discussions go sideways, it could blow up any investor deal before it happens. You'll have more cash to fight and more leverage after a new financing round.

As for the \$20K the founders all put in, that can be treated as "additional paid in capital." Thus each investor simply has a higher basis in their personally held stock. Simple.

-----Original Message-----

From: Ryan Baker [mailto:rbaker@charlestonlabs.com]
Sent: Tuesday, May 18, 2010 1:18 PM
To: Baddour, David
Cc: Paul Bosse; Rutley, Dean
Subject: Re: FW: 10 Charleston/Takigiku Conversation

Hey David,

We are in meetings all day with potential investors in Houston. I'll call you to discuss as soon as possible.

Thanks
Ryan

"Baddour, David" <dbaddour@wcsr.com> wrote:

>FYI. Are you available to discuss, this afternoon?

>

>Best,

>

>David

>

>

>David B. Baddour | Womble Carlyle Sandridge & Rice, PLLC | Direct: 919-484-2352 | Facsimile: 919-484-2090 | dbaddour@wcsr.com<mailto:dbaddour@wcsr.com>

>

>

>From: Willbrand, David [mailto:David.Willbrand@thompsonhine.com]

>Sent: Tuesday, May 18, 2010 11:28 AM

>To: Baddour, David

>Cc: Willbrand, David

>Subject: RE: 10 Charleston/Takigiku Conversation

>

>David -

>

>Thanks. At this point, this cap table will do. I also appreciate you taking the time last week to speak with me about your perspective on the capitalization of the company.

EXHIBIT M

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL CIRCUIT

- - -

Charleston Laboratories, Inc., :
 : Civil Action No.:
 Plaintiff, :
 : 2017-CP-10-3768
 vs. :
 :
 Womble, Carlyle, Sandridge & :
 Rice, LLP, :
 :
 Defendant. :

VIDEOTAPED 30(b)6 DEPOSITION OF CHARLESTON
LABORATORIES, INC.
(Given by George A. Scott, Jr.)

DATE TAKEN: December 4, 2018
TIME BEGAN: 9:12 a.m.
TIME ENDED: 3:43 p.m.
LOCATION: Nelson Mullins
One North Clematis Street
West Palm Beach, Florida
REPORTED BY: Tami I. Watters, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
(803) 212-0012

1 A Yep.

2 Q This is a demand letter drafted by
3 Mitchell Ryan; is that correct?

4 A That's right.

5 Q Okay. Did this letter ever -- was
6 this -- let me start over.

7 This was a demand letter to Dr. T,
8 correct?

9 A Correct.

10 Q And as of May 24th, 2011, correct?

11 A Correct.

12 Q Did Mitchell Ryan ever send this document
13 out to Dr. T?

14 A No, sir.

15 Q Why not?

16 A Because at that point we had --

17 Again, it was about cleaning up books and
18 records. And in a perfect world it was initially
19 discussed, you know, with Womble's comments of you
20 have to file this action in order to clarify these
21 things, blah, blah, blah; that to really have
22 really clean books and records, if Ray could sign
23 this, that would be great.

24 But ultimately, right now, we just had
25 our books and records problem, which we cleaned up,

1 so let's keep that a books and records problem and
2 not try to -- you know, we've played defense with
3 our books and records. They're clean. It's
4 consistent with what we did. Let's just go
5 forward.

6 Q If you look at the last paragraph of this
7 letter on page 3 --

8 A Uh-huh.

9 Q -- Mr. Ryan enclosed the redemption
10 agreement and release; is that correct?

11 A The last paragraph, redemption agreement
12 and release. Yes.

13 Q And he -- it instructs Dr. T to respond
14 by signing this document by June 23rd of 2011.

15 Do you see that?

16 A Uh-huh. Uh-huh.

17 Q I know this correspondence never went out
18 to Dr. T --

19 A Correct.

20 Q -- but Dr. T never did sign the
21 redemption and settlement agreement, correct?

22 A Well, so this never went out to him, so
23 correct, he never signed this redemption agreement
24 and release agreement.

25 Q At any time, whether it was sent by this



Eric S. Bland*
Ronald L. Richter, Jr.
Scott M. Mongillo, Associate

*Also admitted in PA & FL
www.blandrichter.com

VIA EMAIL (ryoungsc@sccourts.org)
The Honorable Roger M. Young, Sr.
Charleston County Judicial Center
100 Broad St., Suite 368
Charleston, SC 29401

February 3, 2020

Reply to:
Peoples Building
Mezzanine Level
18 Broad Street
Charleston, SC 29401
Phone: 843.573.9900
Fax: 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

Offices also at:
1500 Calhoun Street
Columbia, SC 29201
Mail: P.O. Box 72
Columbia, SC 29202
Phone: 803.256.9664
Fax: 803.256.3056
ericbland@blandrichter.com

RE: Charleston Laboratories, Inc. v. Womble, Carlyle, Sandridge & Rice, LLP
Case Number: 2017-CP-10-3768

Dear Judge Young:

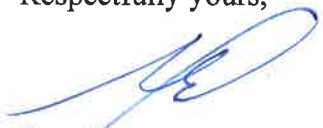
We are certain that it comes as no surprise to you that our client is stunned and disappointed by your Order Granting Summary Judgment given its timing on the eve of our upcoming February 17, 2020 date certain trial. If you would indulge our inquiry, the timing and circumstances do make us wonder if in fact your mind is truly made up on the subject matter. As you know, the issue of the statute of limitations was extensively briefed, a voluminous record was laid before you and the parties argued for hours on September 27, 2019, before you entered your Order Denying Defendants' Motion for Summary Judgment a month later on October 22, 2019. Womble's Rule 59 Motion to Reconsider introduced no new evidence, no new case law and, frankly, no new argument that was not offered prior to the original Order. While it may or may not be true, you are often quoted as having said about summary judgment words to the effect of "what do you not understand about a scintilla?" Given the original reasoned Order and what we believed to be your position on summary judgment, we were admittedly taken by surprise by the reversal as you originally found at least a "scintilla of evidence" to have denied the motion. Respectfully, the same "scintilla" still exists.

In the months following the Order Denying Summary Judgment, the parties continued to prepare in earnest for the trial which had been scheduled for February 18, 2020. In addition to the usual preparation one would expect (ie. preparation of exhibit notebooks, witness preparation, motions in limine, etc.), we conducted a focus group / mock trial with Sam Clawson before two proxy jury panels. Bobby Stepp is a true friend and an outstanding lawyer for whom we have the utmost respect. Ronnie played the role of Bobby Stepp in our mock trial and tried his level best to advance all of the defenses available to Womble in this case, including the defense of the statute of limitations. Both panels returned a full award of actual damages. Both panels awarded appreciable punitive damages. More importantly, both panels found favorably to Charleston Labs on the issue of when it knew or should have known of Womble's malpractice. Needless to say, all of these efforts have been undertaken at great expense to our client.

ROA-3696

Having never before seen a Rule 59 Motion succeed in reversing a denial of summary judgment (we have seen it in the opposite direction), we find ourselves in a procedural never never land. We do not plan on filing a Rule 59 Motion to ask you to reconsider the reconsideration, unless you indicate that an additional hearing with oral argument could provide a different result. Please understand that we are not arguing with the Court after the Court has ruled. Barring your indication to the contrary, we will accept the ruling, respectfully disagree and file our notice of appeal by the end of the week. We will also look forward (God willing) to trying the case before you on the merits in the future, if it is returned to you.

Respectfully yours,


Ronald L. Richter, Jr.


Eric S. Bland

RLR/lml

cc: (via email)
Robert E. Stepp, Esquire
Benjamin R. Gooding, Esquire
Jasmine D. Smith, Esquire
Mr. Paul Bosse
George Scott, Esquire
Scott M. Mongillo, Esquire
Eric S. Bland, Esquire

CERTIFICATION OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

BLAND RICHTER, LLP
Attorneys for Appellant

s/Ronald L. Richter, Jr.
Ronald L. Richter, Jr. (SC Bar No. 66377)
Scott M. Mongillo (SC Bar No. 16574)
Peoples Building
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
Telephone 843.573.9900
Facsimile 843.573.0200
ronnie@blandrichter.com
scott@blandrichter.com

RECEIVED
Sep 04 2020
SC Court of Appeals

s/ Eric S. Bland
Eric S. Bland (SC Bar No. 64132)
1500 Calhoun Street
Post Office Box 72
Columbia, South Carolina 29202
Telephone 803.256.9664
Facsimile 803.256.3056
ericbland@blandrichter.com

September 2, 2020