

**THE STATE OF SOUTH CAROLINA
In The Court Of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-2701

Brian P. Menezes,

Respondent,

v.

WL Ross & Co. LLC, Wilbur
L. Ross, Jr., Michael J.
Gibbons, David H. Storper,
David L. Wax, Joseph L.
Gorga, Stephen B. Duerk,
WLR Recovery Fund II, L.P.,
WLR Recovery Fund III, L.P.,
WLR Recovery Associates II,
LLC, and WLR Recovery
Associates III, LLC,

Appellants.

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STATEMENT OF ISSUES ON APPEAL

I. Whether, under South Carolina law, the plain and unambiguous terms of a release that surrenders “all claims,” whether “known and unknown,” “for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution” of the Release, including “contingent” claims and “any claims based upon or as an owner of any stock” in the subject corporation and all claims “which may have been made” in an earlier lawsuit, bars claims for breach of fiduciary duty challenging the board’s approval of a merger agreement in effect at the time of and incorporated into the release?

II. Whether, under Delaware law, a cause of action for breach of fiduciary duty challenging the terms of a negotiated merger accrues when the board approves the merger agreement fixing those terms or when the merger later closes in accordance with those terms?

STATEMENT OF THE CASE

On April 9, 2008, Brian P. Menezes, a shareholder and former officer of Safety Components International, Inc. ("SCI"), filed this direct shareholder lawsuit alleging that Defendants—officers, directors, or controlling shareholders of SCI—had breached their fiduciary duties in approving a merger of the former International Textile Group, Inc. ("FITG") and a subsidiary of SCI. In their Answers, Defendants asserted affirmative defenses of release and accord and satisfaction, which were based on a Settlement Agreement and Release of All Claims that Plaintiff signed to settle a separate lawsuit against the Defendants. Defendants contended that the broad release provision contained in the settlement agreement barred Plaintiff's current claims. Defendants also filed a counterclaim for breach of the release provision.

On June 6, 2008, Defendants moved for judgment on the pleadings under Rule 12(c), SCRCPP or, alternatively, for summary judgment under Rule 56, SCRCPP, based on the preclusive effect of the release. On July 2, 2008, Plaintiff moved to dismiss Defendants' counterclaim for breach of the release provision. On July 31, 2008, the trial court held a hearing on the motions. On February 17, 2009, the trial court entered an order denying Defendant's motion for judgment on the pleadings or summary judgment (the "Order"). The trial court's Order also granted Plaintiff's motion to dismiss Defendants' counterclaim for breach of the release provision and struck Defendants' affirmative defenses of release and accord and satisfaction. On February 25, 2009,

Defendants moved for reconsideration, which was denied by the trial court on March 4, 2009.

Defendants filed their notice of appeal on March 5, 2009. Thereafter, Plaintiff moved to dismiss the appeal contending that the trial court's Order was interlocutory and that the issues raised by the appeal were not immediately appealable. On April 29, 2009, this Court denied Plaintiff's motion to dismiss. The Court, however, also ruled that review of the trial court's Order would be limited to the dismissal of Defendants' counterclaim and the striking of their affirmative defenses, citing S.C. Code Ann. § 14-3-330(2)(c). The Court stated that it would not review the trial court's denial of Defendants' motion for judgment on the pleadings or denial of summary judgment. On May 14, 2009, Defendants petitioned for rehearing pursuant to Rule 221(a), SCACR, seeking clarification of the Court's Order and pointing out that, under South Carolina law, all rulings of a single order that are appealable in part should be considered on appeal. On June 16, 2009, the Clerk of the Court of Appeals returned Defendants' petition for rehearing, citing Rule 221(c), SCACR, because the underlying order allegedly did not dismiss or finally decide the appeal. On June 23, 2009, Defendants requested that the Clerk of the Court of Appeals re-file the Petition for Rehearing and that a panel rule on Defendants' Petition. As of the date of their Initial Brief, no further action has been taken by this Court on Defendants' petition for rehearing directed to the April 29, 2009 Order denying Plaintiff's motion to dismiss the appeal.

STATEMENT OF FACTS

From 1999 to 2006, Plaintiff Brian P. Menezes was employed by SCI as Chief Financial Officer and, for a period, interim Chief Executive Officer. (R. Vol. I, p. 7, ¶ 4.)¹ Plaintiff separated from SCI in June 2006 but remained a shareholder at the time of the merger. (*Id.*) SCI is a publicly traded Delaware corporation with its headquarters in Greenville, South Carolina, and was in the business of designing and manufacturing airbag fabric and airbag cushions. (R. Vol. I, p. 8, ¶ 8.) In 2006, SCI merged with FITG, a privately held Delaware corporation with its headquarters in Greensboro, North Carolina, whose operations included the manufacture of fabric for apparel, uniforms, and upholstery. (R. Vol. I, pp. 7-8, ¶ 6.) SCI survived the merger, and the combined companies continued operations under the name International Textile Group. (R. Vol. I, p. 8, ¶ 10.) W.L. Ross & Co., LLC (“WLR”), an investment firm, owned shares in SCI and FITG either directly or indirectly through affiliate entities named in this lawsuit. (R. Vol. I, pp. 7-8, ¶¶ 5, 7, 9.) The individual Defendants were members of the board of directors for SCI or FITG, with the exception of Stephen B. Duerk, who was president of SCI prior to the merger and who executed the merger agreement on behalf of SCI. (R. Vol. I, pp. 9-10, 25, ¶¶ 13-16, 86.) One of the questions on appeal asks whether a claim

¹ Plaintiff’s Complaint allegations are admissions *in judicio*. See, e.g., *Fisher v. S.C. Dep’t of Health & Envtl. Control*, 309 S.C. 10, 12-13, 419 S.E.2d 794, 795 (Ct. App. 1992) (plaintiff “judicially bound” by statements contained in her complaint). By reciting these allegations, Defendants do not admit any fact beyond what has been specifically admitted in their Answers, nor do Defendants waive their right to challenge Plaintiff’s version of the facts as alleged.

for breach of fiduciary duty regarding the terms of a merger accrues when the board approves the merger agreement fixing those terms or when the shareholders later vote to consummate the merger. There are three relevant dates.

1. On August 29, 2006, the SCI board of directors approved the merger between SCI and FITG. (R. Vol. I, p. 16, ¶ 46.) The merger agreement provided that FITG would merge into SCI, and that SCI's certificate of incorporation would be amended to reflect the new combined entity. (R. Vol. I, pp. 11-12, ¶¶ 23, 24.) A vote of the SCI shareholders was required to adopt the amended certificate of incorporation. (R. Vol. I, pp. 11-12, ¶ 23.) As the key term, and the one at the heart of this dispute, the agreement provided that FITG shareholders would receive one (1) share of SCI stock for every 1.4739 shares owned in FITG (the "Exchange Ratio"). (R. Vol. I, pp. 12, 14, ¶¶ 25, 35.) That Exchange Ratio reflected a value of \$185 million for FITG based on SCI's share price at the time of the merger agreement. (R. Vol. I, p. 13, ¶ 29.) The SCI board approved these terms based on the recommendation of a special committee established to evaluate the merger (R. Vol. I, p. 14, ¶ 35) and on a fairness opinion rendered by an independent financial firm, RSM EquiCO Capital Markets, LLC ("RSM"), which concluded that the Exchange Ratio was fair to SCI. (R. Vol. I, p. 15, ¶ 43.)

The terms of the merger agreement, including the Exchange Ratio, were publicly disclosed on August 30, 2006, when a press release was issued and a Form 8-K was filed with the Securities and Exchange Commission ("SEC"), and again on September 1, 2006, when a preliminary Joint Proxy Statement/Prospectus ("Prospectus") was publicly filed

with the SEC. The Prospectus contained a detailed description of the reasons for the merger, the terms and conditions of the merger agreement, and the financial analysis performed by RSM and its fairness opinion on the Exchange Ratio. The publicly filed Prospectus in fact supplied much of the information upon which the allegations in Plaintiff's Complaint rest. (*See, e.g.*, R. Vol. I, pp. 11-12, 14-16, 20-21, ¶¶ 23, 35, 44, 45, 47, 67.)

2. On September 28, 2006, approximately one month after the SCI board approved the merger and disclosed the terms through these detailed public filings, Plaintiff signed a Settlement Agreement and Release of All Claims resolving an employment lawsuit he had filed in July 2006. (R. Vol. I, pp. 140-151.) In that lawsuit, Plaintiff alleged that he had been denied compensation in violation of his employment agreement. But the release provision contained in the Settlement Agreement was not limited to this claim. Rather, in exchange for payments totaling \$576,550, Plaintiff agreed to "release, acquit and forever discharge" Defendants of

any and all manner of actions, causes of action, suits, claims, setoffs, debts, compensation, salary, benefits, sums of money, accounts, covenants, trespasses, damages, judgments and demands whatsoever, in law or in equity, whether known or unknown, liquidated, contingent, absolute, or otherwise, which Plaintiff either has had or now has against the Released Parties for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof. It is Plaintiff's intention to release all rights and claims that he may lawfully release.

(R. Vol. I, p. 143, § 7.)² Indeed, Plaintiff expressly waived claims that were not part of his employment lawsuit, including “any claim based upon or as an owner of any stock or interest in any of the Released Parties arising prior to the execution of this Confidential Settlement Agreement” and “all claims made or *which may have been made* in the Underlying Lawsuit or Amended Complaint.” (*Id.*) (emphasis added.) These provisions are collectively referred to in this brief as the “Release.”

Plaintiff had the assistance of legal counsel when he expressly released all “known and unknown” claims, including any “contingent” claims, against Defendants. (R. Vol. II, pp. 619-623.) Notably, the payments made to Plaintiff as consideration for the Release included sums intended to satisfy Plaintiff’s claim for a change in control

² The Release defined the “Released Parties” to mean

Gorga and Safety Components [SCI], and any parent, subsidiary, and affiliated person, company, business, entity or enterprise of Gorga and Safety Components, along with all current and former officers, directors, agents, employees, insurers, representatives, attorneys, successors, and assigns of the same, which shall also include by way of enumeration but not limitation, the International Textile Group, Inc. [FITG], W.L. Ross & Co., LLC, and David L. Wax.

(R. Vol. I, p. 143, § 7.) There has never been any dispute that the Released Parties include all the Defendants named in this action. Defendants WLR, David Wax, and Joseph Gorga were released by name. Defendants Ross, Gibbons, Storper, and Duerk are all current or former officers or directors of SCI. (R. Vol. I, pp. 9-10, ¶¶ 12-13, 16.) Defendants WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P., WLR Recovery Associates II, LLC, and WLR Recovery Associates III, LLC, are affiliated entities of SCI through which WLR is alleged to have controlled SCI. All Defendants are therefore within the ambit of the release provision.

bonus (R. Vol. I, pp. 141-142, § 2), a reference to the recently approved merger of FITG and SCI. (R. Vol. II, pp. 576-577.)³ In other words, the subject matter of the current litigation was incorporated by reference into the same settlement agreement that provided for a release of all claims—whether “known or unknown,” and “which may have been made” in the underlying lawsuit.

3. On October 20, 2006, the shareholders of SCI and FITG voted to consummate the merger (which in the case of SCI meant merely adopting an amended and restated certificate of incorporation reflecting the fact of the merger between FITG and SCI). (R. Vol. I, pp. 11-12, ¶¶ 20, 23.) Although Plaintiff now contends that this closing date—October 20, 2006—marks the point at which his current claims for breach of fiduciary duty accrued, his own Complaint makes clear that “[t]he approval process was a formality.” (R. Vol. I, p. 11, ¶ 22.) Indeed, Plaintiff acknowledges that “[t]he minority stockholders of SCI had no ability to stop the merger had they wanted to,” given that the majority shareholders had already expressed their intent to vote in favor of the merger. (R. Vol. I, p. 11-12, ¶¶ 23, 24.) What Plaintiff has objected to is not the closing of the merger, but rather the SCI board’s decision to approve the merger (1) based on alleged inaccurate information about the financial health of FITG and (2) for consideration (the Exchange Ratio) that allegedly overvalued the worth of FITG and diluted the ownership

³ See also R. Vol. I, p. 251, Pl.’s. First Mem. in Opp’n to Defs.’ Mot. to Dismiss at 2 (noting that the basis for claims settled in 2006 was Plaintiff’s belief “that he was entitled to the bonus in connection with the contemplated merger”).

interests of SCI shareholders. (R. Vol. I, pp. 17, 22, ¶¶ 49, 74.) Specifically, the gravamen of Plaintiff's allegations is that the Defendants knowingly relied on "inaccurate and deeply flawed" financial information supplied by FITG in approving the merger at the stated terms. (R. Vol. I, p. 17, ¶ 49.) Hence, the wrongful act for which Defendants would be liable (if at all) for breaching their fiduciary duties to Plaintiff is the approval of the merger on August 29, 2006, when the board allegedly relied on the inaccurate information about FITG and fixed the Exchange Ratio for FITG shares. That act occurred nearly a month before Plaintiff relinquished all claims against Defendants in exchange for the consideration he received through the Settlement Agreement, executed on September 28, 2006. By the terms of the Release, and under firmly established principles of Delaware law described below, Plaintiff's claims are therefore barred as a matter of law.

STANDARD OF REVIEW

The trial court's Order comprises three legal rulings: it denied Defendants' Motion for Judgment on the Pleadings, or Alternatively, for Summary Judgment; it dismissed Defendants' counterclaim for breach of the Release; and it struck Defendants' third and fourth affirmative defenses asserting the defenses of release and accord and satisfaction. Underlying each ruling, however, is a single legal determination, as recognized by the trial court: "The pertinent question is whether Plaintiff's claims regarding the merger accrued when the merger closed on October 20, 2006, as Plaintiff

contends, or sometime before September 28, 2006, as Defendants argue.” (R. Vol. I, pp. 1-2.)

The question of when a cause of action arises or accrues is a question of law for the court. *See Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997); *Brown v. Finger*, 240 S.C. 102, 111-12, 124 S.E.2d 781, 785-86 (1962). Likewise, the construction of a release and settlement agreement, like any other agreement or contract, is a question of law for the court. *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 325 S.C. 231, 234, 482 S.E.2d 554, 555-56 (1997); *see also Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (“A release is a contract and contract principles of law should be used to determine what the parties intended.”); *Mattox v. Cassady*, 289 S.C. 57, 60-61, 344 S.E.2d 620, 622 (Ct. App. 1986) (applying the general rules of contract construction to a settlement agreement).

On appeals of all cases, the appellate courts undertake a *de novo* review of all issues of law. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). An appellate court “is free to decide matters of law with no particular deference to the trial court.” *Pressley v. REA Constr. Co., Inc.*, 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007). So, although a trial court’s decision to strike affirmative defenses is ordinarily reviewed for an abuse of discretion, *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69-70 (1993), “the trial court’s ruling on a matter within its discretion, if based upon a misunderstanding of the law[,] . . . is one purely of

law[,]” and therefore the standard of review is *de novo*. 16 S.C. Jur. *Appeal and Error* § 122 (2007) (citing *Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 314 S.E.2d 603 (Ct. App. 1984)). The trial court’s ruling dismissing Defendants’ counterclaim for breach of the Release is also reviewed *de novo*, and in deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the counterclaim, viewed in the light most favorable to the Defendants, states any valid claim for relief. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

As explained at Pages 44-48 below, this Court also has the authority to review the trial court’s ruling denying Defendants’ Motion for Judgment on the Pleadings, or Alternatively, for Summary Judgment. When reviewing either the denial of a motion for judgment on the pleadings or a motion for summary judgment, this Court applies the same standards which govern the trial court under Rules 12(c) and 56(c), SCRPC. *Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006) (judgment on the pleadings); *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (2005) (summary judgment). For purposes of considering a motion for judgment on the pleadings, “[a]ll properly pleaded factual allegations are deemed admitted” and “any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Judgment on the pleadings is proper if there is no issue of fact raised by the complaint that, if resolved in favor of the plaintiff would entitle him to judgment. *Id.* A trial court may properly grant a motion for

summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), SCRCF; *Tupper v. Dorchester County*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). “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). Generally, where a motion for summary judgment presents a question as to the construction of a written contract, if the language employed by the agreement is plain and unambiguous, the question is one of law and summary judgment is proper. *First-Citizens Bank Trust Co. v. Conway Nat’l Bank*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984).

ARGUMENT

Despite the fact that Plaintiff signed a broad release absolving Defendants of “all claims”—whether “known and unknown,” absolute or “contingent”—the trial court ruled that the Release did not bar Plaintiff’s Delaware-based claims for breach of fiduciary duty because those claims did not accrue until the closing of the merger, which took place after the execution of the Release. That ruling not only misconstrues the plain and unambiguous terms of the Release, it also misapplies Delaware law, which provides that a cause of action alleging breach of fiduciary duty accrues at the moment of the alleged wrongful act, not when the effects or injury caused by the act are felt. Here, there can be no question that Plaintiff’s complaint challenges not the closing of the merger, but the SCI board’s approval of the merger’s terms on August 29, 2006, nearly a month before the Release became effective. Therefore, under established Delaware law, Plaintiff’s claims accrued well before the Release and are therefore barred by the Release. Plaintiff’s contrary contention, that his claims regarding the merger did not accrue until the close of the merger, is not supported by any Delaware decision, is logically incoherent, and would permit a plaintiff to opt into a shareholder lawsuit after the terms of the merger have been fixed, a result expressly rejected by the Delaware courts. Either as a matter of South Carolina law governing the interpretation of the Release, or Delaware law governing the accrual of Plaintiff’s claims, the decision of the trial court should be reversed.

I. THE PLAIN AND UNAMBIGUOUS TERMS OF THE RELEASE BAR PLAINTIFF'S CLAIMS FOR BREACH OF FIDUCIARY DUTY ARISING FROM THE MERGER.

Although Plaintiff's underlying claims arise under Delaware law, the interpretation of the Release is governed by the law of South Carolina. (R. Vol. I, p. 148, § 29.) A release is a specific type of contract governed by the same principles of interpretation as other contracts. *See Gardner v. City of Columbia Police Dep't*, 216 S.C. 219, 223, 57 S.E.2d 308, 309-10 (1950); *Bowers v. S.C. Dep't of Transp.*, 360 S.C. 149, 153-54, 600 S.E.2d 543, 545 (Ct. App. 2004). "In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties." *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 425 (D.S.C. 1995). The scope of a release is therefore controlled by the intention of the parties as revealed in the language and terms of the release. *See S. Glass & Plastics*, 367 S.C. at 428, 626 S.E.2d at 22 ("A release is a contract, and the scope of a release is gathered by its terms."). South Carolina courts have a strong policy of enforcing settlements and releases to avoid costly litigation and to fulfill the settling parties' intentions. *See Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) ("We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party.").

In *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008), the Court of Appeals recently discussed the principles applicable to contract construction

in affirming the grant of summary judgment to a defendant on the meaning of a written contract. The Court stated that, “[t]o discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Id.* at 476, 666 S.E.2d at 266 (citations omitted). The Court further held that the “[p]arties are governed by their outward expressions and the court is not free to consider their secret intentions.” *Id.* at 476-77, 666 S.E.2d at 266. According to the Court, “[w]hen a contract is clear and unambiguous, the construction of the contract is a question of law for the court.” *Id.* at 477, 666 S.E.2d at 266 (citations omitted). Similarly, the question of whether a release is unambiguous is a matter of law for the court to decide. *Wilson Group, Inc.*, 880 F. Supp. at 425 (citing *Campbell v. Bi-Lo, Inc.*, 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990)).

The Release that Plaintiff signed in exchange for the consideration he received leaves no ambiguity that it precludes the claims he has raised in this lawsuit. First, there can be no doubt that the Release bars more than just the claims that were at issue in Plaintiff’s original employment lawsuit. The scope of the Release is extensive. Plaintiff agreed to release

any and all manner of actions, causes of action, suits, claims, setoffs, debts, compensation, salary, benefits, sums of money, accounts, covenants, trespasses, damages, judgments and demands whatsoever, in law or in equity, whether known or unknown, liquidated, contingent, absolute, or otherwise, which Plaintiff either has had or now has against the Released Parties for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof. It

is Plaintiff's intention to release all rights and claims that he may lawfully release.

(R. Vol. I, p. 143, § 7) (emphases added.) Use of the term "whatsoever" alone demonstrates the broad and all-encompassing coverage of the releases given by Plaintiff in the first paragraph of § 7, without even considering the phrase "from the beginning of time up to and including the date of execution" of the Settlement Agreement. *See State v. Holman*, 14 S.C.L. 124, 125, 3 McCord 306, 308 (1825) (broadly construing the phrase "any matter or thing whatsoever" appearing in a South Carolina statute); *Schuck v. Shook*, 10 N.Y.S. 935, 936, 1890 N.Y. Misc. LEXIS 1073 (N.Y. Sup. Ct. 1890) (finding "word 'whatsoever' has a very broad and comprehensive meaning. Among other definitions given to the word by Webster are 'one thing or another,' and 'anything that may be,' etc. . . ."); 45 C.J.S. Words & Phrases (Whatsoever) (1970) (stating the word "whatsoever" has a very "broad and comprehensive" meaning and is often defined as "all that," "no matter what" or "anything that may be"). Moreover, the Parties went even further in the first paragraph of § 7, expressly stating that "[i]t is Plaintiff's intention to release all rights and claims that he may lawfully release."

Additionally, Plaintiff, "[w]ithout in any way limiting the generality of the foregoing," also relinquished "*any claim based upon or as an owner of any stock or interest in any of the Released Parties arising prior to the execution of this Confidential Settlement Agreement.*" (R. Vol. I, p. 143, §7) (emphasis added.) And, a definitive provision on this point, Plaintiff agreed to surrender "all claims made or *which may have been made* in the Underlying Lawsuit or Amended Complaint." (*Id.*) (emphasis added.)

These provisions make plain that the parties intended the Release to bring complete finality to their dispute by resolving “all claims” that Plaintiff could have made at the time he signed the Release. *See Gardner*, 216 S.C. at 223, 57 S.E.2d at 309-10 (If the release is not restricted by its terms to particular claims, the release will ordinarily be interpreted to cover all claims in existence at the time of the execution of the release that were contemplated by the parties.)

Second, there is likewise no doubt that Plaintiff’s current allegations constitute “actions, causes of action, suits, [or] claims . . . for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof.” (R. Vol. I, p. 143, § 7.) That broad, all-encompassing phrase assuredly encompasses claims “for or related to” the merger of FITG and SCI. *Cf. Aiken v. World Fin. Corp.*, 373 S.C. 144, 149 n.2, 644 S.E.2d 705, 708 n.2 (2007) (“Courts typically characterize arbitration agreements purporting to govern disputes ‘arising out of or related to’ the underlying contract between the parties as ‘broad’ arbitration clauses encompassing a wide range of issues.”). Plaintiff cannot dispute that the “matter” of the merger existed at the time the Release was executed. The merger agreement fixing the terms of the merger was approved by the SCI board a month before the Release, and the various disclosures filed with the SEC published the merger’s terms in detail for the shareholders (including Plaintiff) and the market to see. Indeed, Plaintiff’s Complaint relies extensively on these publicly filed documents in setting forth his allegations against Defendants, allegations that Plaintiff now contends he could have only raised after the

closing of the merger. (See R. Vol. I, pp. 11-12, 14-16, 20-21, ¶¶ 23, 35, 44, 45, 47, 67.) Furthermore, the Settlement Agreement itself referred to the fact of the recently approved merger between FITG and SCI (see R. Vol. I, pp. 141-142, § 2), a fact that Plaintiff himself has repeatedly conceded.⁴ The plain language of the Release therefore incorporates the merger as a “thing or matter” existing at the time of the parties’ settlement of the previous dispute.

More to the point, Plaintiff had the right to bring suit either “in law or in equity” as soon as the SCI board approved the merger agreement. See *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) (“The wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. . . . Suit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions.”). Indeed, Delaware courts have noted that “the optimal

⁴ See R. Vol. II, pp. 576-577, July 31, 2008 Hearing (“But they did have a dispute about the bonus that he was entitled to for a merger. And they refused to pay him anything or do anything unless he conceded on that point. And he wasn't willing to concede. And that's where the original lawsuit came from.”) (Statement of Plaintiff’s counsel); see also R. Vol. I, p. 251, Pl.’s. First Mem. in Opp’n to Defs.’ Mot. to Dismiss at 2 (noting that the basis for claims settled in 2006 was Plaintiff’s belief “that he was entitled to the bonus in connection with the contemplated merger”). See also *Shelton v. Bressant*, 312 S.C. 183, 184, 439 S.E.2d 833, 834 (1993) (“Acts of an attorney are directly attributable to and binding upon the client.”); *Smith v. Pearson*, 210 S.C. 524, 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing); *Widdicombe v. Tucker-Cales*, 366 S.C. 75, 90 n.5, 620 S.E.2d 333, 341 n.5 (Ct. App. 2005) (“[A] party is generally bound by stipulations made by their counsel.”).

time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval, is before the stockholder vote is taken and the deal closes.” *In re SunGard Data Sys., Inc. S’holders Litig.*, No. Civ. A. 1221-N, 2005 WL 1653975, at *2 (Del. Ch. July 8, 2005).

Logically, of course, the “optimal time” to bring suit to enjoin a merger is before the consummation of the merger, and Plaintiff had standing to bring such a suit upon the SCI board’s approval of the merger. *See Albert v. Alex. Brown Mgmt. Servs. Inc.*, No. Civ. A. 762-N, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) (“Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.”) Accordingly, a request for injunctive relief “may have been made in the Underlying Lawsuit or Amended Complaint,” as provided for in the Release. As Plaintiff himself has acknowledged, it is “clear” that “the Release might have applied to pre-merger claims,” including a “claim for injunctive relief.” (R. Vol. I, p. 357.) Yet Plaintiff maintains that the Release “would not apply [to] the post-merger claim that it was a breach of fiduciary [duty] to allow the Merger to consummate.” (*Id.*) The Release, however, makes no such distinction between a pre-merger suit for injunctive relief and a post-merger claim for damages. And as a matter of South Carolina law, a “broad” release like the one at issue here bars all claims based on the same “cause” or legal right, regardless of the choice of remedy elected by the plaintiff.

In *Kennerty v. Etiwan Phosphate Co.*, 17 S.C. 411, 1882 WL 5594 (1882), the South Carolina Supreme Court addressed the identical, though converse, argument that a release as to damages did not bar a later claim for injunctive relief. The Court flatly rejected that argument:

The plaintiff agreed to release and “not to sue for future damage arising from the fumes or gases that may escape from the company’s works in the air, etc.,” the identical thing he is now seeking relief against by way of injunction. It seems to us that considering the whole of this agreement together, and the circumstances under which it was executed, the fair construction of it is, that the parties intended to bar all judicial proceedings for the same cause—a suit in equity for injunction as well as suit at law for damages. We do not suppose that the parties had in view the difference between an action at law and a proceeding in equity, and that in providing against the former they intentionally omitted to provide against the latter, which would enable the party covenanting against future suits for damages, to accomplish his purpose only the more effectually in another way, by injunction.

Id. at *5 (emphases in original).

Although the release in *Kennerty* expressly included “present or future” claims, the Court’s rationale was not so limited. Noting that “there can be no injunction without the legal right to rest upon,” the Court concluded that the release agreement barred any action based on the same “cause” or “legal right,” regardless of the nature of the relief sought. *Id.* at *6. If the cause or “legal right” to seek an injunction existed at the time Plaintiff signed the Release, as Plaintiff concedes, then any action based on that legal right is likewise barred. To construe the Release otherwise would “enable the party covenanting against future suits for [injunctive relief] to accomplish his purpose only the more effectually in another way, by [a claim for damages].” *Id.* at *5.

Nor may Plaintiff avoid the clear terms of the Release by arguing that his current claims challenge the Defendants' role in "allow[ing] the Merger to consummate." As explained below, the technicality of a merger's consummation is completely immaterial to determining when a claim challenging the terms of a merger first accrues under Delaware law. But as a simple matter of construing the terms of the Release (again, a question governed by South Carolina law), Plaintiff surrendered "all claims" against Defendants, "whether known or unknown" and with explicit acknowledgment that "there may be facts or consequences of facts which are unknown to Plaintiff." (R. Vol. I, pp. 143-144, §§ 7, 8.) The "consequence" of the merger's consummation flows directly from the "fact" of the merger's approval by the SCI board, which occurred more than a month before the Release took effect. Thus the Release by its terms bars any claim related to the merger, whether styled as challenging the merger's terms or its "consummation."

In reaching the contrary conclusion, the trial court gave credit to Plaintiff's argument that his claims did not accrue until the consummation of the merger because of the "extensive conditions precedent to the merger that were not satisfied before the closing date." (R. Vol. I, p. 2.)⁵ The error of that conclusion is evident from a cursory

⁵ Plaintiff's Complaint nowhere enumerates the conditions precedent which the trial court determined to be of such central significance for deciding when the claims alleged there accrued. Plaintiff did allege that Defendants should have exercised their right to cancel the merger under the "MAC clause," which permitted either side to cancel the merger in the event of materially adverse changes. (R. Vol. I, pp. 20-21, ¶ 67.) Otherwise, the Complaint makes no mention of the "extensive conditions precedent" that preceded the closing. Plaintiff also alleges that the merger caused two "Further Negative

review of the Release, which in addition to barring all “known and unknown” claims, also bars “contingent” claims. (R. Vol. I, p. 143, § 7.) A condition precedent is synonymous with a contingency. *Compare* Black’s Law Dictionary 289 (7th ed. 1999) (defining *condition precedent* as “[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises”), *with id.* at 315 (defining *contingent* as “[d]ependent on something else; conditional”). Even Plaintiff’s counsel has described the conditions precedent to the merger as “contingencies.” (See R. Vol. II, p. 596 (“It’s like the purchase of a house. You don’t have the purchase of a house—you have a—you enter a contract and you later close on it. But there are all kinds of *contingencies*. And until that happens you don’t have a claim relating to the house.”) (emphasis added). Plaintiff’s argument, erroneously accepted by the trial court, is that the existence of conditions precedent to the merger that were incorporated as terms in the merger agreement deferred the accrual of his merger-related claims until the closing of the merger. Even if that were an accurate statement of the Delaware law of accrual (it is not), the argument is of no moment in this case, where the Release plainly and expressly bars “contingent” claims. Assuming that, at the time Plaintiff signed the Release, his

Consequences”: a replacement credit line for the new combined company whose terms were less favorable than the prior credit arrangements (R. Vol. I, pp. 22-23, ¶ 76); and a “debt for equity swap” that allowed WLR to take equity in the new company in exchange for loans previously made to FITG, allegedly to the detriment of SCI minority shareholders. (R. Vol. I, p. 23, ¶ 79). All of these allegations are, for reasons explained below, merely the effects or consequences of the SCI board’s approval of the merger’s terms on August 29, 2006 and are not independently actionable “wrongs” themselves.

claims depended on the occurrence of some future event, the claims were simply contingent and were as effectively surrendered by the execution of the Release as any claim that had fully accrued by then. South Carolina law endorses the rights of parties to release contingent and even future claims. See *S. Glass & Plastics*, 367 S.C. at 427-29, 626 S.E.2d at 22-23 (enforcing release that barred “future” claims and claims that “may hereafter accrue”). So, when Plaintiff agreed “to release all rights and claims that he may lawfully release” (R. Vol. I, p. 143, § 7), he released the claims at issue here.⁶

As one court has noted, “[i]n release cases, the question is not when was the date of accrual, but rather whether the plaintiff is knowingly giving up the right to sue on some claims, or all claims that are in general terms predictable.” *Wagner v. Nutrasweet Co.*, 95 F.3d 527, 533 (7th Cir. 1996) (holding that “[w]hen a release is broadly worded, as this one was, to cover all claims, ‘known and unknown,’ the plaintiff is giving up the right to sue that she might otherwise have”) (emphasis added); accord *Townsend v. South Carolina Ins. Co.*, 168 S.C. 302, 313, 167 S.E. 5, 8 (1932) (concluding that future consequences from breach of contract were “reasonably within the contemplation of the parties or within the fair import of the terms of the settlement and cancellation”). In light of all that was known about the merger at the time that Plaintiff signed the Release, a claim that Defendants breached their fiduciary duties was “in general terms predictable”

⁶ In fact, Plaintiff’s “contingencies” argument as related to the date the merger formally closed is belied by his own Complaint. The Complaint repeatedly alleges that, once a merger agreement was entered, the actual shareholder approval process was a mere formality. (See R. Vol. I, pp. 11-12, ¶¶ 22-24.)

and “within the fair import of the terms of the settlement.” The details of the merger had been fully disclosed in public SEC filings, and the Release itself incorporated the existence of the merger by reference. Hence, as a result of the plain and unambiguous terms of the Release, Plaintiff gave up his right to pursue his current claims.

II. UNDER DELAWARE LAW, PLAINTIFF’S CLAIMS ACCRUED WHEN THE BOARD APPROVED THE MERGER AGREEMENT, NOT WHEN THE MERGER CLOSED.

Despite this straightforward application of the broad language of the Release, the lower court avoided the effect of the Release on the grounds that the merger closing date deferred the accrual of Plaintiff’s claims until the shareholders voted to consummate the merger on October 10, 2006. Because Plaintiff’s claims concern the fiduciary duties of officers, directors, and controlling shareholders of a Delaware corporation, his claims arise under and are governed by Delaware law. *See Restatement of Conflicts of Laws* § 187 (1934) (“[T]he existence and extent of liability of shareholders, officers, or directors of a corporation . . . is determined by the law of the state of incorporation”); *McDaniel v. McDaniel*, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963) (South Carolina courts follow the traditional choice of law rules as stated in the Restatement of Conflicts of Laws).⁷ Contrary to Plaintiff’s argument and the decision of the trial court,

⁷ That Delaware law governs the question of when Plaintiff’s claims accrued has never been in dispute. The Complaint repeatedly alleges violations of Delaware law (*see, e.g.,* R. Vol. I, p. 28, ¶¶ 96-98), and Plaintiff himself has argued Delaware law in opposing Defendants’ motion. (*See generally* R. Vol. I, pp. 343-361.) Likewise, the lower court decided this issue based on an alleged application of Delaware law.

Delaware law is clear that a claim for breach of fiduciary duties relating to a merger accrues at the time when the terms of the merger are fixed—here, when the SCI board approved the merger agreement before the Release was executed by Plaintiff on September 20, 2006. On this point, there is no dispute about the meaning of the Release: if Plaintiff's claims existed as of September 28, 2006, the effective date of the Release, then his claims are barred. (*See* R. Vol. II, pp. 597, 599 (statement by Plaintiff's counsel agreeing that if claims accrued by September 28, 2006, the claims are barred)). Because the terms of the merger were fixed by that date—including, importantly, the Exchange Ratio, which Plaintiff here challenges—Plaintiff may not avoid the effect of the Release based on the technicality of the merger's closing date.

A. Delaware Law Is “Crystal Clear” that Claims Accrue at the Moment of the Alleged Wrongful Act—Here, When Defendants Approved the Terms of the Merger Agreement.

Under Delaware law, a cause of action for breach of fiduciary duty first accrues “at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.” *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). Over and over again, the Delaware courts have emphasized that determining when a claim for breach of fiduciary duty accrues does not depend on “when the harmful effects of the act are felt” or “when the plaintiff suffered a loss.” *In re Coca-Cola Enters., Inc. S'holders Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, at *5 & n.39 (Del. Ch. Oct. 17, 2007) (“The court reiterates that a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.”), *aff'd sub nom., Int'l Bhd. Teamsters v. Coca-Cola Co.*, 2008

WL 2484587 (Del. 2008); *see also Fike v. Ruger*, 754 A.2d. 254, 260 (Del. Ch. 1999) (“A cause of action accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrong.”).

Rather, “[t]he law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred.” *Albert*, 2005 WL 1594085 at *18 (footnote omitted). On this point there can be no dispute, as all the authorities agree. As summarized by the leading treatise on Delaware corporation law, “the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt.” 2 Edward P. Welch, et al., *Folk on the Delaware General Corporation Law* § 327.3.2 (5th ed. 2006 & Supp. 2007) (hereinafter *Folk*).⁸ Determining when a claim first accrues, therefore, requires isolating the alleged wrongful act and ignoring the effects or consequences that flow from the alleged wrongdoing.

Where, as here, a shareholder challenges the terms of a merger, the claim arises or accrues at the time that the board “pass[es] a resolution approving the merger on terms which she feels to be unfair,” not when the shareholders later vote to consummate the merger. *Brown v. Automated Mktg. Sys., Inc.*, No. 6715, 1982 WL 8782, at *2 (Del. Ch. Mar. 22, 1982). In *Brown*, the Delaware Chancery Court addressed a similar factual

⁸ While there is no dispute that Delaware law controls the question of when Plaintiff’s claims accrued, the rule followed by the Delaware courts is consistent with South Carolina law. *See Stephens*, 327 S.C. at 5, 488 S.E.2d at 309 (“A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”).

scenario as here in the context of applying Delaware's statutory requirement that plaintiffs in derivative suits must be a "stockholder of the corporation at the time of the transaction of which such stockholder complains." Del. Code Ann. 8, § 327. The court concluded that the plaintiff's claims accrued at the time of the merger's approval by the board; the fact that the merger technically closed at a later date, the court explained, was immaterial to deciding when the claim first arises or accrues: "it is not the merger itself that constitutes the wrongful act of which plaintiff complains, but rather it is the fixing of the terms of the transaction which will be finalized by the consummation of the merger which provides the foundation for the suit." *Brown*, 1982 WL 8782 at 2. The court flatly rejected the argument that "no wrong occurs until the merger is voted upon and approved." *Id.*

Delaware courts have repeatedly applied *Brown*'s holding to reject claims by plaintiffs directed at the allegedly unfair terms of a merger agreement. See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002) (plaintiff lacked standing to assert claim for breach of fiduciary duty because claim arose when directors approved merger, not when plaintiff became aware of the merger or the alleged wrongdoing); *In re Beatrice Cos., Inc. Litig.*, 522 A.2d 865, 1987 WL 36708, at *3 (Del. 1987) ("In the case of a proposed merger, the plaintiff must have been a stockholder at the time the terms of the merger were agreed upon because *it is the terms of the merger, rather than the technicality of its consummation*, which are challenged.") (emphasis added); *Folk, supra*, § 327.3 ("[B]oth a proposed merger and a proposed supermajority

voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and not to be continuing transactions up to the time of stockholder approval.”).⁹

Unsurprisingly, the Delaware courts apply the same rule of accrual to the question of when the statute of limitations begins to run for breach of fiduciary claims: claims that challenge the terms of a contractual agreement, like a merger agreement, accrue at the time that the agreement is entered. In *Kahn v. Seaboard Corp.*, the Chancery Court rejected as untimely a shareholder’s challenge to a contract alleged to have been made for the benefit of the defendants and to the detriment of the corporation. *Kahn*, 625 A.2d at 271. Although some of the payments made by the corporation under the contract came within the statute of limitations, the formation of the contract itself fell outside of the limitations period. *Id.* at 270. The court concluded that “[t]he wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was

⁹ As below, Plaintiff will undoubtedly try to argue that these shareholder standing cases are not relevant to deciding when his cause of action for breach of fiduciary duty accrued. That is wrong. In all these cases, the issue to be decided is when a claim challenging a merger accrued. If the claim accrues on the date that the board approved the terms of the merger, then only shareholders who held stock on that date have standing. But if the claim did not accrue until closing, then a shareholder who purchased shares after board approval but before the closing would have standing. These cases are thus centrally concerned with determining when a merger-related claim arises or accrues. See, e.g., *Omnicare*, 809 A.2d at 1168 (“Standing . . . ‘refers to the right of a party to invoke the jurisdiction of the court to enforce a claim or redress a grievance.’”). The consistent holding of these cases is that claims objecting to the terms of a merger accrue when the board approves the merger agreement fixing those terms, not when shareholders later vote to consummate the merger.

detrimental to it and beneficial, indirectly, to the defendants. Any such wrong occurred at the time that enforceable legal rights against Seaboard were created.” *Id.* at 271. Furthermore, there was no “continuing wrong” because the payments merely constituted performance under the contract: as long as the contract remained in effect, “the payments it calls for are legal obligations, not wrongs.” *Id.*

Hence, claims for breach of fiduciary duty related to the action of officers or directors in causing the corporation to enter an agreement accrue at the time the agreement is formed, not at some later point when the effects or consequences of the agreement come to pass. *See In re Dean Witter P'ship Litig.*, C.A. No. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) (“The general law in Delaware is that the statute of limitations begins to run, *i.e.*, the cause of action accrues, at the time of the alleged wrongful act, even if the plaintiff is ignorant of the cause of action.”), *aff'd*, 725 A.2d 441 (Del. 1999). That principle was illustrated in a recent decision by the Delaware Chancery Court in *In re Coca-Cola Enterprises*, a decision that the Delaware Supreme Court affirmed entirely on the basis of the Chancery Court’s opinion. *See Int’l Bhd. of Teamsters v. Coca-Cola Co.*, 954 A.2d 910, 2008 WL 2484587, at *1 (June 20, 2008). The plaintiffs in that case alleged that directors of one of Coca-Cola’s largest bottlers breached their fiduciary duties to shareholders by adopting certain business practices at the behest of Coca-Cola. *In re Coca-Cola Enters., Inc. S’holders Litig.*, 2007 WL 3122370 at *2-*3. Although those business practices were adopted between 2002 and 2005, well within the three-year statute of limitations for fiduciary actions, the court

found plaintiffs' claims barred because, in reality, the board's actions were taken pursuant to a licensing agreement that had been in existence for more than twenty (20) years. *Id.* at *6. As the court explained, "[e]ach one of these claims is, therefore, time-barred because each hinges upon the allegations that the terms and conditions established by a contract are unfair to the plaintiffs." *Id.* (quotation omitted). Because the contract "provided the means by which the Defendants effectuated their breaches of fiduciary duty," the causes of action accrued when the contract was entered, not later when its provisions were actually carried out and put into effect. *Id.*

Other courts applying Delaware law have applied this principle to claims alleging fiduciary violations over the approval of allegedly unfair contract terms. *See Marvel Enter. Group, Inc. v. Mafco Holdings, Inc., (In Re Marvel Enter. Group, Inc.)*, 273 B.R. 58, 73 (D. Del. 2002) ("[W]here the claimed breach of fiduciary duty is an allegedly unfair contract, the limitations period begins to run when the contract is formed."). Looking to Delaware law, the district court in *In re Marvel* concluded that a cause of action for breach of fiduciary duty "accrued when the contract fixed the parties' rights (in 1993) and not when an allegedly harmful legal obligation arose under the contract (in 1997)." *Id.* at 74. The court noted that "[t]his finding is consonant with the principle that in discerning when a cause of action accrues, 'the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt.'" *Id.* (quoting *Folk*, § 327.3 (4th ed.))

It makes practical sense to hold that a cause of action challenging the terms of a merger agreement accrues at the time the agreement is struck, not later when the merger closes. After all, when “[t]he wrong attempted to be alleged is the use of control over . . . [the corporation] to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants,” which is the crux of plaintiff’s allegations, “[s]uit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions. Complete and adequate relief, if justified, could be shaped immediately or at any point thereafter.” *Kahn*, 625 at 271. As the Delaware Chancery Court more recently explained in *Albert*, *supra*, “[w]hether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.” 2005 WL 1594085 at *18. Indeed, Delaware courts have noted that “the optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval, is *before the stockholder vote is taken and the deal closes*.” *In re SunGard Data Sys., Inc. S’holders Litig.*, 2005 WL 1653975 at *2 (emphasis added). Determining when a cause of action exists—whether for standing, statute of limitations, or the effect of a release provision—simply amounts to deciding when the plaintiff had a legal right to bring suit, either for an injunction or damages. *See Kennerty*, 17 S.C. 411, 1882 WL 5594, at *6.

The good sense reflected in the Delaware rule also serves important public policies designed to protect corporations and their fiduciaries from speculative lawsuits. If a cause of action for breach of fiduciary duty did not arise at the moment when the terms of the merger were struck (the alleged wrongful act), plaintiffs would have the “equivalent of a call option” on the success or failure of the merger. *See Albert*, 2005 WL 1594085, at *18. In *Albert*, the plaintiffs alleged numerous breaches of fiduciary duty in the management of several investment funds, including the decision to unhedge certain investments. Although that decision was made outside the limitations period, the plaintiffs contended that their cause of action arose when the value of their funds dropped. The court disagreed:

The wrongful act the plaintiffs allege is the unhedging of the Funds. However, after the defendants unhedged the Funds, their value skyrocketed. This was due, of course, to the fact that the Funds were exposed to much more risk. Assuming (without deciding) that unhedging the Funds was a wrongful act, it was wrongful because it exposed the Funds to this extra risk. However, under the plaintiffs’ theory, they are given the equivalent of a call option. If the unhedging of the Funds works out, and the value of the Funds goes up, the plaintiffs will have no complaint. But if the hedging (or lack thereof) strategy does not work out, and the value of the Funds falls, the plaintiffs can sue. This clearly is not, and should not be, the law.

Id. In other words, a rule of accrual that deferred a cause of action until sometime after the alleged wrongful act would reward plaintiffs for taking a wait-and-see approach to litigation. The Delaware rule, by contrast, encourages plaintiffs to file suit immediately—whether for an injunction, an order of rescission, or for nominal damages—thereby preventing the wrongful act from ramifying into greater harm to the

corporation or its shareholders. That is why, as the *Albert* court “reiterate[d],” “a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.” *Id.*

That rule also serves the “longstanding Delaware public policy against the evil of purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock.” *OmniCare*, 809 A.2d at 1169 (internal quotations omitted). As shown above, Delaware courts vigilantly police the purchaser standing rule to ensure that shareholder plaintiffs owned stock at the time of the alleged wrongful acts; otherwise, they lack standing to bring their claims. That policy would be easily frustrated if prospective plaintiffs could purchase shares after the terms of a merger were fixed in the merger agreement and announced to the public, but before the technical consummation of the merger. In essence, that would allow plaintiffs to purchase a lawsuit against corporate fiduciaries, a result that would be completely contrary to Delaware’s policy to protect its corporate citizens from entirely self-serving lawsuits. *See In re Beatrice Cos.*, 1987 WL 36708, at *3 (plaintiff lacked standing to challenge proposed merger where plaintiff purchased shares after the merger’s terms were fixed in an executed merger agreement but before the “technicality of the [merger’s] consummation”); *Schreiber v. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978) (“The policy behind the Statute and the Rule is to prevent so-called ‘strike suits’ whereby individuals purchase shares in a corporation with litigious motives.”).

Here, it is equally “crystal clear” that all of Plaintiff’s claims stem from the terms of the merger agreement, specifically the Exchange Ratio, which Plaintiff alleges was unfair to minority shareholders like him. According to Plaintiff’s own Complaint, the merger agreement, including the Exchange Ratio, was approved by the SCI board on August 29, 2006. (R. Vol. I, p. 16, ¶ 46.) The allegedly wrongful acts of providing the SCI special committee with “inaccurate and deeply flawed” financial information about FITG, which was used to arrive at the Exchange Ratio, necessarily occurred before then. (R. Vol. I, p. 17, ¶ 49.) Under the well-established principles of Delaware law just discussed, Plaintiff’s claims accrued when the board approved the merger, not later when the merger was consummated by the vote of the shareholders. *See Brown*, 1982 WL 8782, at *2. As a result, the Release that Plaintiff signed on September 28, 2006—nearly a month after Plaintiff could have first brought suit to enjoin or rescind the merger agreement—bars his current claims as a matter of law. *See Kahn*, 625 A.2d at 271 (“Suit could have been brought immediately . . . [after the board approved the challenged contract] to rescind the contract and for nominal damages”); *In re SunGard Data Sys., Inc. S’holders Litig.*, 2005 WL 1653975, at *2 (“[T]he optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval, is before the stockholder vote is taken and the deal closes.”). Any other result would undo the express agreement of the parties to release all claims between them and bring complete finality to their dispute, including

any claims that “may have been made in the Underlying Lawsuit.” (R. Vol. I, p. 143, § 7, (8).)

B. The Claims Accrued When the Board Approved the Merger Agreement Regardless of Any Alleged Conditions Precedent and Regardless of the Date the Merger Closed.

As noted above, the trial court relied on the supposed existence of “extensive conditions precedent to the merger” in accepting Plaintiff’s argument that his claims did not accrue until the closing of the merger. (R. Vol. I, p. 2.) The trial court’s conclusion not only fails to account for Plaintiff’s release of all “contingent” claims in § 7 of the Release, but it is also incompatible with clear Delaware authority holding that the effects or consequences of an alleged wrongful act do not constitute “continuing wrongs” that defer the accrual of causes of action for breach of fiduciary duty. *See Kahn*, 625 A.2d at 271 (holding that payments made under allegedly unfair contract did not constitute separately actionable wrongs that deferred the statute of limitations). The lower court’s error was further compounded by its reliance on the *In re Coca-Cola Enterprises* decision, discussed above, which expressly rejected a similar argument.

In *Coca-Cola*, the Delaware Chancery Court barred plaintiffs from seeking damages for actions that were authorized by the 20-year-old contract between the bottler and the Coca-Cola Company. Those actions could not be construed as independent, continuing wrongs “because each hinge[d] upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s].” *In re Coca-Cola Enters., Inc. S’holders Litig.*, 2007 WL 3122370 at *6 (quotation omitted). Likewise in

Kahn, upon which the *Coca-Cola* court relied, plaintiffs could not challenge payments made under the allegedly unfair contract because those payments were not independent “continuing wrong[s],” but rather legal obligations in the performance of the contract. *Kahn*, 625 A.2d at 271.

Here, the conditions precedent that Plaintiff believes postponed the accrual of his claims are not independently actionable “continuing wrongs.” They have no legal significance apart from the merger agreement. As in *Coca-Cola*, any claim regarding the conditions precedent “hinges upon the allegations that the terms and conditions established by a contract are unfair to the plaintiffs.” The only thing possibly “wrongful” about the fulfillment of the conditions is that they permitted the consummation of the merger on terms that Plaintiff alleges are unfair. In other words, Plaintiff’s argument “amounts to an indirect attack on the fairness of the terms of the merger,” and his right to pursue any claim related to the conditions precedent are inextricably bound up with his right to contest the merger itself. *Lewis v. Anderson*, 477 A.2d 1040, 1048 n. 15 (Del. 1984) (shareholder who could not challenge merger itself could not thereafter challenge provision for “golden parachutes” awarded to management, which amounted to indirect attack on fairness of merger terms). *Coca-Cola* and *Kahn* foreclose the argument the subsequent performance or fulfillment of allegedly unfair contract terms marks the point of accrual for claims that, in reality, challenge the contract terms themselves.

The binding admissions contained in Plaintiff’s own Complaint confirm that Plaintiff has challenged the terms of the merger, not its consummation. The Complaint

makes clear that, once the SCI board approved the merger, the subsequent steps to consummate the merger were a mere "formality." (R. Vol. I, p. 11, ¶ 22) ("The approval process was a formality.") As part of his allegations, Plaintiff acknowledged that "[t]he minority stockholders of SCI had no ability to stop the Merger had they wanted to," because the majority shareholders had committed themselves to vote in favor of the merger. (R. Vol. I, pp. 11-12, ¶¶ 23, 24.) These admissions prove that the "alleged wrongful act" which marks the accrual of Plaintiff's claims under Delaware law is not any of the steps preceding the shareholder vote consummating the merger, but rather the board's approval of the merger agreement on allegedly unfair terms. It is therefore clear that here, "it is the terms of the merger, rather than the technicality of its consummation, which are challenged," *In re Beatrice Cos., Inc. Litig.*, 1987 WL 36708 at *3, and as a result, Plaintiff's claims accrued long before he relinquished them for the consideration offered in exchange for the Release.

What Plaintiff has conceded in his Complaint, Delaware courts have made explicit in their holdings. "[I]t is not the merger itself that constitutes the wrongful act of which plaintiff complains, but rather it is the fixing of the terms of the transaction which will be finalized by the consummation of the merger which provides the foundation for the suit. So viewed, there is no continuing wrong but only an alleged wrong which occurred prior to the date on which [the board approved the terms of the merger]." *Brown*, 1982 WL 8782, at *2. The *Folk* treatise has well summarized this area of Delaware law: "both a proposed merger and a proposed supermajority voting provision

have been held to be consummated when their terms were fixed and announced by the board of directors, and *not to be continuing transactions up to the time of stockholder approval.*” *Folk*, § 327.3.2. The fact that the consummation of the merger required the entirely perfunctory performance of conditions precedent and shareholder approval is no basis for deferring the accrual of Plaintiff’s fiduciary duty claims.

The trial court also erred by relying on *Coca-Cola* for the proposition that Plaintiff lacked a cause of action because “the merger could not have been enforced by FITG against SCI prior to the closing date.” (R. Vol. I, p. 2.) To be sure, both *Coca-Cola* and *Kahn* affirm the commonsense rule that claims accrue when a party has legal rights to enforce. *See Kahn*, 625 A.2d at 271 (“Any such wrong occurred at the time that enforceable legal rights against Seaboard were created.”). But the critical question regarding the application of the Release signed by Plaintiff is not whether FITG had legally enforceable contract rights against SCI, but whether Plaintiff, as a minority shareholder, had legally enforceable rights against Defendants as his fiduciaries for breach of their duties related to the merger. The cases are clear: Plaintiff had the right to bring suit either in law or in equity to challenge alleged breaches of fiduciary duty as soon as the SCI board approved the merger agreement. *See id.* (“The wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. . . . Suit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions.”); *Albert*, 2005 WL 1594085 at *18 (“[A]s

soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.”).

As already noted, Plaintiff has conceded that that it is “clear” that “the Release might have applied to pre-merger claims,” including a “claim for injunctive relief.” (R. Vol. I, p. 357.) Indeed, if the “optimal time” to challenge a “proposed merger . . . is before the stockholder vote is taken and the deal closes,” *In re SunGard Data Sys., Inc. S’holders Litig.*, 2005 WL 1653975 at *2, then Plaintiff had standing to bring such a suit upon the SCI board’s approval of the merger’s terms. Plaintiff’s supposed distinction between a pre-merger claim for injunctive relief and a post-merger claim for damages not only ignores the plain, unambiguous language in and effect of the Release under South Carolina law, as discussed above, but it would also deeply unsettle Delaware law. Applying two different rules for “pre-merger” and “post-merger” claims would allow plaintiffs to avoid the rigorously enforced standing requirement that prevents plaintiffs from “purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock.” *OmniCare*, 809 A.2d at 1169 (internal quotations omitted). It would also stand Delaware law on its head by reversing the incentive to bring claims promptly. Instead, plaintiffs would have every reason to wait for the merger to close before seeking damages, which would give plaintiffs the “equivalent of a call option” on the success or failure of a merger. *See Albert*, 2005 WL 1594085 at *18.

No Delaware decision supports Plaintiff’s specious distinction between pre-merger and post-merger claims. As has been made abundantly clear, the moment of

accrual for fiduciary duty claims is when the challenged wrongful acts are alleged to have occurred, not when the injury or effects caused by those acts are felt. Thus, it is no defense to argue that the board's approval of the merger had no effect on Plaintiff until the shareholder vote consummated the merger.

C. The Trial Court's Order Relies on Cases that Do Not Reflect Delaware Law, or Are Irrelevant to the Facts of this Case.

In addition to the *In re Coca-Cola Enterprises* decision, the trial court relied on three early 1980s decisions that it believed supported the conclusion that a claim for breach of fiduciary duty accrues only upon a shareholder vote approving a merger: *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983); *Dofflemeyer v. W. F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983); and *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982). None of these cases negates the reasoning above or warrants allowing Plaintiff to avoid the effect of his Settlement Agreement and Release.

The lower court's reliance on *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983) is misplaced for the simple reason that the case does not address Delaware law, but federal law. *Baron* concerns a federal cause of action for proxy fraud under § 14(a) of the Securities Exchange Act and addresses when, under federal law, that federal cause of action would have accrued. *See id.* at 108 (“[T]he question of when a cause of action is so complete that it may be enforced by suit, and thus has accrued, is a federal question.”). *Baron* does not speak, in any way, to the accrual of the state-law causes of action alleged here. More to the point, in rejecting the rule that “violation of a

substantive federal standard, rather than fact of injury, determines the accrual of a direct or derivative action for money damages,” *id.* at 109, the *Baron* court applied the exact opposite of the Delaware rule for fiduciary duty claims: Delaware claims do accrue with the violation of the substantive legal standard (*i.e.*, the “wrongful act”), not with the injury. *See, e.g., Albert*, 2005 WL 1594085 at * 18 (“The court reiterates that a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.”).

Likewise, *Dofflemeyer v. W. F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983), provides no support to the trial court’s Order because the district court in that case based its reasoning explicitly on the assumption that the plaintiffs’ claim could not accrue until the plaintiffs had suffered injury. *See id.* at 379 (“until [merger was consummated] the transaction which was the subject of the suit was not accomplished and there had been no injury”). Again, that statement on its face contradicts more recent Delaware Supreme Court and Chancery Court decisions, which provide the controlling law here, and, as shown above, reject any notion that damages or injury are necessary before a claim accrues. *See Albert*, 2005 WL 1594085 at *18. Consequently, neither *Dofflemeyer* nor *Baron* would be viewed by the Delaware courts as persuasive or binding authority on this question. *See Anglo American Sec. Fund, L.P. v. S.R. Global Int’l Fund, L.P.*, No. 20066-N, 2006 WL 1494360, at *3 (Del. Ch. May 24, 2006) (“federal decisions are not persuasive or binding” where federal law provides for a different rule from the one provided by Delaware law).

Finally, the court's reliance on *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982) is unavailing because the case did not concern a negotiated merger, as this case does, but rather a tender offer. As the name suggests, a tender offer is just that—an offer.¹⁰ Thus, in *Kaufman*, there was no transaction at all until the tender offer succeeded (*i.e.*, was accepted by the stockholders), and the ongoing offer was deemed a “continuing wrong.” *Id.* at 764 (“The alleged wrong was therefore a continuing wrong. . . .”). Here, by contrast, the complete merger terms were settled by agreement and approved by the Defendants before the merger was put to the stockholders for its technical consummation. In these circumstances, Delaware law is clear that there is not a continuing wrong. *See Brown*, 1982 WL 8782 at *2 (holding that, in claims challenging terms of a merger, it is the fixing of the merger terms that gives rise to the action, not the consummation of the merger, and “there is no continuing wrong”).

In weighing these three decisions (all from the early 1980s and only one of them actually a Delaware state court case) against the numerous current decisions that the Defendants have presented, it is telling to examine how the *Folk* treatise, the leading

¹⁰ Tender offers and negotiated mergers are not equivalents under Delaware law. *See, e.g., In re Pure Resources, Inc.*, 808 A.2d 421, 437 (Del. Ch. 2002) (noting that tender offers are not addressed by the Delaware General Corporation Law); *Solomon v. Pathe Comms. Corp.*, 672 A.2d 35, *39 (Del. 1996) (explaining that the fairness of certain tender offers is evaluated by a different standard than that applied to “cash-out mergers”). In *Kaufman*, because the transaction took the form of a tender offer, the target company's board did not appoint a special committee or negotiate terms with the acquirer (as here), but rather merely voted to recommend that stockholders accept a tender offer—advice the stockholders were free to follow or ignore. *Kaufman*, 447 A.2d at 762.

treatise on Delaware corporate law, has changed its language over time. In the 1967 edition, as cited by the *Kaufman* court, *Folk* explained that “[i]f the action complained of requires stockholder approval, the transaction is not considered complete until the stockholders have approved.” See *Kaufman*, 447 A.2d at 764. Today, however, the *Folk* treatise no longer contains that statement. Rather, keeping pace with the more recent Delaware precedents that Defendants have cited, the 2006 edition of *Folk* explains that (a) it is the specific wrongful acts, and not the effect, that determine when a claim accrues, and (b) Delaware law has held a proposed merger to be consummated upon the fixing and announcement of its terms, without waiting for subsequent stockholder approval:

Generally, the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt. Therefore the circumstances of the case will determine whether the transaction is executed or continuing. For instance, an offer made by the corporation to certain of its stockholders to exchange one class of stock for another, which was specifically conditioned on approval by the corporation’s other stockholders, was held not to be completed until stockholder approval was obtained. On the other hand, both a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and not to be continuing transactions up to the time of stockholder approval.

Folk § 327.3 (emphases added).

The *Folk* treatise elucidates the error of the trial court. Relying solely on these three early 1980s decisions, the lower court here simply ignored more recent Delaware precedent and the changes to the *Folk* treatise on Delaware Corporate law. There was no attempt by the lower court to distinguish or explain these more recent Delaware court

decisions or to explain how the lower court's decision could be reconciled with the 2006 edition of the *Folk* treatise. By accepting Plaintiff's invitation to rely on outdated, superseded, or otherwise irrelevant decisions, the trial court ignored the current status of Delaware law, which holds that Plaintiff's claims accrued at the time that Defendants fixed the terms of the merger by approving the merger agreement on August 29, 2006, nearly a month before Plaintiff agreed to surrender "all claims" through the Release.

III. THIS COURT HAS JURISDICTION TO REVIEW AND REVERSE THE DENIAL OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS OR ALTERNATIVELY FOR SUMMARY JUDGMENT.

For all the reasons just discussed, this Court should reverse the legal conclusion reached by the trial court when it determined that Plaintiff's Delaware law claims had not accrued by the time Plaintiff signed the Release and that the Release did not bar Plaintiff from bringing his current claims. Reversing that legal determination would reinstate Defendants' counterclaim for breach of the Release provision and their affirmative defenses based on the Release, the two rulings that the Court of Appeals allowed Defendants to challenge in its April 29, 2009 order construing S.C. Code Ann § 14-3-330(2)(c). But the Court should also take the opportunity to reverse the trial court's denial of Defendants' Motion for Judgment on the Pleadings, or Alternatively, for Summary Judgment. Despite the statement in the April 29 order purporting to confine the issues on appeal, well-established principles of South Carolina law confer jurisdiction on this Court to reach all rulings made in the trial court's Order. *See Jean Hoefer Toal et al., Appellate Practice in South Carolina* 88 (2d ed. 2002) ("Where there is a single order

that is admittedly appealable in part, the entire order should be considered upon the appeal.”). Because the denial appears in the same order which contains an appealable issue and turns on the same pure issue of law as the rulings this Court has reviewed, this Court’s decision will logically and necessarily determine Defendants’ motion for judgment.

First, a single pure question of law controls all three rulings in the trial court’s Order. In its February 17, 2009 Order, the trial court decided just one issue. It determined that the Release did not bar Plaintiff’s current claims because those claims did not accrue until the closing of the merger. As the logical consequence of that decision, the court (1) dismissed Defendants’ counterclaim for breach of the Release provision, (2) struck their affirmative defenses of release and accord and satisfaction, expressly based on the Release, and (3) denied Defendants’ Motion for Judgment, which was founded entirely on the preclusive effect of the Release. The trial court recognized that the counterclaim, affirmative defenses, and motion for judgment all rose or fell together, based on the controlling and purely legal issue of when Plaintiff’s claim arose or accrued under Delaware law. Consequently, this Court’s decision on appeal will logically and necessarily determine Defendants’ motion for judgment as well.

Second, numerous cases confirm this Court’s authority to accept jurisdiction over non-appealable rulings where other, admittedly appealable issues are before the Court. *See, e.g., Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (“An order that is not directly appealable may be considered if there is an

appealable issue before the court.”); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 98 (2002) (“This Court reviews interlocutory orders when they contain other appealable issues.”); *Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (stating an appellate court “may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation”); *Briggs v. Richardson*, 273 S.C. 376, 379, 256 S.E.2d 544, 546 n.1 (1979) (noting that “[w]hile not normally appealable, this issue is before the Court due to the appealability of the first issue.”); *Rice Hope Plantation v. South Carolina Public Serv. Auth.*, 216 S.C. 500, 511, 59 S.E.2d 132, 135-36 (1950) (“We have here a single order from a part of which an appeal admittedly will lie, but it is manifest that the entire order should be considered upon this appeal; and the cases cited are sufficient to support this conclusion.”), *overruled on other grounds by McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Pitts v. Jackson Nat’l Life Ins. Co.*, 352 S.C. 319, 338, 574 S.E.2d 502, 511-12 (Ct. App. 2002) (holding that “[g]enerally, the denial of a motion for summary judgment is not immediately appealable. However, we have recently recognized an exception to this rule. Specifically, the courts have made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable”); *Cox v. Woodmen of World Ins. Co.*, 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (considering appeal from the denial of motion to dismiss because “an order that is not directly appealable will be considered if there is an appealable issue before the Court”);

SE. Hous. Found. v. Smith., Op. No. 02-CP-06-314 (S.C. Ct. App., Dec. 12. 2008) (Shearouse Adv. Sh. No. 47 at 27) (“Court may review an interlocutory order when the order is coupled with an appealable issue.”).

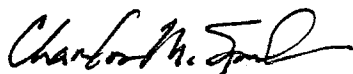
Here, the three rulings at issue are not simply part of the same Order, they are based on precisely the same legal determination regarding the scope of the Release and the accrual of Plaintiff’s claims under Delaware law. In such circumstances, addressing now the trial court’s erroneous denial of Defendants’ motion would serve the ends of judicial economy. *See, e.g., Madison v. Babcock Ctr., Inc.*, 371 S.C. 123, 148, 638 S.E.2d 650, 663 (2006) (holding that “we will address this issue to avoid future debate and confusion about it”); *Jeter v. S.C. Dep’t of Transp.*, 369 S.C. 433, 441, 633 S.E.2d 143, 147 n.6 (2006) (addressing issue regardless that it may not have been appealable “in the interest of judicial economy”); *Ex parte Wilson*, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005) (addressing issue in the interest of judicial economy though not immediately appealable); *Edge*, 366 S.C. at 517, 623 S.E.2d at 390 (finding resolution of partial denial of motion to dismiss was proper when it was coupled with appeal from partial grant of motion to dismiss because resolution of both was “in an effort to avoid another appeal in the future and potentially narrow the issues for trial (*i.e.* judicial economy)”); *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) (holding “an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.”).

Third, it is well settled that when the lower court has made an erroneous ruling as a matter of law, the appellate court may not only reverse, but can direct the lower court to enter judgment as a matter of law in favor of the appealing party. For example, in *Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005), the defendant asserted an affirmative defense that the plaintiff's claims were barred under a release executed by plaintiffs. The lower court granted plaintiff summary judgment on the defendant's release defense based on a legal determination that the claims asserted in the suit were not covered by the terms of the release. The Court of Appeals disagreed with the lower court's legal conclusion, finding that the plaintiff's claims were barred by the release. In that case, the Court of Appeals not only reversed the lower court's order that was technically appealable, but remanded the matter to the lower court with the specific direction to enter judgment as a matter of law in favor of the defendant. *Id.* at 429, 626 S.E.2d at 23; *see also, e.g., Campbell v. Hilton Head No. 1 Pub. Serv. Dist.*, 354 S.C. 190, 197, 580 S.E.2d 137, 141 (2003) (reversing the trial court's grant of summary judgment in favor of respondent, and instead finding "summary judgment should have been granted in appellants' favor"). Consistent with *Southern Glass* and other similar cases, this Court is free to decide and dispose of the legal issue that inextricably links all of the rulings in the trial court's Order and to mandate the entry of judgment in favor of Defendants, which is the logically necessary and inevitable result of reversing the trial court's legal determination below.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand with instructions that the circuit court enter judgment in favor of Defendants.

Respectfully submitted,



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October 14, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Edward W. Miller, Circuit Court Judge

C.A. No. 2008-CP-23-2701

Brian P. Menezes Plaintiff/Respondent,

v.

WL Ross & Co., LLC, Wilbur L. Ross, Jr., Michael J.
Gibbons, David H. Storper, David L. Wax, Joseph L.
Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P.,
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October 15, 2009

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STATEMENT OF ISSUES ON APPEAL

Was The Trial Court Wrong in Holding That Respondent's Claim – That It Was A Breach Of Fiduciary Duty for Appellants To Allow The Merger To Close In Light Of FITG's Financial Collapse – Did *Not* Accrue Before The Merger In Fact Closed, And Thus Was Not Subject To The Release He Signed In Another Case Several Weeks Before The Merger Closed?

STATEMENT OF THE CASE

The Complaint in this action was filed on April 9, 2008. It concerns a Merger that occurred on October 20, 2006, in which a North Carolina private company known as International Textile Group, Inc. (hereinafter “former ITG” or “FITG”), merged into a public company then based in Greenville and known as Safety Components International, Inc. (“SCI”). After the merger, the combined company was renamed “International Textile Group, Inc.” (hereinafter “new ITG” or “NITG”). (Compl. ¶¶20, 1 & 10 [R. pp. 11, 6, & 8].) SCI provided consideration worth \$167 million in connection with the Merger. (*Id.* ¶29 [R. p. 13].)

Appellants controlled SCI, owning a 75.6% interest in the company and having four of the five directors on the Board. They also controlled FITG, owning a 85.4% interest in that company and having five of the six directors on the Board. (*Id.* ¶¶7, 9 & 12 [R. pp. 8-9].) Consistent with their ownership of FITG, they received more than \$130 million of the consideration for the Merger they engineered. (*Id.* ¶¶30-31 [R. pp. 13-14].) It was, therefore, a self-dealing transaction and subject to the “entire fairness” standard of review. (*Id.* ¶¶ 97-98 & 103 [R. pp. 28-29].)

Respondent was a minority shareholder in SCI before the announcement of the Merger and has continued to be a minority shareholder in the company (now NITG) since the Merger. (*Id.* ¶4 [R. p. 7].) He alleges that FITG’s business was collapsing financially at the time of the Merger, a fact which was revealed in the NITG 10-K six months after the Merger. (*Id.* ¶50 [R. p. 17].) In the weeks prior to the Merger, FITG is alleged to have been losing “\$1.9 million each week, and more than \$8 million each month!” (*Id.* ¶52, emphasis in original [R. p. 17].) It appeared to have borrowed \$31 million between

September 22, 2006, when the Proxy¹ was issued, and October 20, 2006, when the Merger closed (the “Closing”). (*Id.* ¶65 [R. p. 20].) The equity associated with its business declined from \$123 million at the end of the first half of 2006 to approximately \$80 million at the end of that year. (*Id.* ¶58 [R. p. 19].)

Respondent alleges that Appellants violated their fiduciary duties as the controlling shareholder and officers and directors of SCI by, among other things, “proposing the Merger and then *allowing it to close notwithstanding the financial condition of FITG*” and “*by failing to call off or renegotiating the Merger (or cause it to be called off or renegotiated) because of the financial condition of FITG.*” (*Id.* ¶¶99(a) & (g) & 104(a) & (g), emphasis added [R. pp. 28-30].) He seeks to represent a class composed of the minority shareholders of SCI. (*Id.* ¶89 [R. p. 26].)

In response, Appellants asserted affirmative defenses and a counterclaim and moved for judgment on the pleadings or in the alternative for summary judgment based on a release (the “Release”) that Respondent had executed on September 28, 2006, to resolve a separate lawsuit. That lawsuit was an employment action by Respondent against SCI and its CEO, Appellant Gorga, relating to Respondent’s dismissal without cause from SCI and seeking payment of wages and a declaratory judgment regarding his entitlement to a future bonus. (*See Complaint, Menezes v. Safety Components International, Inc., and Gorga*, C.A. 2006-CP-23-4326 [R. pp. 517-551].) It was resolved by a settlement in which Respondent released all claims he “has had or now has” against

¹ The complete Proxy, dated September 22, 2006, can be found online at: <http://www.sec.gov/Archives/edgar/data/918964/000119312506195834/d424b3.htm> (R. pp. 756-1110).

the “Released Parties”² “up to and including the date of execution hereof [September 28, 2006].” (Release, ¶7 [R. p. 610].) With regard to shareholder claims specifically, the Release stated that it applied to “any claim based upon or as an owner of any stock or interest in any of the Released Parties *arising prior to the execution of this Confidential Settlement Agreement* [September 28, 2006].” (*Id.*, emphasis added.)

Oral argument on the motion took place before Judge Edward W. Miller on July 31, 2008. Multiple supplemental briefs were filed as issues were further fleshed out. On February 17, 2009, the trial court issued an order denying Appellants’ motion. The court wrote:

Plaintiff alleges that the defendants breached their fiduciary duties to the minority shareholders of SCI (including the plaintiff) by allowing the merger to go forward or close. . . .

The pertinent question is whether Plaintiff’s claims regarding the merger accrued when the merger closed on October 20, 2006, as Plaintiff contends, or sometime prior to September 28, 2006, as Defendants argue.

(Order of Feb. 17, 2009, at 1-2 [R. pp. 1-2].)

The court found that there were “extensive conditions precedent to the merger that were not satisfied before the closing date.” Accordingly, Respondent’s claims “accrue[d] no earlier than the closing of the Merger”:

Under controlling Delaware law, these claims accrue no earlier than the closing of the merger. *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982) (claim accrues on closing of merger); *see also Dofflemyer v. W.F. Hall Printing Company*, 558 F. Supp. 372 (D. Del. 1983) (same); *cf. Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105 (3d Cir. 1983) (claim

² “Released Parties” were defined as Gorga and SCI, and “any parent, subsidiary and affiliated person, company, business, entity or enterprise of Gorga and [SCI], along with all current and former officers, directors, agents, employees, insurers, representatives, attorneys, successors, and assigns of the same, which shall also include by way of enumeration but not limitation, [FITG], W.L. Ross & Co. L.L.C., and David L. Wax.” (Release ¶7 [R. p. 610].)

accrues when merger consummated). This is especially true here since there were extensive conditions precedent to the merger that were not satisfied before the closing date. The merger could not have been enforced by FITG against SCI prior to the closing date. As recently re-affirmed by the Delaware Supreme Court, there can be no breach of fiduciary duty claim regarding an underlying contract until the contract is legally enforceable. See *Int'l Bhd. Teamsters v. Coca-Cola Co.*, [954 A.2d 910] (Del. Sup. 2008), *aff'g In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370 (Del. Ch. [Oct. 17,] 2007) (no claim regarding underlying contract until "enforceable legal rights . . . were created.") Accordingly, since FITG had no right to enforce the merger until the closing date, plaintiff's claims for breach of fiduciary duty did not accrue until that date.

(*Id.* at 2 [R. p. 2].)

In addition to denying Appellants' motion, the court, at Appellants' request (Letter, Mabry to Court, Feb. 10, 2006 [R. pp. 750-752]), also struck their affirmative defenses based on the Release and granted Respondent's motion to dismiss their counterclaim based on the Release. (Order at 2 [R. p. 2].)

Appellants' motion for reconsideration was denied on March 4, 2009. (R. p. 3.)

The Notice of Appeal was filed on March 5, 2009. (R. pp. 389-392.)

SUMMARY OF ARGUMENT

The essence of Respondent's claims against Appellants, the officers, directors, and controlling shareholders of SCI, is that they breached their fiduciary duties to him as a minority shareholder by allowing the merger between SCI and FITG to close on October 20, 2006, even though FITG was in disastrous financial condition. As revealed in the 10-K filed six months later, in the period before the merger, FITG was losing "*\$1.9 million each week, and more than \$8 million each month!*" It appeared to have borrowed \$31 million in the month before the merger. Its equity value dropped by more than a third from the end of the first half of 2006 to the end of the second half.

The trial court correctly held that the Release Respondent executed on September 28, 2006, to resolve his employment dispute with SCI had no application to the claims in this action. It applied only to claims that accrued prior to its execution, while the Merger closed more than three weeks after the Release was executed.

Delaware law is clear that a breach of fiduciary duty claim regarding an underlying contract does not accrue until the underlying contract is legally "enforceable." The Merger agreement was not legally "enforceable," as the trial court held, until October 20, 2006, at the earliest because of the conditions precedent which could not have been satisfied before that time. Accordingly, Respondent's claims could not have accrued prior to then. Further, as to the financial conditions in the agreement, they could not have been satisfied at all in light of how FITG was hemorrhaging money. They had to have been waived at the Closing. It is the waiver of those conditions, effectively, that Respondent alleges was a breach of fiduciary duty. That claim, obviously, accrued at the Closing when the conditions were waived.

All three cases addressing the issue of when a breach of fiduciary duty claim regarding a merger accrues hold that the claim accrues at the closing of the merger, as one would expect. The cases cited by Appellants do not address that question but go to the issue of whether a shareholder has “standing.” The sensible rule in Delaware and many other states is that a shareholder who wishes to challenge the terms of a merger cannot purchase his stock after those terms are publicly announced.

Appellants’ “standing” cases (assuming they are relevant here) cannot be interpreted to hold that claims such as Respondent’s accrue before the underlying agreement is “enforceable,” as Appellants argue. To do so (aside from taking them beyond their holdings) would specifically violate long-standing Delaware law. Accordingly, even under those cases, Respondent’s claims could not accrue until the closing of the Merger.

Moreover, under the actual language of those cases, Respondent’s claims would not accrue until the closing of the Merger because closing was not a mere “technicality.” There were serious, fundamental conditions precedent that had to be satisfied (not mere “ministerial” conditions) but were not.

Further, even under those cases, Respondent’s claims would not accrue until the closing of the Merger because he is challenging the *fact* of the Merger (including the waiver of the financial conditions precedent), not merely its *terms*.

Accordingly, the decision of the trial court was exactly correct. It should be affirmed.

ARGUMENT

I. The Trial Court Correctly Held, As All Parties Agreed Below, That The Release Did Not Apply To Claims That Accrued After The Date Of The Release, And Appellants Have Waived Any Argument To The Contrary.

In a clear concession as to the weakness of their main argument, Appellants argue on appeal, *for the first time*, that the Release applies to Respondent's claims even if they accrued on October 20, 2006, because it referenced "contingent" claims. (See App. Brief at 22 ("Assuming that, at the time Plaintiff signed the Release, his claims depended on the occurrence of some future event, the claims were simply contingent and were as effectively surrendered by the execution of the Release as any claim that had fully accrued by then.").)

This argument is without merit for two reasons.

First, to suggest that Respondent's tort claim is "contingent" because the underlying contract was "conditional" makes no sense whatsoever. It would be like saying "John" has a "contingent" tort claim today against "Sam" because "Sam" "may" steal his money next year. If that were the case, then any release that includes the word "contingent" in it (a standard term) would release all claims against the other party for all time, past and future. That is obviously not what releases do. The argument is simply outlandish, which is probably why Appellants did not think of it until now.

Second, because Appellants did not make this argument to the trial court, it has been waived. The issue below was clearly articulated as "whether Plaintiff's claims regarding the merger accrued when the merger closed on October 20, 2006, as Plaintiff contends, or sometime before September 28, 2006, as Defendants argue." (Order at 2 [R.

p. 2].) All parties agreed to the issue as stated. Indeed, Appellants' counsel described the issue in this manner early in his oral argument:

[Appellants' Counsel]: . . . the sole issue for the court is . . . when did the claims alleged in the current complaint accrue under Delaware law? If they accrued or arose prior to September 28th, 2006, which is the date of the Settlement Agreement and Release, then as a matter of law all the plaintiff's claims in this case are barred.

If they did not accrue prior to September 28th, 2006, then we think – logically as a matter of law the Release does not bar these claims.

(Hearing Tr. 7:21-8:4 [R. pp. 558-559].)

And the trial court, after following the oral arguments at length, concisely re-stated the issue and asked all counsel to confirm their agreement on that point:

The Court: Okay. Well, let me – let me just get this straight. Everybody agrees what decides this – whether or not a claim has been waived by the Release or not is the question of when a merger occurs, right? Does everybody agree?

[Respondent's Counsel]: I agree with that.

The Court: And you all say it's when the Boards vote on it? And [Respondent's Counsel] says it's when the thing –

[Appellants' Counsel]: Closes.

The Court: – Closes. Okay. So I just have to –

(Hearing Tr. 46:2-13 [R. p. 597].)

For good measure, Appellants' counsel himself re-stated the issue and his agreement a few minutes later:

[Appellants' Counsel]: . . . I think the issue, and we can agree on this, is when did the claim arise or accrue? And the position of plaintiff is that it happened at closing. And the position of the defendants, it happened when the terms of the merger . . . were fixed and approved by the Board.

(Hearing Tr. 48:9-14 [R. p. 599].)

Further, Appellants did not challenge this statement of the issue in any of their supplemental memoranda on the motion or object to it in the proposed order on Appellants' motion. Nor did Appellants raise the issue in their motion for reconsideration.³

The law is clear that "[a]n issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004); *see also Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (App. 2006) ("Craft failed to raise the estoppel issue before the trial court for a ruling. Accordingly, that issue is not preserved for this court's review."), citing *Ulmer v. Ulmer*, 369 S.C. 486, 491, 632 S.E.2d 858, 861 (2006); *In re Michael H.*, *supra*; *Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006); *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004).

The reason why it was not raised below is almost self-evident. Had Appellants made this argument to the trial court, they could not have taken the position that their motion was purely a matter of law, as was so important to them. Indeed, the matter would have involved highly contested issues of fact regarding the meaning of the Release and the intent of the parties thereto. This is plain from the information concerning the negotiations over the Release provided as background by Appellant's counsel during oral argument. (Hearing Tr. 28:20-31:15 [R. pp. 579-582].)

³ See August 8, 2008, Reply Memorandum in Support of Motion For Judgment On the Pleadings Or, Alternatively, Motion for Summary Judgment (R. pp. 291-342); August 21 Sur-Reply Memorandum In Support of Motion for Judgment On the Pleadings Or, Alternatively Motion for Summary Judgment (R. pp. 367-378); Letter, Mabry to Court, Feb. 10, 2009 (R. pp. 750-752); and Defendants' Motion for Reconsideration of Court's Order Dated February 17, 2009, and Filed February 18, 2009 (R. pp. 379-388).

For example, counsel, who had handled the negotiations of the Release for Respondent, indicated that, in going through the numerous drafts of the Release, he had “wanted to clarify that [Respondent] would keep all claims that he might have as a shareholder just like any other shareholder.” (*Id.* 29:3-5 [R. p. 580].) Initially, that was inserted as a general statement but that was felt to be too “vague.” (*Id.* 29:8 [R. p. 580].) Then it was pointed out, either by him or adverse counsel in the prior case, that the Release “by definition is limited to things prior to it being executed, which was September 28th.” (*Id.* 29:10-13 [R. p. 580].) Respondent’s counsel and adverse counsel had discussed how “the Release just necessarily wouldn’t cover” “any claim related to the merger” since “the merger hadn’t even happened at that point.” (*Id.* 29:14-17 [R. p. 580].)

Respondent’s counsel had required that Paragraph 7(6) of the Release, which had stated originally that the Release applied to “any claim based upon or as an owner of any stock” in SCI be amended to make clear that the Release did not apply to stockholder claims that would arise after the date of the Release. (*Id.* 29:18-30:2 [R. pp. 580-581].) The first modification from adverse counsel provided that the Release would not apply to any claims that arose after Respondent had “received all benefits owed” under the settlement agreement. That was unacceptable since Respondent would be receiving payments for more than a year under the settlement agreement. (*Id.* 30:14-18 [R. p. 581].) Accordingly, Paragraph 7(6) of the Release was changed to its final form to include only shareholder claims “arising prior to the execution of the” Release. (*Id.* 30:19-20 [R. p. 581].) The whole point of this exercise was to assure that claims regarding the Merger were not covered by the Release. (*Id.* 30:21-31:10 [R. pp. 581-582].)

Appellants, having effectively stipulated below that the Release does *not* apply to post-Release claims (claims after September 28, 2006) cannot now argue to the contrary. Indeed, the trial court's decision effectively embodies a "finding of fact," based on Appellants' stipulation, that the Release does not apply to claims that accrued after September 28, 2006. For the reasons explained by Respondent's counsel for the trial court, as discussed above, that is the appropriate finding.

II. The Trial Court Correctly Held That Respondent's Breach Of Fiduciary Duty Claims Did Not Accrue Before The Closing Of The Merger On October 20, 2006, Well After The Release Was Executed On September 28, 2006.

A. The General Principles Of Claim "Accrual" Under Delaware Law.

There is nothing particularly unusual about Delaware's law on the accrual of tort claims. The long-standing principle is that such claims "accrue at the time of *the injury*." *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. Ct. 1969) (emphasis added) ("A cause of action for breach of contract accrues at the time of the breach and a cause of action in tort accrues at the time of the injury."); *see also, e.g., Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831 (Del. 1992) ("A cause of action in tort accrues at the moment when "an injury, although slight, is sustained in consequence of the wrongful act of another...."); *Krahmer v. Christie's Inc.*, 903 A.2d 773 (Del. Ch. 2006) ("For tort claims, a cause of action accrues at the time of the injury."); *State ex rel. Secretary of Dept. of Transp. v. Regency Group, Inc.*, 598 A.2d 1123, 1128 (Del. Super. 1991) ("Tort actions accrue at the time of injury."); *City of Newark v. Edward H. Richardson Associates, Inc.*, 375 A.2d 475, 476 (Del. Super. 1977) ("It has been held repeatedly that tort actions accrue at the time of the injury and that the statute of limitations begins to run at that time."); *Freedman v. Beneficial Corporation*, 406 F.

Supp. 917 (D. Del. 1975) (“Causes of action sounding in tort, such as this one, accrue at the time of injury.”); *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 425 (Del. Super. 1971) (citing *Nardo*).

Indeed, while in a contract case it is the “breach” which is the wrongful act, in a tort case it is the “injury” that is the “wrongful act.” *Bilinski v. Farmers Bank of State*, 1982 WL 172848, *2 (Del. Super. Nov. 9, 1982) (“In Delaware it is well settled that the limitations period begins to run at the time of the wrongful act. . . . A cause of action for breach of contract accrues at the time of the breach and a cause of action in tort accrues at the time of injury.”)

B. Under These Principles of Delaware Law, As Shown By The Coca-Cola Case From The Delaware Supreme Court, A Fiduciary Duty Claim That Relates To An Underlying Contract Accrues When The Contract Becomes *Legally Enforceable*.

It would seem plain from these principles of Delaware (and general) law that a breach of fiduciary duty claim relating to an underlying contract would not accrue until the underlying contract becomes legally enforceable. It would be an enormous waste of judicial resources to allow litigation of “hypothetical” matters, matters that may or may not occur. *See Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105, 109 (3d Cir. 1983) (“the necessary effect of the trial court’s confusion of the separate issues of accrual and tolling would be to encourage lawsuits which in many instances would be premature”).

This principle is confirmed in the recent Delaware Supreme Court decision in *Int’l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008), *affirming In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370 (Del. Ch. Oct. 17, 2007). That case involved a “Master Bottle Contract” between the Coca-Cola Company and one of its distributors that

had been entered into in 1986. The plaintiffs were complaining “about the painful effects of the terms of the 1986 MBC” 2007 WL 3122370 at *4. There were apparently no conditions precedent to performance of the contract and thus no “closing” after it was signed. “Execution” and “closing” were one and the same. The court, relying on *Kahn v. Seaboard Corporation*, 625 A.2d 269 (Del. Ch. 1993), held that the wrong “occurred at the time that enforceable legal rights [in the 1986 MBC] . . . were created.” 2007 WL 3122370 at *5 (quoting *Kahn*, 625 A.2d at 271). Accordingly, the plaintiff’s claims accrued in 1986 when the MBC contract had been entered into since that was when “enforceable legal rights . . . were created.”

To fully understand this principle, it is helpful to look at the *Kahn* decision. *Kahn* was a derivative action against the controlling stockholder and three members of the board of Seaboard Corporation. The alleged wrong was the defendants’ use of their control over Seaboard to cause it to enter into a ten-year lease contract that was detrimental to it and beneficial to them. As in *Coca-Cola*, there were apparently no conditions precedent to performance of the contract, no “closing” after it was signed, and “execution” and “closing” were one and the same. The defendants argued that the claims were barred by the statute of limitations. The court held that the wrong “occurred at the time that enforceable legal rights against Seaboard [under the lease contract] were created.” 625 A.2d at 271. Accordingly, since the lease contract had been immediately enforceable, the claims had accrued when it was entered into in 1986 and were time-barred.

Appellants’ have no real answer to *Coca-Cola* and *Kahn* except to perversely argue that these cases actually support their position! And at first blush, before reaching

the “enforceable legal rights” language, this may even seem true. For this obvious reason, Appellants argued those cases to the trial court without revealing this basis for the holding. (Hearing Tr. 14:10-15:19 [R. pp. 565-566].) At this point, however, Appellants have no choice but to face and attempt to explain away the “enforceable legal rights” language. But they cannot explain it away.

In straining to do so, they argue that the “enforceable legal rights” at issue in *Coca-Cola* are not the rights of another party to the underlying contract to enforce that contract but the rights of the plaintiff in the later lawsuit (that it was a breach of fiduciary duty to enter into that contract) to bring that suit. They assert that the “the critical question regarding the application of the Release signed by Plaintiff is not whether FITG had legally enforceable contract rights against SCI, but whether Plaintiff, as a minority shareholder, had legally enforceable rights against Defendants as his fiduciaries for breach of their duties related to the merger.” (App. Brief at 38.)

This argument is completely circular (aside from ignoring the facts of *Coca-Cola* and *Kahn* showing the “enforceable legal rights” at issue in those cases were the rights of the other parties to the underlying contracts to enforce them). Effectively, Appellants are arguing that, under *Coca-Cola* and *Kahn*, Respondent’s claims accrued when he had “enforceable legal rights” to assert those claims. In other words, Appellants are saying that under *Coca-Cola* and *Kahn*, Respondent’s claims accrued when they accrued! This argument makes *Coca-Cola* and *Kahn* nullities. It makes no sense whatsoever.⁴

⁴ A similar argument was rejected by the Delaware Chancery Court in *Bren v. Capital Realty Group Senior Housing, Inc.*, 2004 WL 370214, *4 (Del. Ch. Feb. 27, 2004). There, a noteholder was suing the general partner of a partnership for failing to prosecute a claim regarding a contract that had been breached long before. The noteholder alleged that the general partner had committed a breach of fiduciary duty by

Coca-Cola and *Kahn* simply cannot be explained away by Appellants. And under those cases, as the trial court held, there can be no claim that it was a breach of fiduciary duty for a board to authorize entry into a contract before that contract became legally “enforceable.” Indeed, if Appellants’ theory were correct, the breach of fiduciary duty claims in *Coca-Cola* and *Kahn* would have accrued even earlier, when the defendants in each case *authorized* entry into the contracts at issue. In fact, this is exactly how Appellants presented the holding to the trial court below. At the hearing on the motion, Appellants’ counsel represented that *Coca-Cola* had held that that claim accrued from the “*approving* [of] the terms of the agreement.” (Hearing Tr. 15:16-19 [R. p. 566].) That representation to the court was flatly wrong. *Coca-Cola* held that the claim accrued when “enforceable legal rights” were created in the underlying contract, not when the contract was “approved.”

The same is true for *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004), which Appellants also claim supports their argument. That case involved Wal-Mart’s purchase of various life insurance (“COLI”) policies between 1993 and 1995. The company alleged that the defendants failed to disclose material facts and risks of the plan to purchase the COLI policies. *Id.* at 317. As in *Coca-Cola* and *Kahn*, there were apparently no conditions precedent and no “gap” between the “execution” of the contracts and the “closing.” The court held that Wal-Mart’s claim had accrued when it purchased the COLI policies, which would have been the point at which those contracts

failing to prosecute the breach of contract claim. He alleged that his claim did not accrue until there was a breach of fiduciary duty as to him (essentially Respondents’ argument here with respect to *Coca-Cola*) which he claimed was when the statute of limitations as to the underlying contract claim expired. The court rejected his “novel” theory and held that the claim accrued when the underlying contract had been breached. *Id.* (See also discussion of *Bren*, *infra*, at note 9.)

were enforceable against it. Again, as in *Coca-Cola*, it is noteworthy that the court did not hold, as would be expected if Appellants' theory were valid, that the claim accrued even earlier when the defendants had received proposals from various insurance companies and recommended that Wal-Mart purchase the COLI policies of AIG and Hartford. 860 A2d. at 315.⁵

Since, as shown in the next section, the Merger Agreement did not become "enforceable" until the Closing date, as the trial court found, Respondent's claims could not have accrued until that time.

C. Under *Coca-Cola*, Respondent's Claims Could Not Have Accrued Prior To The Closing Since the Merger Agreement Was Not Legally Enforceable Until That Time.

The Merger Agreement, as one might expect for a \$167 million deal, was long and detailed, over fifty single-spaced pages. (Proxy, Annex A [R. pp. 1035-1090].) The "conditions precedent" section alone was several single-spaced pages long. (*Id.*, Annex A at A34-A36 [R. pp. 1072-1074].) The conditions were so important that they were separately summarized in the main body of the Proxy. The summary itself was more than two single-spaced pages long. Since it so important, it is, with apologies to the Court, quoted in full here:

⁵ Appellants also cite *Marvel Enter. Group, Inc. v. Mafco Holdings, Inc. (In re Marvel Enter. Group, Inc.)*, 273 B.R. 58 (D. Del. 2002), as supporting their theory. Again, as with *Coca-Cola*, *Kahn*, and *Wal-Mart*, Appellants have the import of the case backwards. The relevant claim there was based on the terms and conditions of a tax sharing agreement. It was alleged that the defendant parent company and directors breached their fiduciary duty by causing the defendant's subsidiary to enter into that agreement with the parent company. The court held that the claim accrued when the contract was adopted. *Id.* at 73. This is consistent with *Coca-Cola* since that was the point in time when it became enforceable. If Appellants' theory were correct, as with *Coca-Cola*, *Kahn*, and *Wal-Mart*, the claim would have accrued even earlier, when the defendant-directors voted to *authorize* the company to enter into the tax sharing agreement.

Conditions Precedent

Conditions to Each Party's Obligation To Effect the Merger

The respective obligation of each party to effect the merger is subject to the satisfaction or waiver on or prior to the **Closing Date** of the following conditions:

- *ITG stockholder approval of the merger agreement and the merger shall have been obtained;*
- *SCI stockholder approval to adoption of the Amended and Restated Certificate of Incorporation of SCI shall have been obtained;*
- any waiting period (and any extension thereof) applicable to the merger under the HSR Act shall have been terminated or shall have expired;
- *no Restraints (as defined in the merger agreement) shall be in effect, and there shall not be pending any suit, action, proceeding or investigation by any governmental entity (i) seeking to prevent or delay consummation of the merger or any material part of the transactions, or that is reasonably likely to require any material divestiture of the business of ITG or SCI or (ii) which otherwise is reasonably likely to have a material adverse effect on ITG or SCI, as applicable; provided, however, that each of the parties shall have used its reasonable efforts to prevent the entry of any such Restraints and to appeal as promptly as possible any such Restraints that may be entered;*
- the registration statement on Form S-4 shall have become effective under the Securities Act and shall not be the subject of any stop order or proceedings seeking a stop order and, if the issuance of SCI common stock in connection with the merger is subject to the state securities or "blue sky" laws of any state, shall not be subject to a stop order of any state securities commissioner;
- *the parties shall have obtained any and all permits, authorizations, consents, waivers, clearances or approvals required under contracts or agreements or otherwise required for the lawful consummation of the merger and the consummation of the transactions contemplated by the merger agreement, and all such permits, authorizations, consents, waivers, clearances or approvals shall be in full force and effect, in each case, with such exceptions as would not, individually or in the aggregate, be reasonably likely to have a material adverse effect on ITG or SCI, as applicable; and*

- appraisal rights pursuant to Section 262 of the DGCL shall have not have been exercised in connection with the merger in respect of more than 365,850 shares of ITG common stock.

Conditions to Obligations of SCI and SCI Merger Sub

The obligations of SCI and SCI Merger Sub to effect the merger are further subject to satisfaction or waiver of the following conditions:

- *the representations and warranties of ITG set forth in the merger agreement (without giving effect to any qualifications contained therein as to materiality or material adverse effect) shall be true and correct as of the **Closing Date** as if made at and as of such time, with only such exceptions to be true and correct as would not, individually or in the aggregate, reasonably be expected to result in a material adverse effect with respect to ITG, and ITG shall have delivered to SCI a certificate to such effect signed on behalf of ITG by an executive officer of ITG and dated as of the **Closing Date**;*
- *ITG shall have performed in all material respects all obligations required to be performed by it under the merger agreement at or prior to the **Closing Date**, and ITG shall have delivered to SCI a certificate to such effect signed on behalf of ITG by an executive officer of ITG and dated as of the Closing Date;*
- *the opinion of RSM EquiCo Capital Markets LLC, financial advisor to the SCI Special Committee, shall not have been withdrawn or changed in a manner adverse to SCI;*
- SCI shall have received an affidavit of ITG certifying that it is not a United States real property holding corporation under Section 897 of the Code;
- *there shall have been no changes, other than changes contemplated by the merger agreement, in the business, operations, condition (financial or otherwise), assets or liabilities of ITG and its subsidiaries (regardless of whether such events or changes are inconsistent with the representations and warranties of ITG set forth in the merger agreement) that, individually or in the aggregate, has had or would reasonably be expected to have a material adverse effect with respect to ITG; and*
- *the Escrow Agreement shall have been duly executed by the parties thereto.*

Conditions to Obligations of ITG

The obligation of ITG to effect the merger is further subject to satisfaction or waiver of the following conditions:

- *the representations and warranties of SCI and SCI Merger Sub set forth in the merger agreement (without giving effect to any qualifications contained therein as to materiality or material adverse effect) shall be true and correct as of the **Closing Date** as if made at and as of such date, with only such exceptions to be true and correct as would not, individually or in the aggregate, reasonably be expected to result in a material adverse effect with respect to SCI, and SCI shall have delivered to ITG a certificate to such effect signed on behalf of SCI by an executive officer of SCI and dated as of the **Closing Date**;*
- *SCI and SCI Merger Sub shall have performed in all material respects all obligations required to be performed by them under the merger agreement at or prior to the **Closing Date**, and SCI shall have delivered to ITG a certificate to such effect signed on behalf of SCI by an executive officer of SCI and dated as of the **Closing Date**;*
- *the opinion of Sun Trust Robinson Humphrey to the ITG Special Committee shall not have been withdrawn or changed in a manner adverse to ITG;*
- *the SCI Charter Amendment shall have been duly filed with the Delaware Secretary of State and shall be in full force and effect;*
- *there shall have been no changes, other than changes contemplated by the merger agreement, in the business, operations, condition (financial or otherwise), assets or liabilities of SCI and its Subsidiaries (regardless of whether such events or changes are inconsistent with the representations and warranties of SCI set forth in the merger agreement) that, individually or in the aggregate, has had or would reasonably be expected to have a Material Adverse Effect with respect to SCI; and*
- *the Escrow Agreement shall have been duly executed by the parties thereto.*

(Proxy at 82-83, emphasis added [R. pp. 850-851]; see also Merger Agreement, Proxy at A34-A36 [R. pp. 1072-1074].)

Further, apart from the explicit conditions precedent, the transaction was subject to multiple termination events, any one of which could have killed it. For example, it

could be terminated by “mutual agreement” of SCI and ITG, which meant that it could be terminated by Appellants at any time since they controlled SCI and ITG. It could be terminated by either party “if the merger shall not have been consummated by March 31, 2007.” It could be terminated by either party if SCI had not amended its certificate of incorporation or ITG stockholders had not approved the merger agreement by March 31, 2007. And it could be terminated by either party if the other “breached or failed to perform” in any “material respect” any of the representations or warranties and the failure had not been cured in thirty days of written notice. (Proxy at 83-84 [R. pp. 851-852].)

Accordingly, it cannot be seriously disputed, as held by the trial court, that the Merger was subject to “extensive conditions precedent.” (Order at 2 [R. p. 2].) For example, approval had to be obtained from FITG shareholders. SCI shareholders had to approve the amendment to its certificate of incorporation.⁶ The representations and warranties as to the businesses had to be true as of the Closing date. There had to be no material adverse changes as of the Closing date in either company and the fairness opinions could not have been withdrawn (both key provisions in light of how FITG was hemorrhaging money at the time of the merger⁷). Further, the Escrow Agreement through which the Merger would be accomplished had to have been duly executed.

⁶ The SCI annual shareholder meeting to adopt the required amendments to its certificate of incorporation was not even scheduled to occur until October 20, 2006. (See Proxy at viii [R. p. 763].)

⁷ The Complaint alleges that FITG was in disastrous financial condition at the time of the Merger, as revealed in the NITG 10-K six months after the Merger. At the time of the Merger, it was losing nearly \$2 million a week and \$8 million a month; it appeared to have borrowed \$31 million in the *four weeks* between the issuance of the Proxy on September 22, 2006 and the Merger on October 20, 2006; and the equity associated with its business declined from \$123 million at the end of the first half of 2006 to approximately \$80 million at the end of that year. (Complaint ¶¶50, 52, 65, & 58 [R. pp. 17 & 19-20].)

And it cannot be seriously disputed that these were fundamental conditions to the merger and not mere “technicalities.” Indeed, the whole point, for example, of the representations and warranties and the “no material adverse effect”⁸ clauses in mergers is to ensure that a merger partner’s business remains essentially the same when the merger takes place as when it was agreed to. And proposed mergers are cancelled or go “bust” all the time when that does not happen. Indeed, the financial press make something of a “sport” of tracking this. (See, e.g., “Buyouts Gone Bust,” Ex. A to Pltf’s 2nd Mem. In. Opp. To Defs’ Mot. To Dismiss [R. pp. 363-366].) It is highly likely that a sophisticated New York LBO firm such as Appellant W.L. Ross & Co. has cancelled many deals for these reasons.

Notwithstanding these facts, Appellants suggest that the Closing of the Merger was a mere “formality.” To support that argument, which certainly gets no support from the Merger agreement itself (Proxy, Annex A [R. pp. 1035-1090]), Appellants point to Respondent’s allegation in Paragraph 22 of the Complaint (R. p. 11) that “[t]he approval process [for the Merger] was a formality.” (App. Brief at 8, 23 n.1, & 36.) However, that allegation says nothing about the satisfaction of the conditions other than approval. It

⁸ The Merger agreement (Proxy, A-46 [R. p. 1084]) defines this term as follows:

“Material Adverse Effect” means, when used in connection with ITG or SCI, any change, effect, event, occurrence or state of facts (i) that is materially adverse to the business, operations, conditions (financial or otherwise), assets or liabilities of such party (or the Surviving Corporation when used with respect to ITG) and its Subsidiaries, taken as a whole, or (ii) preventing or materially delaying the consummation of the Merger, other than any change, effect, event, occurrence or state of facts (x) relating to the economy in general which does not have a disproportionate impact on such party or (y) relating to the industries in which such party operates in general and not specifically relating to such party”.

says nothing, for example, about the critical requirement that the representations and warranties continue to be true and accurate and that there be no “material adverse effect[s]” on FITG’s business. Indeed, that is not even part of the “approval process” referenced in Respondent’s allegation. Moreover, the allegation itself refers only to the “approval process” as being a “formality” from the perspective of the minority shareholders who had no say in anything and “no ability to stop the Merger had they wanted to.” (Compl. ¶24, *see also* ¶¶22-23 [R. pp. 11-12].) Respondent certainly did not allege that the conditions precedent to the Merger closing did not have to be satisfied for the agreement to be enforceable. As noted above, the satisfaction of the conditions was a fundamental requirement for the Merger to go forward.

Further, it simply cannot be seriously disputed that, under Delaware law, until all of the conditions precedent in the Merger agreement were satisfied, the Merger was not legally “enforceable.” The Delaware Supreme Court has recently made this point very plainly: a “merger agreement” only becomes “binding and mutually enforceable” when “the conditions of the agreement [are] met.” *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1034-35 (Del. 2004), quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 2003 WL 203060 (Del. Ch. Jan. 21, 2003) (“Second, any contractual shareholder right to payment of the merger consideration did not ripen until the conditions of the agreement were met. . . . The merger agreement only became binding and mutually enforceable at the time the tendered shares ultimately were accepted for payment by Credit Suisse Group. It is at that moment in time, November 3, 2000, that the company became bound to purchase the tendered shares, making the contract mutually enforceable.”); *see also Weiss v. Northwest Broadcasting Inc.*, 140 F. Supp. 2d 336 (D.

Del. 2001) (“As a general matter, a condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.”), *citing Gilbert v. El Paso Co.*, 575 A.2d 1131, 1142 (Del. 1990).

In this respect, the merger transaction was much like a contract to purchase a house. Such a contract is not “enforceable” until all the conditions to closing are satisfied (financing, home inspection, termite letter, etc.) and the closing date has come and gone.

Hence, as *Coca-Cola* and *Kahn* instruct and as the trial court held, Respondent’s breach of fiduciary duty claims concerning the Merger did not accrue prior to the Closing and, therefore, the Release was irrelevant.

D. Every Case To Address The Issue of Claim Accrual In The Context Of A Merger Has Held That Such Claims Accrue Upon The Closing Of The Merger, Just As *Coca-Cola* Dictates.

As the discussion of *Coca-Cola* above shows, under Delaware law Respondent’s claims could not have accrued prior to the Closing date because the underlying Merger Agreement was not “enforceable” before that time. Contrary to the implication of Appellants’ memorandum, all three cases to address this issue (all cited by Judge Miller) have reached this conclusion. *See Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982); *Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105 (3d Cir. 1983); and *Dofflemyer v. W.F. Hall Printing Company*, 558 F. Supp. 372 (D. Del. 1983). Revealingly, Appellants did not disclose any of these cases to the trial court in connection with their motion. (Hearing Tr. 31:20-23 [R. p. 582].)

The first case, *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), like this case, involved the question of whether a claim of breach of fiduciary duty ("corporate waste" in that context) accrued when the merger was approved by the board or when it was consummated. The point was important because of the effective date of a statute by which plaintiff had accomplished service. If the claim arose when the merger had been approved, it predated that statute and service was ineffective (and impossible). If it arose after the effective date of the statute, service was effective.

The Delaware Chancery Court held that the claim accrued when the transaction closed. It had "commenced with the adoption of the two resolutions on August 22, 1977 [by the board authorizing the merger], but was not consummated until October 2, 1977 [when sufficient shares were tendered and the merger was successfully concluded]." 447 A.2d at 764. Accordingly, it had accrued after the effective date of the statute regarding service of process, and service was therefore effective.

The United States Court of Appeals for the Third Circuit (which covers Delaware) addressed the same question in *Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105 (3d Cir. 1983). The court of appeals held that a shareholder action based on false and misleading materials effecting a merger accrued when the merger was consummated and not earlier when the shareholder had knowledge of the falsity. While plaintiff's claim was based on federal law, the court noted that it was "in the nature of" an action for "damages for breach of fiduciary duty" under Delaware law and analyzed it as such. *Id.* at 108. Moreover, the court's opinion as to when the claim accrued was premised on a "rule of general application" which, it held, Delaware "*adheres to.*" *Id.* at 108. The court wrote:

It is a rule of general application that a cause of action for the recovery of damages accrues only when it could be prosecuted to a successful

conclusion. *E.g.*, *United States v. Wurts*, 303 U.S. 414, 418, 58 S. Ct. 637, 82 L. Ed. 932 (1938)[]; *Grayson v. Harris*, 279 U.S. 300, 304-05, 49 S. Ct. 306, 73 L. Ed. 700 (1929); *City of Philadelphia v. Lieberman*, 112 F.2d 424, 428 (3d Cir.1940). Delaware, whose statute of limitations governs, adheres to that rule. "A cause of action for breach of contract accrues at the time of the breach and a cause of action in tort accrues at the time of the injury." *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. Ct.1969). The state recognizes "the basic rule that, in general, the statute of limitations begins to run from the date of the injury caused by the defendant" *Lembert v. Gilmore*, 312 A.2d 335, 337 (Del. Super. Ct. 1973). The United States District Court in Delaware has consistently recognized as much. *Rose Hall, Ltd. v. Chase Manhattan Overseas Bank*, 494 F. Supp. 1139, 1157 (D. Del.1980); *Oliver B. Cannon & Son, Inc. v. Fidelity & Casualty Co.*, 484 F. Supp. 1375, 1388 (D. Del. 1980); *Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 922 (D. Del.1975).

Id.

In the third case precisely on point, *Dofflemyer v. W.F. Hall Printing Company*, 558 F. Supp. 372 (D. Del. 1983), the merger had been approved by the defendant directors on November 27, 1978. The approval was followed on January 29, 1979, by the distribution of a proxy statement to the shareholders. The merger was approved by shareholder vote and became effective on February 21, 1979. *Id.* at 375. Like Appellants here, the defendants argued that the breach of fiduciary duty claims accrued when the board approved the merger agreement and not when the merger was consummated.

The Delaware district court disagreed. It held that the claim accrued when the merger closed since "the merger transaction which is the subject of this suit was not accomplished and *no injury occurred* until the merger was effected." *Id.* at 379 (emphasis added). As the court noted, "[i]t is a basic principle of limitations law that a cause of action does not accrue before the right to institute suit arises." *Id.* (citing C.J.S., *Limitations of Actions*, §109.) The court then observed that "[t]he plaintiffs could not have sued for damages until the merger was actually accomplished – until that time, they had *suffered no injury by the defendants' acts*," *Id.* (emphasis added). Since they had not

suffered any *injury* until the merger was consummated, their claim did not accrue until then.

Dofflemyer is doubly persuasive since as recently as 2004 it was cited approvingly by the Delaware Court of Chancery for this exact point. *Bren v. Capital Realty Group Senior Housing, Inc.*, 2004 WL 370214, *4 (Del. Ch. Feb. 27, 2004).⁹ Further, *Dofflemyer* was followed in 1997 in yet another case involving Delaware law. *Montgomery v. Aetna Plywood, Inc.*, 956 F. Supp. 781 (N.D. Il. 1997). The question there was whether, under Delaware law, a breach of fiduciary duty claim against a company's directors regarding a stock repurchase accrued at the time of the repurchase or earlier when the board authorized the repurchase. The court, relying on *Dofflemyer* and *Kaufman*, held that the claim "accrued" upon the "consummation of the sale," not at the time of the resolution authorizing it. *Id.* at 787.

Appellants' response to *Kaufman*, *Baron*, and *Dofflemyer* is weak. *Kaufman*, they argue, does not apply since it "did not concern a negotiated merger, as this case does, but rather a tender offer" which does not require board or corporate action. (App. Mem. at 10

⁹ The *Bren* decision is not otherwise similar to our case. As described in footnote 4 above, the plaintiff there was a noteholder who was suing the general partner of a partnership for failing to prosecute a claim regarding a contract that had been breached long before. The noteholder alleged that the general partner had committed a breach of fiduciary duty by failing to prosecute the claim. He alleged that his claim did not accrue until the expiration of the statute of limitations on the underlying breach of contract claim. His theory was that the claim did not "accrue" as to him until he specifically (not the company) was owed a fiduciary duty. In a creative bit of argument, he cited *Dofflemyer* as supporting this "novel" theory. 2004 WL 370214 at *4. The court said that he "read[] too much" into *Dofflemyer*. The *Dofflemyer* decision, it said, held that "plaintiffs could not sue for damages until the merger was consummated. Prior to that time, plaintiffs had suffered no injury from the defendants' acts." The *Bren* court found *Dofflemyer* irrelevant to the issue before it because *Dofflemyer* "focused on when the injury occurred, not when a fiduciary duty arose, for purposes of determining the limitations period." The *Bren* court held that the claim there accrued when the underlying contract had been breached. *Id.*

& n.8.) Appellants overlook the fact that the merger in *Kaufman* was agreed to and approved by the defendant-directors. As the court notes, the directors received and “reviewed the terms of a proposed tender offer,” “determined that the price was fair and voted unanimously to recommend [it] to all stockholders” 447 A.2d at 762. Further, Appellants ignore the fact that there are far more conditions here than there were in *Kaufman*. *Kaufman* had only *one* condition precedent to the “closing,” namely, the tendering of shares by the shareholders. Here, there were pages and pages of conditions precedent (see pages 18-20 above), including board and shareholder approvals by two companies and no material adverse changes. If the one condition in *Kaufman* meant that the claim did not accrue until closing, the myriad conditions here surely mean the same thing.¹⁰

As to *Baron* and *Dofflemyer*, Appellants assert that they are federal cases and somehow irrelevant. However, *Dofflemyer* was explicitly applying Delaware law, and *Baron* was relying on Delaware law to determine when the fiduciary-duty-like claim at issue there “accrued.” Further, both courts have obvious expertise in Delaware law. The United States District Court in *Dofflemyer* sits in Delaware and applies that state’s law on a daily basis. The Third Circuit Court of Appeals in *Baron* covers Delaware. It is a safe bet that the substantial majority of its corporate cases involve Delaware law.

¹⁰ Appellants also ignore that *Kaufman* has not been criticized but has been followed. See *Brambles USA, Inc. v. Blocker*, 731 F. Supp. 643 (D. Del. 1990). *Brambles* also involved a different twist on a breach of fiduciary duty claim relating to a merger. The merger agreement there had been approved by the company’s board on March 3, 1988, and became effective on May 1, 1988. The plaintiff argued that its claim accrued much later when the effects of the merger were felt. The court held that the wrong occurred when the merger “became effective in May, 1988, thereby finalizing the conditional aspects of the agreement.” *Id.* at 652 (emphasis added).

Appellants' argue further that *Baron* and *Dofflemyer* are incorrect in holding that Delaware law requires an "injury" to determine the accrual of a cause of action.

Regarding *Baron*, Appellants' Brief (at 40) states:

the *Baron* court applied the exact opposite of the Delaware rule for fiduciary duty claims: Delaware claims do accrue with the violation of the substantive legal standard (*i.e.*, the wrongful act), not with the injury.

Regarding *Dofflemyer*, the brief states (at 41):

the district court in [*Dofflemyer*] based its reasoning explicitly on the assumption that the plaintiffs' claims could not accrue until the plaintiffs had suffered injury. . . . Again, that statement on its face contradicts more recent Delaware Supreme Court and Chancery Court decisions, which provide the controlling law here, and, as shown above, reject any notion that damages or injury are necessary before a claim accrues.

These assertions are simply specious. Delaware law most definitely does require "injury" before any claim accrues. This is basic "hornbook" law for Delaware (and every other state). The assertion in *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. Ct.1969), that a "*a cause of action in tort accrues at the time of the injury*" has been cited time and again by the Delaware courts. (*See* Part II.A above at 12.)

The case Appellants' cite for their contention that "injury" is not necessary for a claim to accrue in Delaware, *Albert v. Alex. Brown Mgmt. Servs., Inc.*, 2005 Del. Ch. LEXIS 100, 2005 WL 1594085 (June 29, 2005), is actually very much to the contrary. That case involved two investment funds that the plaintiffs had invested in. The plaintiff alleged, among other things, that the defendants violated their fiduciary duty by "unhedging" the investment funds. 2005 Del. Ch. LEXIS 100, *44-45. What was quite interesting was that there was obviously a gap between when the defendants decided to stop "hedging" the funds and when they actually did stop. Under the theory of Appellants here, the claim in *Albert* would have accrued when the defendants made the decision to

stop hedging. The court, however, held that it accrued “at the time the Funds became unhedged.” 2005 Del. Ch. LEXIS 100, *45, 2005 WL 1594085, *14. That was when there was “harm” or “injury.” As such, it is precisely consistent with *Baron* and *Dofflemyer* (and *Coca-Cola*).

Indeed, *Albert* is even more clearly consistent with *Baron* and *Dofflemyer* when one looks at how the court treated the first claim in the case, which Appellants do not discuss for obvious reasons. The first claim was that “the Managers breached their fiduciary duties in initially screening the stocks allowed into the Funds, failing to properly diversify the Funds, and that, generally, the entire structure of the Fund[s] was *fatally flawed* from the outset.” 2005 Del. Ch. LEXIS 100 at *43 (emphasis added). The court held that plaintiffs’ injuries on this first claim occurred when the “Funds closed,” and that was when the claim “accrued”:

Accepting these allegations as true, the plaintiffs’ *injuries occurred when the Funds closed*, at which time the Funds were not (allegedly) properly diversified nor properly screened. *This was the time of the wrongful act.* Fund I *closed* on May 5, 1997, and Fund II *closed* on April 17, 1998. Likewise, *claims that the Funds were improperly structured accrued at the time the Funds closed.*

Id. (emphasis added, footnotes omitted). Again, as with the unhedging claim, if Appellants’ theory were true, the first claim would have accrued much earlier. It would have accrued well before the closing of the funds, when the plaintiff received the private placement memorandum disclosing how the funds were to be operated (April 14, 1997, for fund I and October 3, 1997, for fund II – *id.* at *11), or perhaps when the plaintiff sent in his investment and subscription agreement. That it did not accrue until the funds “closed” is, again, precisely consistent with *Baron* and *Dofflemyer* (and *Kaufman* and *Coca-Cola*).

The portion of *Albert* that Appellants specifically rely on simply relates to the argument of the plaintiffs there that their claims had not accrued until their investment collapsed because until then they suffered no “harm.” The court did not hold, as Appellants have suggested, that “harm” was unnecessary for claim “accrual.” Indeed, such a holding would be inconsistent with Delaware law. Instead, the court (using the language of the plaintiffs there) held that plaintiffs had in fact been “harmed” and the harm had occurred as soon as the “unhedging” occurred and, because of that “harm,” could have brought their claim at that time. *Id.* at *58-60. This is hardly inconsistent with *Dofflemyer* since *Dofflemyer* held that the plaintiff suffered no “injury” “until the merger was accomplished” and that was why his claim “accrued” at that point. 558 F. Supp. at 379. *Baron* is to the same effect. Basically, *Dofflemyer* and *Baron* speak in terms of “injury,” while *Albert* speaks both in terms of “injuries” and “harm.” There is no difference.

Moreover, if *Albert* actually supported accrual of Respondent’s claims prior to the Closing of the Merger, it would be contrary to the Delaware Supreme Court’s decision in *Coca-Cola*, which it obviously cannot be. This simple fact puts *Albert* in context. Under *Coca-Cola*, there is no claim until the underlying contract is “enforceable.” Under *Albert*, there must be a “harm” but there need not be a “loss” or “damages.” In context, it is clear that *Albert* is referring to quantifiable financial “losses” or financial “damages” and not to “harm” or “injury” (or non-financial damages). In light of *Coca-Cola*, Respondent was not “harmed” or “injured” (or “damaged” in any sense) until the Merger agreement became enforceable, as also held by *Kaufman*, *Baron*, and *Dofflemyer*.

E. The Shareholder “Standing” Cases Appellants Rely On Do Not Support Their Argument.

1. Those Cases Deal With “Standing” And Not Claim “Accrual” And Thus Are Not Applicable.

Aside from missing the point of *Kaufman*, *Baron*, and *Dofflemyer*, Appellants mischaracterize Delaware law in their memorandum. They assert that the “holding” in *Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782, *2 (Del. Ch. Mar. 22, 1982), is that the plaintiff’s “claims accrued at the time of the merger’s approval by the board” (App. Brief at 27.) They assert that *In re Beatrice Cos., Inc. Litig.*, 522 A.2d 865 (Del. 1987), and *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163 (Del. Ch. 2002), follow *Brown* in that regard.

A simple reading of these cases reveals that they do not involve the issue of claim “accrual.” They involve the issue of “standing,” *i.e.*, whether a plaintiff has “standing” to bring derivative claims for injunctive relief. The import of these cases is that to have “standing” in a derivative action challenging a merger, a plaintiff must own his stock at the time the merger is announced.

This is not a controversial or new rule and is almost universal. *See* Rubenstein, Conte and Newberg, 7 *Newberg on Class Actions*, §22:95 (4th ed. 2009). The reason behind the rule is very simple. It prevents persons (particularly, competitors) from learning of a merger and then purchasing stock in the company and seeking to prevent the transaction from closing, attempting to get a better deal, or attempting to buy the company themselves. In *Brown*, *Beatrice*, and *Omnicare*, the plaintiffs did not own stock when the mergers were announced, and thus the cases were dismissed.

Appellants' attempt to pass-off *Brown* (and *Beatrice* and *Omnicare*) as a "claim accrual" case has never been accepted by any court. To the contrary, in *Dofflemyer* it was rejected out-of-hand:

Brown is also inapplicable. In that case, the Court of Chancery held that a plaintiff who purchased shares after reading a press release indicating that the board of directors had approved a plan of merger did not have standing to challenge the merger when it was carried out according to the plan. *The holding of that case involved a determination of the times when a plaintiff must own stock in a corporation in order to have standing to challenge a merger and is not pertinent to when, if standing had existed, the plaintiff could have sued for damages.*

558 F. Supp. at 379 n.5 (emphasis added).

Likewise, contrary to the implication of Appellants' Brief (37 & 42-43), the argument has not been accepted by any scholar or treatise. Appellants imply that a change in the *Folk* treatise from 1967 to 2006 indicates endorsement of *Brown*. But they fail to point out that the section of *Folk* where the change occurs relates to "standing" and not claim "accrual." This is obviously why *Kaufman*, *Baron*, and *Dofflemyer* are not noted there. Moreover, Appellants ignore the fact that, immediately before noting *Brown*, the *Folk* treatise references *Lavine v. Gulf Coast Leaseholds*, 122 A.2d 550 (Del. Ch. 1956), as holding that "where exchanges of stock are contingent upon shareholder approval, the transaction is not completed until the shareholder vote takes place." *Folk*, *supra*.

The holding of *Lavine* was the basis for the statement in the 1967 edition of *Folk* that "the circumstances of the case will determine whether the transaction is executed or continuing. If the action complained of requires stockholder approval, the transaction is not considered complete until the stockholders have approved it." See *Kaufman*, 447 A.2d 761, 764 (Del. Ch. 1982), quoting *Folk*, *The Delaware General Corporation Law*,

487 (1967). Under the teaching of *Lavine* (to the extent a “standing” case is relevant), the claims of Respondent would not have been “completed” until the Closing of the Merger on October 20, 2006, well after the date of the Release simply because shareholder votes were required.

By no stretch of the imagination can *Folk* be seen as either endorsing or criticizing *Brown* or *Lavine* or any other case. The treatise is merely reporting cases that have dealt with the “standing” issue.

2. The “Standing” Cases Do Not Apply If The Closing Of A Merger Is Not A Mere “Technicality.”

The “standing” cases must be read in light of the Delaware Supreme Court’s long-standing principle, as stated in *Coca-Cola* and discussed at length above, that a fiduciary duty claim regarding an underlying contract accrues when the underlying contract becomes “enforceable.” To the extent *Brown*, *Omnicare* and *Beatrice* could be read to support Appellants’ theory, they would directly contradict *Coca-Cola* and the cases cited in Part II.A above (pages 12-13). In other words, as demonstrated above (pages 23-24), there can be no claim such as Respondent’s until all the conditions precedent to a merger are completed.

It is not difficult to reconcile the “standing” cases with this principle. The *Beatrice* case, for example, states that “[i]n the case of a proposed merger, the plaintiff must have been a stockholder at the time the *terms* of the merger were agreed upon because it is the terms of the merger, rather than the *technicality* of its *consummation*, which are challenged.” 522 A.2d 865, *3 (Del. 1987) (emphasis added). On its face, it is clear that the “consummation” of the merger at issue there was a mere “technicality.” As

such, the merger agreement would have already been “enforceable,” thus meeting the requirement of *Coca-Cola*.

There is, in fact, an example of that kind of “technicality” in this case. The Merger agreement here provided that the Merger “shall become effective at such time as the Certificate of Merger is duly filed with the Delaware Secretary of State.” (Proxy, A1-A2 §1.3 [R. pp. 1039-1040].) That is a “ministerial” act, a simple “technicality.” If everything about the Merger had been done except for the filing of the certificate of merger but SCI or FITG refused to go through with the Merger, the other party would certainly have had legal rights regarding the Merger. In other words, the Merger agreement would have been “enforceable.”

The conditions precedent that are at issue here, however, are not mere “technicalit[ies].” As already discussed (pages 21-23 above), there were fundamental conditions that had to be met. Aside from approval of FITG and SCI shareholders, the representations and warranties as to the businesses had to be true as of the Closing date, and there had to be no material adverse changes as of the Closing date in either company.

Without putting too fine a point on it, if FITG had sued SCI prior to the Merger to compel it to go forward or for damages for refusing to do so, the lawsuit would have turned on whether the conditions to the merger had been satisfied. (*See* pages 23-24 above.) And given that FITG was losing nearly \$2 million a week and \$8 million a month and appears to have borrowed \$31 million in the *four weeks* between the issuance of the Proxy on September 22, 2006 and the Merger on October 20, 2006 (Compl. ¶¶50, 52, 65, & 58 [R. pp. 17-20]), FITG would have had a very difficult case. In any event, the

satisfaction of the financial conditions would have been the critical issue. Obviously, therefore, satisfaction of those conditions was no mere “technicality.”

Accordingly, under *Beatrice* and *Coca-Cola*, since the Merger agreement was not “enforceable” by the date of the Release and the “consummation” of the Merger was not a mere “technicality,” Respondent’s claims could not have accrued prior to the Closing (or prior to when all the conditions precedent were met). Since that happened well after the date of the Release, the Release is irrelevant.

3. The “Standing” Cases Support Respondent’s Position Because He Is Challenging The *Fact Of The Merger*, Not Merely Its *Terms*.

In the “standing” cases, the plaintiffs were all merely challenging the “terms” of proposed mergers. In *Omnicare*, the plaintiff considered the \$1.60 per share that it would receive inadequate, and was offering \$3.50 per share in a competing offer. 809 A.2d at 1167-68. In *Brown*, the plaintiff felt the \$10 per share she would receive was “inadequate.” 1982 WL 8782, at *467. In *Beatrice*, the plaintiff objected to settlement that would have paid him \$50 for his shares. 522 A.2d 865 at *2. In all those cases, the challenger knew the amount it would receive when it bought its shares!

Here, in stark contrast, Respondent was not “receiving” a price that might have been too high or too low, a situation that could have been corrected simply by adjusting the price. Here, the company in which Respondent owns shares (SCI) was absorbing another company which Appellants also controlled. Respondent was “receiving” nothing. He did not even “receive” appraisal rights (only FITG shareholders had “appraisal” rights – Proxy at 3 [R. p. 768]). Further, Respondent had long owned his stock. He had not

bought in with any expectation of selling in a merger. His only expectation was that Appellants would act in accordance with their fiduciary duties.

Notwithstanding the limitations of the facts in the “standing” case, Appellants argue based on them that, in a merger case, regardless of what is being challenged or how conditional the merger is (basically regardless of all facts!), the plaintiff must have owned stock when the merger was announced. Appellant appears to suggest that the mere use of the word “merger” magically overrides all legal principles. Obviously, that is not the case. Merger cases remain subject to ordinary rules of claim accrual and to the principles set forth in *Coca-Cola* and the other cases referenced above.

The question then is what do the “standing” cases actually mean (assuming they are relevant at all here). The case of *7547 Partners v. Beck*, 682 A.2d 160 (Del. 1996), is helpful on this point. The plaintiffs there alleged that the defendant officers and directors, in order to enrich themselves, had set an “absurdly low” price of \$20 per share for a private placement of stock that immediately preceded an IPO. The defendants were able to purchase stock at \$18.60 a share (\$20 less the underwriter’s discount). When the IPO opened, the price went to \$45 a share. Plaintiffs purchased 100 shares at that price. *Id.* at 161. The question was whether the plaintiffs had standing to bring the action. The court noted that the plaintiffs were not challenging the overall transaction or attempting to set it aside (“not seeking cancellation of any . . . stock” – 682 A.2d at 162). They were merely challenging the “terms.” Still, they argued that the wrongful transaction occurred at the time of the IPO. The defendants argued that it occurred earlier when the price was set.

The Delaware Supreme Court held that the “timing of the allegedly wrongful transaction must be determined by identifying the ‘wrongful acts which [Partners]

want[s] remedied and which are susceptible of being remedied in a legal tribunal.” *Id.*, quoting *Newkirk v. W.J. Rainey, Inc.*, 76 A.2d 121, 123 (Del. Ch. 1950). Since the plaintiff there was challenging the “terms” of the private placement, “rather than the technicality of its consummation,” the relevant time was when those terms were set. *Id.*, quoting *Beatrice, supra*.

Following *7547 Partners*, it is necessary here to identify “the wrongful act” here that Respondent seeks to have remedied. In the words of the United States Court of Appeals for the Seventh Circuit in a case applying Delaware law and interpreting these principles, it is necessary to identify “what about the transaction is being challenged.” *Montgomery v. Aetna Plywood Inc.*, 231 F.3d 399, 406 (7th Cir. 2000).

Here, Respondent’s objection, his fundamental issue, is that the Merger was allowed to close *at all* in light of FITG’s deteriorating financial condition. The specific financial terms are relevant mainly as background, showing how the value of the merged company’s stock collapsed (showing what the market thought of the Merger) and how extremely self-interested the Appellants were in the transaction.¹¹ The fundamental claim is that Appellants’ violated their fiduciary duty by allowing this Merger to consummate.

This was how the trial court construed Respondent’s allegations: “Plaintiff alleges that the defendants breached their fiduciary duties to the minority shareholders of SCI (including the plaintiff) by allowing the merger to go forward or close.” (Order at 1 [R. p. 1].) And it follows directly from the Complaint. The very *first* “specification” in the very *first* cause of action is that the Appellant controlling shareholders breached their fiduciary

¹¹ By the time the Complaint here was filed (well before the current economic downturn), the value had declined by nearly 90%. (Compl. 84 [R. p. 24].) Appellants received over \$130 million of the Merger consideration. (*Id.* ¶¶30-31 [R. pp. 13-14].)

duty by “allowing [the Merger] to close notwithstanding the financial condition of FITG.” (Compl. ¶99(a) [R. p. 28].) The *first* “specification” in the second cause of action makes the same allegation as to the Appellant directors and officers of SCI. (*Id.* ¶104(a) [R. pp. 29-30].) And the *first* “common question” in the Class Allegations is whether Appellants breached their fiduciary duty by “allowing [the Merger] to close notwithstanding the financial condition of FITG.” (*Id.* ¶91(a) [R. p. 26].).

This question permeates the main body of the Complaint. In Paragraph 66, for example, it is alleged that, given FITG’s losses, the Merger was “indefensible on the terms agreed to on August 29, 2006, and *probably indefensible generally. It should have been cancelled or dramatically re-negotiated.*” (R. p. 20, ¶66, emphasis added.) Paragraph 67 alleges that Defendants “*could easily have cancelled the Merger . . . based on the ‘MAC clause’ in the Merger agreement.*” (R. p. 20, ¶67, emphasis added.) And Paragraph 68 alleges that “[n]otwithstanding the information they knew or should have known regarding the deterioration of FITG’s business, and *notwithstanding that non-deterioration was a condition precedent to the Merger, Defendants allowed the Merger (which benefited them enormously) to proceed and be consummated*, thereby violating their fiduciary duties to the minority shareholders including Plaintiff[.]” (R. p. 21, ¶68, emphasis added.)

In light of the specific allegations of the Complaint, it is clear that the principal item “about the transaction” that is “being challenged” here (to use the language of *Montgomery v. Aetna Plywood Inc.*, above) is that it was allowed “to close notwithstanding the financial condition of FITG.” (*Id.* ¶¶99(a) & 104(a) [R. pp. 28-30].) In other words, Respondent’s fundamental claim is that the Merger was “fatally flawed” (to use

the language of *Albert v. Alex. Brown Mgmt. Servs., Inc.*, which Appellants rely so much on – see discussion at 30 above). The Merger simply should not have been allowed to close in light of the collapse of FITG’s business.

SCI and Appellants did not have to proceed with the Merger. They had every right not to close since FITG could not meet the conditions precedent. But they closed anyway. They waived the conditions precedent and closed the merger. That is, fundamentally, what Respondent is challenging. (See Compl. ¶¶67-68 [R. p. 20-21].)

That waiver took place when the Merger was allowed to close on October 20, 2006. That is when Respondent’s claims accrued. Since the Release was executed on September 28, 2006, Respondent’s claims unquestionably post-date it. And the Release is irrelevant. The trial court ruled correctly.

CONCLUSION

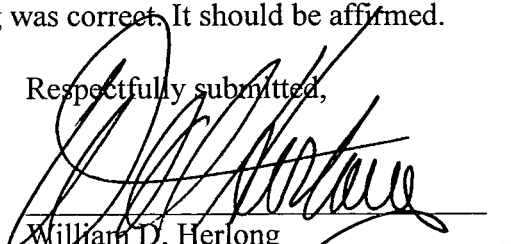
Under long-standing Delaware law and the Delaware Supreme Court’s decision in *Coca-Cola*, Respondent had no claim until the underlying merger agreement was “enforceable.”

Since the Merger could not have been “enforceable” before the Closing date because of the extensive conditions precedent, as held by the trial court, Respondent’s claims, as common sense would dictate, could **not** have accrued prior to that date.

Since the Release was executed well before the Closing date, it had no application to Respondent's claims here.

Accordingly, the trial court's ruling was correct. It should be affirmed.

Respectfully submitted,



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October 15, 2009.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

C.A. No. 2008-CP-23-2701

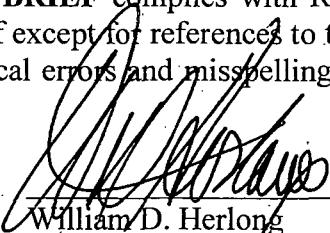
Brian P. Menezes, ...Respondent,

v.

WL Ross & Co. LLC, Wilbur L. Ross, Jr.,
Michael J. Gibbons, David H. Storper,
David L. Wax, Joseph L. Gorga, Stephen
B. Duerk, WLR Recovery Fund II, L.P.,
WLR Recovery Fund III, L.P, WLR Recovery
Associates II LLC, and WLR Recovery
Associates III LLC, ...Appellants.

CERTIFICATION OF COMPLIANCE WITH RULE 211(b)

I certify that **RESPONDENT'S FINAL BRIEF** complies with Rule 211(b) in that it is identical to the Respondent's Initial Brief except for references to the Record on Appeal and the correction of obvious typographical errors and misspellings which were contained in the initial brief.



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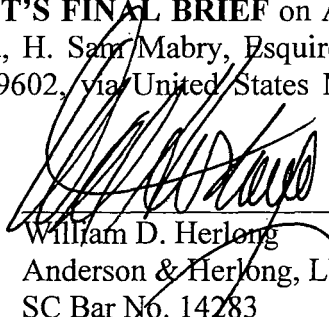
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B. Duerk, WLR Recovery Fund II, L.P.,
WLR Recovery Fund III, L.P, WLR Recovery
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PROOF OF SERVICE

I certify that I have served **RESPONDENT'S FINAL BRIEF** on Appellants by having a copy mailed to their attorney of record, H. Sam Mabry, Esquire, at his post office box at P. O. Box 2048, Greenville, SC 29602, via United States Mail, postage prepaid, on October 15, 2009.



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Gibbons, David H. Storper,
David L. Wax, Joseph L.
Gorga, Stephen B. Duerk,
WLR Recovery Fund II, L.P.,
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SUMMARY OF ARGUMENT

This appeal boils down to one question: Could Plaintiff have brought suit against Defendants for approving the terms of the merger between FITG and SCI before he agreed to release “all claims” against those same Defendants? The answer to that question is yes. Delaware courts not only permit shareholders to file suit for injunctive relief, rescission, or nominal damages before the close of a merger, they actively encourage shareholders to bring such actions as early as possible, so as to avoid the difficulties and waste of undoing a consummated corporate merger. That is why the Delaware courts uniformly hold that a claim for breach of fiduciary duty accrues at the moment of the wrongful act, not when the injury or harm is later felt. Plaintiff’s argument that his claims did not accrue until an alleged injury occurred ignores this hornbook principle and is not tenable under Delaware law.

In an effort to evade this straightforward test, Plaintiff reframes his complaint on appeal as a challenge to Defendants’ failure to terminate the merger when the alleged “deteriorating financial condition” of FITG became known. That claim too must fail. First, Plaintiff’s belated recharacterization of his own complaint cannot be squared with the actual allegations appearing there—*i.e.*, that Defendants should have done something to stop the merger because the *original* terms did not supposedly reflect the relative values of the companies. Second, FITG and SCI were contractually bound to perform the conditions precedent enumerated in the merger agreement. As such, those conditions cannot be independently actionable wrongs under Delaware law. Third, Plaintiff alleges that Defendants knew or should have known of FITG’s so-called deteriorating financial

condition on or before September 22, 2006. Consequently, even if Plaintiff's "failure to stop the merger" claim were supportable under Delaware law (which it is not), the alleged "failure to act" occurred at least six days before he signed his release on September 28, 2006, when Plaintiff agreed to surrender all "known and unknown" claims and pocketed \$576,550.00 in consideration for the release.

ARGUMENT

I. BECAUSE PLAINTIFF CONCEDES THAT HE HAD THE RIGHT TO INSTITUTE SUIT FOR INJUNCTIVE RELIEF, RESCISSION, OR NOMINAL DAMAGES RELATED TO THE MERGER, THE RELEASE BARS HIS CLAIMS.

Although the parties have a fundamental disagreement about the effect of Delaware law on the accrual of Plaintiff's claims, it is important to note the wide areas of agreement on other matters that are pertinent to this appeal:

- Plaintiff does not dispute that the interpretation of the Release is governed by South Carolina law. (*See* R. Vol. I, p. 148, § 29.)
- Plaintiff does not dispute that South Carolina courts have a strong policy of enforcing settlements and releases. *See Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) ("[T]his Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party.").
- Plaintiff does not dispute that the interpretation of a clear and unambiguous release provision is a question of law for the court to decide. *See M & M Group, Inc. v. Holmes*, 379 S.C. 468, 476-77, 666 S.E.2d 262, 266 (Ct. App. 2008). And he does not contend that a question of fact prevents the Court from applying the clear terms of the Release.
- Plaintiff does not dispute that the Release bars more than just the claims that were at issue in Plaintiff's original employment lawsuit, including "any and all manner of actions, causes of action, suits, claims . . . in law or in equity, whether known or unknown," and "any claim based upon or as an owner of any stock or interest in any of the Released Parties." (R. Vol. I, p. 143, § 7.)

Plaintiff does not dispute that it was his “intention to release all rights and claims that he may lawfully release.” (*Id.*)

- Plaintiff does not dispute that the merger was a “matter or thing” that existed at the time the Release was executed, that the Settlement Agreement itself referred to the recently approved merger between FITG and SCI (*see* R. Vol. I, p. 141-142, § 2), and that the merger agreement was published before the execution of the Release through disclosures filed with the SEC.
- Plaintiff has not retracted his earlier admission that “the Release might have applied to pre-merger claims,” including a “claim for injunctive relief.” (R. Vol. I, p. 357, Pl.’s Second Mem. in Opp’n to Defs.’ Mot. to Dismiss at 15.)
- Plaintiff does not dispute that the Release applies equally to actions at law or suits in equity and that under South Carolina law a “broad” release like the one here bars all claims based on the same “cause” or legal right, regardless of the choice of remedy elected by the plaintiff. *See Kennerty v. Etiwan Phosphate Co.*, 17 S.C. 411, 1882 WL 5594 (1882).
- Consistent with his earlier admission, Plaintiff does not argue that Delaware law would prevent him from seeking injunctive relief before the close of the merger. *See Albert v. Alex. Brown Mgmt. Servs. Inc.*, No. Civ. A. 762-N, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) (“Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.”).
- And Plaintiff does not dispute the authority of this Court not only to reinstate the Defendants’ counterclaim for breach of the Release provisions and their affirmative defenses based on the release, but also to reverse the trial court’s denial of Defendants’ motion for judgment as a matter of law. (*See* Appellants’ Br. 44-48.)

These uncontested statements of law and fact establish that the trial court erred in denying Defendants’ motion for judgment as a matter of law. Plaintiff’s concessions leave only his argument that the existence of conditions precedent to the close of the merger, and the Defendants’ failure to stop the merger when they learned of FITG’s alleged “deteriorating financial condition,” are independent claims from the merger agreement that survived the Release. For the reasons explained below, those claims too must fail.

II. NEITHER THE “FORMALITY” OF THE MERGER’S CLOSING NOR THE EXISTENCE OF CONDITIONS PRECEDENT DEFERRED THE ACCRUAL OF PLAINTIFF’S MERGER-RELATED CLAIMS UNDER DELAWARE LAW.

A. Plaintiff’s General Delaware Tort Cases Do Not State the Rule of Accrual for Claims for Breach of Fiduciary Duty.

Turning to Delaware law, Plaintiff starts on the wrong foot by assuming (without support) that the accrual law applicable to general tort claims applies to breach of fiduciary duty claims under Delaware law. This assumption is wrong. Citing cases that involve causes of action such as fraud and negligence, he contends that under Delaware law, claims accrue at the time of injury. (Resp’t Br. 12.) The problem for Plaintiff is that he has alleged claims for breach of fiduciary duty, which “accrue at the moment of initial wrongdoing—not when their effects are felt” or “when the plaintiff suffered a loss.” *In re Coca-Cola Enters., Inc. S’holders Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, *5 & n. 39 (Del. Ch. Oct. 17, 2007), *aff’d sub nom., Int’l Bhd. Teamsters v. Coca-Cola Co.*, 2008 WL 2484587 (Del. 2008). As established by the numerous, binding Delaware decisions specifically addressing claims for breach of fiduciary duty that Defendants have cited and discussed in their opening brief, the accrual of such actions does not depend on when the alleged harm or injury was incurred, but when the defendant is alleged to have committed the wrongful act. *See Albert*, 2005 WL 1594085, at *18 (“The law in Delaware is crystal clear that a claim accrues as soon as the alleged wrongful act occurred. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred. Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.”).

Against this uniform line of Delaware authority, Plaintiff has failed to cite a single case applying the general tort standard for the accrual of actions to claims for breach of fiduciary duty. Instead, each one of the cases he cites involves standard tort allegations such as negligence and fraud.¹

The reason for the distinction between fiduciary claims and general tort claims highlights the error of Plaintiff's argument that his claims did not exist until the close of the merger. In general tort cases, harm or injury to the plaintiff is an essential element of the claim: No matter how negligent or how flagrant a defendant's misconduct, an action will not lie in tort unless the plaintiff is harmed by the tortious conduct. But fiduciaries are held to a higher standard, and in cases such as this one, plaintiffs are not required to allege actual quantifiable damages as an element of their claim for breach of fiduciary duty. *See In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 334 (Del. 1993) (overruled on other grounds by statute) ("Although it is clear that claims for common law fraud, misrepresentation, or equitable fraud do require plaintiffs to show quantifiable damage, the issues before us relate to breach of fiduciary duty, not fraud." (citation omitted)); *see also In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774 (Del. 2006) (affirming *Tri-Star's* rule to permit nominal damages for deprivations to "stockholders' economic interests or

¹ *See, e.g., Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 832 (Del. 1992) (negligent procurement of insurance); *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 255 (Del. Super. Ct. 1969) (contract and negligence claims for home construction); *Krahmer v. Christie's, Inc.*, 903 A.2d 773, 775 (Del. Ch. 2006) (purchase of fake work of art); *State ex rel. Sec'y of Dept. of Transp. v. Regency Group, Inc.*, 598 A.2d 1123, 1127 (Del. Super. Ct. 1991) (negligent legal description of real property); *City of Newark v. Edward H. Richardson Assocs., Inc.*, 375 A.2d 475, 476 (Del. Super. Ct. 1977) (negligent design); *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 424 (Del. Super. Ct. 1971) (negligence or breach of bailment contract).

impairment of their voting rights”). Were it otherwise, officers and directors would have free license to breach their fiduciary duties so long as no harm resulted to the corporation’s shareholders. Here, Plaintiff has alleged direct claims for breach of fiduciary duty that supposedly resulted in a deprivation to his economic interests and impairment of his voting rights. (See, e.g., R. Vol. I, pp. 28, 29-30, ¶¶ 99(b), 104(b).) Accordingly, he was under no requirement to allege actual compensatory damages before proceeding with this lawsuit.²

Moreover, as explained in Appellants’ opening brief, the preferred approach under Delaware law is for the lawsuit to be brought after the merger is approved, but before it finally closes. See, e.g., *In re SunGard Data Sys., Inc. S’holder Litig.*, No. Civ. A. 1221-N, 2005 WL 1653975, at *2 (Del. Ch. July 8, 2005) (noting that the “optimal time” to bring a claim challenging a merger transaction is before the transaction closes); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993) (“Suit could have been brought immediately [after the board approved the challenged contract] to rescind the contract and for nominal damages.”). As recently as last month, the Delaware Chancery Court issued a decision on a complaint filed after the board’s approval and execution of a merger agreement, but before the transaction was approved by the shareholders. *Wayne County Employee’s Ret. Sys. v. Corti*, C.A. No. 3534-CC, 2009 WL 2219260, at *7 (Del. Ch. July 24, 2009).

² Even if actual damages were an element of Plaintiff’s claims, his conceded right to seek injunctive relief before the merger closed means that, under South Carolina law, the release of that right bars a later claim for damages based on the same underlying legal “cause.” *Kennerty*, 17 S.C. 411, 1882 WL 5594, at *5. Plaintiff does not dispute this long-standing principle. Additionally, because Plaintiff admittedly had a claim for injunctive relief at the time he executed the Release, his claim falls within the provision barring “all claims made or which may have been made in the Underlying Lawsuit or Amended Complaint.” (R. Vol. I, p. 143, § 7) (emphasis added.)

Wayne County is not an outlier. The cases are legion in which shareholder plaintiffs bring suit *before* the close of a merger seeking equitable or nominal relief to challenge the terms of the merger.³ Such suits in Delaware are the rule, not the exception, which underscores the policy of Delaware courts to encourage plaintiffs to bring their claims as early as possible to avoid the difficulty and waste of undoing a consummated corporate merger. Plaintiff has therefore failed to address the fatal inconsistency in his argument: If his characterization of the Delaware law of accrual were correct, how could the plaintiffs in *SunGard*, *Kahn*, and *Wayne County* (and many other Delaware cases) have filed and maintained fiduciary duty claims *before* they accrued? The answer is simple: All of the claims asserted in these cases accrued at the time of the alleged underlying wrongful acts, *i.e.*, the time the merger agreement is approved. Plaintiff ignores, as he must, this stubborn reality. If Plaintiff's accrual theory were correct, all of the defendants in the aforementioned cases could have obtained easy and immediate dismissals because the claims would not yet have accrued and thus would not be ripe or justiciable. Because there is no dispute that the claims had accrued, however, none of these claims were or could have been dismissed on those grounds.

³ See, e.g., *Smith v. Van Gorkom*, 488 A.2d 858, 864 n. 1 (Del. 1985) (overruled on other grounds by statute); *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715, 721 (Del. Ch. 2008); *David P. Simonetti Rollover IRA v. Margolis*, C.A. No. 3694-VCN, 2008 WL 5048692, at *1 (Del. Ch. 2008); *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 788 (Del. Ch. 2007); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 97 (Del. Ch. 2007); *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 63 (Del. Ch. 2007); *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1177-78 (Del. Ch. 2007).

B. As Delaware Courts Recognize, Cases Addressing Standing to Bring Derivative Actions Are Relevant to the Question of Accrual.

As a side note, Plaintiff contends that some of the Delaware cases Defendants have relied on are irrelevant to the question of accrual because they address a shareholder's standing to bring derivative claims under the contemporaneous ownership rule. (Resp't Br. 32-34.) It is clear that Plaintiff does not believe his own argument, because he later argues at great length how the Delaware standing cases actually support his position. (*Id.* at 34-38.) In any event, Plaintiff's contention that these standing cases are irrelevant misses the mark.

To begin with, standing cases and claim accrual cases address the same question—that is, determining the point in time when the plaintiff could assert the claim at issue, which in the case of fiduciary duty claims is the moment of the wrongful act. Compare, e.g., *Schreiber v. R.G. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978) (for standing, “what must be decided is when the specific acts of alleged wrongdoing occur, and not when their effect is felt”), with *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004) (“This Court has repeatedly held that a cause of action ‘accrues’ under Section 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.”). Because these cases are addressing a common question, there is nothing exceptional about looking to one line of cases to illuminate the other.

Not surprisingly, that is exactly what the Delaware courts do. For example, in the *Coca-Cola* case, the Chancery Court looked directly to standing decisions to determine whether the statute of limitations barred plaintiffs' claims. See *In re Coca-Cola Enter. Inc.*, 2007 WL 3122370, at *5 n. 39 (citing *Albert*, 2005 WL 1594085, at *18; *Schreiber*, 396

A.2d at 516); *see also In re Marvel Entm't Group, Inc.*, 273 B.R. 58, 73 (D. Del. 2002) (discussing *Schreiber*, 396 A.2d at 516). If the Delaware courts themselves look to standing cases to decide the accrual of claims, Plaintiff cannot fault Defendants for doing the same.⁴

C. Contrary to Plaintiff's Assertion, the Merger Agreement Was a Legally Enforceable Contract before Closing.

Plaintiff argues that his claims for breach of fiduciary duty did not accrue until the closing of the merger because, until that time, the merger agreement was not a legally enforceable contract. (Resp't Br. 13-24.) Plaintiff's argument is both (1) wrong, because the merger agreement was a legally enforceable contract that Defendants were bound to perform, and (2) irrelevant, because Plaintiff is not suing Defendants for failing to bring a breach of contract claim, but for entering into the contract in the first place.

First, Plaintiff is simply wrong when he states that the "Merger Agreement was not legally 'enforceable,' . . . until October 20, 2006, at the earliest because of the conditions precedent which could not have [been] satisfied before that time." (*Id.* at 6.) In reality, the merger agreement contains numerous obligations that SCI and FITG were required to fulfill *before* the closing and *before* the conditions precedent could have been satisfied. For

⁴ As Plaintiff notes, the federal district court in *Dofflemeyer v. W. F. Hall Printing Co.*, 558 F. Supp. 372, 379 n. 5 (D. Del. 1983), rejected the comparison between standing and claim accrual. (Resp't Br. 33.) Defendants have already explained that *Dofflemeyer*, a federal district court decision entitled to no deference in its interpretation of Delaware law, simply misstated the law of accrual for fiduciary breach claims. (Appellants' Br. 41.) The *Dofflemeyer* court's refusal to consider principles of shareholder standing, when Delaware courts plainly have, confirms that the federal district court's opinion is not a reliable guide to Delaware law. Indeed, the Delaware Chancery Court in the *Coca-Cola* case relied on the very decision that the *Dofflemeyer* court attempted to distinguish. *See In re Coca-Cola Enter. Inc.*, 2007 WL 3122370, at *5 n. 39 (citing *Albert*, 2005 WL 1594085, at *18).

example, § 4.1 of the agreement obligated SCI and FITG to “carry on their respective businesses in the ordinary course consistent with past practice,” and to do so “during the period from the date of this Agreement to the Effective Time [*i.e.*, the filing of amended certificates after closing].” (R. Vol. III, pp. 1067-1069, § 4.1(a), (b).) Section 5.1 required SCI to prepare and file a Form S-4 with the SEC, which under § 6.1(d) was required to “have become effective under the Securities Act” before the closing of the merger. The number of these binding and legally enforceable obligations is simply too great to list. (*See, e.g.*, R. Vol. III, pp. 1045, §§ 2.4(a) (requiring FITG to adjust the terms of all outstanding stock options and the equity incentive plan “[a]s soon as practicable following the date of this Agreement”)). The merger agreement itself could not be clearer: “This Agreement has been duly executed and delivered by SCI and Merger Sub and . . . constitutes the valid and binding obligation of SCI and Merger Sub, enforceable against each of them in accordance with its terms.” (R. Vol. III, p. 1059, § 3.2(d); *see also* R. Vol. III, p. 1047, § 3.1(d) (same for FITG).)

In fact, the agreement specifically obligated SCI and FITG to take “all reasonable acts necessary to cause the conditions to Closing to be satisfied as promptly as practicable.” (R. Vol. III, p. 1070, § 5.4(i).) Accordingly, the so-called “conditions precedent” that Plaintiff relies so heavily upon are actually distinct obligations that each side was bound to perform *before* closing. (*See, e.g.*, R. Vol. III, p. 1073, § 6.1(c) (requiring each party to use reasonable efforts to prevent “litigation, legal restraint or prohibition”); § 6.1(e) (requiring each to obtain any and all permits and approvals “for the lawful consummation of the Merger”); § 6.2(b) (requiring FITG to “have performed in all material respects all obligations required to be performed by it under the Agreement at or prior to the Closing

Date”); R. Vol. III, p. 1074, § 6.3(b) (requiring same of SCI).) And the merger agreement specifically contemplated monetary damages and other remedies for any breach of these obligations. (R. Vol. III, pp. 1074-75, 1076, §§ 7.1(c), (d), 8.1(b), 8.2(a), (b).)

Not every obligation created by the merger agreement was binding on the parties before the close of the merger. For example, if there had been a duty to pay merger consideration, such a duty would not “ripen until the conditions of the agreement were met.” (Resp’t Br. 23 (quoting *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1034-35 (Del. 2004)). But as Plaintiff acknowledges, he was not receiving any consideration as a result of the merger, given that the company in which he “owns shares (SCI) was absorbing another company which Appellants also controlled.” (*Id.* at 36.) Likewise, the duty to file a certificate of merger with the Delaware Secretary of State did not arise until the closing of the merger (*see id.* at 35), but Plaintiff is not challenging that action either. (*Id.*)

The important point is that all of the obligations for which Plaintiff alleges Defendants breached their fiduciary duty were enforceable at the time the merger agreement was executed, which was a month before Plaintiff signed the Release. The agreement fixed the terms under which the merger would go forward, including the Exchange Ratio that determined Plaintiff’s ownership interests in the new ITG. (*See* R. Vol. III, p. 1041, § 2.1(c).) Even more significantly, the Defendants obligated themselves to recommend to SCI shareholders that the shareholders approve and adopt the amendment to the corporate charter that would effect the merger on the stated terms. (*See* R. Vol. III, p. 1070, § 5.1(b) (“SCI . . . shall, through its Board of Directors, recommend to its stockholders the approval and adoption of the SCI Charter Amendment.” (emphasis added));

§ 5.2 (same for FITG).) Because Defendants were themselves the controlling shareholders, the contractual obligation to recommend approval was a *fait accompli*. As Plaintiff's Complaint explains, the "approval process was a formality." (R. Vol. I, p. 11, ¶ 22.) Plaintiff knew, upon publication of the merger agreement, that the parties had bound themselves to ensure the merger's consummation, and that it was within their power to do so.⁵

Plaintiff alleges that it was wrong for the Defendants to bind SCI to these obligations, but just as in *Kahn*, where the Delaware Chancery Court held that payments made under a contract were not independently actionable wrongs because they were "legal obligations, not wrongs," 625 A.2d at 271, Plaintiff cannot resurrect his released claims by attacking the Defendants' performance under the merger agreement, at least not without attacking the merger agreement itself. As in *Kahn*, the breach of fiduciary duty occurred, if at all, at the time that the Defendants caused SCI to enter into the merger agreement. *Id.* at 271; *see also Elster v. American Airlines*, 100 A.2d 219, 224 (Del. Ch. 1953) ("Assuming that the individual defendants did wrong to the Corporation by entering into the contract it does not follow that they committed any wrong in carrying out the contract once it had been made.").

Second, the trial court's conclusion that "the merger could not have been enforced by FITG against SCI prior to the closing date" (R. Vol. I, p. 2.) is not only factually and legally erroneous in light of the numerous pre-closing obligations imposed on the parties, but it is (ironically) the exact opposite of Plaintiff's claims. Plaintiff does not seek to hold

⁵ For the same reason, the existence of "multiple termination events" in the merger agreement had no effect on the accrual of Plaintiff's claims. (Resp't Br. 20.)

Defendants accountable for failing to enforce the merger agreement—enforcing the agreement, after all, would have lead to its consummation—but for entering the agreement in the first place. To decide when Plaintiff’s claims accrued for the purpose of applying the Release, the question is not whether SCI had legally enforceable contract rights against FITG (which it did), but whether Plaintiff had legally enforceable breach of fiduciary duty claims against Defendants arising out of the merger agreement. As in *Kahn* and *Coca-Cola*, the alleged wrongful acts giving rise to a claim for breach of fiduciary duty is the supposed “use of control over [SCI] to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants,” not the performance of obligations created by that contract. *Kahn*, 625 A.2d at 271; *Coca-Cola*, 2007 WL 3122370, at *6 (rejecting challenges to later actions that “represent the manifestation of the bargain struck in 1986”).⁶

For these reasons, Plaintiff’s reliance on *Coca-Cola* and *Kahn* remains puzzling. These cases support Defendants’ argument that subsequent performance under a contract does not constitute independently actionable wrongs. Moreover, Plaintiff bases his reliance on facts that he reads into those cases. In describing both *Coca-Cola* and *Kahn*, as well as the Delaware Supreme Court’s decision in *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312 (Del. 2004), he surmises that there were apparently no conditions

⁶ Plaintiff mocks Defendants’ argument regarding his enforceable legal rights as “completely circular.” (Resp’t Br. 15.) The argument appears circular only because Plaintiff has failed to quote the remainder of the paragraph from Defendants’ brief, which goes on to explain that Plaintiff’s rights accrued “as soon as the SCI board approved the merger agreement,” because suit could have been brought immediately for injunctive relief or for nominal damages. (Appellant’s Br. 38-39) (citing *Kahn*, 625 A.2d at 271; *Albert*, 2005 WL 1594085, at *18.)

precedent and no closing that delayed the enforceability of the contracts at issue. (See Resp't Br. 14, 16.) Because none of these cases actually address conditions precedent and closing, none provide any support to Plaintiff's theory that the merger agreement was not enforceable until closing. What they do hold is that the performance of contractual obligations that are alleged to be violations of fiduciary duty accrue when those obligations are created, not when they are performed.⁷

D. No Case Has Held that a Claim for Breach of Fiduciary Duty Arising from a Merger Accrues Only upon the Closing of the Merger.

Plaintiff continues his reliance on the three inapposite cases cited by the trial court, *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983), and *Dofflemeyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983).

Plaintiff's reliance on *Kaufman* is misplaced. The most significant distinction is that *Kaufman* arose from a third-party tender offer and, as a result, did not involve the board's approval of a merger agreement. (See Appellants' Br. 42-43.) Moreover, the actual dispute in *Kaufman* did not even concern the board's recommendation of the tender

⁷ Similarly, Plaintiff's reliance on *Bren v. Capital Realty Group Senior Housing, Inc.*, No. Civ. A. 19902-NC, 2004 WL 370214 (Del. Ch., Feb. 27, 2004), is equally puzzling. Plaintiff himself notes that the Delaware Chancery Court in that case refused to follow the law of accrual as stated by the federal district court in *Dofflemeyer*. (Resp't Br. 27 n. 9.) It is therefore a stretch—if not completely misleading—to claim that *Dofflemeyer* “was cited approvingly by the Delaware Court of Chancery [in *Bren*] for this exact point.” (*Id.* at 27.) Moreover, *Bren* in no way “held that the claim accrued when the underlying contract had been breached.” (*Id.* at 16 n. 4.) *Bren* did not concern an underlying breach of contract claim (and thus had no occasion to consider whether accrual turned on the enforceability of a contract) but a series of transactions that were alleged to be self-dealing and therefore a breach of fiduciary duty. See *Bren*, 2004 WL 370214, at *1-*2.

offer; instead, it arose from the board's non-binding resolution to allow certain officers to tender their stock options in exchange for cash from the third party making the offer. *Id.* at 762. By the terms of that resolution, the ability to exchange the options did not become binding until the shareholders approved the tender. *Id.* Because the resolution was non-binding, the court in *Brambles USA, Inc. v. Blocker*, 731 F. Supp. 643 (D. Del. 1990), rejected an argument very similar to the grounds advocated by Plaintiff here:

For similar reasons, Brambles' reliance on *Kaufman* is misplaced. In that case, until the requisite number of shareholders tendered pursuant to the tender offer there was no transaction. As the Court said, until that time the transaction complained of was "subject to extinction." *Kaufman*, 447 A.2d at 764. The resolutions of the board in *Kaufman* were simply not binding until it was consummated by the shareholders tendering the requisite number of shares into the tender offer. In the case *sub judice*, the merger in May, 1988, fixed the method of payment. That it may have provided an alternative method of payment does not mean that the Exchange/Put Agreement and the Merger Agreement were not binding on the parties. Thus it was not a resolution as in *Kaufman*; rather, it was a fixed contract.

Id. at 650 (emphasis added). Similarly, the merger agreement entered into between FITG and SCI before Plaintiff executed the release was not a mere, non-binding resolution; rather it was a fixed contract. As demonstrated above, that fixed contract established the terms of the merger and the method of payment. As a result, *Kaufman* is simply inapt.⁸

As explained in Defendants' opening brief, the federal court of appeals' decision in *Baron* is readily distinguishable because the court expressly applied federal law to

⁸ Moreover, the *Kaufman* court found that the alleged wrongdoing was a "continuing wrong" that "*commenced with the adoption of the two resolutions on August 22, 1977 but was not consummated until October 3, 1977.*" *Id.* at 764 (emphasis added). Because the court described the transaction as a continuing wrong, it therefore appears that the plaintiff could have filed suit beginning on August 22 when the transaction "commenced." The fact that the wrong continued through October 3 says nothing about when the plaintiff could have first brought suit. At the very least, *Kaufman* is inconclusive on this point.

determine the accrual of violations under § 14(a) of the Securities Exchange Act. 717 F.2d at 108. Not only that, but the *Baron* court reached its conclusion by reasoning that the plaintiff had the right to seek an injunction in state court to prevent the merger, and in fact filed such an action in Delaware Chancery Court *more than a month before the close of the merger*. *Id.* at 106 (noting that the merger was “consummated on January 20, 1976” but that on “December 17, 1975 . . . he filed in the Delaware Chancery Court an action seeking to enjoin the merger”). Because only federal courts can hear § 14(a) claims, *see id.* at 106 n.3, the *Baron* court held that it would be inconsistent to limit the plaintiff to injunctive relief in state court when the U.S. Supreme Court had recognized the policy of granting shareholders a private right of action for damages under *federal* law. *See id.* at 107 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)). Hence the decision on accrual was thoroughly based on federal law and policy, despite the court’s passing reference to Delaware law overemphasized in Plaintiff’s response. Notably, the court never disputed that the plaintiff had a right to bring an action under *state* law *before* the close of the merger. That is exactly what the plaintiff in *Baron* did, and exactly what Plaintiff could have done here.

Plaintiff relies on *Dofflemeyer* to support his argument that Delaware law requires an allegation of damages or injury before a claim for breach of fiduciary duty accrues. As Defendants explained in their brief and above, *Dofflemeyer* simply misstates Delaware law: a showing of harm or injury is not a prerequisite to filing suit for a breach of fiduciary duty. *See Albert*, 2005 WL 1594085, at *18 (“Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued . . .”). Plaintiff tries to square the circle by attempting to explain that, “[u]nder *Albert*, there must be a ‘harm’ but there

need not be a ‘loss’ or ‘damages.’” (Resp’t Br. 31.) But the Delaware Chancery Court in *Albert* was clear about what it meant by “harm”: “The law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were harmed as soon as the alleged wrongful acts occurred.” *Albert*, 2005 WL 1594085, at *18. The harm resulting from a breach of fiduciary duty is the failure of officers and directors to discharge their duties of care or loyalty. That alleged breach of fiduciary duty occurred here (if at all) when the Defendants voted to approve the merger and enter the merger agreement on August 29, 2006.

E. Plaintiff May Not Recast His Complaint as Merely a Challenge to the Closing of the Merger.

Remarkably, Plaintiff ultimately agrees near the end of his brief that Defendants have correctly articulated the test for the accrual of a fiduciary duty claim: “it is necessary here to identify ‘the wrongful act’ here that Respondent seeks to have remedied.” (Resp’t Br. 38.) Plaintiff even acknowledges, based on *7547 Partners v. Beck*, 682 A.2d 160 (Del. 1996), that a challenge to the “terms” of a transaction will not be deferred by the “technicality of its consummation.” (Resp’t Br. 38.) In order to meet this standard, which now all the parties agree is the correct test, Plaintiff must radically recast his complaint allegations in order to satisfy it. That ploy comes too late.

Plaintiff now states that his “fundamental claim is that Appellants’ [sic] violated their fiduciary duty by allowing this Merger to consummate”—not, in other words, by entering into a merger agreement on terms unfavorable to minority shareholders. (Resp’t Br. 38.) But Plaintiff’s own Complaint acknowledges that the “approval process was a formality” and that the “minority stockholders of SCI had no ability to stop the Merger had

they wanted to.” (R. Vol. I, pp. 11-12, ¶¶ 22, 24.) The Prospectus informed shareholders that the majority owners of SCI had already “indicated that they intend to vote to adopt the amended and restated certificate of incorporation” and that, consequently, “[a]pproval of the matters to be voted on at the 2006 Annual Meeting is therefore assured.” (R. Vol. I, pp. 11-12, ¶ 23.) Plaintiff is bound by the allegations of his Complaint, and he may not “subsequently take a position contradictory of, or inconsistent with, his pleadings.” *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964). Plaintiff also now contends that the conditions precedent were not technicalities, but were “fundamental conditions that had to be met.” (Resp’t Br. 35.) They are technicalities not because they are unimportant, but because there was no question they would be fulfilled.⁹ That is why Plaintiff specifically challenges the SCI board’s decision to approve the merger on August 29, 2006, when, as alleged, it had received inaccurate information about the financial health of FITG and for consideration (the Exchange Ratio) that allegedly overvalued the worth of FITG and diluted the ownership interests of SCI shareholders. (*See, e.g.*, R. Vol. I, pp. 17, 22, ¶¶ 49, 74.)

Even if Plaintiff had challenged *only* the closing of the merger (which he does not), his claims would still fail because, as explained above, the merger agreement obligated the Defendants to take all reasonable actions to ensure the fulfillment of the conditions

⁹ Plaintiff concedes that some of the conditions do qualify as “technicalities” that would not defer the accrual of an action challenging the merger, such as the filing of the certificate of merger with the secretary of state. (Resp’t Br. 35.) That example is ironic since it is one of the few requirements imposed by Delaware law. *See* 8 Del. C. § 251. But, in addition to lacking any support in Delaware law, Plaintiff’s rule would be completely unworkable, as it would require courts and litigants to determine which conditions were “fundamental” and which were “technicalities” before knowing when their claims commence.

precedent and to “recommend to [SCI] stockholders the approval and adoption of the SCI Charter Amendment.” (R. Vol. III, p. 1070, §§ 5.1(b), 5.4(i).) Thus, the allegation that Defendants breached their fiduciary duties by allowing the merger to close amounts to nothing more than a challenge to the performance of the merger agreement itself, including the performance of the obligations set forth in Sections 5.1(b) and 5.4(i) of the agreement. *See Lewis v. Anderson*, 477 A.2d 1040, 1048 n. 15 (Del. 1984) (shareholder who could not challenge merger itself could not thereafter challenge provision for “golden parachutes” awarded to management, which amounted to indirect attack on fairness of merger terms). Without the merger agreement, the conditions precedent and the close of the merger have no independent legal significance. Rather, they “hinge[] upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s],” in which case Plaintiff could have sued as soon as the Defendants caused SCI to enter the merger agreement. *Coca-Cola*, 2007 WL 3122370, at *6 (quoting *In re Marvel Entm’t Group, Inc.*, 273 B.R. at 74); *see also Nickson v. Filtrol Corp.*, 262 A.2d 267, 269-70 (Del. Ch. 1970) (shareholder who was foreclosed from challenging acquisition of bonds could not challenge corporation’s failure to sell bonds as they decreased in value; retention of bonds was a consequence of the original acquisition).

Nor does the allegation that Defendants should have invoked the MAC clause to prevent the close of the merger in light of FITG’s “deteriorating financial condition” (Resp’t Br. 38) survive the scope of the Release. Plaintiff’s Complaint alleges that Defendants “knew or should have known prior to the issuance of the Prospectus on September 22, 2006, of the losses and reduction of shareholder equity that FITG was experiencing.” (R. Vol. I, p. 19, ¶ 60.) And, Defendants “knew or should have known

prior to SCI's Board vote in favor of the Merger on August 29, 2006, of the losses and reduction of shareholder equity that FITG was experiencing." (R. Vol. I, p. 19, ¶ 61.) But on September 28, 2006, after both of these dates, Plaintiff agreed to release all "known and unknown" claims, with an explicit acknowledgment that "there may be facts or consequences of facts which are unknown to Plaintiff." (R. Vol. I, pp. 143-144, §§ 7, 8.) So although (as alleged) the "disastrous financial condition of FITG" was not reported until "the Combined Company issued its 10-K on April 24, 2007" (R. Vol. I, p. 17, ¶ 50), Plaintiff agreed to relinquish any claim based on the fact of FITG's deteriorating finances, even though that fact may not have been known to Plaintiff, because his Complaint indisputably alleges that the state of FITG's financial condition should have been known to the Defendants as of August 29 and September 22, 2006, before the Release was signed. Such a claim is therefore barred.

III. DEFENDANTS PRESERVED THEIR ARGUMENTS ON THE PLAIN LANGUAGE AND EXTENSIVE SCOPE OF THE RELEASE, INCLUDING THE REFERENCE TO "CONTINGENT" CLAIMS.

For these reasons, the trial court was mistaken about the Delaware law of accrual, and the Order below should be reversed. But even if the trial court had correctly applied Delaware law, Plaintiff would still be barred from litigating his current claims by the expansive scope of the Release. Plaintiff offers no substantive reason for disputing the application of the Release to his current claims. Instead, he has elected to ground his argument on the contention that Defendants waived their right to rely on a single word—"contingent"—found in the Release provisions. (Resp't Br. 8-10.) Defendants' memoranda filed below, contrary to Plaintiff's assertion, squarely preserved their right to

invoke the entire scope of the Release, including Plaintiff's relinquishment of "contingent" claims.¹⁰

To begin with, the ultimate question before the trial court—and now this Court—has always been whether the terms of the Release that Plaintiff signed encompass the claims he has raised in this action. To be sure, the briefing below shifted to the subsidiary question whether, under Delaware law, Plaintiff's claims had accrued as of the date of the Release. But Defendants argued below that the Release's expansive scope was the primary basis for the dismissal of his claims. Accordingly, Defendants' memorandum of law in support of their motion for judgment on the pleadings prominently quoted the key provision of the Release, including the language barring Plaintiff from later suing on any claim, "whether known or unknown, liquidated, *contingent*, absolute, or otherwise." (R. Vol. I, p. 124 (emphasis added); *see also* R. Vol. I, pp. 303-304.) Defendants did not belabor the point that Plaintiff had surrendered his contingent claims, but that was because a litany of other provisions and terms contained in the Release applied equally to describe the expansive scope of the Release and the nature of the claims Plaintiff had relinquished, including the bar on "any claim based upon or as an owner of stock or interest in any of the

¹⁰ Plaintiff makes one half-hearted contention on the merits, suggesting that enforcing the prohibition on "contingent" claims would mean that releases such as the one here would "release all claims against the other party for all time, past and future" and "[t]hat is obviously not what releases do." (Resp't Br. 8.) But there is nothing novel about a release that bars future claims or claims that remain contingent in some respects. As explained in Defendants' opening brief (Appellants' Br. 23), South Carolina law endorses the rights of parties to release contingent and even future claims. *See Townsend v. South Carolina Ins. Co.*, 168 S.C. 302, 313, 167 S.E. 5, 8 (1932) (holding that future consequences from breach of contract were "reasonably within the contemplation of the parties or within the fair import of the terms of the settlement and cancellation"); *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427-29, 626 S.E.2d 19, 22-23 (Ct. App. 2005) (enforcing release that barred "future" claims and claims that "may accrue hereafter").

Release Parties” and Plaintiff’s expressly memorialized “intention to release all rights and claims that he may lawfully release.” (*Id.*) By calling the issue of the terms of the Release, including the reference to “contingent” claims, “to the attention of the trial court sufficiently to obtain a ruling thereon,” the Defendants have adequately preserved the issue for review here. *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting 4 C.J.S. *Appeal and Error* § 213 (1993)).

Moreover, Plaintiff does not (and could not) contend that Defendants somehow failed to raise the terms of the Release as a defense to his action. Such an argument would be belied by even a cursory review of the Defendants’ memorandum of law. He does not, for instance, fault the Defendants for failing to raise below Plaintiff’s relinquishment of all “known and unknown” claims, claims sounding “in law or in equity,” or claims “for or related to any matter or thing whatsoever.” (R. Vol. I, p. 143, § 7.) Yet these other aspects of the Release received no greater emphasis in Defendants’ briefing than did the ban on “contingent” claims. All material provisions of the Release supporting Defendants’ contentions were identified and relied upon in Defendants’ brief, and the terms of the Release were discussed extensively at the hearing on Defendants’ motion.¹¹

¹¹ Equally unavailing is Plaintiff’s implication that Defendants somehow waived their right to rely on the Release’s express terms during oral argument. Counsel’s clarifying the issue for the Court—*i.e.*, when did the claim accrue—did not render unspecified Release terms irrelevant or somehow amount to a waiver of certain portions of the Release. As discussed, to determine whether Plaintiff released contingent claims or unknown claims or all of the other types of claims mentioned in the Release, the Court had to determine when those claims accrued. Defense counsel’s representation to the trial court was entirely correct: if Defendants prevailed on the threshold question of when plaintiffs’ claims accrued under Delaware law, that would be the end of the case. Counsel never stated that the terms of the Release were irrelevant to the ultimate question of Plaintiff’s right to proceed with this lawsuit.

And although Plaintiff takes issue with Defendants' reliance on the "contingent" language of the release, contingent claims are effectively barred by other provisions to which he does not object. For example, through the Release Plaintiff surrendered "all claims" against Defendants, "whether known or unknown," and with explicit acknowledgement that "there may be facts or *consequences of facts* which are unknown to Plaintiff." (R. Vol. I, pp. 143-144, §§ 7, 8) (emphasis added.) The conditions precedent to the closing of the merger were merely "consequences" of the "fact" that the merger agreement, as approved by the Board, set forth those conditions and expressly obligated the officers and directors of SCI, including Defendants, to fulfill or waive them prior to closing. (See R. Vol. III, pp. 1070-71, § 5.4) (obligating the parties to take "all reasonable acts necessary to cause the conditions to Closing to be satisfied as promptly as practicable"). In addition, Plaintiff agreed that it was his "intention to release all rights and claims that he may lawfully release." (R. Vol. I, p. 143, § 7.) As noted above (*see supra* note 10), South Carolina law authorizes the release of future and contingent claims. Whether taken individually or in combination, these provisions were just as effective in releasing claims or aspects of claims that were "contingent" on future events. Accordingly, as a matter of South Carolina law, Plaintiff gave up his right to litigate his current claims.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and remand with instructions that the circuit court enter judgment in favor of Defendants.

Respectfully submitted,



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October 14, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Honorable Edward W. Miller, Circuit Court Judge

C.A. No. 2008-CP-23-2701

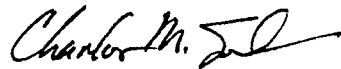
Brian P. Menezes Plaintiff/Respondent,

v.

WL Ross & Co., LLC, Wilbur L. Ross, Jr., Michael J.
Gibbons, David H. Storper, David L. Wax, Joseph L.
Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P.,
WLR Recovery Fund III, L.P., WLR Recovery Associates
II, LLC and WLR Recovery Associates III, LLC, ... Defendants/Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that Appellants' Final Reply Brief complies with Rule 211(b),
SCACR.



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