STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

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S.C. Supreme Court

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701
South Carolina Court of Appeals
Opinion No. 4810, filed March 23, 2011

Brian P. Menezes,.....Petitioner,

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,.....Respondents.

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STATEMENT OF ISSUE ON APPEAL

Did the court of appeals err in reversing the circuit court's holding that Petitioner's claims could not have accrued prior to the closing of the merger?

STATEMENT OF THE CASE

Safety Components International, Inc. ("SCI"), was a publicly traded Delaware corporation with its headquarters in Greenville, South Carolina. SCI was in the business of designing and manufacturing airbag fabric and airbag cushions. Brian Menezes ("Menezes") was employed by SCI from 1999 to 2006. For the majority of this time, Menezes was the Chief Financial Officer of SCI, but for a short period he was SCI's Chief Executive Officer. In 2006, Menezes was terminated from his employment with SCI. A short time after his termination, Menezes exercised his stock options which were about to expire and purchased shares of SCI stock.

Employment Lawsuit and the Release

Menezes filed a lawsuit against SCI to recover severance pay and other monies owed to him ("employment lawsuit"). On September 28, 2006, in exchange for $575,000, Menezes signed a Settlement Agreement and Release ("the Release") to settle his employment lawsuit. Menezes agreed to "release, acquit and forever discharge" Respondents of:

> [a]ny 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 [Respondents]** for or related to any matter or things whatsoever from the beginning of time up to and including

> the date of execution hereof. It is [Menezes's] intention to release all rights and claims that he may lawfully release.

(App. 88, 616.) (emphasis added). In short, Menezes released all claims he had against Respondents as of September 28, 2006, but did not release any claims against Respondents that accrued after that date.[1]

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]**." (App. 88 & 616.) (emphasis added). The term "Released Parties" was 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

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[1] Before the court of appeals, Respondents argued Menezes's claims were "contingent" and therefore even if they post-dated the execution of the Release they were still barred. Specifically, Respondents asserted "[Menezes's] 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." (App. 1150.) This argument was not preserved for review because Respondents never raised the issue to the trial court. In fact, not only did Respondents not raise the argument below, they expressly conceded it by agreeing that any claim that accrued after the date on which Menezes signed the Release was not barred. (App. 1191.) Furthermore, Judge Pieper recognized in his concurring opinion below that Menezes only released claims that accrued prior to the Release date. *See Menezes v. W.L. Ross & Co., LLC*, 392 S.C. 584, 597, 709 S.E.2d 114, 121 (Ct. App. 2011).

way of enumeration but not limitation, International Textile Group, Inc., W.L. Ross & Co. L.L.C., and David L. Wax." (App. 88, 616.) In other words, the term Released Parties is synonymous with the term Respondents.

Merger of SCI and FITG to form NITG

On August 29, 2006 - approximately one month before Menezes signed the Release - the SCI board entered into an agreement that provided for the merger of SCI and International Textile Group, Inc. ("former ITG" or "FITG"), a Delaware company with its headquarters in North Carolina. The merger agreement established that FITG would merge into SCI. After the merger, the new company was to assume the name International Textile Group, Inc. ("New ITG" or "NITG"). (App. 14.) SCI provided consideration worth $167 million in connection with the merger. (App. 16.)

The merger agreement was long and detailed - more than fifty (50) single-spaced pages. (App. 1044-1099.) The "conditions precedent" section alone was several single-spaced pages long. (App. 1081-1083.) The conditions were so material and important that they were separately summarized in the main body of the Proxy. The summary itself was more than two single-spaced pages long. (App. 859-860; App. 1081-1083.) Further, apart from the explicit conditions precedent, the transaction was

subject to multiple termination events, any one of which could have scuttled it. For example, the merger could have been terminated by "mutual agreement" of SCI and ITG, which meant that it could be terminated by Respondents at any time since they controlled SCI and ITG. It could have been terminated by either party "if the merger shall not have been consummated by March 31, 2007." It could have been 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 have been 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. (App. 860-861.)

Additionally, the merger was subject to conditions outside the control of the parties. For instance, the merger agreement itself states that the merger is subject to "the obtaining of all necessary consents, approvals or waivers from third parties." (App. 1079.) Further, the Proxy states that "[t]he merger is subject to the receipt of consents and approvals from various governmental entities, which may impose conditions on, jeopardize or delay completion of the merger. . . ." (App. 800.)

Nearly one month after Menezes signed the Release, all conditions precedent were satisfied and third party consents received. Because none of the termination events occurred, the merger of SCI was consummated on October 20, 2006 (which was the earliest the merger could occur since that was the date of the shareholder vote on the necessary amendments to the SCI Articles of Incorporation). (App. 772.)

At the time of the merger Respondents controlled both SCI and FITG.[2] As a result of the merger, Respondents received more than $130 million.[3] (App. 16-17.) However, unknown to the SCI minority shareholders, at the time of the merger, FITG had begun to collapse financially. In the weeks prior to the merger, FITG was losing more than eight million dollars per month. (App.23.) It borrowed $31 million between September 22, 2006 (when the Proxy was issued), and October 20, 2006 (the closing). (App. 23.) These facts were revealed for the first time six (6) months after the merger in the 10-K filed by NITG. (App. 20.)

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[2] Respondents owned a 75.6% interest in SCI and had four of the five directors on the Board. Respondents also owned an 85.4% interest in FITG and had five of the six directors on the Board. (App. 11-12.)

[3] Because of their ownership interests in SCI and FITG, the merger is subject to the "entire fairness" standard of review in this law suit. (App. 31-32.)

Menezes Challenges Merger

Menezes filed a putative class action lawsuit against Respondents on April 9, 2008, alleging that Respondents (both as board members [Ross, Gibbons, Storper and Gorga] and as controlling shareholders [all Respondents]) breached their fiduciary duties owed to the minority shareholders by "allowing [the merger] 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." (App. 31-33.) Menezes seeks to represent a class composed of the SCI minority shareholders and he seeks to recover damages caused by the merger. (App. 29.)

Respondents Assert the Release as a Complete Bar to Menezes's Claims

Respondents asserted various affirmative defenses as a complete bar to Menezes's claims and a counterclaim for breach of the Release. They also moved for judgment on the pleadings or, in the alternative, summary judgment based on the Release. Menezes moved to dismiss Respondents' counterclaim for breach of the Release arguing that the Release does not apply to his claims because they accrued subsequent to his execution of the Release.

The circuit court heard arguments on the motions on July 31, 2008, and the parties filed supplemental briefs to further educate the court. (App. 291-366.) On February 17, 2009, the circuit court denied Respondents' motions and granted Menezes's motion to dismiss Respondents' counterclaim for breach of the release. Additionally, as a result of the court's reasoning, it struck Respondents' affirmative defenses based on the Release. The court explained its rationale, stating:

> [Menezes] alleges that the defendants breached their fiduciary duties to the minority shareholders of SCI (including [Menezes]) by allowing the merger to go forward or close. . . .
>
> The pertinent question is whether [Menezes's] claims regarding the merger accrued when the merger closed on October 20, 2006, as [Menezes] contends, or sometime prior to September 28, 2006, as [Respondents] argue.

(App. 4-5.) The court concluded that the Menezes's claims for breach of fiduciary duty accrued after he signed the Release and thus he was not barred from asserting them:

> Under controlling Delaware law, [Menezes's] 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 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 [International Brotherhood] 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.

(App. 5.) Respondents filed a motion for reconsideration, which the circuit court denied on March 4, 2009. (App. 6.) Respondents then filed a notice of appeal in the court of appeals on March 5, 2009. (App. 395-398.) After oral argument, the court of appeals reversed the circuit court finding that Menezes's claims for breach of fiduciary "could have" arisen prior to the closing of the merger.[4] *See Menezes v. WL Ross & Co., LLC*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011). The court of appeals based its decision on "more recent case law" and statutory amendments that it reasoned supersede the decisions relied upon by the circuit court. *Id.* at 589.

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[4] The Court of Appeals also held that Respondents' "counterclaim arising out of the Release does not, resolving all doubts in their favor, fail to state a valid claim for relief." *Menezes*, 392 S.C. at 597. The issue of whether Respondents properly pled the counterclaim (i.e., whether a release can be used as a sword and not just as a shield), however, was not presented to or addressed by the court.

In concurrence, Judge Pieper found that "the question of whether or not the court erred in considering Menezes's claims **in combination** is not preserved for appellate review." *Menezes*, 392 S.C. at 598, 709 S.E.2d at 121 (emphasis added). Judge Pieper went on to say, in spite of his preservation concerns, that "some of [Menezes's] claims could have arisen prior to the closing of the merger and others could have arisen after the closing of the merger." *Id.* This point was important because, on remand, he did not view it as possible that all of Menezes's claims should be barred by the Release.[5]

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[5] Menezes's pleaded breach of fiduciary duty claims against Respondents Ross, Gibbons, Storper and Gorga as board members (Count II of Complaint [App. 32-33]) and claims against them and the other Respondents as controlling shareholders (Count I of Complaint [App. 31-32]). The specific allegations with respect to the claims for breach of fiduciary duty are that they breached their fiduciary duties:

(a) by proposing the Merger and then allowing it to close notwithstanding the financial condition of FITG;

(b) by approving the Merger on terms which gave 65% ownership to the FITG stockholders and diluted the minority shareholders down to 35%, or at all;

(c) by not providing accurate and complete information regarding FITG to Dr. Tessoni and RSM or ensuring that such information was provided to them;

(d) to the extent an one of them was not aware of the financial situation of FITG and failing to take it into account, or see that it was taken into account, with regard to the merger;

(e) by failing to ensure that proper due diligence was conducted on behalf of SCI on FITG;

(f) by allowing the representation at the merger closing that MAC Clause condition was satisfied;

(g) by failing to call of or renegotiating the merger (or cause it to be called off or renegotiated) because of the financial condition of FITG;

(footnote continued)

Menezes filed a petition for rehearing on April 7, 2011, which the court of appeals denied. Menezes filed a Petition for Writ of Certiorari in this Court on June 30, 2011.[6] This Court granted the Petition on September 6, 2012.

ARGUMENT

General principles of claim accrual under Delaware law establish that Menezes's claims for breach of fiduciary duty accrued at the time the merger was closed and thus the Release does not bar him from asserting it. Therefore, this Court should reverse the decision of the court of appeals.

Additionally, the court of appeals' decision was erroneously based on "more recent case law" and changes to federal law that it believed superseded or otherwise overturned the firmly established law relied upon by the circuit court. *Menezes*, 392 S.C. at 589, 709 S.E.2d at 117. The

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(i) [sic] by allowing the debt previously held by FITG to be transferred to the Combined Company and/or by allowing that debt to be converted into preferred stock;

(j) [sic] by allowing or causing the renegotiation of the SCI's credit facility and/or obtaining $100 million of additional preferred stock in connection therewith; and/or

(k) [sic] by otherwise failing to protect the interests of the minority stockholders of SCI.

(App. 31-33.)

[6] Petitioner filed an amended petition and a second amended petition on August 16, 2011, and August 19, 2011, respectively. In substance, these amended petitions are identical to the original.

"more recent case law" and changes to federal law relied upon by the court of appeals are irrelevant to this case. This point is illuminated most clearly by the fact that none of the cases relied upon by the circuit court has been reversed. For these reasons, as more fully explained below, this Court should reverse the opinion of the court of appeals.

I. Under Delaware law, general principles concerning claim accrual firmly establish that Menezes's claims for breach of fiduciary duty did not accrue until the closing of the merger, nearly one month after he signed the Release.

In Delaware, it is a long-standing principle that a cause of action accrues with the occurrence of the alleged wrongful act. *Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992). For breach of contract claims, the wrongful act occurs when the breach occurs. *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. 1969). For tort claims, however, the cause of action "accrues at the time of injury." *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 896 n. 16 (Del. Supr. 2009); *Kaufman*, 603 A.2d at 834; *Nardo*, 254 A.2d at 256. Here, Menezes and the other SCI minority shareholders were injured by the merger between SCI and FITG, and the injury occurred (and is still occurring) when the merger closed. In other words, the alleged wrongful acts that caused injury were failure to stop the merger and allowing its consummation on October 20, 2006 – events that occurred after Menezes signed the Release.

Under Delaware law, a claim for breach of fiduciary duty against the directors or officers of a corporation sounds in tort. A recent commentary on the issue makes this clear. *See* J. Travis Laster and Michelle D. Morris, *Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71 (2010). The authors of this article squarely address the nature of a breach of fiduciary duty claim and determine that under Delaware law "a breach of a fiduciary duty is in fact a tort." *Id.* at 71. The commentators trace the jurisprudential history of the issue and conclude that courts across the country have found that a claim for breach of fiduciary duty sounds in tort:

> After a brief flirtation with the earlier theories that breaches of fiduciary duty arose in contract, a strong majority view emerged that characterized breaches of fiduciary duty as tort claims. For example, in the part of the country that was ground zero for the savings and loan crisis courts consistently held that claims for breach of fiduciary duty against corporate fiduciaries were tort claims. . . .

Id. at 92-93 (citation omitted). Therefore, as the "strong majority view"[7] indicates, a claim for breach of fiduciary duty sounds in tort and accrues at

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[7] The "strong majority view" is embodied in the following, non-exhaustive, list of cases: *Freeland v. Enodis Corp.*, 540 F.3d 721, 740-41 (7th Cir. 2008); *see Federal Deposit Ins. Corp. v. Abel*, 1995 WL 716729, at *9 (S.D.N.Y. Dec. 6, 1995); *see Resolution Trust Corp. v. Gravee*, 1995 WL 75373, at *3 (N.D. Ill. Feb. 22, 1995); *see Resolution Trust Corp. v. Fortunato*, 1994 WL 478616, at *4 (N.D. Ill. Sept. 1, 1994); *see Resolution Trust Corp. v. Zimmerman*, 853 F. Supp. 1016, 1020 (N.D. Ohio 1994); *see Resolution Trust Corp. v. O'Bear, Overholser, Smith & Huffer*, 840 F. Supp. 1270, 1278 (N.D. Ind. 1993); *see Federal Deposit Ins. Corp. v.*

(footnote continued)

the time of a plaintiff's injury.[8] In other words, a breach of fiduciary duty claim accrues as soon as "all elements of the tort can be truthfully alleged in a complaint." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 907 N.E.2d 268, 273 (N.Y. 2009).

Applying the well-settled, general analysis of claim accrual to the facts of this case, Menezes's claims[9] for breach of fiduciary duty accrued when he was injured. He was injured when the merger closed on October 20, 2006. If the merger had not closed, for whatever reason, he would not

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Gonzalez-Gorrondona, 833 F. Supp. 1545, 1560 (S.D. Fla. 1993); *see Washington Bancorporation v. Said*, 812 F. Supp. 1256, 1272 (D.D.C. 1993); *see Federal Deposit Insurance Corporation v. Dannen*, 747 F. Supp. 1357, 1361 (W.D. Mo. 1990); *C-T of Virginia, Inc. v. Barrett*, 124 B.R. 689, 693 (W.D. Va. 1990), *superseded by statute on unrelated grounds, as recognized in WLR Foods, Inc. v. Tyson Foods, Inc.*, 155 F.R.D. 142 (W.D. Va. 1994); *Beloit Liquidating Trust v. Grade*, 677 N.W.2d 298, 311 (Wis. 2004); *Brooks v. Hill*, 717 So. 2d 759, 764 (Ala. 1998).

[8] Specific to Delaware law, a breach of fiduciary duty is likely an "equitable tort," but this is a distinction without a difference when considering claim accrual here. *See* 11 Del. L. Rev. at 96-97. This term "equitable tort" is used because, under Delaware law, the claim is a tort but the underlying duty is equitable in nature. *Sloan v. Segal*, 2008 WL 81513 (Del. Ch. 2008) (recognizing that a breach of fiduciary duty is a tort, but referring to the underlying obligation as equitable). Because, Menezes seeks the recovery of damages this court should treat his claim as a tort for the purposes of claim accrual.

[9] As noted above, while it was not important to the circuit court given its holding that none of the claims could have accrued prior to the closing of the merger on October 20, 2006, Menezes did have at least two breach of fiduciary duty claims. His first was against Respondents as controlling shareholders. (App. 31-32.) The shareholder vote was not until October 20, 2006, weeks after the release was signed. (App. 772.) It is difficult to imagine any theory under which it could be covered by the release. The second was against those Respondents who were board members for breaching their fiduciary duty as board members. (App. 32-33.) Further, as Judge Pieper's concurring opinion in the court of appeals pointed out, each of those claims actually included numerous individual actions that were alleged to be breaches of fiduciary duty. (*See supra* note 5.)

have been injured, and he would have no claims. Because Menezes's claims for breach of fiduciary duty accrued after he executed the Release, this Court should reverse the decision of the court of appeals.

II. Under Delaware law, principles of claim accrual specific to shareholder disputes firmly establish that Menezes's claims for breach of fiduciary duty did not accrue until the closing of the merger.

Although it is well established by general principles of Delaware law that a claim for breach of fiduciary duty accrues at the time of the alleged wrongful act, the relatively esoteric case law specific to the arena of shareholder disputes under Delaware law presented Respondents with an opportunity to confuse the court of appeals. However, notwithstanding Respondents litany of red herrings they raised to the court of appeals and will likely raise before this Court, when the law concerning claim accrual in the arena of shareholder lawsuits is firmly understood and applied to this case, it is clear that Menezes's claim for breach of fiduciary duty accrued after he signed the Release.

The circuit court correctly relied on four opinions addressing Delaware law and claim accrual in the context of shareholder disputes and rightly concluded that Menezes's claim accrued after he signed the release. These four opinions are directly on point here and were appropriately relied upon by the circuit court. These cases are discussed below.

A. Pursuant to *Kaufman v. Albin*, Menezes's claims for breach of fiduciary accrued at the time the merger closed.

The circuit court correctly relied upon *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), a case in which the Delaware Chancery Court addressed the question of whether a claim for breach of fiduciary duty accrued when a merger was approved by the board or when it was consummated. Despite the fact that this is the precise issue presented here, the court of appeals erroneously distinguished *Kaufman* and followed an inapplicable line of cases.

This question of claim accrual was important to the court in *Kaufman* because of the effective date of a statute by which plaintiff had accomplished service. If the claim accrued when the merger had been approved, it predated that statute and service was ineffective. If it accrued after the effective date of the statute, service was effective.

The *Kaufman* court held the claim for breach of fiduciary duty accrues when a merger closes. Even though the merger at issue in *Kaufman* had "commenced with the adoption of the two resolutions on August 22, 1977 [by the board authorizing the merger, the deal] was not consummated until October 2, 1977 [when sufficient shares were tendered and the merger was successfully concluded]." *Id.* at 765. The claim, therefore, accrued after the effective date of the statute regarding service of

process, and service was therefore effective. Based on the reasoning in *Kaufman*, it is clear that Menezes's claim accrued on the date the merger closed.

i. The Court of Appeals erroneously determined that "more recent case law" on the issue of standing superseded *Kaufman*.

The court of appeals erroneously distinguished *Kaufman* from the instant case by relying on "more recent case law" that is inapplicable to this matter.[10] *Menezes*, 392 S.C. at 590-592. The "more recent case law" is *Dieter v. Prime Computer, Inc.*, 681 A.2d 1068 (Del. Ch. 1996) and *FMC Corp. v. R.P. Scherer Corp.*, 1982 WL 17888 (Del. Ch. 1982).

Both *Dieter* and *FMC* are decisions in which the Delaware Chancery Court addressed the issue of standing - not claim accrual. This is an important distinction because Delaware law on the issue of standing and claim accrual are distinct in critical respects. As the Court has made clear,

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[10] The court of appeals also seemed to distinguish *Kaufman* because the merger there was based on a tender offer which had to be accepted by 52% of the shareholders. However, the merger here had even more conditions than that. First, the necessary changes to SCI's articles of incorporation had to be approved by the SCI shareholders. Since Respondents owned a majority of SCI's stock, this condition was a formality unless they changed their mind. Formality or not, however, until it happened the merger could not go forward. (App. 770-772.) Second, the merger was subject to third party approvals which had to be obtained before the merger could go forward. Obvious examples would be governmental entities with jurisdiction (App. 800 ["[t]he merger is subject to the receipt of consents and approvals from various governmental entities, which may impose conditions on, jeopardize or delay completion of the merger. . . ."]) and SCI's lender (e.g., Wachovia bank [App. 900].).

"a determination of the times when a plaintiff must own stock in a corporation in order to have **standing** to challenge a merger . . . is not pertinent to when, if standing had existed, the plaintiff could have sued for damages." *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 379, n. 5 (D. Del. 1983) (emphasis added). In other words, determining whether a plaintiff has standing to sue to challenge the fairness of a merger under Delaware law is distinct from, and thus not relevant to, the question of when a claim accrues.[11] Respondents conflated these two distinct issues, convinced the court of appeals that they were one and the same, and persuaded the court to erroneously follow a line of standing cases in determining when Menezes's claim for breach of fiduciary duty accrued.

These issues are not one and the same. Delaware law is very specific that for a cause of action to "accrue" the "proper parties [must be] in

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[11] In Delaware, as in most states, the law on standing requires that a plaintiff own shares in a company prior to the time a merger agreement is publicly announced in order to have standing to challenge the merger. *See* Rubenstein, Conte and Newberg 7 Newberg on Class Actions, §22:95 (4th ed. 2009); *see also Grosset v. Wenaas*, 42 Cal. 4th 1100, 1109 (2008), *citing Alabama By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 264, fn. 12 (Del. 1995) (Discussing the policy behind Delaware's law on standing in this arena: "[t]he purpose of this first requirement for 'contemporaneous ownership' is to prevent so-called strike suits, whereby stock in a corporation is purchased with 'purely litigious motives,' that is, 'for the sole purpose of prosecuting a derivative action to attack transactions' that occurred before the stock purchase."). However, despite the fact that a plaintiff must own the stock at the time the merger agreement is publicly announced in order to have standing to file a claim concerning the merger, no Delaware decision requires that a claim for damages arising out of a merger accrues at the time the merger agreement is entered into or publicly announced.

existence capable of suing and being sued" **and** "a cause of action [must] exist[] capable of being sued on forthwith." *Borden v. Sinskey*, 530 F.2d 478, 488 (3d Cir. 1976), citing *Keller v. Farmers Bank*, 4 A.2d 539, 541 (Del. 1942) ("Under Delaware law a cause of action accrues when both the cause of action and parties capable of suing and being sued are in existence."). In other words, there must be "standing" and there must be "cause of action."

Because both *Dieter* and *FMC* concern standing, not claim accrual, they are easily distinguished from *Kaufman*. Rather, *Kaufman* is dispositive of the question presented in this case, and was correctly relied on by the circuit court.

a. *Dieter* does not control.

In *Dieter*, the Delaware Chancery Court addressed the question of whether the proposed class representatives (the Dieters) could adequately represent the interests of the class, given that they had purchased their stock after the merger at issue was announced publicly and the terms of the transaction were established. The court found that the Dieters were not appropriate class representatives because their participation in the suit was subject to a standing defense.

The *Dieter* court did not hold that a claim for breach of fiduciary duty accrued when the merger was announced. Instead, the court held that the Dieters did not have standing to sue because they had received exactly what the company had announced (before they bought their shares) they would receive. 681 A.2d at 1072. In other words, they had no damages. *Dieter* did not address the holding in *Kaufman* (or even recognize its existence).

It is true, as pointed out by the court of appeals, that the rationale of *Dieter* was that the merger in question there was not the "wrongful act of which the Plaintiffs complain; it [was] the fixing of the terms of the transaction." That language is a direct quote from *Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782 (Del. Ch. Mar. 22, 1982), a similar standing case. And for this proposition, *Brown* relied on yet another chancery court case, *Newkirk v. W. J. Rainey, Inc.*, 76 A.2d 121 (Del. Ch. 1950). *Newkirk*, however, does not say that "it is the fixing of the terms of the transaction" that is the wrongful act, and certainly does not say that a cause of action "accrues" upon the fixing of the terms of a merger. Rather, the issue in *Newkirk* was whether the stealing of corporate opportunities, which had occurred before the plaintiffs bought stock, but after a merger, were part of a "continuous wrong" which would be an exception to the statutory rule

that "in order to maintain a derivative action the stockholder must allege that he was a stockholder at the time of the transaction of which he complains." The court had to determine, statutorily, and for standing purposes, what was the "transaction of which he complains." There the court found that the stealing of corporate opportunities was the "transaction in issue." But what is a "transaction" for standing purposes is a different question than whether a cause of action - which requires injury - has accrued.

Thus, *Dieter* has nothing to do with whether or not a claim for breach of fiduciary duty regarding the fairness of the merger accrues at the time it closes. This Court should recognize that the court of appeals reliance upon *Dieter* was erroneous, disregard its purported applicability to this case, and find that *Kaufman* controls in this instance.

b. *FMC* does not control.

Additionally, the court of appeals relied upon *FMC Corp. v. R. P. Scherer Corp.*, 1982 WL 17888 (Del. Ch. 1982), and criticized *Kaufman* as too outdated[12] to control the issue of claim accrual. As with the analysis of

[12] *Kaufman* was decided on May 11, 1982 and *FMC* on August 6, 1982 - less than three months later. Assuming there was some legal significance to the fact that *FMC* was decided more recently than *Kaufman* (which there is not), the court of appeals reliance on *FMC* is undermined by the fact that *FMC* is "more recent" than *Kaufman* by less than ninety (90) days.

Dieter, the court's reliance on *FMC* is misguided. *FMC* is exactly like *Dieter* in that it addresses the standing of an individual to sue based on the fairness of a merger agreement, and does not address when a claim for breach of fiduciary duty accrues. For the reasons stated above with respect to *Dieter*, this Court should decline to give any weight to *FMC*.

ii. *Kaufman* controls

In short, *Kaufman* is on all fours with this case and establishes that Menezes's claims for breach of fiduciary duty accrued on October 20, 2006, when the merger was consummated. The fact that *Dieter* and *FMC* post-date *Kaufman* is of no legal significance because the law discussed by *Dieter* and *FMC* concerns standing, not claim accrual. Perhaps if Menezes purchased his stock after the merger of SCI and FITG was announced but before the settlement was closed he would be barred from suit for lack of standing because, as *Dieter* instructs, he could not prove that he suffered any harm. That, however, is not this case and this Court should find that *Kaufman* is controlling and disregard the court of appeals reasoning based on the "more recent case law" of *Dieter* and *FMC*.

B. Pursuant to *Dofflemyer v. W.F. Hall Printing Co.*, Menezes's claim for breach of fiduciary duty accrues at the time a plaintiff suffers damages.

The circuit court relied upon *Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983), which is a case that establishes that a claim for breach of fiduciary duty under Delaware law accrues at the time a plaintiff suffers damages arising out of the alleged breach.[13] The court of appeals erroneously distinguished this case despite the fact that it squarely addresses the issue presented here.

As the court of appeals recognized:

> In *Dofflemyer*, the plaintiffs, former shareholders, filed a derivative action alleging various directors breached their fiduciary duties in relation to orchestrating a merger. The plaintiffs alleged the directors procured a faulty investment opinion, maneuvered to avoid a supermajority provision in the by-laws, and issued a false and misleading proxy statement.

Menezes, 392 S.C. at 592-593, 709 S.E.2d at 118-19. The *Dofflemyer* court concluded that a claim for breach of fiduciary duty based on these facts did not accrue until the plaintiff could sue for money damages. *Dofflemyer*, 558 F. Supp. at 379. As the circuit court recognized, because Menezes did

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[13] Despite Respondents arguments to the contrary, as recently recognized by the Delaware Chancery Court, *Dofflemyer* is still good law. *See Bren v. Capital Realty Group Senior Housing, Inc.*, 2004 WL 370214 (Del. Ch. 2004) (relying on the claim accrual analysis in *Dofflemyer*).

not suffer any harm until October 20, 2006, when the merger between SCI and FITG closed, his claim for breach of fiduciary duty in this matter did not accrue until that time.

Nonetheless, the court of appeals distinguished the plain holding of *Dofflemyer* by relying upon the "more recent" decision of *Albert v. Alex Brown Management Services, Inc.*, 2005 WL 1594085 (Del. Ch. 2005). In doing so, it erroneously determined *Albert* contradicts *Dofflemyer*.

In *Albert*, the Delaware Chancery Court held that "[t]he law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs." 2005 WL 1594085 at *18 (2005). The court of appeals, however, completely fails to understand that the closing of the merger on October 20, 2006, is the act Menezes alleges was wrongful, not entering into the merger agreement.

The holdings in *Dofflemyer* and *Albert* are not in conflict when applied to this case. *Dofflemyer* makes clear that Menezes's claim accrued on October 20, 2006, when the merger closed because that was the time he sustained an injury. Likewise, *Albert* establishes that Menezes's claim accrued on October 20, 2006, when the merger closed because that was the allegedly wrongful act. Thus, this Court should disregard the court of

appeals reasoning with respect to *Albert* because it is not in conflict with *Dofflemyer* as applied to the facts of this case.[14]

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[14] In fact, *Albert*, when read in its entirety, confirms *Dofflemyer* and the holding of the circuit court here. *Albert* 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. 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 the court of appeals here, the claim in *Albert* would have accrued when the defendants made the decision to stop hedging. The *Albert* court, however, held that it accrued "at the time the Funds became unhedged." 2005 WL 1594085 at *14. That was when there was "harm" or "injury."

Albert is even more consistent with *Dofflemyer* when one looks at how the court treated the first claim in the case. 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*." *Id.* at *13 (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 the court of appeals holding were correct, the first claim in Albert would have accrued well before the closing of the funds; it would have accrued 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 *6), or perhaps when the plaintiff sent in his investment and subscription agreement. That it did not accrue until the funds "closed" is precisely consistent with *Dofflemyer*.

C. Pursuant to *Baron v. Allied Artists Pictures Corporation*, Menezes's claim accrued when the merger closed because, before that time, it could not have been prosecuted to a successful conclusion.

The circuit court also relied upon *Baron v. Allied Artists Pictures Corporation*, 717 F.2d 105 (3rd Cir. 1983), a case in which the court held that, under Delaware law, a claim for damages arising out of a merger accrues when the merger is consummated. The *Baron* court reasoned that, prior to the closing, the plaintiff could not have suffered any damages and thus the claim could not have been prosecuted to a successful conclusion. *Id.* at 108

In *Baron*, the plaintiff's claim for damages arising out of the merger was based on alleged violations of federal law, but was "in the nature of" an action for "damages for breach of fiduciary duty" under Delaware law. The court therefore analyzed the exact issue in this case - when does a breach of fiduciary duty claim for damages accrue under Delaware law? The court held:

> 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. Supr. 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).

Baron, 717 F.2d at 108. Thus, pursuant to *Baron*, Menezes's claim for breach of fiduciary duty accrued at the time the merger closed because the damages he seeks to recover were suffered at the time the merger was consummated.

Despite the fact that the holding in *Baron* is crystal clear, the court of appeals was confused by the interplay of Delaware and federal law and dismissed the opinion because **federal** law changed under Sarbanes-Oxley Act. That fact is irrelevant to Delaware accrual law. What is important is that the Delaware law on accrual has not changed.

Therefore, notwithstanding any changes to federal statutes, it is still the law in Delaware that a claim for damages, such as Menezes's, accrues "only when it could be prosecuted to a successful conclusion." *Baron*, 717 F.2d at 108. In other words, Menezes's breach of fiduciary duty claims for damages arising out of the merger accrued at the time of the closing – October 20, 2006 – because he was not injured until then, and could not

have prosecuted his claim for damages prior to that time. For this reason, this Court should reverse the decision of the court of appeals.

D. Pursuant to *In re Coca-Cola Enterprises, Inc.*, a breach of fiduciary duty claim that relates to an underlying contract accrues when the contract becomes legally enforceable.

The circuit court relied upon *In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370 (Del. Ch. 2007), *aff'd Industrial Brotherhood Teamsters v. Coca-Cola, Inc.*, 2008 WL 2484587 (Del. 2008), which is a case that establishes that a breach of fiduciary duty claim relating to an underlying contractual agreement accrues when the underlying contract becomes legally enforceable. *In re Coca-Cola* involved a 1986 "Master Bottle Contract" between Coca-Cola Company and one of its distributors wherein the plaintiffs complained "about the painful effects of the terms of the 1986 MBC . . . ." The Delaware court held the wrong "occurred at the time that enforceable legal rights [in the 1986 MBC] . . . were created."[15] The court found that the plaintiffs' claims accrued in 1986 when the MBC contract was executed since that was when "enforceable legal rights . . . were created."

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[15] *In re Coca-Cola Enterprises, Inc.*, 2007 WL 3122370 at *5 (*quoting Kahn v. Seaboard Corporation*, 625 A.2d 269, 271 (Del. Ch. 1993)). While the court of appeals' opinion cited this language from the *Coca-Cola*, and *Kahn* decisions, *see* 392 S.C. at 596, 709 S.E.2d at 119-121, the legal principles were not properly applied to the facts of this case.

There were no conditions precedent to the enforceability of the contract at issue in *In re Coca-Cola*, unlike the merger agreement at issue here. The court of appeals completely missed this point and determined that the closing was a "mere formality" based on language from the complaint. That language in the complaint, however, referenced the fact that Respondents controlled both ITG and SCI, and, therefore, if Wilbur Ross wanted to vote to approve the merger on October 20, 2006, no contrary vote by the minority shareholders would have mattered.[16] The fact that the merger was subject to a myriad of conditions precedent is critical because, based on the reasoning of *In re Coca-Cola*, it is clear that the legally enforceable rights concerning the merger were not created until the conditions precedent were satisfied and the merger closed.

The court of appeals discussed *In re Coca-Cola*, but erroneously reasoned that the merger agreement created legally enforceable rights when it was approved by the SCI board on August 29, 2006. The court of appeals supported this conclusion by the fact that Menezes could have sued to enjoin SCI from consummating the merger because the agreement

[16] The complaint did ***not*** allege that the closing of the merger was a "formality." It alleged that approval by the stockholders was a formality since Respondents controlled 75.6% of the stock. (App. 14-15.)

created legally enforceable rights "to proceed with all aspects of the merger agreement in good faith." *Menezes*, 392 S.C. at 596.[17]

A potential suit to enjoin the merger is irrelevant here. The alleged breach of fiduciary duty at issue here occurred when all conditions precedent to the merger were satisfied and the merger closed, and those conditions precedent were not satisfied until weeks after Menezes signed the Release. Therefore, legally enforceable rights concerning the merger were not created until after the Release was signed. Since the merger did not become legally enforceable until the closing, as the circuit court found, Menezes' claims could not have accrued until that time.

This court of appeals also failed to address *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006), a case which makes clear that Menezes' cause of action for breach of fiduciary duty

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[17] The court of appeals' reasoning here is difficult to follow. The obvious meaning of the language in *Coca-Cola* is with respect to the right to enforce the master bottling agreement. The analogy here would be to the right to enforce the merger agreement, i.e., to force the merger to close. There could have been no right to force the merger to close until the conditions precedent were satisfied. *See 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."

could not have accrued prior to the closing of the merger. In Teachers' which is explicitly recognized in *In re Coca-Cola* (2007 WL 3122370, n. 45), the plaintiff brought a derivative action alleging a breach of fiduciary duty based on the fact various AIG officers were receiving additional compensation via a contract between AIG and another company, Starr, for doing what they should have been doing as AIG employees. The defendants moved to dismiss based on the same arguments the Respondents made here, asserting that

> when a contract is contended to have resulted from fiduciary misconduct, the statute of limitations begins running at the time of the decision to contract, as the date of the key wrong. Performance under the contract, then, is generally considered as a natural consequence flowing from the original decision by the defendant-fiduciaries to obligate the corporation to the contract.

Id. at 665-666 (emphasis added).

The court rejected the argument because the contract was subject to termination each year on short notice, noting:

> Each of those contracts contains a provision granting AIG an annual right to terminate without penalty upon certain notice. As Teachers argues, what the complaint challenges is the discretionary decision of the AIG director-defendants to continue doing business with Starr on terms that Teachers alleges were grossly unfair. **Therefore, the complaint is not challenging the original decision of AIG to sign the MGA Agreements in the 1970s. It is attacking the allegedly disloyal and self-enriching decision of Greenberg, Matthews, and Smith to perpetuate an unfair relationship**

> **with Starr, with the supine complicity of the outside directors of AIG, who breached their duty of care by failing to understand, much less knowingly approve, the Starr-AIG relationship.**

Id. at 666-667 (emphasis added).

Here, the Respondents had multiple opportunities to cancel[18] (or simply not proceed with) the merger after the Release was signed. Pursuant to *Teachers'*, Menezes's breach of fiduciary duty claims could not, then, have accrued against the Respondents at any time prior to the expiration of those opportunities – that is, prior to the closing of the merger. Because the relevant rights did not become legally enforceable until the merger closed and the agreement was subject to cancellation, this Court should find that Menezes's claim accrued at the closing of the merger and reverse the decision of the court of appeals.

[18] *See* pp. 4-5, *supra.*

CONCLUSION

Based upon the foregoing arguments and citation of authority, Menezes respectfully requests this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

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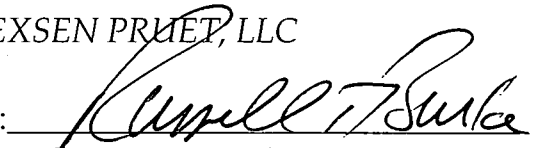
By: 

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October 8, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701
South Carolina Court of Appeals
Opinion No. 4810, filed March 23, 2011

Brian P. Menezes,.....Petitioner,

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,.....Respondents.

PROOF OF SERVICE

I certify that on this day I have served the Petitioner's Brief and Appendix, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following counsel of record:

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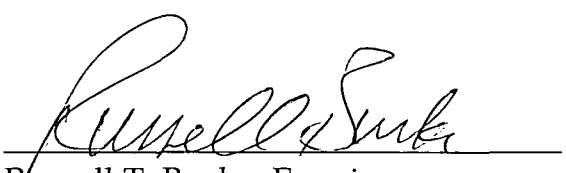

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October 8, 2012

Via Hand Delivery

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: *In re International Textile Group Merger Litigation*
C.A. No. 2008-CP-23-2701

Dear Mr. Shearouse:

Enclosed for filing please find the original and 14 copies of the Petitioner's Brief and Appendix in connection with the above-referenced matter. Please file the originals and return one (1) filed-stamped copy of the documents to me in the enclosed, self-addressed, stamped envelope.

As noted on this letter and as further evidenced by the Proof of Service, opposing counsel is being served.

Thank you for your assistance in this matter.

Sincerely,

Russell T. Burke

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