STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Richard D. White, Plaintiff, vs. FT Acquisitions, LLC; Commercial Food Service Repair, Inc.; and Kurt Herwald, Defendants.	Civil Action No. 2019-CP-23-06915 **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on the Motion for Summary Judgment (the "Motion") filed by Defendants/Counterclaimants FT Acquisitions, LLC ("FTA"), Commercial Foodservice Repair, Inc. ("CFR"), and Kurt Herwald ("Herwald") (collectively, "Defendants") on April 6, 2022. Defendants filed a Memorandum in Support of their Motion for Summary Judgment on April 29, 2022. Plaintiff/Counterdefendant Richard D. White ("White" or "Plaintiff") did not submit a memorandum opposing the Motion, but relied on briefing previously submitted to the Court on May 16, 2021, and which the Court has fully considered. The Court conducted a virtual hearing on the Motion on May 9, 2022. Devon M. Puriefoy appeared on behalf of White. Giles M. Schanen, Jr., appeared on behalf of Defendants. After consideration of the record, argument of counsel, memoranda submitted by the parties, and the applicable court rules and relevant statutory and case law, the Court hereby GRANTS Defendants' Motion, and summary judgment is entered in Defendants' favor as to all of White's claims and all of Defendants' counterclaims.

FACTUAL BACKGROUND

This case arises from a dispute between a former employee and his employer. Defendant CFR, founded in South Carolina in 1982, represents that it provides fast, skilled, on-site

foodservice equipment repair and maintenance for convenience stores, restaurants, coffee shops, and concessions operations, as well as other related services and parts. In 2014, CFR purchased another foodservice repair business known as Foodservices Technologies, Inc. ("FT"). Plaintiff White was the President, Chief Executive Officer, and majority shareholder of FT.

In July of 2014, White and J.C. Viteri, the other shareholder of FT, sold FT to CFR (through its wholly-owned subsidiary, FTA) for $14,000,000. White and Mr. Viteri were paid $13,000,000 upon the closing of the purchase. The remaining $1,000,000 was to be paid pursuant to the terms of a Junior Subordinated Promissory Note (the "Note"), with White receiving fifty-five percent (55%) of the total payments and Mr. Viteri, receiving forty-five percent (45%) of the total payments, commensurate with their ownership interests in the company. White confirmed in his deposition that Defendants made thirty-four (34) of the fifty-nine (59) monthly payments originally due under the Note, amounting to $641,622.16. (Deposition of Richard White ("White Dep.") at 63:17-64:9.)[1] The last payment made to White under the Note was on July 5, 2017. (*Id.* at 64:13-15.)

The Note was subject to a Subordination Agreement. (Subordination Agreement; White Dep. at 45:17-46:7.) Under the terms of the Subordination Agreement, the Note was subordinate to CFR's senior lienholders, who initially were PNC Bank and Leeds Novamark Capital I, L.P. ("Leeds"). (*Id.* at 45:4-16.) The Subordination Agreement provided that White, as a junior lienholder, was not permitted to assert any claim against CFR on the Note unless and until CFR had satisfied its debts to the senior lienholders. (*Id.* at 47:5-10.)

At the time White sold FT, he also became employed with CFR as its Vice President of Operations, the senior operations position in the company. In 2017, CFR was experiencing

[1] Each document cited herein is part of the record before the Court.

financial challenges. In connection with those financial challenges, CFR defaulted on its obligations to its senior lender. (Herwald Dep. at 63:21-64:22.) As a result, on June 29, 2017, the senior lender issued a payment blockage which prevented CFR from making any further Note payments to White. Due to this payment blockage, CFR was not permitted to make scheduled payments to White under the Note on August 1, 2017, or at any time thereafter until the default was cured. White acknowledged that he was informed of the payment blockage by CFR's president, Mr. Herwald, on or about July 5, 2017, as he stated the following in his written responses to Defendants' Interrogatories:

> Plaintiff [White] had numerous conversations with Kurt Herwald [CFR's President] regarding nonpayment on the Junior Subordinated Promissory Note. Plaintiff learned of the blocked payment on or about July 5, 2017. During the conversation between Plaintiff and Herwald, Herwald stated that the senior lender was preventing CFR from making any further payments to Plaintiff due to CFR's insolvency and inability to pay under the terms of the senior note.

(White's Resp. to Defendants' Interrogatory No. 28; *see also* White's Response to Defendants' Interrogatory No. 14.)

On September 11, 2017, over two months after White was informed of the payment blockage and of CFR's insolvency, White invested $550,000.00 in CFR in exchange for common stock. (White Dep. at 109:6-11.) On November 2, 2017, Clark Mizell, CFR's Chief Financial Officer, emailed White a comprehensive financial report for CFR, which included detailed income statements, profit and loss sheets, and balance sheets for CFR and its various divisions. (*Id.* at 145:18-146:1.) This document contained detailed financial information about CFR's operations, including among other things, CFR's outstanding debts and negative shareholder equity. (*Id.*) Although White disputes that he received financial information regarding CFR throughout his tenure there, it is undisputed that he received these financial documents on November 2, 2017, and understood the content therein. (*See id.* at 145:18-156:12.) In his deposition White admitted that

after he received these financial reports on November 2, 2017, he was fully aware of the Company's financial condition. (*Id.* at 156:2-12.) White also acknowledged that after receiving these financial reports, he "discussed this issue with Kurt Herwald and ultimately elected to resign his position." (White's Response to Defendants' Interrogatory No. 9.)

On November 29, 2017, approximately 2.5 months after making his investment in CFR, White resigned his employment with CFR. In connection with his resignation, White was presented with a "General Waiver and Release Agreement" (the "General Release") dated November 29, 2017. Gordon Miller, CFR's Director of Human Resources, emailed White the General Release for White to review and execute. The General Release contained provisions that advised White to consult with an attorney prior to executing the agreement, provided him twenty-one (21) days to consider signing the agreement, and provided another seven (7) days to revoke the agreement if he changed his mind after execution. (General Release at 6 & ¶ 19.) White executed the General Release twice – once electronically on November 30, 2017, and once with a wet signature before a notary on December 5, 2017. (White Dep. at 169:13-171:9.) During White's deposition, he testified that Mr. Miller's email providing a copy of the General Release was the only statement made by anyone at CFR to White about the General Release, and that Herwald never spoke to him about the General Release. (*Id.* at 168:21-169:12, 178:2-9.)

Pursuant to the General Release, White agreed to receive the gross amount of $300,000.00 in severance payments over the course of three (3) years, to be paid in equal installments through CFR's payroll procedures. (*Id.* ¶ 1.) In exchange for the severance payments, White agreed to release all claims, causes of action, and demands against CFR and its affiliates, subsidiaries, and officers based on events occurring on or before November 29, 2017. (*Id.* ¶ 3.) At the time he executed the General Release, White knew that he had not received a payment under the Note for

over four (4) months due to a payment blockage, and was aware of the financial challenges of CFR that existed prior to and at the time of his investment in CFR. (White Dep. at 181:17-23.) It is undisputed that CFR timely made severance payments to White in the amount of $300,000.00, and that his execution of the General Release was a condition of him receiving those payments. (*Id.* at 172:20-173:2, 205:3-17.)

On November 11, 2019, White commenced this civil action against Defendants by filing the Summons and Complaint. Defendants timely answered the Complaint and asserted counterclaims. On March 10, 2020, White filed an Amended Summons and Complaint. On July 19, 2021, White file a Second Amended Summons and Complaint, raising claims against Defendants for (1) breach of contract, (2) breach of contract accompanied by a fraudulent act, (3) fraud in the inducement, and (4) violation of the South Carolina Uniform Securities Act of 2005. On August 31, 2021, Defendants filed their Answer to the Second Amended Complaint and Counterclaims, raising counterclaims against White for (1) breach of contract – General Waiver and Release Agreement, and (2) breach of contract – Subordination Agreement. The parties conducted written discovery, exchanged documents, and conducted depositions of Plaintiff, Defendants, and the parties' experts. Defendants filed the instant Motion on April 6, 2022, and the Motion is ripe for review.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings and evidence demonstrate "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." R. 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692

S.E.2d 499, 505 (2010). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). The party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Trivelas v. S.C. Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). Once the moving party has met that burden, the burden shifts to the party opposing summary judgment, who must show the Court the existence of a genuine issue of material fact. *Dyer v. Moss*, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). When a motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." R. 56(e), SCRCP.

DISCUSSION

Defendants move for summary judgment on all of White's claims and all of Defendants' counterclaims. Based on the arguments of the parties and for the reasons set forth below, the Court finds there is no genuine issue of material fact as to the claims raised by White or the counterclaims raised by Defendants, and judgment is therefore entered in favor of Defendants on all counts.

I. Judgment is Entered in Favor of Defendants on All of White's Claims.

As explained more fully below, the Court concludes that Defendants are entitled to summary judgment on all of White's claims because (1) White's first, second, and fourth claims were released through White's execution of the General Release, and (2) White's third claim (for fraudulent inducement of the General Release) is barred by South Carolina's "tender back" rule, and separately fails because White has failed to create a genuine issue of material fact that he was fraudulently induced into entering into the General Release.

A. By Executing and Affirming the General Release, White Released The First, Second, and Fourth Causes of Action Raised Against Defendants.

The General Release was effective on November 29, 2017. As set forth below, the Court finds that, even assuming they are actionable, White's first, second, and fourth causes of action (1) are based on events that occurred on or before November 29, 2017, and (2) accrued prior to November 29, 2017. In his prior briefing and during the hearing, White did not dispute that his first, second, and fourth causes of action accrued prior his execution of the General Release. Thus, White released these causes of action by executing the General Release, and summary judgment is entered against him on this basis.

i. White's First and Second Causes of Action

In his first cause of action for breach of contract, White alleges that Defendants breached the Note by failing to make a payment on the Note since July of 2017. (Second Am. Compl. ¶¶ 46-51.) White's second cause of action for breach of contract accompanied by a fraudulent act is based on the same breach described in the first cause of action, and he further alleges that, leading up to the execution of the Note, "certain representations" were made to him by Defendants, and that Defendants' conduct demonstrates a "fraudulent intent."[2] (*Id.* at ¶¶ 52-57.) Accordingly, White's first and second causes of action are both based on allegations of conduct occurring before White executed the Release and relating to CFR's failure to pay amounts due under the Note. (*Id.* at ¶¶ 46-57.)

[2] In addition, the allegations contained in White's second cause of action fall woefully short of the standard required to establish fraud-based claims. In White's deposition, he was unable to identify any "representations" that Defendants made about the Note that qualify as fraudulent, and White's briefing and oral argument reveal none. (White Dep. at 37:18-38:8.) Accordingly, the Court finds that White's second claim separately fails due to the lack of evidence of fraud pertaining to the Note.

"The question of when a cause of action arises or accrues is a question of law." *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). "A cause of action accrues at the moment when the plaintiff has a legal right to sue on it. . . . The fact that substantial damages did not occur until later is immaterial to determining when the action accrued or arose." *Stephens v. Draffin*, 327 S.C. 1, 4, 433 S.E.2d 307, 309 (1997). In breach of contract actions, actions upon a liability created by statute, and most tort actions, the cause of action accrues when the person knew or by the exercise of reasonable diligence should have known that he had a cause of action. S.C. Code Ann. § 15-3-535; *see also Maher v. Tietex Corp.*, 331 S.C. 371, 377-78, 500 S.E.2d 204, 207 (Ct. App. 1998).

CFR's first missed payment occurred in August of 2017, more than three months before White signed the General Release. (White Dep. at 180:10-13.) Under the terms of the Note:

> The entire principal amount of, interest on, and other amounts due under this Note may, at the option of Sellers' Representative or its permitted assigns, be accelerated and shall become immediately due and payable upon the occurrence of any one or more of the following: (a) a default in the payment of any amount due under this Note by the Maker which is not cured within 30 days after written notice thereof from Sellers' Representative to the Maker . . .

(Note at 2.) White was immediately aware of the missed Note payment in August 2017. (White Dep. 64:20-65:3, 181:9-11.) Likewise, White testified that the remaining amount due on the Note was accelerated at that time. (*Id.* at 108:13-109:5.) Thus, the Court concludes that to the extent there was a claim for breach of the Note, a claim for the immediate payment of the entire amount due on the Note accrued well before White signed the General Release, after the payment was missed and not cured. (*Id.*)

In addition, as to White's claim for breach of contract accompanied by a fraudulent act, even if White had presented evidence of fraud pertaining to the Note, which he did not (see FN 2, above), that alleged act necessarily would have occurred well before the execution of the General

Release. White alleges in the Amended Complaint that "certain representations were made to Plaintiff by way of Herwald's execution of the Note on behalf of all named Defendants, representations Plaintiff relied upon." (Second Am. Compl. ¶ 53.) Those representations, to the extent they occurred, would have happened in 2014, more than five (5) years before White executed the General Release. (White Dep. 180:2-9.) Accordingly, the Court finds that White's first and second causes of action accrued prior to his execution of the General Release and were released upon his execution of the General Release.

ii. White's Fourth Cause of Action

Finally, White's fourth cause of action is for violation of the South Carolina Uniform Securities Act of 2005 ("SCUSA") based on White's investment in CFR in September of 2017. (Second Am. Compl. ¶¶ 71-82.) White alleges that Defendants omitted material facts that should have been disclosed prior to his investment, including statements about the financial health of the company. (*Id.*) It is undisputed that White's investment, and any of Defendants' alleged statements about the same, occurred more than two months before he signed the General Release. (White Dep. at 180:14-181:4.) In addition, it is undisputed that White received detailed financial reports on CFR in early November 2017, and at that time, had a full understanding of the company's financial situation. (*Id.* at 156:2-22.) Therefore, to the extent any cause of action exists under the SCUSA, it would have accrued no later than November 2, 2017. Accordingly, even when the facts are viewed in the light most favorable to White, the Court finds that White's fourth cause of action is barred because it accrued prior to his execution of the General Release and was released upon his execution of the General Release. *See House v. Aiken Cty. Nat. Bank*, 956 F. Supp. 1284, 1291 (D.S.C. 1996) (holding that release applied to securities fraud claims even if plaintiffs were unaware of certain actions taken by defendants prior to execution of the release).

B. White's First, Second, and Fourth Causes of Action Fall within the Scope of the General Release.

White never disputed that his first, second, and fourth causes of action accrued before he signed the General Release, or that he was aware of the facts giving rise to the same. (White Dep. at 179:18-181:23.) Instead, he argued that the Release Provision in the General Release does not cover the types of claims raised in this action. (*Id.* at 182:13-16.) Under South Carolina law, "[a] release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (collecting cases). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." *Mishoe v. Gen. Motors Acceptance Corp.*, 234 S.C. 182, 188, 107 S.E.2d 43, 47 (1985). "The parties' intention must, in the first instance, be derived from the language of the contract." *Ecclesiastes Prod. Ministries*, 374 S.C. at 497. "To 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 498. "Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions." *Id.* "If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect." *Id.* at 499.

Here, the Court finds that White's first, second, and fourth causes of action fall within the scope of the General Release. The Release Provision in the General Release reads in full:

> **3. Release.** Executive hereby releases, acquits, and forever discharges the Company, its parent companies, subsidiaries, divisions, affiliates and controlling persons (if any), their officers, directors, board members, shareholders, members employees, representatives, attorneys, personal representatives, affiliated or unaffiliated benefit plans, third-party administrators, any and all of their successors and assigns, and all persons acting by, through, under, or in concert with any of them (collectively, the "Company") ***from any and all actions, causes of action, claims, demands, losses, claims for attorneys' fees, and all other forms of civil***

damages, occurrences, and liabilities of any kind whatsoever, both known or unknown, arising out of any matter, happening, or things, from the beginning of time to the date of this Agreement is signed by Executive, specifically including, but not limited to, any and all liability arising from, including amendments to and anti-retaliation provisions deriving from the following:

- Local, state, or federal common law, statute, regulation, or ordinance;
- Title VII of the Civil Rights Act of 1964;
- Section 1981 of the Civil Rights Act of 1866;
- the Age Discrimination in Employment Act of 1967;
- the Americans with Disabilities Act of 1990;
- the Family and Medical Leave Act;
- the Employee Retirement Income Security Act of 1974;
- the Health Insurance Portability and Accountability Act;
- the Occupational Safety and Health Act;
- the Equal Pay Act;
- the Uniformed Services Employment and Re-employment Act of 1994;
- Executive Orders 11246 and 11141;
- the Worker Adjustment and Retraining Notification Act;
- the Rehabilitation Act of 1973;
- the Medicare, Medicaid and SCHIP Extension Act of 2007;
- state workers' compensation laws;
- state non-discrimination and/or human affairs laws;
- state payment of wages laws, acts or regulations;
- Executive's employment relationship and/or affiliation with Company

This release also includes a release of any claims for wrongful termination, breach of express or implied contract, intentional or negligent infliction of emotional distress, libel slander, as well as any other claims, whether in tort, contract or equity, under federal or state statutory or common law.

Without waiving any prospective or retrospective rights under the Fair Labor Standards Act ("FLSA"), Executive admits that he has received from Company all rights and benefits, if any, potentially due to him pursuant to the FLSA. Executive states that he is aware of no facts (including any injuries or illnesses) which might lead to his filing a workers' compensation claim against the Company. **It is the parties' intent to release all claims which can legally be released but no more than that.**

Executive further stipulates, such stipulation being expressly understood by Executive as material to this Agreement, that he has not engaged in, nor is he aware of, any misconduct or wrongdoing on the part of the Company of any kind or any regard. Executive's stipulation in this regard is material to the Company's

willingness to enter into this Agreement and provide Executive the benefits provided hereunder.

(General Release at 1-2 (emphasis added).)

In addition to being titled "General Waiver and Release Agreement," the General Release also includes the following notices:

> PLEASE READ THIS AGREEMENT CAREFULLY. IT CONTAINS A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS. YOU AGREE THAT YOU RECEIVED VALUABLE CONSIDERATION IN EXCHANGE FOR ENTERING INTO THIS AGREEMENT AND THAT THE COMPANY ADVISED YOU IN WRITING TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. YOU PROMISE THAT NO REPRESENTATIONS OR INDUCEMENTS HAVE BEEN MADE TO YOU EXCEPT AS SET FORTH HEREIN, AND THAT YOU HAVE SIGNED THE SAME KNOWINGLY AND VOLUNTARILY.

> YOU HAVE BEEN PROVIDED AT LEAST TWENTY-ONE (21) DAYS WITHIN WHICH TO CONSIDER THIS AGREEMENT AND WAIVE AND RELEASE ALL CLAIMS AND RIGHTS INCLUDING BUT NOT LIMITED TO THOSE ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT. YOU SHALL HAVE SEVEN (7) DAYS WITHIN WHICH TO REVOKE THIS AGREEMENT AND THIS AGREEMENT SHALL NOT BECOME EFFECTIVE OR ENFORCEABLE UNTIL THAT REVOCATION PERIOD HAS EXPIRED. ANY SUCH REVOCATION MUST BE IN WRITING AND RECEIVED BY THE COMPANY, IN ACCORDANCE WITH THE NOTICE PROVISIONS SET FORTH ABOVE, PRIOR TO THE END OF THE REVOCATION PERIOD.

(General Release at 6.) Moreover, in Section 19 of the General Release, White expressly acknowledged that he was advised to consult with counsel prior to executing the General Release, that he had twenty-one (21) days to consider the General Release, and that, if he executed it, he had another seven (7) days to revoke his agreement.

White argued that the Release Provision in the General Release only applies to claims "arising out of his employment," and thus that the claims he has raised in this action were not within the scope of the Release Provision. (*See, e.g.*, White Dep. at 183:4-7; May 16, 2021 Mem. of Law in Opp'n to Defs. Mot. Summ. J. ("May 16, 2021 Mem") at 17.) However, as set forth above and contrary to White's arguments, the General Release repeatedly refers to the Release Provision as a release of all known or unknown claims White may have had at the time of

execution. (*See* General Release at 6 & ¶¶ 3, 19.) Although the Release Provision identifies specific employment-related claims that were released, that list is preceded by the words "including, but not limited to," which makes clear that the list is not exhaustive. The Release Provision is clear, unambiguous, and capable of only one interpretation, which is that—as it is titled—it is a general waiver and release of all claims.

In his deposition, White admitted that the General Release contains no language which limits its scope to employment claims, but instead expressly states that it applies to all claims, known or unknown, against Defendants. (White Dep. at 175:12-177:10.) White further acknowledged that the language of the Release Provision applied to claims against CFR, FTA, and Herwald. (*Id.* at 178:10-25.) White's explanation for why he does not believe the Release Provision applies to his claims raised in this action is: "Well, I just don't believe they are." (*Id.* at 183:13-21; *see also id.* at 184:24-185:2 ("I don't believe I can sign my rights away. If someone does something wrong, you can't just make me sign saying I won't sue you. I think that's ridiculous. That's what the court system is for.").) White's arguments are unconvincing and legally incorrect. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. S.C. Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). Indeed, if White's argument were correct, no settlements or releases would be enforceable. Clearly that is not the law.

The Court concludes that, even when viewed in the light most favorable to White, there is no genuine issue of material fact that (1) White voluntarily signed the General Release and received severance consideration thereunder, including the Severance Payment of $300,000.00; (2) the General Release contains a release of all claims, whether known or unknown, up until

November 29, 2017; (3) White's first, second, and fourth claims are based entirely on facts which occurred prior to November 29, 2017, and are claims that, to the extent they exist, accrued prior to November 29, 2017;[3] and (4) the Release Provision applies to White's claims against CFR, FTA, and Herwald. Accordingly, the Court finds that the General Release operates to bar White's first, second, and fourth claims.[4] *See Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993) ("The court is limited to the interpretation of the contract made by the parties, regardless of its wisdom or folly, apparent unreasonableness, or failure of the parties to guard their rights carefully. The court is without authority to alter a contract by construction or to make a new contract for the parties.").

C. Because White Failed to Return or Offer to Return the Consideration He Received in Exchange for Execution of the General Release, He Affirmed the General Release and Waived any Challenges to its Enforceability.

In addition to the arguments above, White also argued that the release provision in the General Release (the "Release Provision") does not bar his claims because he was fraudulently induced into executing the General Release. (Second Am. Compl. ¶¶ 58-70.) However, White's argument fails as a matter of law.

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[3] White argued that his claim for violation of the South Carolina Uniform Securities Act cannot be released. The Court finds this argument is without merit. "[W]here a release is the result of negotiations between parties of equal bargaining power who had access to counsel, it is valid and enforceable even with regard to securities fraud claims." *House v. Aiken Cty. Nat. Bank*, 956 F. Supp. 1284, 1288 (D.S.C. 1996).

[4] Claims that, like those pending before the Court, rest on the interpretation and application of contractual language may be resolved by summary judgment because the meaning and effect of an agreement's language is a question of law for the Court. *See First-Citizens Bank & Tr. Co.*, 282 S.C. 303, 305, 317 S.E.2d 776, 777 (Ct. App. 1984); *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (noting that summary judgment is appropriate when a claim involves the construction of an unambiguous, written contract, because the intent of the parties can be gathered from the four corners of the instrument); *Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 751 S.E.2d 256 (2013) (upholding trial court's grant of summary judgment when the contractual language was unambiguous).

Under South Carolina's well-established "tender back" rule, if a party to a release does not return or offer to return the consideration received in exchange for execution of a release, that party is deemed to have affirmed the contract and is bound to its terms. More specifically,

> [i]n South Carolina, "it is well settled that one who seeks to avoid the effects of a release must first return or tender consideration paid therefor." *State Farm Mut. Ins. Co. v. Turner*, 399 S.E.2d 22, 23 (S.C. Ct. App. 1990). A release induced by fraud is not void, but voidable. *Levister v. Southern Railway Co.*, 35 S.E. 207, 209 (S.C. 1900). Thus, where a releasor, after discovering the fraud, does not repay or offer to repay the consideration received from the releasee, "he will thereby be held to have waived the tort and affirmed the contract." *Id.* . . . . [R]eleasors seeking to avoid the bar of a release must first tender back the consideration they received for signing the release.

Brewer v. EnerSys, Inc., C.A. No. 3:04-1335-MJP, 2006 WL 8446422, at *7 (D.S.C. June 29, 2006). "Ordinarily, the consideration received for a release should be returned or tendered before an action is instituted, or contemporaneously with the institution thereof." *Taylor v. Palmetto St. Life Ins. Co.*, 196 S.C. 195, 12 S.E.2d 708, 710 (1940).

In this case, through his execution of the General Release, White agreed to receive severance payments in the total gross amount of $300,000.00 (the "Severance Payment"), less applicable withholdings and deductions. (General Release; Aff. of Kurt Herwald ¶ 5.) CFR's agreement to make the Severance Payment was expressly contingent upon, and given in consideration for, White's agreement in the General Release to release all claims White had against CFR and its affiliates, officers, directors, and subsidiaries as of the date the General Release was executed. (General Release at 1.) It is undisputed that White received the entire Severance Payment. (White Dep. at 205:3-17.) It is also undisputed that White never repaid, or offered to repay, any portion of the $300,000.00 Severance Payment—either before or after the commencement of this action. (Aff. of Kurt Herwald ¶ 7.) Rather, White retained the entire Severance Payment received in return for his execution of the General Release, while

simultaneously claiming in this litigation that the General Release was procured by fraud and is not enforceable by Defendants.

White did not submit any briefing in response to Defendants' contention that the "tender back" rule bars White's claims. However, at the hearing White argued that the Release Provision in the General Release fails for lack of consideration because the Severance Payment served as consideration for the restrictive covenants in the General Release, and not as consideration for the Release Provision. This argument is unavailing, as the record is clear that the Release Provision is supported by consideration.

First, Section 1 of the General Release expressly provides that the severance consideration given by Defendants, including the $300,000.00 Severance Payment, is "in consideration for [White's] promises as set forth herein . . . ." (General Release at ¶ 1.) Plainly, the Release Provision is a promise given by White in the General Release. Therefore, the plain language of the General Release establishes that the Release Provision is supported by consideration.

Further, there is no language in the General Release that allocates any portion of the severance consideration given by Defendants, including the $300,000.00 Severance Payment, to White's reaffirmation of his restrictive covenants, as opposed to the Release Provision.[5] Thus, the severance consideration given by Defendants, including the Severance Payment, serves as

[5] Contrary to White's arguments, the General Release does not impose restrictive covenants on White, but simply reaffirms the restrictive covenants that White previously agreed to in his 2014 Employment Agreement, and by which he would be bound regardless of whether he chose to execute the General Release. (General Release ¶ 8 ("Executive hereby re-affirms his commitment to honor the covenants set forth in . . . Executive's July 28, 2014 Employment Agreement (inclusive of any and all subsections)."); Employment Agreement ¶¶ 8, 9, 11, 12, and 13.) White's claim that the entire severance consideration given by Defendants was in exchange for White's reaffirmation of his restrictive covenants is entirely unsupported by the record, and is inconsistent with the plain language of the General Release.

consideration for all of the promises given by White in the General Release, including his promises in the Release Provision.

Moreover, even if some portion of the Severance Payment had been allocated to something other than the Release Provision, it would be immaterial because White indisputably did not seek to tender back any portion of the severance consideration he received in return for executing the General Release. *See, e.g., Taylor v. Palmetto State Life Ins. Co.*, 196 S.C. 195, 12 S.E.2d 708, 710 (1940) (noting that if a party "desires to set aside or avoid a release duly entered into and be remitted to his original rights, he must place the other party in statu quo by returning or tendering the return of whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in consequence thereof.").

Finally, White conceded at his deposition that his receipt of the Settlement Payment was contingent upon his executing the General Release, and that if he had not executed the General Release, he would not have received the Severance Payment. (White Dep. at 205:3-17.) In addition, White testified that he should be held to the terms of the contract that he signed. (*Id.* at 181:24-182:12.) Based upon the plain language of the General Release and the record before the Court, the Court finds that the General Release, including the Release Provision therein, is supported by valid consideration.

At the hearing, White alternatively argued that, pursuant to the doctrine of election of remedies, he was not required to tender back the consideration he received for executing the General Release prior to filing the instant suit, but is entitled to make that election at trial. White's argument is without merit. As discussed above, South Carolina law is clear that by failing to return or offer to return the consideration received for executing the General Release prior to commencing

this lawsuit, White affirmed the General Release and, therefore, is bound by its terms. *Taylor v. Palmetto St. Life Ins. Co.*, 196 S.C. 195, 12 S.E.2d 708, 710 (1940).

The Court finds that by retaining the benefits he received under the General Release (specifically including the $300,000.00 Severance Payment), White, as a matter of South Carolina law, affirmed the General Release. As a result, White waived any argument that the General Release, including the Release Provision therein, was procured by fraud, and is unenforceable.

In addition, even if White had not waived these arguments, there is no evidence in the record to support White's contention that the General Release was procured by fraud. White admitted in his deposition that he did not rely on any statements when he decided to execute the General Release, which is fatal to his argument. (White Dep. at 168:21-169:12, 178:6-9.) Furthermore, the alleged statements identified by White in his briefing are statements as to future events, which could not constitute fraud in the inducement, even if White could present evidence that he relied on them, which he has failed to do. Accordingly, for this separate reason, White's argument that the Release Provision is not enforceable is rejected by the Court.

D. White's Third Cause of Action for Fraud in the Inducement Separately Fails.

White's third cause of action is for fraud inducement of the General Release. For the same reasons discussed in Section C, above, this claim is expressly barred by operation of South Carolina's "tender back" rule, since White retained, and never offered to return, the severance consideration (including the $300,000.00 Severance Payment) that he received in return for signing the General Release. *Brewer v. EnerSys, Inc.*, C.A. No. 3:04-1335-MJP, 2006 WL 8446422, at *7 (D.S.C. June 29, 2006) ("Thus, where a releasor, after discovering the fraud, does not repay or offer to repay the consideration received from the releasee, 'he will thereby be held to have waived the tort and affirmed the contract.'" (citing *Levister v. Southern Railway Co.*, 35

S.E. 207, 209 (S.C. 1900)). The Court also finds that this claim separately fails because White failed to create a genuine issue of material facts as to the elements of fraud in the inducement.

To prove a claim for fraud in the inducement, a party must show by "clear, cogent, and convincing evidence," the following elements of fraud: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). A party must also establish three additional elements: "(1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (3) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him." *Moseley v. All Things Possible, Inc.*, 388 S.C. 31, 36, 694 S.E.2d 43, 45 (Ct. App. 2010).

Here, White failed to produce any evidence that a false representation regarding a preexisting fact was made to him by Defendants regarding the Release Provision in the General Release. During his deposition, White testified that no representations were made to him regarding the General Release. (White Dep. at 168:21-169:12, 178:6-9.) In addition, an examination of the email from Gordon Miller to White sending the General Release for review and execution shows no statements whatsoever regarding the substance, scope, or intent of the Release Provision that could support White's claim for fraud or otherwise invalidate the Release Provision. (*See* Miller Email.)

Instead, White contends that the basis of this claim is Herwald's alleged assurance that "CFR would be resuming his regularly scheduled Note payments in the very near future[.]" (Second Am. Compl. ¶ 66; *see also* May 16, 2021 Memorandum at 11-13.) Such a statement, even

if it occurred, could not form the basis of a claim for fraud in the inducement. An actionable statement must concern a *preexisting* fact, not a future event. *See Brown v. Stewart*, 348 S.C. 33, 41-42, 557 S.E.2d 676, 680 (Ct. App. 2001) (noting that future events and unfulfilled promises may not serve as the basis for a claim for fraud in the inducement). In addition, White failed to produce any evidence to establish that Herwald had an intent to deceive White.

As such, the Court finds that White failed to identify any false representation regarding a preexisting fact that was made to him by Defendants regarding the Release Provision in the General Release. Therefore, even when the facts are viewed in the light most favorable to White, the Court finds there is no genuine issue of material fact as to White's claim for fraud in the inducement, and summary judgment is therefore entered in favor of Defendants on this claim.

II. Judgment is Entered in Favor of Defendants On Their Counterclaims.

In this action, Defendants raised counterclaims for (1) breach of the General Release and (2) breach of the Subordination Agreement. The Court finds that there are no genuine issues of material fact as to either of these counterclaims, and judgment is entered against White on these counterclaims.

A. White Breached the General Release by Filing This Lawsuit.

Defendants claim that by filing this lawsuit against CFR, FTA, and Herwald, White breached the General Release. The Court agrees.

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builder, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). "A release is a contract and contract principles of law should be used to determine what the parties intended." *Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007).

Here, White does not dispute that the General Release is an enforceable contract. (White Dep. at 181:24-182:12.) Therefore, there is no genuine issue of material fact regarding the first element of Defendants' claim for breach of the General Release.

As to the second element of this claim, the Court has found that White's first, second, and fourth causes of action were released by the Release Provision of the General Release. By filing this lawsuit and raising claims that accrued prior to White's execution of the General Release, White breached the terms of the General Release. *See Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 550, 744 S.E.2d 178, 193 (2013) (holding that, in case in which plaintiff filed lawsuit raising claims that were released under release agreement and defendants filed counterclaim for breach of the release, trial court should not have dismissed defendants' counterclaim); *Bradley v. British Fitting Grp., PLC*, 221 Ga. App. 621, 624, 472 S.E.2d 146, 151 (Ga. Ct. App. 1996) (finding that plaintiff breached release agreement by filing lawsuit regarding claims that had been released).

Finally, there is no dispute that Defendants incurred costs and attorneys' fees in defending against the released claims that White filed in breach of the General Release, and have thus been damaged by White's breach.

For all these reasons, there are no genuine issues of material fact with respect to Defendants' first counterclaim. The Court hereby grants Defendants' Motion for Summary Judgment as to Defendants' first counterclaim, and will schedule a hearing to determine the issue of damages to be awarded to Defendants.

B. White Breached the Subordination Agreement by Filing This Lawsuit.

Defendants' second counterclaim is for White's breach of the Subordination Agreement. The parties do not dispute that the Subordination is an enforceable contract. In executing the Subordination Agreement, White expressly agreed he would not file any lawsuit against

Defendants based on claims that payments due under the Note were not made, unless and until certain conditions ("Conditions Precedent") had been satisfied. Specifically, in the Subordination Agreement, White agreed that he would not

> commence any action or proceeding at law or equity against Borrowers, or any of them, to recover all or any part of the Seller Subordinated Debt not paid when due and shall at no time join with any creditor, in bringing any proceeding against Borrowers, or any of them . . . unless and until the Superior Debt shall be indefeasibly paid and satisfied in full in cash, and Senior Lender has no further obligation to make revolving loans and advances under the Senior Agreement.

(Subordination Agreement at ¶ 9.) It is undisputed that the Note is the Seller Subordinated Debt referenced in the Subordination Agreement. (White Dep. 45:24-46:3.) In filing this action, White included claims based on Defendants' failure to make payments under the Note. (Sec. Am. Compl. ¶¶ 46-57.) The record evidence establishes that these Conditions Precedent had not been met at the time White filed this action. Therefore, the Court concludes there is no genuine issue of material fact that White breached the Subordination Agreement by filing this action.

The uncontroverted record evidence is that Fifth Third Bank and McLarty Capital Partners ("McLarty") assumed the position of senior lienholders under the Subordination Agreement executed by White, and that White's Note was subordinate to CFR's debt to Fifth Third Bank and McClarty. (Herwald Dep. 63:21-64:22.) Defendants presented evidence from White's deposition, in which White testified that White's Note was subordinate to the senior debt; that CFR would not be permitted to make payments on White's Note in the event of a default on the senior debt; that the Subordination Agreement was in effect until the senior debt had been paid in full; that White, as the seller noteholder, agreed he would not commence any action or proceeding at law against CFR "to recover any part of the note not paid when due until the superior debt was paid in full"; and that at the time he filed this lawsuit, White had no evidence that CFR's debt to the senior lienholders had been paid. (White Dep. 45:24-46:3, 46:8-25, 47:1-10, 52:11-15, 53:9-12, 56:22-

25.) Moreover, the record demonstrates that after White filed this lawsuit in November 2019, but before he filed his Amended Complaint in March 2020, Defendants' counsel informed White's counsel that if White did not agree to dismiss the action without prejudice, he would be in breach of the Subordination Agreement and Defendants would be required to assert counterclaims. (*See* Emails attached as Exhibit K to Defendants' April 29, 2022 Memorandum.) Despite this notice, White chose to proceed with this lawsuit.

From the record, the Court concludes that there is no genuine issue of material fact that on November 26, 2019, when White filed this action, CFR's debts to its senior lender and mezzanine lender were not satisfied, and thus the Conditions Precedent which would have permitted him to file suit under the Subordination Agreement had not been fulfilled. By filing this action before those Conditions Precedent were fulfilled, White breached the Subordination Agreement.

White argued that Paragraph 3 of the Subordination Agreement required Defendants to provide written notice to White of the default on the senior debt, and that Defendants' failure to provide written notice is fatal to Defendants' second counterclaim. (May 16, 2021 Mem. at 22-24.) The Court finds White's argument legally incorrect. Contrary to White's argument, the unambiguous language of Paragraph 3 of the Subordination Agreement does not require *Defendants* to provide written notice to White, and only provides Defendants with the option to continue making Note payments to White until a written notice was received. (Subordination Agreement at ¶ 3.) Moreover, Paragraph 3 of the Subordination Agreement is separate and distinct from, and does not relate to, Paragraph 9 of the Subordination Agreement, which is the subject of this counterclaim. Therefore, White's argument is without merit.

Accordingly, the Court finds that White breached Paragraph 9 of the Subordination Agreement. The Court therefore grants Defendants' Motion for Summary Judgment against White

on this counterclaim, and will schedule a hearing to determine the amount of damages to be awarded to Defendants.

C. Defendants are Entitled to Recover Reasonable Costs and Attorneys' Fees.

Having entered summary judgment in favor of Defendants, Defendants are therefore the prevailing party in this litigation. Under the terms of the General Release, Defendants, as the prevailing parties, are entitled to recover all reasonable coasts and attorneys' fees incurred in this action. (General Release at ¶ 18.) *See Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993) ("[A]ttorney's fees are not recoverable unless authorized by contract or statute.") Accordingly, prior to the damages hearing to be scheduled by the Court, Defendants are instructed to submit an affidavit detailing the costs and attorneys' fees incurred by them in this action for the Court's consideration.

CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment is hereby granted, all claims raised in White's Second Amended Complaint are dismissed with prejudice, and judgment is entered in favor of Defendants on their counterclaims. The Court has carefully weighed and considered each of White's allegations, claims, and arguments asserted in his written submissions and oral arguments but finds them unpersuasive or legally incorrect. This ruling disposes of all the remaining causes of action in this matter. The Court will schedule a hearing to determine the issue of damages for Defendants' Counterclaims.

AND IT IS SO ORDERED.

[Judge's Electronic Signature to Follow]

Greenville Common Pleas

Case Caption: Richard D White vs. FT Acquisitions LLC , defendant, et al

Case Number: 2019CP2306915

Type: Order/Summary Judgment

IT IS SO ORDERED!

s/J. Derham Cole 2053