

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

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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. 4820, filed March 23, 2011

S.C. Supreme Court

Brian P. Menezes

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STATEMENT OF ISSUES ON APPEAL

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

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

STATEMENT OF THE CASE

Petitioner, Brian P. Menezes (“Plaintiff”), is one of several plaintiffs pursuing identical claims against Defendants in the trial court. The Circuit Court has now consolidated all the plaintiffs’ claims into a single action, which is advancing through discovery toward trial. The issues on this appeal, however, concern only Mr. Menezes’s alleged claims.

On April 9, 2008, Mr. Menezes, a shareholder and former officer of Safety Components International, Inc. (“SCI”), filed a direct shareholder lawsuit alleging that Defendants—predominately the officers, directors, or purported controlling shareholders of SCI—had breached their fiduciary duties in approving a merger of the former International Textile Group, Inc. (“FITG”) and a subsidiary of SCI. In their Answers, Defendants asserted affirmative defenses of release and accord and satisfaction, which were based on a Settlement

Agreement and Release of All Claims that Plaintiff signed to settle a separate lawsuit against certain of the Defendants. Defendants contended that the broad release provision (“Release”) contained in the settlement agreement barred Plaintiff’s current claims. Defendants also filed a counterclaim for breach of the Release.

On June 6, 2008, Defendants moved for judgment on the pleadings under Rule 12(c), SCRPC, or, alternatively, for summary judgment under Rule 56, SCRPC, based on the preclusive effect of the Release. On July 2, 2008, Plaintiff moved to dismiss Defendants’ counterclaim for breach of the Release. On July 31, 2008, the trial court held a hearing on the motions. On February 17, 2009, the trial court entered an order denying Defendants’ motion for judgment on the pleadings or summary judgment (the “Order”). The Order also granted Plaintiff’s motion to dismiss Defendants’ counterclaim for breach of the Release and struck Defendants’ affirmative defenses of release and accord and satisfaction. On February 25, 2009, Defendants moved for reconsideration, which was denied by the trial court on March 4, 2009.

Defendants filed their notice of appeal on March 5, 2009. Thereafter, Plaintiff moved to dismiss the appeal, contending that the Order was interlocutory and that the issues raised by the appeal were not immediately appealable. On April 29, 2009, the Court of Appeals denied Plaintiff’s motion to dismiss. The Court of Appeals, however, also ruled that review of the Order would be limited to the dismissal of Defendants’ counterclaim and the striking of their affirmative defenses, citing S.C. Code Ann. § 14-3-330(2)(c). The Court of Appeals stated that it would not review the trial court’s denial of Defendants’ motion for judgment on the pleadings or denial of summary judgment. On May 14, 2009, Defendants petitioned for rehearing pursuant to Rule 221(a), SCACR, seeking clarification of the Court of Appeals’s order and pointing out that, under South Carolina law, all rulings of a single order that are

appealable in part should be considered on appeal. On June 16, 2009, the Clerk of the Court of Appeals returned Defendants' petition for rehearing, citing Rule 221(c), SCACR, because the underlying order allegedly did not dismiss or finally decide the appeal. On June 23, 2009, Defendants requested that the Clerk of the Court of Appeals re-file the Petition for Rehearing and that a panel rule on Defendants' Petition. No further action was taken by the Court of Appeals on Defendants' Petition for Rehearing directed to the April 29, 2009 Court of Appeals order denying Plaintiff's motion to dismiss the appeal.

On October 6, 2010, the Court of Appeals issued its decision reversing the Order of the trial court and remanding. The Court of Appeals held that it was "error for the circuit court to dismiss Plaintiff's defenses and counterclaim relating to the release." The Court of Appeals did not review the denial of Defendants' motion for judgment on the pleadings or summary judgment. Thereafter, Plaintiff petitioned the Court of Appeals for a rehearing, which petition was denied. On June 30, 2011, Mr. Menezes petitioned this Court for a writ of certiorari, which this Court granted on September 6, 2012.

STATEMENT OF FACTS

From 1999 to 2006, Mr. Menezes was employed by SCI as Chief Financial Officer and, for a period, interim Chief Executive Officer. (R. Vol. I, p. 7, ¶ 4.)¹ Plaintiff separated from SCI in June 2006 but remained a shareholder at the time of the merger. (*Id.*) SCI was a publicly traded Delaware corporation with its headquarters in Greenville, South Carolina, and was in the business of designing and manufacturing airbag fabric and airbag cushions. (R. Vol. I, p. 8, ¶ 8.) In 2006, SCI merged with FITG, a privately held Delaware corporation

¹ Plaintiff's Complaint allegations are admissions *in judicio*. See, e.g., *Fisher v. S.C. Dep't of Health & Envtl. Control*, 309 S.C. 10, 12-13, 419 S.E.2d 794, 795 (Ct. App. 1992). By reciting these allegations, Defendants do not admit any fact beyond what has been specifically admitted in their Answers, nor do Defendants waive their right to challenge Plaintiff's account.

with its headquarters in Greensboro, North Carolina, whose operations included the manufacture of fabric for apparel, uniforms, and upholstery. (R. Vol. I, pp. 7-8, ¶ 6.) SCI survived the merger, and the combined companies continued operations under the name International Textile Group. (R. Vol. I, p. 8, ¶ 10.) W.L. Ross & Co., LLC (“WLR”), is an advisor of investment funds named in this lawsuit that allegedly owned shares in SCI and FITG either directly or indirectly through affiliated entities. (R. Vol. I, pp. 7-8, ¶¶ 5, 7, 9.) The individual Defendants were members of the board of directors for SCI or FITG, with the exception of Stephen B. Duerk, who was president of SCI prior to the merger and who executed the merger agreement on behalf of SCI. (R. Vol. I, pp. 9-10, 25, ¶¶ 13-16, 86.) One of the questions on appeal is whether a claim for breach of fiduciary duty regarding the terms of a merger accrues when the board approves the merger agreement fixing those terms or when the shareholders later vote to consummate the merger. There are three relevant dates.

1. On **August 29, 2006**, the SCI board of directors approved the merger between SCI and FITG. (R. Vol. I, p. 16, ¶ 46.) The merger agreement provided that FITG would merge into SCI, and that SCI’s certificate of incorporation would be amended to reflect the new combined entity. (R. Vol. I, pp. 11-12, ¶¶ 23, 24.) A vote of the SCI shareholders was required to adopt the amended certificate of incorporation, but because the majority shareholders had already expressed their intent to vote in favor of the merger, this step was, by Plaintiff’s admission, a mere formality. (R. Vol. I, p. 11-12, ¶¶ 22, 23, 24.) As the key term, and the one at the heart of the underlying lawsuit, the agreement provided that FITG shareholders would receive one (1) share of SCI stock for every 1.4739 shares owned in FITG (the “Exchange Ratio”). (R. Vol. I, pp. 12, 14, ¶¶ 25, 35.) That Exchange Ratio reflected a value of \$185 million for FITG based on SCI’s share price at the time of the

merger agreement. (R. Vol. I, p. 13, ¶ 29.) The SCI board approved these terms based on the recommendation of a special committee established to evaluate the merger (R. Vol. I, p. 14, ¶ 35) and on a fairness opinion rendered by an independent financial firm, RSM EquiCo Capital Markets, LLC (“RSM”), which concluded that the Exchange Ratio was fair to SCI. (R. Vol. I, p. 15, ¶ 43.)

The terms of the merger agreement, including the Exchange Ratio, were publicly disclosed the next day on August 30, 2006, when a press release was issued and a Form 8-K was filed with the Securities and Exchange Commission (“SEC”), and again on September 1, 2006, when a preliminary Joint Proxy Statement/Prospectus (“Prospectus”) was publicly filed with the SEC. The Prospectus contained a detailed description of the reasons for the merger, the terms and conditions of the merger agreement, and the financial analysis performed by RSM and its fairness opinion on the Exchange Ratio. The publicly filed Prospectus in fact supplied much of the information upon which the allegations in Plaintiff’s Complaint rest. (*See, e.g.*, R. Vol. I, pp. 11-12, 14-16, 20-21, ¶¶ 23, 35, 44, 45, 47, 67.)

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

any and all manner of actions, causes of action, suits, claims, setoffs, debts, compensation, salary, benefits, sums of money, accounts, covenants, trespasses, damages, judgments and demands whatsoever, in law or in equity, whether known or unknown, liquidated, contingent, absolute, or otherwise, which Plaintiff either has had or now has against the Released Parties

for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof. It is Plaintiff's intention to release all rights and claims that he may lawfully release.

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

Plaintiff had the assistance of legal counsel when he expressly released all “known and unknown” claims, including any “contingent” claims, against Defendants. (R. Vol. II, pp. 619-623.) Notably, the payments made to Plaintiff as consideration for the Release included sums intended to satisfy Plaintiff's claim for a change-in-control bonus (R. Vol. I, pp. 141-142, § 2), which was triggered by the merger of FITG and SCI, approved approximately one month earlier. (R. Vol. II, pp. 576-577.)³ In other words, the subject matter of the current litigation was incorporated by reference into the same settlement agreement that provided for a release of all claims—whether “known or unknown,” and “which may have been made” in the underlying lawsuit. Moreover, during the negotiations to settle the employment lawsuit, Plaintiff's counsel provided opposing counsel with a draft

² It is undisputed that the “Released Parties” as defined in the Release include all Defendants. (Pet'r's Br. 4.)

³ See R. Vol. II, pp. 576-577, July 31, 2008 Hearing (“But they did have a dispute about the bonus that he was entitled to for a merger. And they refused to pay him anything or do anything unless he conceded on that point. And he wasn't willing to concede. And that's where the original lawsuit came from.”) (Statement of Plaintiff's counsel). See also *Shelton v. Bressant*, 312 S.C. 183, 184, 439 S.E.2d 833, 834 (1993) (“Acts of an attorney are directly attributable to and binding upon the client.”); *Smith v. Pearson*, 210 S.C. 524; 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing). See also R. Vol. I, p. 251 (the basis for claims settled in 2006 was Plaintiff's belief “that he was entitled to the bonus in connection with the contemplated merger”).

amended complaint containing an allegation, albeit stricken through, that the proposed merger agreement was made on unfair terms. (Appendix Vol. III, p. 1258.)

3. On **October 20, 2006**, the shareholders of SCI and FITG voted to consummate the merger (which in the case of SCI meant merely adopting an amended and restated certificate of incorporation reflecting the fact of the merger between FITG and SCI). (R. Vol. I, pp. 11-12, ¶¶ 20, 23.) Although Plaintiff now contends that this closing date—October 20, 2006—marks the point at which his current claims for breach of fiduciary duty accrued, his own Complaint makes clear that “[t]he approval process was a formality.” (R. Vol. I, p. 11, ¶ 22.) Indeed, Plaintiff acknowledges that “[t]he minority stockholders of SCI had no ability to stop the Merger had they wanted to,” given that the majority shareholders had already expressed their intent to vote in favor of the merger. (R. Vol. I, p. 11-12, ¶¶ 23, 24.) What Plaintiff has objected to is not the closing of the merger, but rather the SCI board’s decision to approve the merger (1) based on alleged inaccurate information about the financial health of FITG and (2) for consideration (the Exchange Ratio) that allegedly overvalued the worth of FITG and diluted the ownership interests of SCI shareholders. (R. Vol. I, pp. 17, 22, ¶¶ 49, 74.) Specifically, the gravamen of Plaintiff’s allegations is that Defendants knowingly relied on “inaccurate and deeply flawed” financial information supplied by FITG in approving the merger at the stated terms. (R. Vol. I, p. 17, ¶ 49.)

Hence, the wrongful act for which Defendants would be liable (if at all) for breaching their fiduciary duties to Plaintiff is the approval of the merger on August 29, 2006, when the board allegedly relied on the inaccurate information about FITG and fixed the Exchange Ratio for FITG shares. That act occurred nearly a month before Plaintiff relinquished all claims against Defendants in exchange for the consideration he received through the Settlement Agreement, executed on September 28, 2006. In fact, Plaintiff’s Complaint

alleges damages beginning from that act—the merger approval and announcement—and does not limit the alleged damages to the period after the merger closed:

This reduction in value is reflected in the stock price. On the day the Merger was publicly announced, August 30, 2006, SCI stock was trading at \$14.65 a share. The most recent trade, on April 2, 2008, for the stock of the Combined Company ... was at \$1.65. This is a reduction in value of nearly 90%. In terms of dollars, the value of the minority shareholder's interest has dropped from nearly \$20 million before the Merger was announced to just over \$2 million now.

(See R. Vol. 1, p. 24 ¶ 84.)

By the terms of the Release, and under firmly established principles of Delaware law described below, Plaintiff's claims are therefore barred as a matter of law.

ARGUMENT

I. The Release's Plain and Unambiguous Terms Bar Plaintiff's Claims For Breach of Fiduciary Duty Arising From the Merger.

A. South Carolina Law Encourages Settlement and Has a Strong Policy of Enforcing Releases According to their Terms.

Although Plaintiff's underlying claims arise under Delaware law, the interpretation of the Release is governed by the law of South Carolina. (R. Vol. I, p. 148, § 29.) A release is a specific type of contract governed by the same principles of interpretation as other contracts. See *Gardner v. City of Columbia Police Dep't*, 216 S.C. 219, 223, 57 S.E.2d 308, 309-10 (1950); *Bowers v. S.C. Dep't of Transp.*, 360 S.C. 149, 153-54, 600 S.E.2d 543, 545 (Ct. App. 2004). "In construing [a] release, the court must seek to ascertain and give effect to the intention of the parties." *Wilson Group, Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 425 (D.S.C. 1995). The scope of a release is therefore controlled by the intention of the parties as revealed in the language and terms of the release. See *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 S.E.2d 19, 22 (Ct. App. 2006). South Carolina courts have a strong policy of enforcing settlements and releases to avoid costly litigation and to fulfill the

settling parties' intentions. *See Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) ("We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party.").⁴

B. Plaintiff's Release Unambiguously Bars His Claims Here.

The Release that Plaintiff signed in exchange for the consideration he received is unambiguous. It precludes the claims he has raised in this lawsuit.

The Release broadly bars more than just the claims that were at issue in Plaintiff's original employment lawsuit. The scope of the Release is extensive. Plaintiff agreed to release

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

(R. Vol. I, p. 143, § 7) (emphasis added.) The use of the term "whatsoever" alone demonstrates the broad and all-encompassing coverage of the releases given by Plaintiff in

⁴ In *M & M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008), the Court of Appeals stated that "[t]o discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." *Id.* at 476, 666 S.E.2d at 266 (citations omitted). The Court further held that the "[p]arties are governed by their outward expressions and the court is not free to consider their secret intentions." *Id.* at 476-77, 666 S.E.2d at 266. According to the Court, "[w]hen a contract is clear and unambiguous, the construction of the contract is a question of law for the court." *Id.* at 477, 666 S.E.2d at 266 (citations omitted). Similarly, the question of whether a release is unambiguous is a matter of law for the court to decide. *Wilson Group, Inc.*, 880 F. Supp. at 425 (citing *Campbell v. Bi-Lo, Inc.*, 301 S.C. 448, 392 S.E.2d 477 (Ct. App. 1990)).

the first paragraph of § 7, without even considering the phrase “from the beginning of time up to and including the date of execution” of the Settlement Agreement. *See State v. Holman*, 3 McCord 306, 308, 14 S.C.L. 124, 125 (1825) (broadly construing the phrase “any matter or thing whatsoever” appearing in a South Carolina statute); *Schuck v. Shook*, 10 N.Y.S. 935, 936 (N.Y. Sup. Ct. 1890) (finding “word ‘whatsoever’ has a very broad and comprehensive meaning. Among other definitions given to the word by Webster are ‘one thing or another,’ and ‘anything that may be,’ etc. ...”); 45 Words & Phrases (Whatsoever) (1970) (the word “whatsoever” has a very “broad and comprehensive” meaning and is often defined as “all that,” “no matter what” or “anything that may be”). Moreover, the parties went even further in the first paragraph of § 7, stating “Plaintiff’s intention to release all rights and claims that he may lawfully release.”

Additionally, Plaintiff, “[w]ithout in any way limiting the generality of the foregoing,” relinquished “*any claim based upon or as an owner of any stock or interest in any of the Released Parties arising prior to the execution of this Confidential Settlement Agreement.*” (R. Vol. I, p. 143, §7 (emphasis added).) And Plaintiff agreed to surrender “all claims made or *which may have been made* in the Underlying Lawsuit or Amended Complaint.” (*Id.* (emphasis added).) These provisions are dispositive. They make plain that the parties intended the Release to bring complete finality to their dispute by resolving “all claims” that Plaintiff could have made at the time he signed the Release. *See Gardner*, 216 S.C. at 223, 57 S.E.2d at 309-10 (if the release is not restricted by its terms to particular claims, the release will ordinarily be interpreted to cover all claims in existence at the time of the execution of the release that were contemplated by the parties). Notably, when Plaintiff entered this agreement to release all claims that he could have brought in the employment lawsuit, his attorney had already drafted and submitted to opposing counsel a draft amended

complaint in that lawsuit including (albeit stricken through) a paragraph alleging the merger's terms were unfair. (Appendix, Vol. III p. 1258.)

There is likewise no doubt that Plaintiff's current allegations constitute "actions, causes of action, suits, [or] claims ... for or related to any matter or thing whatsoever from the beginning of time up to and including the date of execution hereof." (R. Vol. I, p. 143, § 7.) That broad, all-encompassing phrase encompasses claims "for or related to" the merger of FITG and SCI. *Cf. Aiken v. World Fin. Corp.*, 373 S.C. 144, 149 n.2, 644 S.E.2d 705, 708 n.2 (2007) ("Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues."). Plaintiff cannot dispute that the "matter" of the merger existed at the time the Release was executed. The merger agreement fixing the terms of the merger was approved by the SCI board a month before the Release, and the various disclosures filed with the SEC before the Release published the merger's terms in detail for the SCI shareholders (including Plaintiff) and the market to see. Indeed, Plaintiff's Complaint relies extensively on these publicly filed documents in setting forth his allegations against Defendants, allegations that Plaintiff now contends he could have only raised after the closing of the merger. (*See* R. Vol. I, pp. 11-12, 14-16, 20-21, ¶¶ 23, 35, 44, 45, 47, 67.) And the Settlement Agreement itself referred to the fact of the recently approved merger (*see* R. Vol. I, pp. 141-142, § 2), a fact that Plaintiff himself has repeatedly conceded. (*See* R. Vol. II, pp. 576-577, July 31, 2008 Hearing.) The plain language of the Release therefore specifically references the merger as a "matter or thing" existing at the time of the parties' settlement of the previous dispute.

More to the point, Plaintiff had the right to bring suit either "in law or in equity" as soon as the SCI board approved the merger agreement. *See Kahn v. Seaboard Corp.*, 625

A.2d 269, 271 (Del. Ch. 1993) (“The wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. ... Suit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions.”). Indeed, Delaware courts have noted that “the optimal time to bring a disclosure claim in connection with a proposed merger ... where the company requests shareholder action or approval, is *before* the stockholder vote is taken and the deal closes.” *In re SunGard Data Sys., Inc. S’holders Litig.*, No. Civ. A. 1221-N, 2005 WL 1653975, at *2 (Del. Ch. July 8, 2005) (emphasis added).

Plaintiff certainly had standing to sue for injunctive relief immediately upon the SCI board’s approval of the merger. *See Albert v. Alex. Brown Mgmt. Servs. Inc.*, No. Civ. A. 762-N, 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) (“Whether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.”). Accordingly, a request for injunctive relief “may have been made in the Underlying Lawsuit or Amended Complaint,” as provided for in the Release. As Plaintiff himself has acknowledged, it is “clear” that “the Release might have applied to pre-merger claims,” including a “claim for injunctive relief.” (R. Vol. 1, p. 357.) Though Plaintiff maintains that the Release “would not apply [to] the post-merger claim that it was a breach of fiduciary [duty] to allow the Merger to consummate,” (*id.*), the Release makes no such distinction between a pre-merger suit for injunctive relief and a post-merger claim for damages. And as a matter of South Carolina law, a “broad” release like the one at issue here bars all claims based on the same “cause” or legal right, regardless of the choice of remedy elected by the plaintiff. *See Kennerty v. Etiwan Phosphate Co.*, 17 S.C. 411, 419 (1882).

In *Kennerty*, the South Carolina Supreme Court addressed the identical, though converse, argument that a release as to damages did not bar a later claim for injunctive relief.

The Court flatly rejected that argument:

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

Id. at *5.

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

Nor may Plaintiff avoid the clear terms of the Release by arguing that his current claims challenge the Defendants’ role in “allow[ing] the Merger to consummate.” As explained below, the technicality of a merger’s consummation is completely immaterial to

determining when a claim challenging the terms of a merger first accrues under Delaware law. And, furthermore, the Complaint itself shows that Plaintiff is challenging the decision to approve the merger terms in August 2006. But as a simple matter of construing the terms of the Release (again, a question governed by South Carolina law), Plaintiff surrendered “all claims” against Defendants, “whether known or unknown” and with explicit acknowledgment that “there may be facts or consequences of facts which are unknown to Plaintiff.” (R. Vol. I, pp. 143-144, §§ 7, 8.) The “consequence” of the merger’s consummation flows directly from the “fact” of the merger’s approval by the SCI board, which occurred more than a month before the Release took effect. Thus the Release by its terms bars any claim related to the merger, whether styled as challenging the merger’s terms or its “consummation.”

In reaching the contrary conclusion, the trial court gave credit to Plaintiff’s argument that his claims did not accrue until the consummation of the merger because of the “extensive conditions precedent to the merger that were not satisfied before the closing date.” (R. Vol. I, p. 2.)⁵ But, as the Court of Appeals recognized, Plaintiff’s own Complaint belies this argument. The Complaint repeatedly alleges that once a merger agreement was entered, the

⁵ Though Plaintiff devotes much of his brief to alleging conditions precedent, his Complaint nowhere enumerates the conditions precedent which the trial court determined to be of such central significance for deciding when the claims alleged there accrued. Plaintiff did allege that Defendants should have exercised their right to cancel the merger under the “Material Adverse Change,” or “MAC clause,” which permitted either side to cancel the merger in the event of materially adverse changes. (R. Vol. I, pp. 20-21, ¶ 67.) Otherwise, the Complaint makes no mention of the supposed “extensive conditions precedent” that preceded the closing. Plaintiff also alleges that the merger caused two “Further Negative Consequences”: a replacement credit line for the new combined company whose terms were less favorable than the prior credit arrangements (R. Vol. I, pp. 22-23, ¶ 76); and a “debt for equity swap” that allowed WLR to take equity in the new company in exchange for loans previously made to FITG, allegedly to the detriment of SCI minority shareholders. (R. Vol. I, p. 23, ¶ 79.) All of these allegations are, for reasons explained below, merely the purported effects or consequences of the SCI board’s approval of the merger’s terms on August 29, 2006 and are not independently actionable “wrongs” themselves.

actual shareholder approval process was a mere formality. (*See* R. Vol. I, pp. 11-12, ¶¶ 22-24.) Further confirming this point, the Complaint alleges that the merger *announcement* triggered the beginning of Plaintiff's alleged injury, as the Complaint links the drop in SCI's stock price to the announcement of the merger, not its closing. (R. Vol. I, p. 24, § 84.)

Moreover, the error in Plaintiff's argument about conditions precedent is evident from the Release, which in addition to barring all "known and unknown" claims, also bars "contingent" claims. (R. Vol. I, p. 143, § 7.) A condition precedent is synonymous with a contingency. *Compare* Black's Law Dictionary 312 (8th ed. 2004) (defining *condition precedent* as "[a]n act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises"), *with id.* at 338 (defining *contingent* as "[d]ependent on something else; conditional"). Even Plaintiff's counsel has described the conditions precedent to the merger as "contingencies." (*See* R. Vol. II, p. 596 ("It's like the purchase of a house. ... [Y]ou enter a contract and you later close on it. But there are all kinds of *contingencies*.")) (emphasis added.) Plaintiff's argument, erroneously accepted by the trial court, is that the existence of conditions precedent to the merger that were incorporated as terms in the merger agreement deferred the accrual of his merger-related claims until the closing of the merger. Even if that were an accurate statement of the Delaware law of accrual (it is not), the argument is of no moment in this case, where the Release plainly and expressly bars "contingent" claims. Assuming that, at the time Plaintiff signed the Release, his claims depended on the occurrence of some future event, the claims were simply contingent and were as effectively surrendered by the execution of the Release as any claim that had fully accrued by then. South Carolina law endorses the rights of parties to release contingent and even future claims. *See S. Glass & Plastics*, 367 S.C. at 427-29, 626 S.E.2d at 22-23 (enforcing release that barred "future" claims and claims that "may

accrue hereafter”). So, when Plaintiff agreed “to release all rights and claims that he may lawfully release” (R. Vol. I, p. 143, § 7), he released the claims at issue here.

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

C. Defendants Preserved Their Arguments on the Plain Language and Extensive Scope of the Release, Including the Reference To “Contingent” Claims.

Both in this Court and below, Plaintiff has tried to narrow the Release’s scope by arguing that Defendants waived their right to rely on the word—“contingent”—found in the Release provisions. (Pet’r’s. Br. 3 n.1.) But Defendants’ memoranda below, contrary to Plaintiff’s assertion, squarely preserved their right to invoke the entire scope of the Release, including Plaintiff’s relinquishment of “contingent” claims.

To begin with, the ultimate question before the trial court—and now this Court—has always been whether the Release encompasses the claims he has raised in this action. To be sure, the briefing below shifted to the secondary question of whether, under Delaware law, Plaintiff's claims had accrued as of the date of the Release. But Defendants argued below that the Release's expansive scope was the primary basis for the dismissal of his claims. Accordingly, Defendants' memorandum of law in support of their motion for judgment on the pleadings prominently quoted the key provision of the Release, including the language barring Plaintiff from later suing on any claim, "whether known or unknown, liquidated, *contingent*, absolute, or otherwise." (R. Vol. I, p. 124 (emphasis added); *see also* R. Vol. I, pp. 303-304.) Defendants did not belabor the point that Plaintiff had surrendered his contingent claims, but that was because a litany of other provisions and terms in the Release applied equally to describe the expansive scope of the Release and the nature of the claims Plaintiff had relinquished, including the bar on "any claim based upon or as an owner of stock or interest in any of the Release Parties" and Plaintiff's expressly memorialized "intention to release all rights and claims that he may lawfully release." (*Id.*) By calling the issue of the terms of the Release, including the reference to "contingent" claims, "to the attention of the trial court sufficiently to obtain a ruling thereon," Defendants have adequately preserved the issue for review here. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

Moreover, Plaintiff does not (and could not) contend that Defendants somehow failed to raise the terms of the Release as a defense to his action. Such an argument would be belied by even a cursory review of Defendants' memorandum of law. He does not, for instance, fault Defendants for failing to raise below Plaintiff's relinquishment of all "known and unknown" claims, claims sounding "in law or in equity," or claims "for or related to any

matter or thing whatsoever.” (R. Vol. I, p. 143, § 7.) Yet these other aspects of the Release received no greater emphasis in Defendants’ briefing than did the ban on “contingent” claims. All material provisions of the Release supporting Defendants’ contentions were identified and relied upon in Defendants’ brief, and the terms of the Release were discussed extensively at the hearing on Defendants’ motion.⁶

And although Plaintiff takes issue with Defendants’ reliance on the “contingent” language of the Release, contingent claims are effectively barred by other provisions to which he does not object. For example, through the Release Plaintiff surrendered “all claims” against Defendants, “whether known or unknown,” and with explicit acknowledgement that “there may be facts or *consequences of facts* which are unknown to Plaintiff.” (R. Vol. I, pp. 143-144, §§ 7, 8 (emphasis added).) The conditions precedent to the closing of the merger were merely “consequences” of the “fact” that the merger agreement, as approved by the SCI board, set forth those conditions and expressly obligated the officers and directors of SCI, including Defendants, to fulfill or waive them prior to closing. (*See* R. Vol. III, pp. 1070-71, § 5.4 (obligating the parties to take “all reasonable acts necessary to cause the conditions to Closing to be satisfied as promptly as practicable”).) In addition, Plaintiff agreed that it was his “intention to release all rights and claims that he may lawfully release.” (R. Vol. I, p. 143, § 7.) As noted above, South Carolina law

⁶ Equally unavailing is Plaintiff’s implication that Defendants somehow waived their right to rely on the Release’s express terms during oral argument. Counsel’s clarifying the issue for the Court—*i.e.*, when did the claim accrue—did not render unspecified Release terms irrelevant or somehow amount to a waiver of certain portions of the Release. To determine whether Plaintiff released contingent claims or unknown claims or all of the other types of claims mentioned in the Release, the Court had to determine when those claims accrued. Defense counsel’s representation to the trial court was entirely correct: if Defendants prevailed on the threshold question of when Plaintiff’s claims accrued under Delaware law, that would be the end of the case. Counsel never stated that the terms of the Release were irrelevant to the ultimate question of Plaintiff’s right to proceed with this lawsuit.

authorizes the release of future and contingent claims. Whether taken individually or in combination, these provisions were just as effective in releasing claims or aspects of claims that were “contingent” on future events. Accordingly, as a matter of South Carolina law, Plaintiff gave up his right to litigate his current claims.

II. Under Delaware Law, Plaintiff’s Claims Accrued When the Board Approved the Merger Agreement, Not When the Merger Closed.

Despite this straightforward application of the broad language of the Release, the trial court avoided the effect of the Release on the grounds that the merger closing date deferred the accrual of Plaintiff’s claims until the shareholders voted to consummate the merger on October 20, 2006. Under Delaware law, which controls this issue, the trial court’s conclusion is incorrect, and the Court of Appeals therefore correctly reversed.⁷

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

⁷ Because Plaintiff’s claims concern the fiduciary duties of officers, directors, and controlling shareholders of a Delaware corporation, his claims arise under and are governed by Delaware law. *See Restatement of Conflicts of Laws* § 187 (1934); *McDaniel v. McDaniel*, 243 S.C. 286, 292, 133 S.E.2d 809, 813 (1963) (South Carolina courts follow the traditional choice of law rules as stated in the Restatement of Conflicts of Laws).

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

Under Delaware law, a cause of action for breach of fiduciary duty first accrues “at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action.” *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004). Time and again, the recent opinions of the Delaware courts have emphasized that determining when a claim for breach of fiduciary duty accrues does not depend on “when the harmful effects of the act are felt” or “when the plaintiff suffered a loss.” *In re Coca-Cola Enters., Inc. S’holders Litig.*, C.A. No. 1927-CC, 2007 WL 3122370, at *5 & n.39 (Del. Ch. Oct. 17, 2007) (“The court reiterates that a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.”), *aff’d sub nom., Int’l Bhd. Teamsters v. Coca-Cola Co.*, 954 A.2d 910 (Del. 2008); *see also Fike v. Ruger*, 754 A.2d 254, 260 (Del. Ch. 1999) (“A cause of action accrues at the moment of the wrongful act, even if the plaintiff is ignorant of the wrong.”).

Delaware law is “crystal clear” on this point, and the underlying reason is that, in fiduciary duty cases, as distinct from other types of claims, “the plaintiffs were harmed as soon as the alleged wrongful acts occurred.” *Albert*, 2005 WL 1594085 at *18 (footnote omitted). As summarized by the leading treatise on Delaware corporation law, “the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt.” 2 Edward P. Welch, et al., *Folk on the Delaware General Corporation Law* § 327.3.2 (5th ed. 2006 & Supp. 2007) (hereinafter *Folk*).⁸ Determining when a claim

⁸ While there is no dispute that Delaware law controls the question of when Plaintiff’s claims accrued, the rule followed by the Delaware courts is consistent with South Carolina law. *See Stephens v. Draffin*, 327 S.C. 1, 4-5, 488 S.E.2d 307, 309 (“A cause of action accrues at the moment when the plaintiff has a legal right to sue on it.”).

first accrues, therefore, requires isolating the alleged wrongful act and ignoring the effects or consequences that flow from the alleged wrongdoing.

Where, as here, a shareholder challenges the terms of a merger, the claim arises or accrues at the time that the board “pass[es] a resolution approving the merger on terms which [the plaintiff] feels to be unfair,” not when the shareholders later vote to consummate the merger. *Brown v. Automated Mktg. Sys., Inc.*, No. 6715, 1982 WL 8782, at *2 (Del. Ch. Mar. 22, 1982). In *Brown*, the Delaware Chancery Court addressed a similar factual scenario as here in the context of applying Delaware’s statutory requirement that a plaintiff in a derivative suit must be a “stockholder of the corporation at the time of the transaction of which such stockholder complains.” Del. Code Ann. 8, § 327. The court concluded that the plaintiff’s claims accrued at the time of the merger’s approval by the board; the fact that the merger technically closed at a later date, the court explained, was immaterial to deciding when the claim first arose or accrued: “it is not the merger itself that constitutes the wrongful act of which plaintiff complains, but rather it is the fixing of the terms of the transaction which will be finalized by the consummation of the merger which provides the foundation for the suit.” *Brown*, 1982 WL 8782 at *2. The court flatly rejected the argument that “no wrong occurs until the merger is voted upon and approved.” *Id.*

Delaware courts have repeatedly applied *Brown*’s holding to reject, on standing grounds, claims by plaintiffs directed at the allegedly unfair terms of a merger agreement. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1169 (Del. Ch. 2002) (plaintiff lacked standing to assert claim for breach of fiduciary duty because claim arose when directors approved merger, not when plaintiff became aware of the merger or the alleged wrongdoing); *In re Beatrice Cos., Inc. Litig.*, 522 A.2d 865, 1987 WL 36708, at *3 (Del. 1987) (“In the case of a proposed merger, the plaintiff must have been a stockholder at the

time the terms of the merger were agreed upon because *it is the terms of the merger, rather than the technicality of its consummation*, which are challenged.”) (emphasis added); *Folk, supra*, § 327.3 (“[B]oth a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and not to be continuing transactions up to the time of stockholder approval.”); *see also Dieter v. Prime Computer, Inc.*, 681 A.2d 1068, 1072-73 (Del. Ch. 1996) (rejecting plaintiffs as class representatives in a merger-challenge case where they purchased stock after the merger was announced: “it is not the Merger that constitutes the wrongful act of which Plaintiffs complain; it is the ‘fixing of the terms of the transaction’” (citing *Brown*, 1982 WL 8782 at *6)); *FMC Corp. v. R.P. Scherer Corp.*, Civ. A. No. 6889, 1982 WL 17888, at *2 (Del. Ch. Aug. 6, 1982) (denying request for preliminary injunction brought by shareholders who purchased their shares after the challenged decision was announced).⁹

The rule has also been applied for purposes of determining when breach of fiduciary duty claims accrued for statute of limitation purposes. In *Kahn v. Seaboard Corp.*, the Chancery Court rejected as untimely a shareholder’s challenge to a contract alleged to have been made for the benefit of the defendants and to the detriment of the corporation. 625 A.2d at 271. Although some of the payments made by the corporation under the contract came within the statute of limitations, the formation of the contract itself fell outside of the limitations period. *Id.* at 270. The court concluded that “[t]he wrong attempted to be alleged is the use of control over Seaboard to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants. Any such wrong occurred at the time that enforceable legal rights against Seaboard were created.” *Id.* at 271. Furthermore, there was

⁹ *FMC Corp.* is admittedly not a merger case and was accordingly cited by the Court of Appeals below as merely a “see also” reference—not one of the Court of Appeals’ primary cited authorities. Tellingly, Plaintiff’s Brief in this Court dwells on this “see also” case while virtually ignoring most of the other cases discussed above.

no “continuing wrong” because the payments merely constituted performance under the contract: as long as the contract remained in effect, “the payments it call[ed] for [were] legal obligations, not wrongs.” *Id.*

The principle is also illustrated in the Delaware Chancery Court’s decision in *In re Coca-Cola Enterprises*, which the Delaware Supreme Court affirmed. *See Int’l Bhd. of Teamsters v. Coca-Cola Co.*, 954 A.2d 910. The plaintiffs in that case alleged that directors of one of Coca-Cola’s largest bottlers breached their fiduciary duties to shareholders by adopting certain business practices at the behest of Coca-Cola. *In re Coca-Cola Enters., Inc. S’holders Litig.*, 2007 WL 3122370, at *2-3. Although those business practices were adopted between 2002 and 2005, well within the three-year statute of limitations for fiduciary actions, the court found plaintiffs’ claims barred because, in reality, the board’s actions were taken pursuant to a licensing agreement that had been in existence for more than twenty years. *Id.* at *6. As the court explained, “[e]ach one of these claims is, therefore, time-barred because each hinges upon the allegations that the terms and conditions established by a contract are unfair to the plaintiffs.” *Id.* (quotation marks omitted). Because the contract “provided the means by which the Defendants effectuated their breaches of fiduciary duty,” the causes of action accrued when the contract was entered, not later when its provisions were actually carried out and put into effect. *Id.*¹⁰

It makes practical sense to hold that a cause of action challenging the terms of a merger agreement accrues at the time the agreement is struck, not later when the merger

¹⁰ Other courts applying Delaware law have applied this principle to claims alleging fiduciary violations over the approval of allegedly unfair contract terms. *See Marvel Entm’t Group, Inc. v. Mafco Holdings, Inc.*, (*In Re Marvel Entm’t Group, Inc.*), 273 B.R. 58, 73 (D. Del. 2002) (“[W]here the claimed breach of fiduciary duty is an allegedly unfair contract, the limitations period begins to run when the contract is formed.”). In *Marvel Entm’t Group*, the court noted its finding was “consonant with the principle that in discerning when a cause of action accrues, ‘the determinative issue is when the specific acts of alleged wrongdoing occurred, and not when their effect is felt.’” *Id.* (quoting *Folk*, § 327.3 (4th ed.)).

closes. After all, when “[t]he wrong attempted to be alleged is the use of control over ... [the corporation] to require it to enter into a contract that was detrimental to it and beneficial, indirectly, to the defendants”—precisely what Plaintiff alleges here—“[s]uit could have been brought immediately thereafter to rescind the contract and for nominal damages which are traditionally available in contract actions. Complete and adequate relief, if justified, could be shaped immediately or at any point thereafter.” *Kahn*, 625 A.2d at 271. As the Delaware Chancery Court more recently explained in *Albert*, “[w]hether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued, since, as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief.” 2005 WL 1594085, at *18. Indeed, Delaware courts have noted that “the optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval, is *before the stockholder vote is taken and the deal closes.*” *In re SunGard Data Sys., Inc. S’holders Litig.*, No. Civ. A. 1221-N, 2005 WL 1653975 at *2 (Del. Ch. July 8, 2005) (emphasis added). Determining when a cause of action exists—whether for standing, statute of limitations, or the effect of a release provision—simply amounts to deciding when the plaintiff had a legal right to bring suit, *either* for an injunction *or* damages. *See Kennerty*, 17 S.C. 411, 1882 WL 5594, at *6.

The cases are legion in which shareholder plaintiffs bring suit *before* the close of a merger seeking equitable or nominal relief to challenge the terms of the merger. *See, e.g., Wayne County Employee’s Ret. Sys. v. Corti*, C.A. No. 3534-CC, 2009 WL 2219260, at *7 (Del. Ch. July 24, 2009).¹¹ Such suits in Delaware are the rule, not the exception, which underscores the policy of Delaware courts to encourage plaintiffs to bring their claims as

¹¹ *See also Smith v. Van Gorkom*, 488 A.2d 858, 864 n. 1 (Del. 1985) (overruled on other grounds by statute); *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715, 721 (Del. Ch. 2008); *David P. Simonetti Rollover IRA v. Margolis*, C.A. No. 3694-VCN, 2008 WL 5048692, at *1 (Del. Ch. 2008).

early as possible to avoid the difficulty and waste of undoing a consummated corporate merger. Plaintiff has therefore failed to address the fatal inconsistency in his argument: If his characterization of the Delaware law of accrual were correct, how could the plaintiffs in *SunGard*, *Kahn*, and *Wayne County* (and many other Delaware cases) have filed and maintained fiduciary duty claims *before* they accrued? The answer is simple: Plaintiff's position is not correct. All of the claims asserted in those cases accrued at the time of the alleged underlying wrongful acts, *i.e.*, the time the merger agreements were approved, and that is when Plaintiff's claims accrued as well.¹²

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

The wrongful act the plaintiffs allege is the unhedging of the Funds. However, after the defendants unhedged the Funds, their value skyrocketed. This was due, of course, to the fact that the Funds were exposed to much more risk. Assuming (without deciding) that unhedging the Funds was a wrongful act, it was wrongful because it exposed the Funds to this extra risk. However, under the plaintiffs' theory, they are given the equivalent of a call option. If the unhedging of the Funds works

¹² If Plaintiff's accrual theory were correct, all of the defendants in these cases could have obtained easy and immediate dismissals because the claims would not yet have accrued and thus would not have been ripe or justiciable. Because there was no dispute that the claims had accrued, however, none of the claims were or could have been dismissed on those grounds.

out, and the value of the Funds goes up, the plaintiffs will have no complaint. But if the hedging (or lack thereof) strategy does not work out, and the value of the Funds falls, the plaintiffs can sue. This clearly is not, and should not be, the law.

Id. In other words, a rule of accrual that deferred a cause of action until sometime after the alleged wrongful act would reward plaintiffs for taking a wait-and-see approach to litigation. The Delaware rule, by contrast, encourages plaintiffs to file suit immediately—whether for an injunction, an order of rescission, or for nominal damages—thereby preventing the wrongful act from ramifying into greater harm to the corporation or its shareholders. That is why, as the *Albert* court “reiterate[d],” “a claim accrues at the time of the alleged wrongdoing, and not when the plaintiff suffered a loss.” *Id.*¹³

That rule also serves the “longstanding Delaware public policy against the evil of purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock.” *OmniCare*, 809 A.2d at 1169 (quotation marks omitted). As shown above, Delaware courts vigilantly police the contemporaneous ownership rule to ensure that shareholder plaintiffs owned stock at the time of the alleged wrongful acts; otherwise, the plaintiffs lack standing to bring their claims. That policy would be easily frustrated if prospective plaintiffs could purchase shares after the terms of a merger were fixed in the merger agreement and announced to the public, but before the technical consummation of the merger. In essence, that would allow plaintiffs to purchase a lawsuit against corporate fiduciaries, a result that

¹³ Plaintiff badly misconstrues this case when he suggests that a claim could somehow have accrued merely upon someone deciding to pursue a wrongful act. (Pet’r’s Br. 25 n. 14.) Obviously, the law requires an actual act and not a mere thought. In *Albert*, that act was the unhedging of the funds. Here, it was entering into the merger agreement. Similarly, Plaintiff’s attempt to equate the closing of the funds in *Albert* to the closing of the merger is also misguided. In *Albert*, what “closed” was the period during which securities were being contributed to certain funds. The plaintiff in that case alleged the contributed securities were insufficiently diversified. But until they were all contributed, the degree of diversification was still fluctuating and, therefore, no wrongful act could have occurred. *Albert*, 2005 WL 1594085, at *19. Here, by contrast, the “closing” was merely the admitted formality of concluding a merger whose terms were fixed when the merger agreement was approved.

would be completely contrary to Delaware's policy to protect its corporate citizens from entirely self-serving lawsuits. *See In re Beatrice Cos.*, 1987 WL 36708, at *3 (plaintiff lacked standing to challenge proposed merger where plaintiff purchased shares after the merger's terms were fixed in an executed merger agreement but before the "technicality of the [merger's] consummation"); *Schreiber v. Bryan*, 396 A.2d 512, 516 (Del. Ch. 1978) ("The policy behind the Statute and the Rule is to prevent so-called 'strike suits' whereby individuals purchase shares in a corporation with litigious motives.").

All of Plaintiff's claims here stem from the terms of the merger agreement, specifically the Exchange Ratio, which Plaintiff alleges was unfair to minority shareholders like him. According to Plaintiff's own Complaint, the merger agreement, including the Exchange Ratio, was approved by the SCI board on August 29, 2006. (R. Vol. I, pp. 16, 26-29 ¶ 46, 85, 91, 99.) The allegedly wrongful acts of providing the SCI special committee with "inaccurate and deeply flawed" financial information about FITG, which was used to arrive at the Exchange Ratio, necessarily occurred before then. (R. Vol. I, p. 17, ¶ 49.) Under well-established principles of Delaware law, Plaintiff's claims accrued when the board approved the merger, not later when the merger was consummated by the vote of the shareholders. *See Brown*, 1982 WL 8782, at *2. Thus, the Release that Plaintiff signed on September 28, 2006—nearly a month after Plaintiff could have first brought suit to enjoin or rescind the merger agreement—bars his current claims as a matter of law. Any other result would undo the express agreement of the parties to release all claims between them and bring complete finality to their dispute, including any claims that "may have been made in the Underlying Lawsuit." (R. Vol. I, p. 143, § 7, (8).)

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

Plaintiff has tried to distinguish the “crystal clear” Delaware rule by noting that some of the cases stating the rule concern questions of standing (under the contemporaneous ownership requirement). As the Court of Appeals recognized, this attempted distinction fails. Logically, and by their express terms, these holdings necessarily speak directly to the accrual issue.

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

Not surprisingly, that is exactly what the Delaware courts do. For example, in the *Coca-Cola* case, the Chancery Court looked directly to standing decisions to determine whether the statute of limitations barred plaintiffs’ claims. *See In re Coca-Cola Enter. Inc.*, 2007 WL 3122370, at *5 n. 39 (citing *Albert*, 2005 WL 1594085, at *18; *Schreiber*, 396 A.2d at 516); *see also In re Marvel Entm’t Group, Inc.*, 273 B.R. at 73 (discussing *Schreiber*, 396 A.2d at 516). Even the case of *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982), cited

by Plaintiff, relies on a standing case as speaking to the issue of when a claim accrues.¹⁴ If the Delaware courts themselves look to standing cases to decide the accrual of claims, Plaintiff cannot fault Defendants for doing the same.¹⁵

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

In addition to his unsuccessful attempts to distinguish the current controlling Delaware authorities on claim accrual in merger cases, Plaintiff also tries to shift the focus by pointing to general tort cases, wrongly assuming that the accrual rule stated in such cases applies to breach of fiduciary duty claims. It does not.

Citing cases that involve general causes of action such as fraud and negligence, Plaintiff contends that under Delaware law, claims accrue only after there has been an injury. (Pet'r's Br. 12.) The problem for Plaintiff is that he has not alleged general tort claims but claims for breach of fiduciary duty, which "accrue at the moment of initial wrongdoing—not when their effects are felt" or "when the plaintiff suffered a loss." *Coca-Cola*, 2007 WL 3122370, at *5 & n. 39. As explained above, the accrual of such actions does not depend on

¹⁴ Specifically, *Kaufman* cites *Lavine v. Gulf Coast Leaseholds, Inc.*, 122 A.2d 550 (Del. Ch. 1956), a standing case. See *Kaufman*, 447 A.2d at 764. *Kaufman* and *Lavine* are both inapposite for other reasons and have been superseded by the more recent and on-point authorities, as explained below. But the connection between them confirms that standing cases are as relevant as any other when it comes to determining when a cause of action accrues.

¹⁵ The federal district court in *Dofflemeyer v. W. F. Hall Printing Co.*, 558 F. Supp. 372, 379 n. 5 (D. Del. 1983), rejected the comparison between standing and claim accrual. As shown below, however, *Dofflemeyer*, a federal district court decision entitled to no deference in its interpretation of Delaware law, simply misstates Delaware authority, certainly as that law has subsequently been clarified by the Delaware Supreme Court. The *Dofflemeyer* court's refusal to consider principles of shareholder standing, when Delaware courts plainly have, confirms that the federal district court's opinion is not a reliable guide to Delaware law. Indeed, the Delaware Chancery Court in the *Coca-Cola* case relied on the very decision that the *Dofflemeyer* court attempted to distinguish. See *In re Coca-Cola Enter. Inc.*, 2007 WL 3122370, at *5 n. 39 (citing *Albert*, 2005 WL 1594085, at *18).

when the alleged harm or injury was incurred, but when the defendant is alleged to have committed the wrongful act. *See Albert*, 2005 WL 1594085, at *18.

Against this uniform line of Delaware authority, Plaintiff has failed to cite a single Delaware case applying the general tort standard for the accrual of actions to claims for breach of fiduciary duty. Instead, each one of the cases he cites involves standard tort allegations such as negligence and fraud.¹⁶ To be sure, Plaintiff cites a law review article and a long string of cases—from *outside* Delaware—for the more general proposition that claims for breach of fiduciary duty “sound in tort.” But Plaintiff veers into misstatement when he asserts that the non-Delaware cases call for breach of fiduciary duty claims to accrue only at the point of injury under Delaware law. Even if Delaware law regards such claims as akin to torts for certain purposes, an uncertain proposition in itself,¹⁷ Delaware law is absolutely clear that claims for breach of fiduciary duty do *not* require a showing of loss or injury. *See In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 334 (Del. 1993) (overruled on other grounds by statute) (“Although it is clear that claims for common law fraud, misrepresentation, or equitable fraud do require plaintiffs to show quantifiable damage, the issues before us relate to breach of fiduciary duty, not fraud.” (citation omitted)). Such claims, therefore, cannot be deemed to accrue upon the occurrence of injury, as no injury need ever occur. Rather, the claims accrue as soon as the alleged breach of duty occurs.

¹⁶ *See, e.g., Kaufman v. C.L. McCabe & Sons, Inc.*, 603 A.2d 831, 832 (Del. 1992) (negligent procurement of insurance); *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 896 n. 16 (Del. 2009) (personal injury); *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 255 (Del. Super. Ct. 1969) (contract and negligence claims for home construction).

¹⁷ *See* Travis Lester and Michelle D. Norris, *Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71, 94-95 (2010) (“The [Delaware] cases nevertheless appear to treat breach of fiduciary duty claims as distinct from common law tort or contract claims.”).

As Plaintiff concedes, “a breach of fiduciary duty claim accrues as soon as all elements of the [claim] can be truthfully alleged in a complaint.” (Pet’r’s Br. 14).) In breach of fiduciary duty cases, Delaware law requires only two elements: duty and breach. *See Cede & Co. v. Technicolor*, 634 A.2d 345, 371 (Del. 1993). Because fiduciaries are held to a higher standard, plaintiffs are not required to allege actual quantifiable damages as an element of their claim for breach of fiduciary duty. *Id.*; *see also In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 766, 774 (Del. 2006) (affirming *Tri-Star*’s rule to permit nominal damages for deprivations to “stockholders’ economic interests or impairment of their voting rights”). Were it otherwise, officers and directors would have free license to breach their fiduciary duties so long as no harm resulted to the corporation’s shareholders. Consequently, all the elements are satisfied, and the claim accrues, as soon as there is a breach of duty, regardless of whether or when the breach may ever cause actual injury.

The law review article cited by Plaintiffs actually underscores this very point. *See Lester & Norris, Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. at 94-95. As the article observes, in 1993, “the Delaware Supreme Court decisively rejected the application of traditional common law tort elements and burdens to acclaim for breach of fiduciary duty.” *See id.* at 94 (citing *Technicolor*, 634 A.2d 345). Specifically, the article notes, the Delaware Supreme Court has held it “fundamental error” to require in a breach of fiduciary duty claim that the plaintiff show injury or loss. *Id.* at 95 (quoting *Technicolor*, 634 A.2d at 371). Moreover, this holding remains the law in Delaware:

Since *Technicolor*, there has not been any significant discussion in Delaware decisions about the proper characterization of breach of fiduciary duty claims. The cases nevertheless appear to treat breach of fiduciary duty claims as distinct from common law tort or contract claims. In a 2007 opinion, for example, the Delaware Supreme Court

differentiated between a claim ‘arising out of contract or tort’
... and ‘a purported breach of fiduciary duty’[.]

Id. at 96 (citing *North Am. Catholic Ed. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 103 n. 43 (Del. 2007)).¹⁸

Here, Plaintiff has alleged direct claims for breach of fiduciary duty that supposedly resulted in a deprivation to his economic interests and impairment of his voting rights. (*See, e.g., R. Vol. I*, pp. 28, 29-30, ¶¶ 99(b), 104(b).) Accordingly, he was under no requirement to allege actual compensatory damages before proceeding with this lawsuit.¹⁹

Finally, even if damages were required for a claim to accrue, Plaintiff’s arguments would still be unavailing because Plaintiff’s Complaint actually alleges losses beginning from the merger announcement. The Complaint alleges a drop in SCI’s (and, later, NITG’s) stock price and it explicitly asserts that the drop in price began when the merger was agreed to and announced, not when it closed. (*See R. Vol. 1*, p. 24, ¶ 84.)

¹⁸ The article’s main point is to argue for treatment of breach of fiduciary duty claims as “equitable torts” for purposes of contribution law. Contrary to Plaintiff’s assertion that this is a distinction without a difference (Pet’r’s Br. 14 n.8), the article emphasizes that equitable torts may involve different elements and burdens of proof than other torts. Lester & Norris, *Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L.Rev. at 96. Thus, the article does not in any way contradict the current rule in Delaware that breach of fiduciary duty claims do not require proof of loss or injury and thus accrue as soon as the wrongful act occurs.

¹⁹ Even if actual damages were an element of Plaintiff’s claims, his conceded right to seek injunctive relief before the merger closed means that, under South Carolina law, the release of that right bars a later claim for damages based on the same underlying legal “cause.” *Kennerty*, 17 S.C. 411, 1882 WL 5594, at *5. Additionally, because Plaintiff admittedly had a claim for injunctive relief at the time he executed the Release, his claim falls within the provision barring “all claims made *or which may have been made* in the Underlying Lawsuit or Amended Complaint.” (*R. Vol. I*, p. 143, § 7 (emphasis added).)

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

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

In *Coca-Cola*, the Delaware Chancery Court barred plaintiffs from seeking damages for actions that were authorized by the twenty-year-old contract between the bottler and the Coca-Cola Company. Those actions could not be construed as independent, continuing wrongs “because each hinge[d] upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s].” *In re Coca-Cola Enters., Inc. S’holders Litig.*, 2007 WL 3122370 at *6 (quotation marks omitted). Likewise, in *Kahn*, upon which the *Coca-Cola* court relied, plaintiffs could not challenge payments made under the allegedly unfair contract because those payments were not independent “continuing wrong[s],” but rather legal obligations in the performance of the contract. *Kahn*, 625 A.2d at 271.

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

The binding admissions contained in Plaintiff’s own Complaint confirm that Plaintiff has challenged the terms of the merger, not its consummation. The Complaint makes clear that, once the SCI board approved the merger, the subsequent steps to consummate the merger were a mere “formality.” (R. Vol. I, p. 11, ¶ 22.) As part of his allegations, Plaintiff acknowledged that “[t]he minority stockholders of SCI had no ability to stop the Merger had they wanted to,” because the majority shareholders had committed themselves to vote in favor of the merger. (R. Vol. I, pp. 11-12, ¶¶ 23, 24.) These admissions prove that the “alleged wrongful act” which marks the accrual of Plaintiff’s claims under Delaware law is not any of the steps preceding the shareholder vote consummating the merger, but rather the

board's approval of the merger agreement on allegedly unfair terms. It is therefore clear that here, "it is the terms of the merger, rather than the technicality of its consummation, which are challenged," *In re Beatrice Cos., Inc. Litig.*, 1987 WL 36708, at *3, and as a result, Plaintiff's claims accrued before he relinquished them for the consideration offered in exchange for the Release.

Particularly misguided is Plaintiff's attempt, in his brief to this Court, to re-write his allegations by parsing out a new, separate claim against the shareholder Defendants for voting in favor of the merger. (Pet'r's Br. 14 n. 9.) Plaintiff even tries to argue that he could not have asserted a claim against the shareholders until the shareholder vote. But the portions of the Complaint that Plaintiff cites in support of this argument do not refer to the *shareholder* vote at all. (*See* R. Vol. I pp. 31-32.) And, in fact, the Complaint repeatedly and explicitly alleges wrongdoing by all the Defendants in the *directors'* vote to approve the merger agreement and the steps leading up to that approval. (*See* R. Vol. I p. 16 ¶ 46 (challenging *board* votes by Defendant directors Ross, Gorga and Storper to approve the merger in August 2006), p. 19 ¶ 61 (alleging that Defendants Ross, Wax and Gorga should have known of FITG's allegedly deteriorating financial condition before the *board* vote in August 2006), p. 25 ¶ 85 (alleging wrongdoing in proposing the merger, allowing the special committee to consider it, and approving it on the "final terms" approved in August 2006). Lest there be any doubt, Plaintiff's allegations specifically fault "WLR"—a term including the investment funds that owned the shares—for proposing the merger on the terms initially presented, allowing the special committee to consider the merger, and allowing it to be proposed on the terms finally agreed. (R. Vol. I, pp. 25, 26, 28-29 ¶¶ 85, 91, 99.) Plaintiffs' list of supposed wrongdoing does not even mention the shareholder vote, which makes sense

given that, by Plaintiff's own admission, Defendants had, by August 2006, committed themselves to vote for the merger, thus rendering that vote a "mere formality."

What Plaintiff has conceded in his Complaint, Delaware courts have made explicit in their holdings. "[I]t is not the merger itself that constitutes the wrongful act of which plaintiff complains, but rather it is the fixing of the terms of the transaction which will be finalized by the consummation of the merger which provides the foundation for the suit. So viewed, there is no continuing wrong but only an alleged wrong which occurred prior to the date on which [the board approved the terms of the merger]." *Brown*, 1982 WL 8782, at *2. The *Folk* treatise has well summarized this area of Delaware law: "both a proposed merger and a proposed supermajority voting provision have been held to be consummated when their terms were fixed and announced by the board of directors, and *not to be continuing transactions up to the time of stockholder approval.*" *Folk*, § 327.3.2 (emphasis added). The fact that the consummation of the merger required the entirely perfunctory performance of conditions precedent and shareholder approval is no basis for deferring the accrual of Plaintiff's fiduciary duty claims.

Relatedly, the trial court erred by relying on *Coca-Cola* for the proposition that Plaintiff lacked a cause of action because "the merger could not have been enforced by FITG against SCI prior to the closing date." (R. Vol. I, p. 2.) Plaintiff continues to press this proposition as well, arguing that his claim did not accrue until the merger agreement became legally enforceable and that legal enforceability did not begin until after closing. But the argument is both (1) irrelevant, because the dispositive issue is not FITG's contract rights but Plaintiff's legal right to bring a claim against the merger, and (2) wrong, because the merger agreement was from its signing a legally enforceable contract that Defendants were bound to perform.

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

Plaintiff has conceded that it is “clear” that “the Release might have applied to pre-merger claims,” including a “claim for injunctive relief.” (R. Vol. I, p. 357.)²⁰ Indeed, if the “optimal time” to challenge a “proposed merger ... is before the stockholder vote is taken and the deal closes,” *SunGard*, 2005 WL 1653975, at *2, then Plaintiff had standing to bring such a suit upon the SCI board’s approval of the merger’s terms. Plaintiff’s supposed distinction between a pre-merger claim for injunctive relief and a post-merger claim for damages not only ignores the plain, unambiguous language in and effect of the Release under South Carolina law, as discussed above, but it would also deeply unsettle Delaware law. Applying two different rules for “pre-merger” and “post-merger” claims would allow

²⁰ Moreover, it bears repeating that Plaintiff’s counsel actually sent over to opposing counsel, as part of his attempt to settle the employment lawsuit, a draft amended complaint in the employment action that included an allegation (albeit stricken through) that the merger terms were unfair.

plaintiffs to avoid the rigorously enforced standing requirement that prevents plaintiffs from “purchasing stock in order to attack a transaction which occurred prior to the purchase of the stock.” *OmniCare*, 809 A.2d at 1169 (internal quotations omitted). It would also stand Delaware law on its head by reversing the incentive to bring claims promptly. Instead, plaintiffs would have every reason to wait for the merger to close before seeking damages, which would give plaintiffs the “equivalent of a call option” on the success or failure of a merger. *See Albert*, 2005 WL 1594085, at *18.²¹

Moreover, as between FITG and SCI, Plaintiff is simply wrong when he states that “legally enforceable rights concerning the merger were not created until the conditions precedent were satisfied and the merger closed.” (Pet’r’s Br. 29.) The merger agreement contains numerous obligations that SCI and FITG were required to fulfill *before* the closing and *before* the conditions precedent could have been satisfied. For example, § 4.1 of the agreement obligated SCI and FITG to “carry on their respective businesses in the ordinary course consistent with past practice,” and to do so “during the period from the date of this Agreement to the Effective Time [*i.e.*, the filing of amended certificates after closing].” (R. Vol. III, pp. 1067-1069, § 4.1(a), (b).) Section 5.1 required SCI to prepare and file a Form S-4 with the SEC, which under § 6.1(d) was required to “have become effective under the Securities Act” before the closing of the merger. There are almost too many of these binding and legally enforceable obligations to list. (*See, e.g.*, R. Vol. III, pp. 1045, §§ 2.4(a) (requiring FITG to adjust the terms of all outstanding stock options and the equity incentive plan “[a]s soon as practicable following the date of this Agreement”)). And if all that were not enough, the merger agreement spells it out explicitly: “This Agreement has been duly

²¹ Given the Complaint’s admission that Plaintiff’s losses from the drop in share price began from time the merger agreement was entered into and announced, he had a damages claim then as well. (*See* R. Vol. 1, p. 24 ¶ 84.) This is another reason why Plaintiff’s attempt to split his claim is misguided.

executed and delivered by SCI and Merger Sub and ... constitutes the valid and binding obligation of SCI and Merger Sub, enforceable against each of them in accordance with its terms.” (R. Vol. III, p. 1059, § 3.2(d); *see also* R. Vol. III, p. 1047, § 3.1(d) (same for FITG).) In fact, Plaintiff’s own Brief actually argues that breach of the merger agreement prior to closing would have been grounds for termination. (Pet’r’s Br. 5.) Obviously, there could not have been any breach before closing if there were not already binding obligations.

Even the so-called “conditions precedent” that Plaintiff relies so heavily upon are actually distinct obligations that each side was bound to perform *before* closing. (*See, e.g.*, R. Vol. III, p. 1073, § 6.1(c) (requiring each party to use reasonable efforts to prevent “litigation, legal restraint or prohibition”); § 6.1(e) (requiring each party to obtain any and all permits and approvals “for the lawful consummation of the Merger”); § 6.2(b) (requiring FITG to “have performed in all material respects all obligations required to be performed by it under the Agreement at or prior to the Closing Date”); R. Vol. III, p. 1074, § 6.3(b) (requiring same of SCI).) The agreement specifically obligated SCI and FITG to take “all reasonable acts necessary to cause the conditions to Closing to be satisfied as promptly as practicable.” (R. Vol. III, p. 1070, § 5.4(i).) And the merger agreement specifically contemplated monetary damages and other remedies for any breach of these obligations. (R. Vol. III, pp. 1074-75, 1076, §§ 7.1(c), (d), 8.1(b), 8.2(a), (b).)

The important point is that all of the obligations for which Plaintiff alleges Defendants breached their fiduciary duty were enforceable at the time the merger agreement was executed, which was a month before Plaintiff signed the Release. The agreement fixed the terms under which the merger would go forward, including the Exchange Ratio that determined Plaintiff’s ownership interests in the new ITG. (*See* R. Vol. III, p. 1041, § 2.1(c).) Even more significantly, Defendants obligated themselves to recommend to SCI

shareholders that the shareholders approve and adopt the amendment to the corporate charter that would affect the merger on the stated terms. (*See* R. Vol. III, p. 1070, § 5.1(b) (“SCI ... shall, through its Board of Directors, recommend to its stockholders the approval and adoption of the SCI Charter Amendment.” (emphasis added)); § 5.2 (same for FITG).) Because Defendants were themselves the controlling shareholders, the contractual obligation to recommend approval was a *fait accompli*. As Plaintiff’s Complaint explains, the “approval process was a formality.” (R. Vol. I, p. 11, ¶ 22.) Plaintiff knew, upon publication of the merger agreement, that the parties had bound themselves to ensure the merger’s consummation, and that it was within their power to do so.

Plaintiff alleges that it was wrong for Defendants to bind SCI to these obligations, an alleged wrong that occurred weeks before the Release. And just as in *Kahn*, where the Delaware Chancery Court held that payments made under a contract were not independently actionable wrongs because they were “legal obligations, not wrongs,” 625 A.2d at 271, Plaintiff cannot resurrect his released claims by attacking Defendants’ performance under the merger agreement, at least not without attacking the merger agreement itself. As in *Kahn*, the breach of fiduciary duty occurred, if at all, at the time that Defendants caused SCI to enter into the merger agreement. *Id.* at 271.²²

For these reasons, Plaintiff’s attempt to affirmatively rely on *Coca-Cola* remains puzzling. The case unequivocally supports Defendants’ argument that subsequent performance under a contract does not constitute independently actionable wrongs.

²² Indeed, the trial court’s conclusion that “the merger could not have been enforced by FITG against SCI prior to the closing date” (R. Vol. I, p. 2.) is not only factually and legally erroneous in light of the numerous pre-closing obligations imposed on the parties, but it is (ironically) the exact opposite of Plaintiff’s claims. Plaintiff does not seek to hold Defendants accountable for failing to enforce the merger agreement—enforcing the agreement, after all, would have led to its consummation—but for entering the agreement in the first place.

Moreover, Plaintiff bases his reliance on facts that he reads into the case. In describing *Coca-Cola*, he surmises that there were apparently no conditions precedent and no closing that delayed the enforceability of the contracts at issue. (See Pet'r's Br. 29.) In fact, the case does not say one way or the other. And, because the case does not address conditions precedent and closing, it does not provide any support to Plaintiff's theory that the merger agreement was not enforceable until closing. What it does hold is that claims over the performance of contractual obligations that are alleged to be violations of a fiduciary duty accrue when those obligations are created, not when they are performed.²³

E. No Delaware Case Has Held That a Claim for Breach of Fiduciary Duty Arising from a Merger Accrues Only Upon the Closing of the Merger.

In addition to the *In re Coca-Cola Enterprises* decision, the trial court relied on three early 1980s decisions that it believed supported the conclusion that a claim for breach of fiduciary duty accrues only upon a shareholder vote approving a merger: *Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983); *Dofflemeyer*, 558 F. Supp. 372; and *Kaufman v. Albin*, 447 A.2d 761. Plaintiff continues to rely almost entirely on these cases, devoting most of his brief to discussing and defending them. But none of them negates the reasoning above or warrants allowing Plaintiff to avoid the effect of his Release.

Most critically, all of these cases predate the Delaware Supreme Court's decisive holding in the 1993 *Technicolor* case that claims for breach of fiduciary duty do not require proof of injury, loss or damage. 634 A.2d at 371; see generally, Lester & Norris, *Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. at 96. It is that

²³ Similarly, Plaintiff's reliance on *Bren v. Capital Realty Group Senior Housing, Inc.*, No. Civ. A. 19902-NC, 2004 WL 370214 (Del. Ch., Feb. 27, 2004), is equally puzzling. The court in that case refused to follow the law of accrual as stated by the federal district court in *Dofflemeyer*. It is therefore a stretch—if not completely misleading—to claim that *Bren* “rel[ied] on the claim accrual analysis in *Dofflemeyer*.” (Pet'r's Br. 23 n. 13.)

ruling, as much as anything else, that engendered the development in Delaware law that the Court of Appeals in this case correctly observed and applied. (R. Vol. III pp. 1260-64.) Before the *Technicolor* ruling, there was some lack of clarity in Delaware as to whether fiduciary duty claims required proof of harm, as evidenced by the lower court ruling in *Technicolor* and the cases on which Plaintiff and the trial court have relied. Since the *Technicolor* precedent issued in 1993, however, Delaware law has been, as the recent cases say, “crystal clear.”

Not surprisingly, then, Plaintiff’s cited cases are of no value both because they contradict subsequent Delaware Supreme Court precedent and because they are distinguishable on various grounds. The lower court’s reliance on *Baron*, 717 F.2d 105, is misplaced for the simple reason that the case does not address Delaware law, but federal law. *Baron* concerned a federal cause of action for proxy fraud under § 14(a) of the Securities Exchange Act and addressed when, under federal law, that federal cause of action would have accrued. *See id.* at 108 (“[T]he question of when a cause of action is so complete that it may be enforced by suit, and thus has accrued, is a federal question.”). *Baron* does not speak, in any way, to the accrual of the state law causes of action alleged here. Moreover, the *Baron* court *rejected* the rule that “violation of a substantive federal standard, rather than fact of injury, determines the accrual of a direct or derivative action for money damages.” *Id.* at 109. But it is now established that *Delaware* claims *do* accrue with the violation of the substantive legal standard (*i.e.*, the “wrongful act”), and not with the injury, for the simple reason that injury is not a required element. *See, e.g., Albert*, 2005 WL 1594085, at *18.

Furthermore, the *Baron* court reached its conclusion by reasoning that the plaintiff had the right to seek an injunction in state court to prevent the merger, and in fact filed such an action in Delaware Chancery Court, *more than a month before the close of the merger.*

717 F2d at 106. Because only federal courts can hear § 14(a) claims, *see id.* at 106 n.3, the *Baron* court held that it would be inconsistent to limit the plaintiff to the injunctive relief he pursued in state court when the U.S. Supreme Court had recognized the policy of granting shareholders a private right of action for damages under *federal law*. *See id.* at 107 (citing *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)). Hence the decision on accrual was thoroughly based on federal law and policy, despite the court's passing reference to Delaware law overemphasized in Plaintiff's Brief. Notably, the *Baron* court never disputed that the plaintiff had a right to bring an action under *state law before* the close of the merger. That is exactly what the plaintiff in *Baron* did, and exactly what Plaintiff could have done here.

Likewise, *Dofflemeyer*, 558 F. Supp. 372, provides no support to the trial court's Order because the district court in that case based its reasoning explicitly on what is now a clearly incorrect assumption—namely, that the plaintiffs' claim could not accrue until the plaintiffs had suffered injury. *See id.* at 379 (“until [merger was consummated] the transaction which was the subject of the suit was not accomplished and there had been no injury”). The assumption is at odds with more recent Delaware Supreme Court and Chancery Court decisions, which provide the controlling law here, and, as shown above, reject any notion that damages or injury are necessary before a claim for breach of fiduciary duty accrues. *See Technicolor*, 634 A.2d at 371; *Albert*, 2005 WL 1594085 at *18. Neither *Dofflemeyer* nor *Baron* would be viewed by Delaware courts as binding or even persuasive authority on this question. *See Anglo American Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, No. 20066-N, 2006 WL 1494360, at *3 (Del. Ch. May 24, 2006) (“federal decisions,

however, are not persuasive or binding” where federal law provides for a different rule from the one provided by Delaware law).²⁴

Finally, in addition to contradicting *Technicolor* and other more recent Delaware authority, the reliance by Plaintiff and the trial court on *Kaufman v. Albin*, 447 A.2d 761 is unavailing because the case did not concern a negotiated merger, as this case does, but rather a tender offer. As the name suggests, a tender offer is just that—an offer.²⁵ Thus, in *Kaufman*, there was no transaction at all until the tender offer succeeded (*i.e.*, was accepted by the stockholders), and the ongoing offer was deemed a “continuing wrong.” *Id.* at 764 (“The alleged wrong was therefore a continuing wrong. . . .”). Here, by contrast, the complete merger terms were settled by agreement and approved by the Defendants before the merger was put to the stockholders for its technical consummation. In these circumstances, Delaware law is clear that there is not a continuing wrong. *See Brown*, 1982 WL 8782, at *2.

Moreover, the actual dispute in *Kaufman* did not even concern the board’s recommendation of the tender offer; instead, it arose from the board’s non-binding resolution

²⁴ Plaintiffs have tried below to square the circle by arguing that, “[u]nder *Albert*, there must be a ‘harm’ but there need not be a ‘loss’ or ‘damages.’” But the Delaware Chancery Court in *Albert* was clear about what it meant by “harm”: “The law in Delaware is crystal clear that a claim accrues as soon as the wrongful act occurs. This is so because the plaintiffs were *harmed as soon as the alleged wrongful acts occurred.*” 2005 WL 1594085, at *18 (emphasis added). The harm resulting from a breach of fiduciary duty is the failure of officers and directors to discharge their duties of care or loyalty. That alleged breach of fiduciary duty occurred here (if at all) when the Defendants voted to approve the merger and enter the merger agreement.

²⁵ Tender offers and negotiated mergers are not equivalents. *See, e.g., In re Pure Resources, Inc.*, 808 A.2d 421, 437 (Del. Ch. 2002) (tender offers are not addressed by the Delaware General Corporation Law); *Solomon v. Pathe Comms. Corp.*, 672 A.2d 35, *39 (Del. 1996) (explaining that fairness of certain tender offers is evaluated by a different standard than that applied to “cash-out mergers”). In *Kaufman*, because the transaction took the form of a tender offer, the target company’s board did not appoint a special committee or negotiate terms with the acquirer (as here), but rather merely voted to recommend that stockholders accept an offer—advice the stockholders were free to ignore. *Kaufman*, 447 A.2d at 762.

to allow certain officers to tender their stock options in exchange for cash from the third party making the offer. 447 A.2d at 762. By the terms of that resolution, the ability to exchange the options did not become binding until the shareholders approved the tender. *Id.* Because the resolution was non-binding, the court in *Brambles USA, Inc. v. Blocker*, 731 F. Supp. 643 (D. Del. 1990), rejected an argument very similar to the grounds advocated by Plaintiff here:

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

Id. at 650 (emphasis added). Here, as in *Brambles USA, Inc.*, the merger agreement entered into between FITG and SCI before Plaintiff executed the release was not a mere, non-binding resolution; rather, it was a fixed contract. As demonstrated above, that fixed contract established the terms of the merger and the method of payment. As a result, *Kaufman* is simply inapt.²⁶

²⁶ Still further, the *Kaufman* court found that the alleged wrongdoing was a "continuing wrong" that "commenced with the adoption of the two resolutions on August 22, 1977 but was not consummated until October 3, 1977." 447 A.2d at 764 (emphasis added). Because the court described the transaction as a continuing wrong, it therefore appears that the plaintiff could have filed suit beginning on August 22 when the transaction "commenced." The fact that the wrong continued through October 3 says nothing about when the plaintiff could have first brought suit. At the very least, *Kaufman* is inconclusive on this point.

In weighing these three decisions (all from the early 1980s and only one of them actually a Delaware state court case) against the numerous current decisions that Defendants have presented, it is telling to examine how the *Folk* treatise, the leading treatise on Delaware corporate law, has changed its language over time. In the 1967 edition, as cited by the *Kaufman* court, *Folk* explained that “[i]f the action complained of requires stockholder approval, the transaction is not considered complete until the stockholders have approved.” *See Kaufman*, 447 A.2d at 764. Today, however, the *Folk* treatise no longer contains that statement. Rather, keeping pace with the more recent Delaware precedents that Defendants have cited, the 2006 edition of *Folk* explains that (a) it is the specific wrongful acts, and not the effect, that determine when a claim accrues, and (b) Delaware law has held a proposed merger to be consummated upon the fixing and announcement of its terms, without waiting for subsequent stockholder approval:

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

Folk § 327.3 (emphasis added).

The *Folk* treatise elucidates the error of the trial court and confirms that the opinion by the Court of Appeals is correct. Relying solely on these three early 1980s decisions, the trial court simply ignored more recent Delaware precedent and the changes to the *Folk* treatise on Delaware Corporate law. There was no attempt by that court to distinguish or

explain these more recent Delaware court decisions or to explain how the lower court's decision could be reconciled with the 2006 edition of the *Folk* treatise. By accepting Plaintiff's invitation to rely on outdated, superseded, or otherwise irrelevant decisions, the trial court ignored the current status of Delaware law, an error that the Court of Appeals decision corrects.

Finally, Plaintiff's Brief in this Court concludes with a citation to *Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654, 666 (Del. Ch. 2006). Like Plaintiff's misplaced reliance on *Coca-Cola*, his enthusiasm for this *Aidinoff* opinion is puzzling, as the case directly supports Defendants' arguments. *Aidinoff* notes the general rule 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." 900 A.2d at 666. This general rule did not apply in *Aidinoff* because there, unlike here, the contract at issue contained an annual termination option and plaintiffs specifically alleged failure to exercise that option. "Therefore, the [*Aidinoff*] complaint [was] not challenging the original decision ... to sign the" agreement at issue." *Id.* Here, by contrast, the complaint specifically challenges the merger agreement, with the subsequent closing being a mere formality. The *Aidinoff* opinion thus accords with the Court of Appeals ruling that "once the merger agreement was signed, [Plaintiff] as a shareholder, had a legally enforceable right to enjoin the merger from being consummated" and that Plaintiff's claims therefore accrued at that time. (Appendix, Vol. III p. 1263.)

F. Plaintiff's Attempt to Recast His Complaint as Challenging Only the Merger Close is Unavailing.

As another attempt to negate the effect of his Release, Plaintiff tries to characterize his Complaint as challenging only the merger's closing and Defendants' alleged failure to

call the merger off or renegotiate its terms during the approval process. (Pet'r's Br. 7.) But Plaintiff's own Complaint acknowledges that the "approval process was a formality" and that the "minority stockholders of SCI had no ability to stop the Merger had they wanted to." (R. Vol. I, pp. 11-12, ¶¶ 22, 24.) The Prospectus informed shareholders that the majority owners of SCI had already "indicated that they intend to vote to adopt the amended and restated certificate of incorporation" and that, consequently, "[a]pproval of the matters to be voted on at the 2006 Annual Meeting is therefore assured." (R. Vol. I, pp. 11-12, ¶ 23.) Plaintiff is bound by the allegations of his Complaint, and he may not "subsequently take a position contradictory of, or inconsistent with, his pleadings." *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964). Plaintiff also now denies that the conditions precedent were technicalities, asserting that they were instead conditions that had to be met. They are technicalities not because they are unimportant, but because there was no question they would be fulfilled. That is why Plaintiff specifically challenges the SCI board's decision to approve the merger in August 2006, at which time—allegedly—it had received inaccurate information about the financial health of FITG, as well as the Exchange Ratio that allegedly overvalued the worth of FITG and diluted the ownership interests of SCI shareholders. (*See, e.g.*, R. Vol. I, pp. 17, 22, 28-29 ¶¶ 49, 74, 99(a), (b), (c).)

Even if the Complaint challenged *only* the closing of the merger (which it does not), Plaintiff's claims would still fail because, as explained above, the merger agreement obligated Defendants to take all reasonable actions to ensure the fulfillment of the conditions precedent and to "recommend to [SCI] stockholders the approval and adoption of the SCI Charter Amendment." (R. Vol. III, p. 1070, §§ 5.1(b), 5.4(i).) Thus, the allegation that Defendants breached their fiduciary duties by allowing the merger to close amounts to nothing more than a challenge to the performance of the merger agreement itself, including

the performance of the obligations set forth in Sections 5.1(b) and 5.4(i) of the agreement. *See Lewis*, 477 A.2d at 1048 n.15 (shareholder who could not challenge merger itself could not thereafter challenge provision for “golden parachutes,” which amounted to indirect attack on fairness of merger terms). Without the merger agreement, the conditions precedent and the close of the merger have no independent legal significance. Rather, they “hinge[] upon the allegations that the terms and conditions established by a contract are unfair to the plaintiff[s],” in which case Plaintiff could have sued as soon as the Defendants caused SCI to enter the merger agreement. *Coca-Cola*, 2007 WL 3122370, at *6 (quoting *In re Marvel Entm't Group, Inc.*, 273 B.R. at 74).

Nor does the allegation that Defendants should have invoked the MAC clause to prevent the close of the merger in light of FITG’s “deteriorating financial condition” survive the scope of the Release. Plaintiff’s Complaint alleges that Defendants “knew or should have known *prior to the issuance of the Prospectus on September 22, 2006*, of the losses and reduction of shareholder equity that FITG was experiencing.” (R. Vol. I, p. 19, ¶ 60 (emphasis added).) And, Defendants “knew or should have known prior to SCI’s Board vote in favor of the Merger on August 29, 2006, of the losses and reduction of shareholder equity that FITG was experiencing.” (R. Vol. I, p. 19, ¶ 61.) But on September 28, 2006, after both of these dates, Plaintiff agreed to release all “known and unknown” claims, with an explicit acknowledgment that “there may be facts or consequences of facts which are unknown to Plaintiff.” (R. Vol. I, pp. 143-144, §§ 7, 8.) So although (as alleged) the “disastrous financial condition of FITG” was not reported until “the Combined Company issued its 10-K on April 24, 2007” (R. Vol. I, p. 17, ¶ 50), Plaintiff agreed to relinquish any claim based on the fact of FITG’s deteriorating finances, even though that fact may not have been known to Plaintiff, because his Complaint indisputably alleges that the state of FITG’s financial

condition should have been known to Defendants as of August 29 and September 22, 2006, before the Release was signed. Such a claim is therefore barred.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Court of Appeals and, moreover, remand with instructions that the trial court grant Defendants' motion for judgment on the pleadings and enter judgment against Plaintiff and in Defendants' favor, which is the logically necessary and inevitable result of reversing the trial court's legal determination below.

Respectfully submitted,



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November 7, 2012

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

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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. 4820, filed March 23, 2011

S.C. Supreme Court

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 Recover Fund III, L.P., WLR Recovery Associates II LLC, and WLR
Recovery
Associates III, LLC, Respondents.

PROOF OF SERVICE

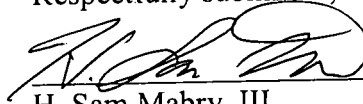
Pursuant to Rule 242, SCACR, I certify that a copy of *RESPONDENTS' BRIEF* was served upon counsel for Petitioner by placing a copy of it in the United States Mail, postage prepaid, on November 7, 2012, addressed to Petitioner's attorneys of record as follows:

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November 7, 2012

S.C. Supreme Court

VIA REGULAR US MAIL

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

Re: Brian P. Menezes v. WL Ross & Co., LLC, et al.
South Carolina Court of Appeals Opinion No. 4820, filed March 23, 2011
Appellate Case No. 2011-194626

Dear Mr. Shearouse:

Enclosed for filing is the original and sixteen (16) copies of the Respondent's Brief and Proof of Service related to the above matter. Please return one filed copy of each of said documents to me in the enclosed envelope provided for your convenience.

Thank you for your attention to this matter.

With highest regards, I am

Very truly yours,

HAYNSWORTH SINKER BOYD, P.A.



H. Sam Mabry, III

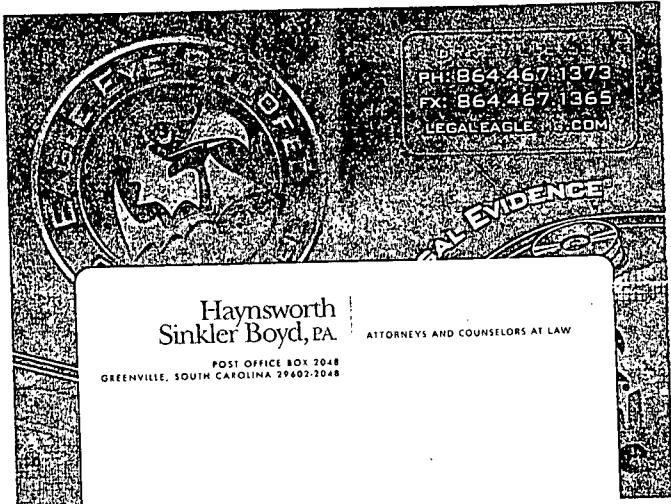
HSM/mlw
Enclosures

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