Exhibit 1

February 6, 2023 Order

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Bierer and Associates, Inc.,

Plaintiff,

v.

Jan F. Kennerly, Jr., Danielle Kennerly, EUSA, LLC, J&D Farms, LLC, Trystar LLC; Travis Pattern & Foundry, Inc.; Illinois Tool Works, Inc.; and David Deinek,

Defendant.

Jan F. Kennerly, Jr.,

Defendant/Third Party Plaintiff,

v.

Walter Bierer, Brent Jeffries, and Joseph Bierer,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-40-04841
(In the Richland County Business Court)

ORDER GRANTING SUMMARY JUDGMENT TO TRAVIS PATTERN & FOUNDRY, INC. AND TRYSTAR LLC

This matter is before the Court on motions for summary judgment filed pursuant to Rule 59, S.C. R. Civ. P., by Travis Pattern & Foundry, LLC ("Travis Pattern") on September 28, 2022, and Trystar LLC ("Trystar") on October 26, 2022 (the "Moving Defendants"). On December 29, 2022, Bierer and Associates, Inc. ("Plaintiff") filed opposition briefs to both motions. On December 30, 2022, Trystar filed a reply brief in support of its motion. On January 3, 2023, Travis Pattern filed a reply brief in support of its motion.

A hearing took place by WebEx on January 4, 2023. Appearing for Trystar were attorneys Brian Duffy and John Ursu. Attorneys John Beach and Lyndey Bryant appeared for Travis Pattern. Jim Griffin and Maggie Fox appeared as counsel for Plaintiff. Also present at the hearing, but not submitting any argument on behalf of their clients, were Bill Padget, counsel for Defendants Jan F.

Kennerly, Jr., Danielle Kennerly, EUSA, LLC, and J&D Farms, LLC; Kurt Rozelsky, counsel for Defendant Illinois Tool Works, Inc.; and John Kelchner, counsel for Defendant David Deinek.

The Court concludes Plaintiff was on inquiry notice as early as April 9, 2013, and as late as October 14, 2015, of the existence of potential claims against the Moving Defendants. Plaintiff contends that, following such notice, Defendant Jan Kennerly ("Kennerly") denied or fraudulently concealed the existence of any wrongdoing to Plaintiff. But a reasonable investigation would have revealed to Plaintiff the complained-upon misconduct more than three years before Plaintiff filed claims against the Moving Defendants. Plaintiff failed to conduct a reasonable investigation. Accordingly, South Carolina's three-year statutes of limitation bar all of Plaintiff's legal claims against the Moving Defendants. Likewise, Plaintiff's equitable causes of action against the Moving Defendants are barred by laches.

As more fully set forth below, the Court concludes there are no genuine issues of material fact as to any of Plaintiff's claims against the Moving Defendants. Therefore, pursuant to Rule 56, S.C. R. Civ. P., the Court grants summary judgment in favor of Travis Pattern and Trystar.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, "a court cannot ignore facts unfavorable to [the nonmovant], and it

must determine whether a verdict for that party would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (quotation omitted).

FINDINGS OF FACT[1]

A. Kennerly's employment with Plaintiff and his known dissociative actions in 2012

Kennerly began working for Plaintiff in 2003. In 2009, Plaintiff tasked Kennerly with finding cable and clamp products from other manufacturers, as part of Plaintiff's initiative to expand services into the utility grounding business. At the direction of Plaintiff's principal owner, Walter Bierer, and in furtherance of the Plaintiff's new grounding assembly initiative, Kennerly identified Travis Pattern as a manufacturer for clamps and Trystar as a manufacturer for cable. Thereafter, Kennerly initiated a business relationship with Travis Pattern and Trystar on Plaintiff's behalf. As early as 2011, Plaintiff purchased products from Travis Pattern and Trystar. Plaintiff continued in its business relationships with Travis Pattern and Trystar for years.

In 2012, Plaintiff was aware that Kennerly was taking steps to purportedly distance himself from his employment with Plaintiff. Plaintiff was aware that Kennerly switched his email and phone from Plaintiff's company accounts to personal accounts. Walter Bierer, as well as his sons, Joe Bierer and Brent Jeffries, both of whom were in management roles with Plaintiff, noticed Kennerly's dissociative activities and, later, characterized them as obvious. Kennerly also reduced the amount of credit card receipts and reports he submitted to Plaintiff from his sales trips. Walter Bierer also noticed Kennerly ceased introducing representatives from other companies to Plaintiff in a work capacity. Plaintiff admits in this litigation that it failed to "regulate outside employment" activities Kennerly was conducting outside of what Kennerly reported himself.

[1] The facts recited herein are not genuinely or materially disputed by the Plaintiff in opposing the Motions for Summary Judgment.

B. Plaintiff's actual knowledge of the Moving Defendants' alleged wrongdoing

On April 9, 2013, Joe Bierer, on behalf of Plaintiff, wrote to Trystar's Dan Moerke, stating:

> It has come to our attention over a period of time, after noticing a drop in cable/jumper sales, emails from customers, etc., that Trystar may possibly be circumventing our efforts to establish and support new sales. I remember having dinner with you and [Kennerly] in Louisville almost two years ago and discussing this very topic.

Later, on December 5, 2013, Joe Bierer wrote an email about Trystar to Kennerly and another of Plaintiff's sales representatives, Defendant Deniek. That communication stated:

> It is obviously too late in this case, but yes, another line was crossed with Trystar.
>
> You can chalk that business (First Energy) up as lost, at least for Bierer anyway. Trystar has a history (two other product lines) of undermining any and all business that Bierer has introduced them to by simply having a product shipped directly to the customers location that Bierer foolishly supplied to them, as in this case. We supposedly put a stop to this sometime ago, until now.
>
> Please inform Bierer if you are ever required to contact one of our vendors.

One of the many indicators of Kennerly's outside activities that Plaintiff was aware of arose approximately a year later. On October 24, 2014, Travis Pattern presented a technical seminar at Pacific Gas and Electric ("PG&E") in New Jersey. The seminar was publicly advertised in the Institute of Electrical Engineers ("IEEE") newsletter in 2014. The brochure provided a biography for the two presenters, Kennerly and Dick Pelletier. Kennerly's biography read, in relevant part, that he "has worked for Bierer Meters as an engineering and operations manager for 15 years and Travis [Pattern] for 2 years."

Walter Bierer conceded in his deposition that he was aware of the IEEE brochure in November 2014.[2] At a weekly company meeting, which took place at that time, Bierer informed

[2] In opposition affidavits, Walter Bierer and Joe Bierer testified they were not aware of the IEEE brochure until 2015 or 2016. The Moving Defendants have pointed out such testimony contradicts sworn testimony at deposition and under cross examination. The Moving Defendants have characterized the affidavits as "sham affidavits" and asked that the Court disregard contradictory language in the affidavits.

Kennerly that he had seen the IEEE brochure. Kennerly allegedly "laughed off" the notion he worked for Travis Pattern and attempted to convince Plaintiff the biography contained an error. Plaintiff claims it simply accepted Kennerly's explanation and conducted no further investigation into the matter. For instance, Plaintiff did not attempt to contact anyone associated with the IEEE, PG&E, Travis Pattern, or any of the potential participants at the seminar to inquire further.[3]

Another year later, on October 14, 2015, Walter Bierer confronted Kennerly by email regarding Kennerly's lack of reporting, Kennerly's "outside activities," and Kennerly's distancing himself from Plaintiff's business. Bierer wrote:

> I think it is important that you understand my current thoughts. I see your lack of reporting your activities (itinerary and reports) as a symptom of a larger issue which is your lack of accountability to anyone and everyone in our company including me. More and more I am beginning to wonder why I am paying you large sums of money to disappear for weeks at a time. For years I have trusted you were always doing the 'right thing' but my trust is waning.
>
> Your outside activities seem almost chaotic –in that almost everything you are currently doing seems to put you at odds with everyone in our company about something. What feedback I do get from the field, you have no respect for any of your fellow employees and are quick to throw anyone of them under the bus as being incompetent and that you, basically and single handily, run Bierer & Associates. While this may enhance your stature, it demeans everyone else in our company including me.
>
> You have purposefully separated yourself from Bierer by maintaining private telephone and e-mail accounts which leads me to wonder what other activities you may be conducting on my dime when you are gone for weeks at a time with no reporting. As I said before, my trust is waning.
>
> I think it may be time for you to begin looking for employment elsewhere unless you can think of some way to resolve and reverse all of the issues mentioned.
>
> You do have many wonderful traits and it may be that you have simply outgrown our company.
>
> Carefully think over what I have said and then I would like to hear your thoughts on this.

Even if the Court accepts Walter Bierer and Joe Bierer's suggestion that they did not learn of the IEEE affidavit until 2015 or 2016, having such actual knowledge at that time still renders their claims against the Moving Defendants barred by the statutes of limitation and laches, as Plaintiff's claims against the Moving Defendants were not filed until April 2021, between five and six years after actual knowledge of the IEEE brochure. In any event, the IEEE brochure is one of several independent reasons for the Court's decision.

[3] Plaintiff had exactly the same information at this point that it would have in 2018 when it actually follow-up and made inquiries.

In April 2016, Kennerly emailed Bierer stating that while traveling to San Antonio, Texas, for work for Plaintiff, he would be spending some "off" time to meet with industry representatives. Bierer forwarded Kennerly's email to Plaintiff's managers, Joe Bierer, Jamie Bierer, and Brent Jeffries. Jeffries said: "From talking with [another sales representative], [Kennerly] helps many people with other manufacturer's products[.] . . . I never realized that 'off' time was a factor." Walter Bierer and his wife, Billie Bierer, responded: "You should reserve comment on [Kennerly's] activities until you understand what [it] means and how it effects [sic] the future of your company" and "you should not vent – No need. Rick is doing business."

On July 13, 2018, in Plaintiff's termination email to Kennerly, Bierer stated the "obvious" concerns he had with Kennerly's conduct over the years. Bierer wrote, "it has been obvious to me that you have been trying to separate yourself from Bierer and appear as an independent entity within the electric utility industry for many years." Bierer admitted "no other business. . . would have tolerated this for any period of time."

CONCLUSIONS OF LAW

I. PLAINTIFF'S LEGAL CLAIMS ARE BARRED BY THE STATUTES OF LIMITATION.

Plaintiff's allegations against the Moving Defendants revolve around these Defendants' alleged efforts to work in concert with Kennerly to divert orders from Plaintiff. (*See* Third Am. Compl. at ¶¶ 25-48.) Plaintiff alleged, for example, that Trystar wrongfully used Plaintiff's confidential information to "usurp sales and customers" from Plaintiff, and that Trystar "intentionally interfered with prospective and future contractual and business relationships between [Plaintiff] and its customers." (*Id.*, ¶¶ 98(b), 123.) Plaintiff contends Kennerly surreptitiously worked with Travis Pattern to "open[] a new production division" and serve as its

sales representative for which Kennerly received a commission from Travis Pattern. (*Id.*, ¶ 45.)

Plaintiff's legal claims against the Moving Defendants—in Counts 3, 5, 7, 9, 14, and 15 of the Third Amended Complaint—are governed by a three-year limitations period. *See* S.C. Ann. § 15-3-530(5) (applying to claims for "injury to the person or rights of another" that are "not arising on contract"); S.C. Ann. § 39-8-70 (applying to trade secret claims).

Under South Carolina law, a statute of limitations begins to run 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." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 489 (2016) (citing *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 also Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405-406, 680 S.E.2d 778, 782 (Ct. App. 2009) ("The limitations period … begins to run when the plaintiff 'knew or by the exercise of reasonable diligence should have known that he had a cause of action.") (quoting S.C. Code Ann. § 15-3-535)).

The limitations period is triggered even if the plaintiff does "not know the exact nature of the wrong" where the plaintiff is nevertheless "aware of their injuries." *Brown v. Pearson*, 483 S.E.2d 477, 482 (S.C. App. 1997); *see also Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) ("[T]he focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer."). In other words, South Carolina courts do not wait until "after a full-blown theory of recovery has developed[.]" *Id.* (quotation omitted). Instead, the exercise of reasonable diligence requires "some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist." *Majstorich v. Gardner*, 361 S.C. 513, 520, 604 S.E.2d 728, 732 (Ct. App. 2004) (quotation omitted).

Under these authorities, there is no genuine dispute Plaintiff was on inquiry notice of some claim against the Moving Defendants more than three years before Plaintiff filed its claims against them in April 2021. From the undisputed evidence of record, it was "obvious" (using Plaintiff's own words) to Plaintiff that Kennerly began to dissociate himself as early as 2012, the same time that Plaintiff was establishing business arrangements with the Moving Defendants, and others, through Kennerly. Such evidence gave Plaintiff a basis on which later facts, discussed below, should have put Plaintiff on notice of potential claims.

In Plaintiff's April 9, 2013, email to Trystar, Plaintiff acknowledged it had "notic[ed] a drop in cable/jumper sales" and believed "Trystar may possibly be circumventing [Plaintiff's] efforts to establish and support new sales." This email proves Plaintiff was on notice as early as 2013 "that some claim against [Trystar] might exist." *Brown*, 483 S.E.2d at 482. Accordingly, the three-year limitations period against Trystar began running as early as that date. *See, e.g.*, S.C. Stat. Ann. § 15-3-535. Plaintiff had three years to investigate and bring a claim against Trystar but failed to do so until eight years later in April 2021. *See, e.g.*, *Dean v. Ruscon Corp.*, 468 S.E.2d 645, 647 (S.C. 1996) (affirming summary judgment; "fact that the injured party may not comprehend the full extent of the damage is immaterial"); *Dorman*, 500 S.E.2d at 789-90 (same); *Brown*, 483 S.E.2d at 482 (same).

A year later, in October 2014, Plaintiff had actual knowledge of an industry-wide, publicly-available seminar brochure listing Kennerly as "working for . . . Travis [Pattern] for 2 years" (since 2012, when Kennerly's obvious dissociative activities began). Accordingly, by this date, Plaintiff's duty to investigate further compounded as to Trystar and triggered, as to Travis Pattern, Plaintiff's notice of potential claims. However, Plaintiff failed to do anything other than ask Kennerly about

his affiliation with Travis Pattern. In doing only this, Plaintiff failed to exercise reasonable diligence in investigating its potential claims.

Bierer conceded it was "public knowledge" and "in national newsletters" that Kennerly was "working with Travis and Bierer in 2014." While Plaintiff may not have known *the extent* of Kennerly's relationship and activities with either Trystar or Travis Pattern, the evidence of such relationships, and Plaintiff's knowledge of potential injury, when considered along with all the other factors, would have prompted a reasonable person to look further into Kennerly's activities. The information that Plaintiff's rights had allegedly been invaded was readily available to Plaintiff and Plaintiff failed to diligently consider it. The applicable law does not excuse a plaintiff from its obligation to exercise reasonable diligence because the plaintiff blindly "trusts" the potential defendant, here Kennerly. Plaintiff has pointed the Court to no case authority to the contrary.

Finally, as late as October 14, 2015, Bierer wrote to Kennerly making clear that Plaintiff knew or should have known of a potential claim against the Moving Defendants by this date. Bierer's "thoughts" included concerns of "a larger issue," including "lack of [Kennerly's] accountability to . . . the company," Kennerly's course of "disappear[ing] for weeks at a time," and "outside activities" which "seem to put [Kennerly] at odds with everyone in our company[.]" Bierer acknowledged Kennerly was "purposefully separat[ing] [himself] . . . by maintaining telephone and email accounts[.]" These actions "le[d] [Bierer] to wonder what other activities [Kennerly] may be conducting on [Plaintiff's] dime when [Kennerly] [was] gone for weeks at a time with no reporting." Indeed, Plaintiff's concern on October 14, 2015 about Kennerly's actions were sufficiently serious for Plaintiff to threaten termination, by stating: "I think it may be time for you to begin looking for employment elsewhere unless you can think of some way to resolve and reverse all of the issues mentioned." Based on this email, the Court concludes that a person of

common knowledge and experience would be on notice that some claim against another party. *See Stokes-Craven Holding Corp.*, 416 S.C. at 526, 787 S.E.2d at 489.

Put another way, Plaintiff knew or should have known of claims against the Moving Defendants by October 14, 2015, at the latest. That Plaintiff's claims against the Moving Defendants were not filed until April 2021 render them time barred.

The Court is not convinced by Plaintiff's counter-arguments. First, Plaintiff alleges it was "not aware" of certain facts until within the limitations period. Whether Plaintiff had actual knowledge of any facts at all, however, is irrelevant. "[T]he discovery rule does not require ***actual notice*** of anything, or knowledge of the full extent of the damage." *Ashley River Indus., Inc. v. Mobil Oil Corp.*, 135 F. Supp. 2d 733, 743 (D.S.C. 2000) (emphasis added); *see also Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (holding that the fact that an injured party may not comprehend the full extent of the damage is immaterial for purposes of the statute of limitations). What matters under South Carolina's discovery rule is whether Plaintiff knew "or by the exercise of reasonable diligence *should have known* that he had a cause of action." S.C. Ann. § 15-3-535 (emphasis added). The Court has concluded that Plaintiff's own emails make plain that Plaintiff should have known of a potential cause of action against the Moving Defendants as early as April 2013 and as late as October 2015.

Next, Plaintiff argues that the facts necessary to trigger the limitations period included whether the Moving Defendants were *paying* Kennerly commissions. However, South Carolina cases do not require that much. As stated in *Christensen v. Mikell*, 476 S.E.2d 692, 694 (1997), "even if [Plaintiff] did not know the exact nature of the wrong or the extent of the damages in [2013], [it] should have known" then that it might have a claim. *Id.* And Plaintiff had already identified losses to the company as potentially having been caused by actions at issue: "noticing a

drop in cable/jumper sales" and "chalk[ing] that business (First Energy) up as lost." In any event, Joe Bierer testified that the language "working for" (which was the exact language used in the IEEE seminar brochure to describe Kennerly's relationship with Travis Pattern) meant a *paying* relationship. This testimony undermines Plaintiff's assertion it lacked actual or constructive knowledge of a paying relationship between the Moving Defendants and Kennerly sufficient to trigger the limitations period.

Based on the undisputed record, Plaintiff had three years from April 2013, and as late as October 2015, to file its claims against the Moving Defendants. Under either date Plaintiff waited too long, not filing any claims against the Moving Defendants until 2021, well after the limitations period had expired. Summary judgment is appropriate in these circumstances and the Court dismisses all legal claims against the Moving Defendants with prejudice based on the running of the three-year limitations period.

II. THE LIMITATIONS PERIOD WAS NOT TOLLED BY KENNERLY'S ALLEGED FRAUDULENT CONCEALMENT.

Plaintiff argues the doctrine of fraudulent concealment equitably tolled its discovery trigger and limitations period as to the Moving Defendants on all claims. Plaintiff relies upon alleged denials, misrepresentations, and fraudulent concealment by *Kennerly* as the basis for this position. However, Plaintiff did not submit any evidence to create a genuine issue of material fact as to fraudulent concealment by either Trystar or Travis Pattern directly. Moreover, the record shows that alleged Plaintiff had actual knowledge of facts sufficient to trigger an inquiry long before filing suit against Trystar and Travis Pattern and well outside the applicable limitations period.

Under South Carolina law, Plaintiff must show that Trystar and Travis Pattern, themselves, fraudulently concealed from Plaintiff their alleged wrongful conduct in order to survive summary judgment based on the running of the statute of limitations and/or laches. "Whether *the defendant's*

actions lulled the plaintiff into a false sense of security is usually a question of fact; however, summary judgment is proper if there is no evidence of conduct on *the defendant's* part warranting estoppel." *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 618-19, 698 S.E.2d 879, 883 (Ct. App. 2010) (citing *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001)) (emphasis added).

In *Pro Slab, Inc. v. Argos USA, LLC*, No. 2:17-cv-3185-BHH, 2021 WL 7366656 (D.S.C. Mar. 24, 2021), the South Carolina federal court held: "a plaintiff 'must establish that (1) *the party pleading the statute [of limitations]* fraudulently concealed facts which are the basis of a claim; and that (2) the [plaintiff] failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Id.* at *4 (quotation omitted) (emphasis in original). The court concluded: "Because Cook and Baird are the parties pleading the statute of limitations, Plaintiffs must demonstrate *that Cook and Baird* concealed facts that are the basis of a claim. In other words, Plaintiffs must point to affirmative acts of fraudulent concealment *by these Defendants* (and not by any other Defendants), and Plaintiffs must set forth those facts with the degree of particularity required by Federal Rule of Civil Procedure 9(b)." *Id.* (emphasis in original).

Instead of pointing to any actions by Trystar or Travis Pattern constituting alleged fraudulent concealment, Plaintiff argues that *Kennerly* committed fraudulent concealment which should be *imputed* to the Moving Defendants. However, Plaintiff cites no record evidence of any kind that Kennerly's alleged fraudulent concealment was within the scope of any purported "agency relationship" with Trystar or Travis Pattern. Not only did Plaintiff fail to establish record evidence of agency, Plaintiff also failed to adduce evidence to establish the scope of that agency or that Kennerly's conduct fell within it. Nor is there any record evidence submitted by Plaintiff that Trystar or Travis Pattern took actions to cloak Kennerly in any apparent authority as to these

alleged fraudulent representations.

Under South Carolina law, Plaintiff cannot create an agency relationship between the Moving Defendants and Kennerly based solely on what *Kennerly* did (or did not do). Instead, "apparent authority must be established based upon manifestations by the principal, not the agent." *Shropshire v. Prahalis*, 309 S.C. 70, 71, 419 S.E.2d 829, 829-30 (Ct. App. 1992). Plaintiff has not come forward with any evidence to create a genuine issue of material fact that the Moving Defendants authorized Kennerly to fraudulently conceal their relationships.

Plaintiff's citation to *West v. Serv. Life & Health Ins. Co.*, 220 S.C. 198, 66 S.E.2d 816 (1951), is inapposite. In *West*, the Court aptly stated:

> It is a general doctrine of law that although the principal is not ordinarily liable (for he sometimes is) in a criminal suit, for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in them, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and omissions of duty of his agent **in the course of his employment**, although the principal did not authorize or justify or participate in, or indeed, know of such misconduct, or even if he forbade the acts or disapproved of them.

Id. at 202, 66 S.E.2d at 817 (emphasis added). Plaintiff conspicuously omits the emphasized language in its opposition briefs and the Court finds that the absence of any evidence to show Kennerly was acting "in the course of his employment" when making the purported misrepresentations to Plaintiff undercuts Plaintiff's theory.

To the contrary, the record is clear the Moving Defendants considered their respective relationships with Kennerly to be out in the open, to the electrical utility industry and to Plaintiff. For instance, Travis Pattern publicly promoted Kennerly as having "worked for" Travis Pattern for two years. In July 2018 when Plaintiff asked the Moving Defendants, directly, about their relationships with Kennerly, the Moving Defendants readily acknowledged that Kennerly was their respective sales representative.

Plaintiff's argument that Kennerly's *denial* of the mere existence of such relationships would be in the course and scope of his relationship with the Moving Parties defies common sense. "A motion for a summary judgment speaks in terms of 'no genuine issue as to material facts.' It is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." *Id.* This is especially so where, as here, Plaintiff has identified no record evidence in support of this theory.

Moreover, unreasonable reliance on a misrepresentation does not save a plaintiff from its own failure to exercise reasonable diligence. "[T]he fraudulent concealment doctrine does not toll the statute of limitations where the plaintiff knew or should have known of his claim despite the defendant's misrepresentation or omission." *See Mest v. Cabot Corp.*, 449 F. 3d 502, 516 (3rd Cir. 2006). "Where common sense would lead the plaintiff to question a misrepresentation, the plaintiff cannot reasonably rely on that misrepresentation." *Id.* This was plainly the case here. In 2016, Plaintiff wrote of Kennerly's work during off hours and that such work required follow-up.

For negligent misrepresentation cases, a plaintiff must show evidence that its reliance on a misrepresentation was "*justifiable*." *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997) (emphasis added). "There is no liability for casual statements, misrepresentations . . . or matters which plaintiff could ascertain on his own in the exercise of due diligence." *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" *McLaughlin v. Williams*, 379 S.C.

451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (*quoting Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)).

Plaintiff had multiple, independent, reasons to question Kennerly's activities and on which to know of the existence of potential claims against the Moving Defendants from 2012 to 2016. It is undisputed Plaintiff was on notice and had actual knowledge, on multiple separate and distinct occasions, during these years, of Kennerly's potentially conflicting business affiliations with other companies, including the Moving Defendants. "To claim the protection of the discovery rule, the injured party must have been reasonably diligent in discovering whether a cause of action existed." *S.C. Farm Bureau Mut. Ins. Co. v. Kelly*, 345 S.C. 232, 237, 547 S.E.2d 871, 874 (Ct. App. 2001) (citing *Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 502-03, 532 S.E.2d 1, 3 (Ct. App. 2000)). In these circumstances, it was not reasonable or justifiable for Plaintiff to rely on Kennerly's numerous purported misrepresentations and such conduct does not toll the statute of limitations or stay the period for laches as to the Moving Defendants.

III. PLAINTIFF'S EQUITABLE CLAIMS ARE BARRED BY LACHES.

Plaintiff's remaining two claims against the Moving Defendants (Counts 10 and 13)—for an accounting and a constructive trust—are equitable claims that are barred by laches. As explained above, all of Plaintiff's claims at law are barred by the statute of limitations. A party cannot avoid dismissal of claims merely by asserting parallel equitable claims to which the statute of limitations does not strictly apply. *See Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 329, 721 S.E.2d 447, 450–51 (Ct. App. 2011) (collecting cases and stating "the possibility the statute of limitations may have potentially barred the [plaintiff] from obtaining a legal remedy is no ground in itself for allowing the [plaintiff] to seek equitable relief."). In evaluating a laches defense, courts may apply the statute of limitations by analogy. *See Thomerson v. DeVito*, 430 S.C. 246, 251, 844

S.E.2d 378, 381 (2020) ("the statute of limitations may be applied by analogy in a court of equity").

"In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009). The untimely assertion of amounts purportedly due from one party to the other constitutes such unreasonable delay. *Id.* Here, that is just the situation.

Plaintiff is seeking, via its equitable claims, an accounting of amounts purportedly due to it and/or imposition of a constructive trust over those funds as a consequence of the Moving Defendants' alleged *legal* misconduct.[4] As described above, Plaintiff knew or should have known that the Moving Defendants were involved in alleged wrongful conduct to divert Plaintiff's profits or use Plaintiff's employee (Kennerly) for allegedly competitive sales as early as April 2013 (as to Trystar) and October 2014 (as to Travis Pattern). Plaintiff did not bring its claims against either Trystar or Travis Pattern until April 2021. It is unreasonable for Plaintiff to have delayed for that long. Moreover, the Moving Defendants suffered prejudice from Plaintiff's unreasonable delay, as the Court concludes it would be inequitable to require Defendants to account for monies they received from conduct barred by the statute of limitations or impose a trust over the specific funds at issue which Plaintiff could not recover under any legal theory due to the limitations period. The practical ability for the Court to impose such equitable relief over funds for such a long period of time is necessarily prejudicial to Defendants.

[4] *See* Third Am. Compl. at ¶ 142, as to Accounting ("Bierer is entitled to an equitable accounting of all sums wrongfully received by all Defendants, as a result of the wrongful activities set forth herein."); *id.* at ¶¶ 154; as to Constructive Trust ("[Defendants] wrongfully obtained monies in bad fath as a result of Kennerly's breach of his duties of trust and loyalty and in violation of his fiduciary duty to Bierer, in an amount to be determined at the trial of this case, but including at least the total sum of all profits and/or commissions made by [Defendants] on all sales of products that compete with Bierer products. Bierer is entitled to recover all such monies herein, including the current value of such sums.").

In opposing summary judgment, Plaintiff raised no additional counterarguments against the Moving Defendants specifically with regard to Plaintiff's claims for a constructive trust or an accounting. It therefore forfeited any such argument. *See, e.g., Cunningham v. Anderson County*, 414 S.C. 298, 303, 778 S.E.2d 884, 886-87 (2015). Regardless, Plaintiff cannot save its case by affixing equitable claims on top of its claims at law. The Moving Defendants are entitled to summary judgment on those claims as well.

CONCLUSION

Plaintiff was on inquiry notice of potential claims against Travis Pattern and Trystar as early as April 2013 and as late as October 2015. Yet, here, Plaintiff failed to file a lawsuit against Travis Pattern or Trystar until April 2021, years after the statutes of limitation expired. Likewise, as explained more fully herein, Plaintiff's equitable claims are barred by laches, as Plaintiff unreasonably delayed its assertion of a known right against the Moving Defendants and the Court concludes that such delay caused prejudice to the Moving Defendants.

Accordingly, for the reasons stated in this order, the Court hereby grants the Motions for Summary Judgment filed by Travis Pattern and Trystar, and, accordingly, Plaintiff's claims against the Moving Defendants are hereby ended, with prejudice.

IT IS SO ORDERED.

_____

Lawton McIntosh, Business Court Judge

_____, South Carolina

January _____, 2023

Richland Common Pleas

Case Caption: Bierer And Associates Inc , plaintiff, et al vs Jan F Kennerly Jr , defendant, et al

Case Number: 2018CP4004841

Type: Order/Summary Judgment

S/R. LAWTON McINTOSH

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