

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite D. Murphy, Circuit Court Judge

RECEIVED

Case No. 2013-CP-10-4874
Appellate Case No. 2017-000529

APR 07 2017
SC Court of Appeals

Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and
Wesley Nau Plaintiffs,

v.

Johnathan Ramaci, Haverly Ramaci, Richard Scott, and
Billy Ulm Defendants,

Of whom

Johnathan Ramaci is Appellant,

And

Billy Ulm is Respondent.

MOTION TO DISMISS

J. Rutledge Young, III
Julie L. Moore
DUFFY & YOUNG, LLC
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This appeal is the result of Appellant's thinly veiled attempt to manufacture an immediately appealable issue for the purpose of delaying the trial of the underlying case. It is plain that Appellant has disguised a second crack at his failed motions for summary judgment as an appeal of the denial of a motion for injunctive relief. Respondent moves to dismiss the appeal pursuant to Rule 240 of the South Carolina Appellate Court Rules.

BACKGROUND

In the underlying case, a group of plaintiffs allege their investment in a technology company called iCache was induced by a series of false representations. The plaintiffs sued the Chief Executive Officer, Johnathan Ramaci ("Appellant"), and two members of the board of directors, Richard Scott and Billy Ulm.

Billy Ulm ("Ulm" or "Respondent") also invested in iCache through his trust, the William L. Ulm, Sr. 2006 Delaware Trust ("the Trust"). In January of 2014, Ulm amended his answer to assert crossclaims against Appellant arising out of Appellant's conduct in soliciting Ulm's investment. On February 19, 2016, the Trust assigned all of its rights to prosecute the crossclaims to Ulm.

Appellant filed several motions seeking to dispose of Ulm's crossclaims: 1) a motion for summary judgment contending Ulm lacked standing as a real party in interest; 2) a motion for summary judgment contending the statute of limitations expired; and 3) after the assignment, a motion to enjoin the Trust's assignment of its claims to Ulm. The trial court denied each motion in an order dated February 21, 2017 ("the Order"). *See Exhibit A: Order at 14, Feb. 21, 2017.*

Appellant filed a notice of intent to appeal the trial court's order on February 27, 2017.

ARGUMENT

The Court need only quickly scan Appellant's Initial Brief to see that he has simply repackaged his rejected arguments for summary judgment as reasons the trial court erred in denying his motion for injunctive relief. For example, Appellant again challenges Respondent's standing to prosecute the crossclaims on the basis that the assignment was not valid. *See* Appellant's Initial Br. 22-25, March 29, 2017. He also repeats his arguments as to the statute of limitations at length. *See id.* at 12-21. Those issues were properly raised—and denied—as motions for summary judgment. The rulings on these issues are not immediately appealable even when Appellant seeks to rehabilitate them under the guise of a plea for injunctive relief.

I. Appellant's motion for injunctive relief is illusory.

Appellant's stated reasons for seeking an injunction illuminate that his motive here has nothing to do with equitable relief. While Respondent does not make this point in an attempt to engage the Court in consideration of the merits of this appeal, Appellant's substantive arguments for a permanent injunction only illustrate that his real intention is delay the trial of this case—which he attempts to achieve by inappropriately couching arguments as supportive of injunctive relief.

Appellant claims he will be irreparably harmed if Respondent is not enjoined from asserting the assigned crossclaims “because he will be forced to continue to litigate this case and incur substantial legal fees[.]” Appellant's Initial Br. 33. Litigation itself cannot and does not constitute irreparable harm—otherwise all defendants would be irreparably harmed. *See ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1337 (Fed. Cir. 2012) (“Litigation costs are undoubtedly undesirable and may take funds away

from other endeavors, but they are not an irreparable harm in the injunction calculus. . . . Reliance on litigation costs to support a determination of irreparable harm [is] therefore legal error.”); *see also Rogers v. Comprehensive Rehab. Associates, Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992) (stating that economic losses do not justify the imposition of an injunction).

Appellant also asks this Court to accept Respondent’s lawful insistence that he continue to prosecute the crossclaims that have been filed since 2014 leaves Appellant with “lack of adequate legal remedy” because he is somehow prevented from settling his claims with plaintiffs. Appellant’s Initial Br. 33. Appellant states that because Respondent will get to present his crossclaims to a jury “he will be forced to continue to litigate this matter at substantial cost and effort without the means to recoup either.” Appellant’s Initial Br. 34. This ignores the obvious answer—Appellant can defend the claims at trial and attempt to prevail.

It is clear that Appellant is straining to squeeze the current status of this litigation into the elements of injunctive relief because that is the only possible way he can claim he has an immediately appealable issue to present to the Court. It is improper and frivolous.

II. Appellant cannot pursue a backdoor appeal of the trial court’s denial of his motions for summary judgment.

Appellant cannot deny that “[t]he denial of a motion for summary judgment is not appealable because it does not finally determine anything about the merits or strike a defense.” *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). With full knowledge of this basic rule of appellate procedure, Appellant asks this Court to pretend his appeal of the court’s denial of injunctive relief is not actually about the issues

he raised at summary judgment. This is improper and a dismissal of Ramaci's appeal is warranted.

- a. Challenges to the statute of limitations are properly resolved at trial when there is a genuine issue of material fact as to when the statute began to run or when it expired.

The trial court's ruling on issues related to the statute of limitations is not immediately appealable: "the denial of a motion for summary judgment . . . does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526, *2, 443 S.E.2d 539, 540, *2 (1994) (analyzing a motion to dismiss on the basis of the expiration of the statute of limitations). *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962)("The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

The trial court's ruling did not dispositively reject Appellant's statute of limitations defense. At trial, Appellant can—and undoubtedly will—challenge when Respondent knew or should have known about the existence of his potential crossclaims. The court's denial of his motion for summary judgment does not hinder Appellant from fully putting on this defense at trial, raising it at directed verdict and ultimately challenging a jury's determination of when the statute began to run. Appellant cannot use an appeal of a denial of his a motion for injunctive relief to revive his summary judgment claims as to the statute of limitations.

- b. Challenges to the lower court's determination as to a real party in interest are not immediately appealable.

Appellant also attempts to rectify his arguments that Ulm is not the real party in interest and lacks standing to prosecute the crossclaims as reasons he is entitled to injunctive relief. Instead, this is a challenge to the procedural mechanisms of Rule 17 of the South Carolina Rules of Civil Procedure.

At the February 24, 2016 hearing, Appellant asserted that the assignment of claims afforded Ulm, as assignee, no greater rights than the assignor. *See* Appellant's Initial Br. 19-20; *see also* **Exhibit B**: Hr'g Tr. 44:13, 18-25, Feb. 24, 2016. To that end, he argued that Ulm's assignment was improper because "the statute of limitations was blown" and Ulm's claims were time barred. *Id.* at 45:4-16. Appellant then stated that "filing was part of a strategy" and "Rule 17's broad language that allows for the correction and ratification of all these mistakes that are made doesn't apply here." *Id.* at 45:18-21. Finally, Appellant takes issue with the court's focus on whether Ulm's initial cross-claims were filed within the three year statute of limitations, and argues the court "ignore[d] the fact that Ulm did not have standing to assert those claims when they were filed and could not subsequently obtain standing by way of an improper and invalid assignment[.]" Appellant's Initial Br. 21. The actual substance of Appellant's appeal is whether the trial court correctly applied Rule 17 to validate the Trust's assignment to Ulm.¹ The trial court's determination that

¹ In support of his motion for a permanent injunction, Appellant argued that Respondent "should not be considered the real party in interest pursuant to Rule 17(a)" on the basis that Ulm's mistake was neither "understandable" nor "honest." *See* **Exhibit C**: Def. Ramaci's Mem. Supp. Permanent Inj. 10. He further alleges that Ulm's attempts to correct the mistake were untimely, and the court should refuse to allow the assignment as a Rule 17 ratification. *Id.* at 11. Ramaci emphasizes these sentiments in his Initial Appellate Brief, stating "South Carolina Rule of Civil Procedure does not apply to confer real party in

Ulm has standing as a real party in interest is not immediately appealable.

South Carolina has generally held that orders affecting the addition of, identification of, or changing of parties to be interlocutory. For example, orders granting a party's request to intervene are not immediately appealable. *Duncan v. Government Employees Ins. Co.*, 331 S.C. 484, 449 S.E.2d 580 (1994). Orders adding a third party as a defendant are not immediately appealable. *Edgefield County Hosp. Trustees v. Cannon Constr. & Supply Co.*, 273 S.C. 500, 257 S.E.2d 501 (Ct. App. 1984). Orders denying class certification are not immediately appealable. *Eldridge v. City of Greenwood*, 308 S.C. 125, 417 S.E.2d 532 (1992). Further, orders permitting the amendment of pleadings are not immediately appealable. *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 544 (1979); *Schein v. Lamar*, 284 S.C. 252, 255, 325 S.E.2d 573, 574 (Ct. App. 1985).

III. The trial court's rulings are not otherwise immediately appealable pursuant to Section 14-3-330 of the South Carolina Code.

The appeal challenges the court's rejection of his summary judgment motion as to the statute of limitations and the finding that Ulm is the real party in interest. These grounds do not involve the merits of the case or affect Appellant's substantial rights.

Under Section 14-3-330(2) of the South Carolina Code, an order must affect a substantial right and prevent a judgment from which an appeal may later be taken in order to be immediately appealed. As discussed above, our courts have repeatedly held that

interest status upon Ulm or allow him to circumvent the statute of limitations applicable to the cross-claims." Appellant's Initial Br. 12. Finally, Ramaci contends that the court erroneously relied on *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co.*, 515 F. Supp. 64, 84 (D.S.C. 1979), *aff'd sub nom.*, *Campus Sweater & Sportswear Co. v. M. B. Kahn Constr. Co.*, 644 F.2d 877 (4th Cir. 1981) in validating the assignment. *Id.* at 22. These arguments illustrate that what Ramaci truly contests is not the denial of a permanent injunction, but the court's allowing the assignment as a ratification under Rule 17. *See id.*

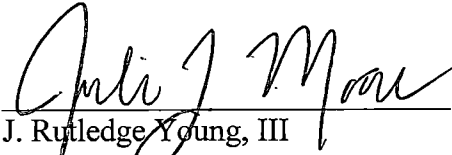
orders addressing the addition of parties and the amendment of pleadings are not immediately appealable because they do not affect substantial rights and do not prevent a later appeal.

Nor does the Order involve the merits of the action such that it is immediately appealable under Section 14-3-330(1). "An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." *Westfield v. Westfield*, 13 S.C. 482 (1880). Here, no final determinations have been made that impact Appellant's ability to defend the crossclaims. The Order simply refuses to summarily dispose of the crossclaims on statute of limitations grounds and permits the litigation to proceed in Ulm's name. *See Exhibit A: Order at 6.*

CONCLUSION

Almost 150 years ago, our Supreme Court recognized that an "appeal operates to delay and hinder the prevailing party in the cause. In practice it too often happens that appeal is resorted to for the mere purpose of delay, a practice not to be encouraged." *Stribling v. Johns*, 16 S.C. 112, 112 (1881). By cloaking issues that are plainly not immediately appealable as an improper rejection of a motion for injunctive relief, the only conclusion to be drawn is that Ramaci's appeal was filed for the purpose of delaying the trial of the underlying action. Ulm respectfully requests that the Court dismiss this appeal.

This 6 day of April, 2017 at Charleston, South Carolina.

A handwritten signature in cursive script, reading "Julie L. Moore", written over a horizontal line.

J. Rutledge Young, III

Julie L. Moore

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EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak,
and Wesley Nau,

☐ Plaintiff

v.

John Ramaci, Haverly Ramaci, Richard Scott, And
Billy Ulm

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-10-4874

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

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☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Julie L. Moore
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

2/21/07
Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT:

☒ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☒ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Collected by: _____

Date Filed:

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2013-CP-10-4874

**BYRDNEST, LLC, CRAIG SEDMAK,
STEPHANIE SEDMAK, AND WESLEY
NAU,**

Plaintiffs,

v.

**JOHNATHAN RAMACI, HAVERLY
RAMACI, RICHARD SCOTT, AND
BILLY ULM,**

Defendants.

ORDER

FILED
2017 FEB 21 PM 1:18
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court on several motions filed by Defendants Johnathan Ramaci and/or Haverly Ramaci: two motions for summary judgment pertaining to crossclaims filed by Defendant Billy Ulm; a motion for judgment on the pleadings pertaining to crossclaims filed by Ulm; a motion for injunctive relief pertaining to crossclaims filed by Ulm; Johnathan Ramaci's motion for summary judgment as to Plaintiffs' claims; Johnathan and Haverly Ramaci's motion for judgment on the pleadings as to certain causes of action in Plaintiffs' Complaint; John and Haverly Ramaci's motion to reopen depositions; and Haverly Ramaci's motion for summary judgment. This Court heard argument from all counsel and has fully considered all issues raised by the memoranda submitted in support of and in opposition to these motions.

Through this order, this Court rules on all issues raised by the operative motions. The Court denies Johnathan Ramaci's motions for summary judgment; denies in part and grants in part the motions for judgment on the pleadings; denies Johnathan Ramaci's motion for injunctive relief;

denies the motion to reopen depositions; and grants in part and denies in part Haverly Ramaci's motion for summary judgment.

FACTUAL BACKGROUND

1. Factual Background as to Plaintiffs' Claims

The Plaintiffs claim, *inter alia*, that Johnathan Ramaci induced the Plaintiffs to invest \$850,000 into a technology startup ("iCache") of which Johnathan Ramaci was Chief Executive Officer. The Plaintiffs allege that their investment was induced by a series of false allegations which appeared in the "pitchbook" and by his oral representations.

Among the misrepresentations the Plaintiffs allege are: the inaccurate and materially incomplete representation that the company was debt-free; and the inaccurate and materially incomplete statement that the company owned all of the critical intellectual property needed to get the product to market. They further allege that Johnathan Ramaci and the Director Defendants, Billy Ulm and Richard Scott, failed to disclose material information which they knew or should have known concerning the company's record-keeping and business operations.

The Plaintiffs assert causes of action for negligence, breach of fiduciary duty, conversion, negligent misrepresentation, fraud, violations of South Carolina's Uniform Securities Act and Unfair Trade Practices Act, and equitable claims under the related doctrines of unjust enrichment, restitution, and constructive trust.

2. Factual Background as to Defendant Ulm's Crossclaims

Defendant Billy Ulm was not only a member of the board of directors but also purchased shares of iCache stock through his trust, The William L. Ulm, Sr. 2006 Delaware Trust ("the Trust") in April and December of 2011. On January 23, 2014, Ulm amended his answer and asserted cross-claims against Johnathan Ramaci, alleging negligent misrepresentation, breach of

fiduciary duty and negligence. Ulm alleges that Johnathan Ramaci induced the Trust's investments, and Ulm's agreement to serve on the board of directors, through a series of direct, false and misleading representations and failures to disclose the true financial and business state of iCache. On February 19, 2016, the Trust assigned all of its rights to prosecute the crossclaims to Ulm via execution of a notarized Assignment of Claims. Pursuant to the Assignment of Claims, the Trust "without recourse, representation or warranty" assigned to Ulm all of its "interests and rights in [the] crossclaims and any other claims [the Trust] has or may have in the litigation." The Trust retained ownership of the subject stock, but as a result of the Assignment of Claims, Ulm was vested with the authority to prosecute the crossclaims in this litigation. The Trust was not made a party to this action.

Johnathan Ramaci has filed several motions to dispose of Ulm's crossclaims. On November 24, 2015, Johnathan Ramaci filed a motion for judgment on the pleadings. On February 4, 2016, Johnathan Ramaci filed a motion for summary judgment on the basis of standing. On February 24, 2016, Johnathan Ramaci filed a motion for injunctive relief seeking to enjoin the Trust's assignments of the crossclaims to Ulm—which had already occurred at the time Johnathan Ramaci filed his motion—or, in the alternative, seeking an order enjoining Ulm from exercising the rights he obtained pursuant to the assignment of the Trust's claims against Johnathan Ramaci, because such claims were time-barred. Based on the injunctive motion, on March 24, 2016, Johnathan Ramaci filed a second motion for summary judgment contending that Ulm's crossclaims are barred by the statute of limitations.

ANALYSIS

I. THE COURT DENIES ALL MOTIONS FOR SUMMARY JUDGMENT FILED BY JOHNATHAN RAMACI AND DENIES IN PART AND GRANTS IN PART HAVERLY RAMACI'S MOTION FOR SUMMARY JUDGMENT.

Summary judgment is only proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. An opposing party need only present a mere scintilla of evidence to survive summary judgment in cases where the burden of proof is the preponderance of the evidence standard. *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009).

1. The Court denies Johnathan Ramaci's motions for summary judgment as to Ulm's Crossclaims.

a. The Court denies Johnathan Ramaci's motion for summary judgment filed February 4, 2016.

Because the Trust owns the subject iCache stock and Ulm does not, Johnathan Ramaci moves for summary judgment on the claim that Ulm is not the real party in interest and therefore lacks standing to prosecute the crossclaims. The Court finds that the Trust's February 19, 2016 assignment of the crossclaims to Ulm during this case was valid and, thus, Ulm now has standing to prosecute the crossclaims. The Court denies Johnathan Ramaci's February 4, 2016 motion for summary judgment.

Ulm is a real party in interest and has standing to prosecute the crossclaims against Johnathan Ramaci. "Generally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). Pursuant to South Carolina law the "real party in interest" is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with the action. *Dockside Ass'n v. Detyens, Simmons and Carlisle*, 285 S.C. 565, 330 S.E.2d 537 *aff'd as mod.* 287 S.C. 287, 337 S.E.2d 887 *appeal after remand* 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1985). Where an action is

brought by one other than the real party in interest, dismissal for lack of subject matter jurisdiction is not the proper remedy. S.C. R. Civ. P 17(a) (“No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”).

The Trust’s assignment of the crossclaims to Ulm was valid under South Carolina law. Our “jurisprudence has long recognized that a [claim for relief] can be validly assigned in either law or equity.” *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007) *aff’d*, 383 S.C. 583, 681 S.E.2d 875 (2009); *Slater Corp. v. S.C. Tax Comm’n*, 280 S.C. 584, 587, 314 S.E.2d 31, 33 (Ct. App. 1984). Here, Ulm, as the assignee of a claim stands in the shoes of the Trust, the assignor, and Ulm has “all the same rights and privileges” as the Trust. *Id.*; *Twelfth RMA Partners, L.P. v. Nat’l Safe Corp.*, 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999). The assignment was not required to be executed before the commencement of litigation. *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 84 (D.S.C. 1979) *aff’d sub nom. Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 644 F.2d 877 (4th Cir. 1981) (stating “even when the claim is not assigned until after the action has been instituted the assignee is the real party in interest and can maintain the action.”). By virtue of the Trust’s assignment of its claims to Ulm, Ulm is the real party interest with standing to prosecute the crossclaims. Johnathan Ramaci’s motion for summary judgment is therefore denied.

b. The Court denies Johnathan Ramaci's motion for summary judgment filed March 24, 2016.

Johnathan Ramaci argues that the relevant statutes of limitation render the Ulm crossclaims time-barred. The Court disagrees and also denies Johnathan Ramaci's second motion for summary judgment.

The Court finds that at the time of the Trust's assignment of the crossclaims to Ulm, the statute of limitations defense did not bar the claims of the assignor Trust because the Ulm crossclaims had already been filed within the three-year statute of limitations prescribed by Section 15-3-530 of the South Carolina Code.¹

An assignor cannot convey to an assignee rights he does not have. *See Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745 (Ct. App. 2007). Johnathan Ramaci relies on a line of cases which neither reflect the law of South Carolina nor present similar factual circumstances. *See generally Murphy*, 657 F. Supp. 2d 683; *U.S. v. Taylor*, 144 F. Supp. 15 (E.D. Pa. 1956); *Vaughan v. Moore*, 366 S.E.2d 518 (1988); *Madison Fund, Inc. v. Midland Glass Co.*, No. 394 CIV.A. 1974, 1980 WL 332958, at *1 (Del. Super. Aug. 11, 1980); *Woolett v. Am. Employers Ins. Co.*, 77 Cal. App. 3d 619, 143 Cal. Rptr. 799 (Ct. App. 1978). In each of these cases, the claims were not filed until *after* the applicable statutes of limitations had run or assignors/assignees who learned of claims at different times. Those cases have no application here and Johnathan Ramaci's motion for summary judgment is denied.

¹ Johnathan Ramaci correctly states that an assignee takes such assignment subject to the same defenses that would be applicable to the assignor. *See, e.g., Chet Adams Co. v. James F. Pedersen Co.*, 418 S.E.2d 337, 338 (S.C. Ct. App. 1992) ("[T]he assignee of a non-negotiable chose in action takes it subject to all equities and defenses which could have been set up against the assignor at the time of the assignment.").

2. Johnathan Ramaci's Motion for Summary Judgment on the Plaintiffs' Claims is Denied.

Johnathan Ramaci claims that he is entitled to summary judgment on all claims asserted by the Plaintiffs because he has been released from liability for the alleged wrongful conduct via what Johnathan Ramaci asserts is a viable settlement agreement ("Purported Release") under which iCache released him from all liability to the company. The Court finds and concludes that the Purported Release does not support summary judgment. First, there is a triable factual issue as to whether the Purported Release required subsequent shareholder approval, which never was obtained, after being signed by Johnathan Ramaci and Richard Scott. Second, even if consummated, the Purported Release would have no effect on the Plaintiffs' individually-held, pre-investment claims asserted in this lawsuit.

a. A factual issue exists as to whether the Purported Release required subsequent shareholder approval, which never was obtained, in order to be consummated.

The Court finds that there is a genuine issue of fact as to whether the Purported Release was consummated: specifically, though Johnathan Ramaci and Mr. Scott appear to have signed the document, a jury could fairly conclude that consummation of the Purported Release required subsequent shareholder approval, which no evidence in the record indicates was obtained. As Johnathan Ramaci concedes in his memorandum, at page 6, the Purported Release on its face anticipates "an additional shareholder vote". Further, a jury could find both in the body of the Purported Release (agreement effective "upon the authorization and approval of the shareholders") and at Richard Scott's signature (agreement subject to "final shareholder approval") evidence that the Purported Release expresses the intention that the Agreement be contingent upon a full shareholder approval.

Substantial evidence in the record also indicates that the “final shareholder approval” contemplated in the January 22nd, 2013 Purported Release never was obtained. As set forth in the Memorandum in Opposition, Mr. Scott wrote a letter dated January 25th, 2013 to the shareholders to preview the upcoming shareholder meeting, which confirmed his understanding that “subsequent shareholder approval” was required: “During this past month we have finalized and signed a **Settlement and Release Agreement** document between iCache and Jonathan Ramaci. *This agreement must be voted on and approved by a majority of the shareholders for it to take effect.*” The Plaintiffs also cite the agenda for the February 23rd, 2013 shareholder meeting, which includes “Vote on...Ramaci Settlement and Release Agreement” in its action items. At the meeting where the “subsequent shareholder approval” was to be sought, the record reflects that no quorum was achieved, and no vote taken: “[Richard Scott] brought [the Purported Release] to the meeting. He showed it. He proposed a vote on it, and he couldn’t get a quorum at the meeting...[l]ike I said, he signed it subject to shareholder approval.” (Deposition of Jeff Byrd, p. 154, line 8 – p. 155, line 1; Memorandum in Support, Exhibit #2.)

For these reasons, the Court finds the following triable issues of material fact: whether the Purported Release ever became a binding contract; whether the Purported Release required “subsequent shareholder approval”, and whether “subsequent shareholder approval” ever was obtained.

In the alternative, and irrespective of “subsequent shareholder approval”, Johnathan Ramaci argues that his and Richard Scott’s signatures, in and of themselves, constitute full consummation of the Purported Release, because Johnathan Ramaci and Richard Scott were or may have constituted a majority shareholder bloc. Importantly, though, Johnathan Ramaci’s own expert, Prof. Martin McWilliams, has acknowledged what the Plaintiffs argue at page three of their

Memorandum in Opposition: that Richard Scott and Johnathan Ramaci were free to structure the Purported Release such that subsequent shareholder action was required in order for the Purported Release to be valid; and Prof. McWilliams further concedes that, indeed, the Purported Release, on its face, can be construed as calling for such subsequent shareholder action. (Deposition of Martin McWilliams, p. 132-136, Exhibit #1 to Plaintiffs' Supplemental Memorandum in Opposition.)

For these reasons, the question of the Purported Release's enforceability and operation present triable issues, and the motion is denied.

b. The Purported Release, even if enforceable, has no effect on the Plaintiffs' individually held claims.

As a separate and alternative basis for denying the motion, the Court finds that even if the Purported Release is enforceable, it would release only claims held by the Plaintiffs in their capacity as iCache shareholders, because iCache is the only releasing party identified in the Purported Release. Even if the company itself—and, by extension, its shareholders, in their capacity as shareholders—released Johnathan Ramaci, the Plaintiffs themselves, individually, did not: claims they held individually—i.e., not in their capacity as iCache shareholders—would be unaffected because the Plaintiffs never signed—nor even were named in—the Purported Release.

Johnathan Ramaci's memorandum relies on the notion that "[t]he broad language of this release encompasses the Plaintiffs in this case because they are shareholders of the corporation." (Memorandum in Support, p. 5.) The Court is aware of no authority—and none is cited—for the proposition that a shareholder majority can terminate the rights of private citizens who, after the rights arose, became minority shareholders. Prof. John Freeman, expert for the Plaintiffs, opines that the Purported Release, even if given full effect, would have no effect on these individually held claims. (Deposition of John Freeman, p. 236-238, Exhibit #2 to Plaintiffs' Supplemental

Memorandum in Opposition.) That the Plaintiffs assert causes of action grounded in individually held rights is clear: the Plaintiffs' allege misrepresentations made before the Plaintiffs were shareholders, and therefore give rise to causes of action which are held by the Plaintiffs individually. (Complaint, Paragraphs 13-15; Exhibit #1 to Memorandum in Support.)

For these additional reasons, the motion is denied with respect to all causes of action which are individually held by the Plaintiffs.

c. Johnathan Ramaci's promissory estoppel argument does not support summary judgment because no evidence supports that Byrd or Sedmak made the promises alleged.

Johnathan Ramaci asserts that summary judgment is appropriate because promissory estoppel bars Byrd's and Sedmak's claims. I disagree. Johnathan Ramaci correctly notes that the first element of the defense is "the presence of a promise unambiguous in its terms", but provides no evidence that either Mr. Byrd or Mr. Sedmak made any promise. Johnathan Ramaci appears to discern a "promise" in the Purported Release, a document which neither Mr. Byrd nor Mr. Sedmak either drafted or signed, and in Johnathan Ramaci's assertion in his affidavit that Mr. Sedmak "wanted to obtain control of iCache." The Court finds as a matter of law that neither of these assertions constitutes a promise unambiguous in its terms and deny the motion to the extent it relies on the promissory estoppel.

Based on these findings of fact and conclusions of law, Johnathan Ramaci's motion for summary judgment on all claims by the Plaintiffs is denied.

3. Haverly Ramaci's motion for summary judgment is granted in part and denied in part.

In light of Plaintiffs' counsel's stated consent, I dismiss the Plaintiff's claims against Haverly Ramaci for violations of the South Carolina Uniform Securities Act. Finding that the Plaintiffs have an adequate remedy at law, the Court grants Haverly Ramaci's motion for summary

judgment on the Plaintiffs' unjust enrichment claims. The Court finds that there is a genuine, triable issue of fact concerning the Plaintiffs' conversion and breach of fiduciary duty causes of action, and therefore deny Haverly Ramaci's motion for summary judgment as to these two causes of action.

II. THE COURT DENIES IN PART AND GRANTS IN PART JOHNATHAN RAMACI'S MOTIONS FOR JUDGMENT ON THE PLEADINGS.

1. The Court denies in part and grants in part the motion for judgment on the pleadings as to Ulm's crossclaims.

Johnathan Ramaci argues that Ulm's crossclaims for negligence and breach of fiduciary duty are derivative claims which must be dismissed for failure to comply with the pleading requirements of Rule 23 of the South Carolina Rules of Civil Procedure. Johnathan Ramaci's motion for judgment on the pleadings is denied in part and granted in part.

A shareholder may bring a direct claim against a corporation or its officers and directors "if his loss is separate and distinct from that of the corporation." *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995); *see also Todd v. Zaldo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991) ("If an individual stockholder has suffered a particular loss due to mismanagement of a corporation then the stockholder may bring an action for his loss since it is his personal asset."). Because Ulm did not state a cause of action distinct from that of other shareholders, the claim for negligence is an improperly-pled derivative claim. Johnathan Ramaci's motion for judgment on the pleadings is granted as to Defendant Ulm's cross-claim for negligence.

The law in South Carolina is plain. The wrongful inducement of an investment constitutes a separate and distinct injury that allows an investor to bring direct claims against a corporate director or officer. *Bivens v. Watkins*, 313 S.C. 228, 232, 437 S.E.2d 132, 134 (Ct. App. 1993)

("We find [the Plaintiff] has standing to assert some of the causes of action alleged in her complaint, particularly the fraud and negligent misrepresentation causes of action. [Plaintiff] asserts that the actions of [Defendants], as individuals, induced her to invest in and surrender her assets to the new business. Injuries emanating from such an inducement are different from injuries arising from any actions these individuals may have taken as officers, directors, and managers of the new corporation in dissipating or wasting its assets. In that regard, [Plaintiff's] alleged injury is separate and distinct from that of the corporation.").

"An individual action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation." *Brown*, 348 S.C at 50, 557 S.E.2d at 685; *see also In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319, 327 (Del. 1993), as corrected (Dec. 8, 1993). Finally, those who execute a contract with a corporation may bring a direct action to recover for damages stemming from that contract. *See Lipton v. News Int'l, Plc*, 514 A.2d 1075, 1078 (Del. 1986), *disapproved of by Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

The Court finds that Ulm seeks damages for Johnathan Ramaci's breaches of fiduciary duty which induced him to invest in iCache. *Id.* Ulm alleges that Johnathan Ramaci's misrepresentations were made directly to Ulm during multiple meetings between Johnathan Ramaci and Ulm, causing Ulm harm distinct from that of other shareholders. Ulm's claim for breach of fiduciary duty is therefore separate and distinct from the claims of other shareholders, which seek redress for diminution in stock value due to Johnathan Ramaci's mismanagement of iCache. Johnathan Ramaci's motion for judgment on the pleadings is therefore denied as to Defendant Ulm's cross-claim for breach of fiduciary duty.

2. The Court denies in part and grants in part the motion for judgment on the pleadings as to certain causes of action in Plaintiffs' complaint.

a. The Plaintiffs' UTPA claims are dismissed.

At oral argument on this matter, Plaintiffs' counsel consented to the dismissal of their Unfair Trade Practices Act claim; accordingly, the Plaintiffs' UTPA claims against the Ramaci Defendants are dismissed.

b. The Plaintiffs' claims against John and Haverly for unjust enrichment, restitution and constructive trust are dismissed.

The Court finds that the Plaintiffs' legal and statutory causes of action afford them a remedy which is as certain, practical, complete, and efficient to attain the ends of justice as would be the remedies afforded under their equitable causes of action: unjust enrichment, restitution, and constructive trust. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 379 S.E.2d 119, 123 (S.C. 1989). Because equitable relief is only available where there is no adequate remedy at law, *ZAN, LLC v. Ripley Cove, LLC*, 751 S.E.2d 664, 669 (S.C. App. 2013), the Court finds that the Plaintiffs' equitable causes of action against John and Haverly Ramaci—unjust enrichment, restitution, and constructive trust—are improper, and should be and hereby are dismissed.

c. The Plaintiffs' conversion claim against John and Haverly Ramaci is dismissed.

The Court finds that the Plaintiffs' conversion claim against Johnathan Ramaci is based upon allegations that relate to mismanagement of the company which occurred after the Plaintiffs' investment, and therefore during their time as shareholders. With reference to the legal authorities cited in Ramaci's memorandum, the Court finds that these claims could be brought only in the posture of a shareholder derivative claim. Because the Plaintiffs do not proceed in a derivative posture, I dismiss the Plaintiffs' claims for conversion against Johnathan and Haverly Ramaci.

d. The motion for judgment on the pleadings with respect to the Plaintiffs' negligence and breach of fiduciary duty claims is denied.

The Court finds that the Plaintiffs seek damages under the negligence and breach of fiduciary duty causes of action based on Defendants' alleged wrongful conduct in soliciting the Plaintiffs' investment in iCache. Because these causes of action arose prior to the Plaintiffs' becoming iCache shareholders, these claims were held in the Plaintiffs' individual capacity, and need not have been pursued as shareholder derivative claims. Therefore, viewed in the light most favorable to the Plaintiffs, the Complaint raises an issue of fact that would entitle the Plaintiffs to relief on these claims.

III. THE COURT DENIES JOHNATHAN RAMACI'S MOTION FOR INJUNCTIVE RELIEF AS TO ULM'S CROSSCLAIMS.

On February 24, 2016, Johnathan Ramaci moved to permanently enjoin the assignment of claims by and between Ulm and the Trust. In the alternative, Johnathan Ramaci seeks an order enjoining Ulm from attempting to assert any claims acquired in the assignment in the pending action. The Court denies Johnathan Ramaci's motion for injunctive relief.

An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party. *Hampton v. Haley*, 403 S.C. 395, 409, 743 S.E.2d 258, 265 (2013) (citing *Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010)). A party is only entitled to injunctive relief if the party demonstrates: (1) it would suffer irreparable harm if the injunction is not granted; (2) a likelihood of success on the merits; and (3) there is an absence of an adequate remedy at law. *See Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). Johnathan Ramaci, as the party seeking the injunction, has the burden of demonstrating facts and circumstances warranting such remedy. *See Strategic Res.*

Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). Johnathan Ramaci failed to meet this burden, and his motion is therefore denied.

1. Johnathan Ramaci failed to demonstrate irreparable harm.

The continuation of ongoing litigation to its proper resolution does not constitute irreparable harm. An injunction is not an appropriate remedy for a party who dislikes the fact that an opposing party pursues claims against him. South Carolina courts have only recognized irreparable harm in very limited circumstances. See *Peek v. Spartanburg Reg'l Healthcare Sys.*, 367 S.C. 450, 455, 626 S.E.2d 34, 37 (Ct. App. 2005) ("The complete loss of a professional practice can be an irreparable harm."); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 52, 674 S.E.2d 505, 509 (Ct. App. 2009) (injunction warranted where subject actions "interfered with their right to the use and enjoyment of [homeowners'] property"); *Levine v. Spartanburg Reg'l Servs. Dist., Inc.*, 367 S.C. 458, 465, 626 S.E.2d 38, 41-42 (Ct. App. 2005) *holding modified by Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 694 S.E.2d 15 (2010) (loss of physician's referral base and competency due to practice restrictions, which could lead to the loss of her professional practice and career, can be an irreparable harm); see generally *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 709 S.E.2d 639 (2011) (state's failure to destroy inmate records as required by statute constituted irreparable harm, as it would result prevent eligibility for parole); *Parker v. S.C. Dairy Comm'n*, 274 S.C. 209, 215-16, 262 S.E.2d 38, 42 (1980) (granting injunction "to protect the consuming public of South Carolina against irreparable harm" that would result from enforcement of a price-setting order prior to a review of its constitutionality).

Further, as the United States Supreme Court observed when addressing the concept of irreparable harm:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in

the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974).

Johnathan Ramaci claims “[i]f the Court permits the Assignment and allows Billy Ulm to assert the claims of the Trust in this matter as his own claims, the Ramaci Defendants will be irreparably harmed because they will be forced to continue to litigate this case and incur substantial legal fees.” See Ramaci Motion at ¶ 8. The crossclaims against Johnathan Ramaci have been pending since January of 2014. The Court finds that the persistence of and continued costs of ongoing litigation does not constitute irreparable harm. While the Court acknowledges that litigation is a burden for *any* defendant, litigation itself does not constitute irreparable harm, otherwise all defendants would be irreparably harmed. See *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1337 (Fed. Cir. 2012) (“Litigation costs are undoubtedly undesirable and may take funds away from other endeavors, but they are not an irreparable harm in the injunction calculus. . . . Reliance on litigation costs to support a determination of irreparable harm [is] therefore legal error.”); see also *Rogers v. Comprehensive Rehab. Associates, Inc.*, 808 F. Supp. 493, 498 (D.S.C. 1992) (stating that economic losses do not justify the imposition of an injunction). No South Carolina court has held that litigation costs incurred by a defendant constitute irreparable harm, and the Court declines to do so here.

2. Johnathan Ramaci failed to demonstrate a likelihood of success on the merits.

The Court finds that there are numerous genuine issues of material fact regarding the scope of the allegations of Johnathan Ramaci’s misrepresentations and fraud in the inducement of Ulm’s investment. All parties with the exception of the Ramaci Defendants, do not dispute that Johnathan

Ramaci induced Ulm's investment in iCache, Inc. or that the company ultimately failed. There is evidence before the Court that would support the conclusion that Johnathan Ramaci misrepresented the true state of the company to induce both Ulm's and the Plaintiffs' investments. *See* Ulm Amended Answer and Crossclaims.

The Court finds that Johnathan Ramaci has failed to meet his burden of demonstrating likelihood of success on the merits of Ulm's crossclaims. Further, the Court finds that Johnathan Ramaci does not address this element of injunctive relief in his motion or papers.² *See Atwood Agency v. Black*, 374 S.C. 68, 72, 646 S.E.2d 882, 884 (2007) (ruling that a motion for an injunction will not be granted unless it includes allegations sufficient to meet all required elements of an injunction).

3. Johnathan Ramaci has an adequate remedy at law.

The Court finds that the law affords Johnathan Ramaci an adequate remedy with respect to Ulm's crossclaims. Johnathan Ramaci asserts that he "does not have an adequate remedy at law because he will be forced to continue to litigate this matter at substantial cost and effort without the means to recoup either." *See* Ramaci Motion at ¶ 11. Johnathan Ramaci's assertion ignores the existence of several remedies available to Johnathan Ramaci—if Johnathan Ramaci's factual arguments or legal assertions are correct, he will win in the defense of the crossclaims. This is an adequate remedy for Johnathan Ramaci.

Ulm has prosecuted these crossclaims against Johnathan Ramaci for more than two years. Throughout the duration of this litigation, Johnathan Ramaci has voraciously defended and challenged the merits of these claims. Ulm's assignment does nothing to change this. The ordinary

² Ramaci argued that the assigned claims are time-barred and that he should be granted judgment as a matter of law on this issue. The Court rejects these grounds in finding that injunctive relief is not warranted.

process of law provides Johnathan Ramaci with several legal remedies to address his contentions with respect to the Trust's assignment of the crossclaims in this litigation to Billy Ulm, two of which Johnathan Ramaci is actively pursuing: 1) Johnathan Ramaci challenges the validity of the assignment; 2) Johnathan Ramaci challenges the application of the statute of limitations; 3) Johnathan Ramaci can defend the merits of Ulm's crossclaims at trial. Any of these measures may provide Johnathan Ramaci with an adequate remedy at law. These are all not only available remedies but also very common litigation vehicles provided by our procedural rules. *See Van Robinson Ins. Agency, Inc. v. Harleysville Mut. Ins. Co.*, 272 S.C. 127, 129, 249 S.E.2d 744, 745 (1978) ("in the absence of some positive provision of the law to the contrary, an injunction will not be granted in cases where there is a choice between the ordinary processes of law and the extraordinary remedy by injunction"). Johnathan Ramaci's motion for injunctive relief is therefore denied.

IV. JOHNATHAN AND HAVERLY RAMACI'S MOTION TO REOPEN DEPOSITIONS, OR IN THE ALTERNATIVE TO REDEPOSE CERTAIN PARTIES IS DENIED.

The Court finds no cause in the record of this case to permit the further or additional deposition of the witnesses identified in this motion, and therefore respectfully deny the motion.

CONCLUSION

Johnathan Ramaci has failed to demonstrate the elements necessary to warrant the imposition of a permanent injunction. Johnathan Ramaci's Motion for Permanent Injunction is therefore DENIED. Johnathan Ramaci's Motions for Summary Judgment as to the Ulm Crossclaims are DENIED. Johnathan Ramaci's Motion for Summary Judgment on the Plaintiffs' Claims is DENIED. Johnathan and Haverly Ramaci's Motion for Judgment on the Pleadings as to certain causes of action in Plaintiffs' Complaint is DENIED IN PART and GRANTED IN

PART. Johnathan Ramaci's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) as to the Ulm Crossclaims is DENIED IN PART and GRANTED IN PART. Johnathan and Haverly Ramaci's Motion to Reopen Depositions is DENIED. Haverly Ramaci's Motion for Summary Judgment is DENIED IN PART and GRANTED IN PART.

AND IT IS SO ORDERED.

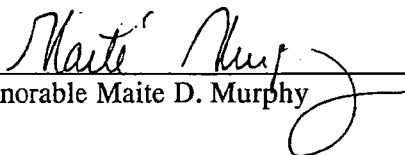

Honorable Maite D. Murphy

EXHIBIT B

1 STATE OF SOUTH CAROLINA
2 COUNTY OF CHARLESTON

COURT OF COMMON PLEAS
2013-CP-10-4874

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4
5
6 BYRDNEST, LLC, CRAIG)
7 SEDMAK, STEPHANIE)
8 SEDMAK, AND WESLEY)
9 NAU,)

PLAINTIFFS,)

VS.)

10 JOHN RAMACI, HAVERLY)
11 RAMACI, RICHARD)
12 SCOTT, AND BILLY ULM,)

DEFENDANTS, .)

TRANSCRIPT OF RECORD

FEBRUARY 24, 2016
ST. GEORGE, SC

13
14
15 B E F O R E:

16 HONORABLE MAITE MURPHY, JUDGE
17

18 A P P E A R A N C E S:

19 BENJAMIN TRAYWICK, ESQUIRE
20 Attorney for the Plaintiffs

21 JULIE MOORE, ESQUIRE
22 CORY MANNING, ESQUIRE
23 ADAM HEGLER, ESQUIRE
24 JENNIFER JOKERST, ESQUIRE
25 Attorneys for the Defendants

Ruth C. Weese, RDR
Official Court Reporter

1 under the rules of civil procedure and then we get
2 a withdrawal of the substitution motion and a note
3 saying oh, we have assigned the claims. Everything
4 is okay now. These claims were time barred before
5 they were assigned. Indeed, if he has new claims
6 now he still doesn't have standing to bring the
7 claims that he has. He has standing to bring these
8 new claims which I don't see a pleading -- I don't
9 see a pleading that relates to these new claims.
10 So I am asking the Court to enjoin this --
11 permanently enjoin the assignment here. Or in the
12 alternative enjoin Mr. Ulm from attempting to
13 assert any claims being --

14 THE COURT: Hold on on that. You
15 obviously just gave her that so it is not proper
16 for me to hear that at this time. That's not
17 before me today.

18 MR. MANNING: So you are not going to
19 hear the injunction motion today?

20 MS. MOORE: I would object.

21 THE COURT: It hasn't been filed or
22 served so no, I will not hear it.

23 MR. MANNING: I just served it on her.

24 THE COURT: She has got to have proper
25 notice to review it.

1 MS. MOORE: You just served it on me
2 less than 60 seconds ago. We're happy to respond,
3 Your Honor, but I would at least like to read it
4 and think about it.

5 THE COURT: Sure, I want to give you
6 adequate time so you can properly prepare.

7 MS. MOORE: Thank you, Your Honor.

8 MR. MANNING: We filed a rely to her
9 opposition. Am I allowed to go through that?

10 THE COURT: You are.

11 MR. MANNING: So we have been over
12 this. Mr. Ulm has withdrawn his substitution
13 motion in light of this 11th hour assignment of his
14 claims of claims from the trust. And the trust
15 conveyed to Mr. Ulm all of it rights to prosecute
16 the cross-claims and any other claims the trust may
17 have in the litigation.

18 So under South Carolina law the
19 validity of that assignment is only limited to the
20 rights that the trust possessed, those rights that
21 the trust possessed at the time that it made the
22 transfer. An assignee, Mr. Ulm in this case, he
23 has no greater rights than the assignor. What they
24 are asking this Court to do is to extend the
25 statute of limitations. They are asking this Court

1 to extend the statute of limitations. That goes to
2 standing as well. Because if the statute of
3 limitations is blown there's no standing.

4 We argued in our previous response that
5 the statute of limitations was blown. That was
6 another reason why the substitution was improper.
7 We are reiterating those arguments right here.
8 There is evidence in the record that is recounted
9 in our motion and in our injunction motion talking
10 about how the statute of limitations here has been
11 blown and therefore the claims that were assigned
12 by the trust, they were time barred. So they are
13 time barred already so there's holding this up
14 anymore with this last ditch effort by Mr. Ulm
15 because somebody may have filed a lawsuit in the
16 wrong person's name. I don't think that was
17 intentional. And I say that in my papers. I think
18 that filing was part of a strategy, therefore
19 Rule 17's broad language that allows for the
20 correction and ratification of all these mistakes
21 that are made doesn't apply here. The mistake
22 wasn't understandable. This guy's represented by
23 multiple counsel. Was represented by multiple
24 counsel in each of his stock purchase agreements
25 with respect to the iCache purchases. Even changed

1 some of the language in that in a back and forth
2 with lawyers for iCache.

3 So it's not understandable now when all
4 these fiduciaries, these lawyers, these trustees,
5 these beneficiaries are around Mr. Ulm and his case
6 is filed in the wrong name? I'm sorry that I just
7 got into this matter in November of last year. But
8 this is not something that I think we can apply the
9 laches arguments that Ms. Moore seems to be making
10 to me. This guy didn't have standing, he still
11 doesn't have standing because A, he either has an
12 assignment that's not valid and I'd like this Court
13 to enjoin it; or B, he has an assignment of claims
14 that are time barred. Thank you, Your Honor.

15 MS. MOORE: Yes, Your Honor. I think
16 that you -- we cited this in our memo and we are
17 happy to address it further in light of the new
18 motion filed, but if you just review the Campus
19 Sweater case which we have cited in our brief it
20 speaks exactly to this situation.

21 In the Campus Sweater case, a South
22 Carolina case, a claim was filed, the action was
23 commenced and before trial the causes of action
24 that had been pursued by the original Plaintiff
25 were assigned to a different party for

EXHIBIT C

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Byrdnest LLC, Craig Sedmak,) Civil Action No. 2013-CP-10-4874
Stephanie Sedmak, and Wesley Nau,)

Plaintiffs,)

vs.)

John Ramaci, Haverly Ramaci, Richard)
Scott, and Billy Ulm,)

Defendants.)

**DEFENDANT JONATHAN
RAMACI'S MEMORANDUM IN
SUPPORT OF MOTION FOR
PERMANENT INJUNCTION**

FILED
2016 MAR 24 PM 3:14
CLERK OF COURT

Defendant Jonathan Ramaci ("Ramaci") submits this Memorandum of Law in Support of his Motion for Permanent Injunction. Ramaci has moved this Court pursuant to South Carolina Rule of Civil Procedure 65 to enter a permanent injunction barring the attempted Assignment of Claims by and between The William L. Ulm, Sr. 2006 Delaware Trust (the "Trust") and Billy Ulm. Ramaci respectfully requests an order from this Court enjoining the purported Assignment of Claims by the Trust to Billy Ulm or in the alternative, enjoining Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action.

STATEMENT OF FACTS

Plaintiffs filed the underlying action against Defendants Jonathan and Haverly Ramaci, Richard Scott, and Billy Ulm on August 19, 2013. Defendant Billy Ulm ("Ulm") filed his initial answer on November 14, 2013, and simultaneously filed a motion to dismiss. On January 23, 2014, approximately two months after this Court denied his motion to dismiss, Ulm amended his answer to assert three cross-claims against Ramaci. Now, two years after he moved to dismiss Plaintiffs' complaint, answered that complaint, amended his answer to that complaint, and asserted cross-claims, Ulm has repeatedly changed course in an attempt to assert the time-barred claims of the Trust. Ulm's recent procedural machinations, and Ramaci's responses to the same, are as follows:

- On December 21, 2015, Ulm filed a Motion seeking to substitute The William L. Ulm, Sr. 2006 Delaware Trust (the "Ulm Trust") as the proper cross-claimant in the claims brought against Ramaci (the "Substitution Motion").
- In his Substitution Motion, Ulm admitted that he did not own the interest in iCache individually and, therefore, that he does not have a valid individual cross-claim against Ramaci: "Ulm's purchase of iCache stock was done by and through the Trust, at the direction of Billy Ulm. Defendant Billy Ulm now seeks to substitute the trust as the proper party to prosecute his cross-claim against Defendant John [sic] Ramaci." (Substitution Motion at p.1 (emphasis added).)
- On February 4, 2016, Ramaci filed a memorandum of law in opposition to Ulm's Substitution Motion, arguing that the substitution was improper under the South Carolina Rules of Civil Procedure and barred by the statute of limitations.
- On February 4, 2016, Ramaci also filed a Summary Judgment Motion as to the cross-claims asserted by Billy Ulm on the basis of the admission in the Substitution Motion that Billy Ulm was not the proper party to prosecute the cross-claims.
- On February 22, 2016, apparently in response to the arguments and authority in Ramaci's February 4 opposition, counsel for Billy Ulm filed a Memorandum in Opposition to Defendant John [sic] Ramaci's Motion for Summary Judgment as to the Ulm Crossclaims and Motion for Judgment on the Pleadings as to the Ulm Crossclaims, in which counsel abruptly informed the Court and parties to this case that the Trust had executed an Assignment of Claims whereby the Trust purported to assign its right to prosecute the cross-claims to Billy Ulm on February 19, 2016.¹
- On February 24, 2016, this Court heard arguments on pending motions. Counsel for Ulm informed the Court and the parties to this case that it would be withdrawing the Substitution Motion.
- On February 25, 2016, Ramaci filed a Reply to Defendant Ulm's Memorandum in Opposition, challenging the purported Assignment of stale claims as improper because the claims are time barred.
- On February 25, 2016, Ramaci filed the instant Motion for Permanent Injunction, requesting an order from this Court enjoining the purported

¹ Importantly, the Trust retained actual ownership of the iCache shares.

Assignment of Claims by the Trust to Billy Ulm or in the alternative, enjoining Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action.

- Alternatively, and filed contemporaneously with this memorandum in support, Ramaci filed a Motion for Summary Judgment Seeking Dismissal of the Trust's Assigned, Time-Barred Claims. Should this Court find that the assignment of claims was actually proper and decline to enjoin the same, Ramaci seeks an order dismissing these assigned claims as time-barred by the applicable statutes of limitations.

Defendant/Cross-Claimant Ulm's repeated attempts to inject the Trust's time-barred claims into this litigation highlight the improper basis for these maneuvers, and as outlined below, demonstrate that this Court should not allow the Assignment of Claims as a vehicle to upset the progress of this case at the last minute.

ARGUMENT

This Court should enjoin the Trust's purported Assignment of Claims or, in the alternative, enjoin Defendant/Cross-Claimant Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action as his own claims.

I. An Injunction is the Only Available Remedy for the Improper Assignment.

A party seeking a permanent injunction must demonstrate the following: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Bradacs v. Haley*, 58 F. Supp. 3d 514, 531 (D.S.C. 2014). Under South Carolina law, the existence of a legal remedy is no obstacle to injunctive relief if the available legal remedy is ineffective because it is impractical, because the threatened acts may continue while a legal action is pending, or because successive actions at law would be necessary to protect plaintiff's rights. *See Kirk v. Clark*, 4 S.E.2d 13, 15 (S.C. 1939).

Irreparable Harm. If the Court permits the Assignment and allows Billy Ulm to assert the claims of the Trust in this matter as his own claims, the Ramaci Defendants will be irreparably harmed because they will be forced to continue to litigate this case and incur substantial legal fees, after nearly reaching settlement. Courts have recognized that thwarting a negotiated settlement causes irreparable harm because it forces a party to face the risk of litigation after they have expended great effort to obtain settlement on negotiated terms. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 89 (1981) (finding that a court's refusal to enter a consent decree regarding settlement might cause serious or irreparable harm because "petitioners might lose their opportunity to settle their case on the negotiated terms"). Settlement agreements allow parties "to avoid the costs and uncertainties of litigation," and once the parties have an agreement in place, "denying the parties their right to compromise their dispute on mutually agreeable terms" causes "serious, perhaps irreparable, consequence[s]." *Id.* at 88-89.

That is the case here. As stated in the parties most recent Consent Motion to Amend Scheduling Order, the parties have continued to be involved in settlement negotiations and have recently made progress as to the same. Indeed, a settlement agreement was approved by the Plaintiffs and by Defendant Scott, subject to a few relatively non-controversial edits. (E-Mail from R. Young, January 19, 2016, 11:26 AM, attached as Exhibit 1.) Billy Ulm's attempt to insert the time-barred claims of the Trust into this matter as his own claims has already upset the parties' substantial progress toward settlement over the past months. Indeed, his actions have forced all of the parties back into a full litigation posture where they are again subject to the uncertainties of litigation that they have worked through over the past several months to avoid.²

² Having identified an agreeable framework, however, Ramaci is optimistic that the resolution of the matters addressed in this Motion will allow parties to resume and conclude the settlement negotiations.

No Adequate Remedy at Law. In addition, Ramaci does not have an adequate remedy at law because he will be forced to continue to litigate this matter at substantial cost and effort without the means to recoup either. Although a finding that Ramaci does not have an adequate remedy at law is not required for an injunction to issue in South Carolina,³ if this Court allows the assignment, Ramaci will be without recourse. Ramaci may incur substantial fees for a trial of this matter, and, no matter the outcome, he will bear those fees. *See Baron Data Sys., Inc. v. Loter*, 377 S.E.2d 296, 297 (S.C. 1989) ("[A]ttorney's fees are not recoverable unless authorized by contract or statute."). Here, Ramaci can look to neither statutory law nor a contract to recover his fees.

Balance of Hardships. The balance of hardships weighs in favor of granting the equitable relief requested because continued litigation would impose a burden on all parties to this matter, who have been actively pursuing settlement and litigating this matter. On the other hand, any harm resulting from the injunction would be borne by the Trust, who is not, and should not be, a party to this action. That cannot constitute a hardship. *See Metropolitan Life Ins. Co. v. Bell*, 2014 WL 8021562, at * 7 (M.D. Fla. Oct. 9, 2014) (finding that "being deprived of the ability to institute meritless lawsuits is not a 'hardship'")

Public Interest. The relief sought herein would be in the public interest because it would give effect to the goals of the substantive and procedural law of this state to protect defendants against stale claims and provide continuity and uniformity for the resolution of claims. When a party's actions attempt to thwart the uniform application of the law, such as when a party attempts to avoid the application of established procedure, injunctions are the proper remedy. *See, e.g., Coach, Inc. v. Fashion Paradise, LLC*, 2012 WL 194092, at *9 (D.N.J. Jan. 20, 2012) (issuing an injunction will serve the public interest goals of preventing

³ Ramaci contends that these claims should not be allowed into this litigation as the assignment is improper. However, if this Court declines to enjoin the assignment, the claims should still be dismissed as time barred for the reasons set forth in Ramaci's Motion for Summary Judgment, filed contemporaneously herewith.

consumer confusion and the trademark holder's property interest). Put simply, an injunction is proper when it forces a litigant to act within the bounds of established legal framework.

In this case, Ulm and the Ulm Trust are seeking, under the guise of the eleventh-hour assignment, to avoid the long standing policy undergirding statutes of limitations.

Statutes of limitations are not simply technicalities. Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. Statutes of limitations relieve courts of the burden of trying stale claims of those who have slept on their rights.

Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 699 S.E.2d 687, 690 (S.C. 2010) (citations omitted). Defendant Ulm's procedural tactic of filing a quick cross-claim (without standing to do so) in hopes of creating some leverage should not be rewarded, particularly when it was procedurally defective from the beginning.

Moreover, courts have long recognized that public policy favors settlement. *See, e.g., Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 754 S.E.2d 486, 490 (S.C. 2014), reh'g denied (Mar. 6, 2014) ("Our courts have a long standing policy favoring settlements."); *In re A.H. Robins Co., Inc.*, 173 F.3d 423 (4th Cir. 1999) (citing *Hemstreet v. Spiegel, Inc.*, 851 F.2d 348, 350 (Fed. Cir. 1988)) ("The law strongly favors settlement of litigation, and there is a compelling public interest and policy in upholding and enforcing settlement agreements voluntarily entered into."); *Evans v. Jeff D.*, 475 U.S. 717, 761 n.15 (1986) ("By lessening docket congestion, settlements make it possible for the judicial system to operate more efficiently and more fairly while affording plaintiffs an opportunity to obtain relief at an earlier time.").

The Ulm Trust's attempted assignment of its time-barred claims threatens to undermine both of these long-standing public policies. As outlined below, Ulm has abandoned his attempt to substitute the Trust under the Rules of Civil Procedure, and is attempting the assignment in

an effort to circumvent those rules. Therefore, an injunction is appropriate to prevent the purported assignment.

II. Through its Assignment, the Trust Cannot Inject Time-Barred Claims into this Litigation.

Defendant Ulm and the Ulm Trust executed an Assignment of Claims on February 19, 2016. Under the terms of the Assignment, the Trust conveyed to Ulm "all of its rights to prosecute the crossclaims and any other claims [the Trust] may have in the litigation." (2/19/2016 Assignment of Claims, p.1.).⁴

The Assignment of Claims conveyed to Ulm those rights (and only those rights) that the Trust possessed at the time of conveyance. Under South Carolina law, "[a]n assignee of a chose in action can claim no higher rights than his assignor had at the time of the assignment." *Singletary v. Aetna Cas. & Sur. Co.*, 447 S.E.2d 869, 870 (S.C. Ct. App. 1994); *see also* *Murphy v. Jefferson Pilot Commc'ns Co.*, 657 F. Supp. 2d 683, 690 (D.S.C. 2008) ("Since they were assigned to Plaintiffs, Plaintiffs [assignees] can have no greater rights on these claims than Feldman [assignor] himself would have had had Feldman chosen to pursue the claims himself.").

Moreover, an assignee takes such assignment subject to the same defenses that would be applicable to the assignor. *See, e.g., Chet Adams Co. v. James F. Pedersen Co.*, 418 S.E.2d 337, 338 (S.C. Ct. App. 1992) ("[T]he assignee of a non-negotiable chose in action takes it

⁴ The Assignment of Claims further provides that the "Assignor [Ulm Trust] expressly retains ownership of the Stock and hereby conveys to Assignee no interests or rights in the Stock other than Assignor's interests and rights in the crossclaims and any other claims Assignor has or may have in the Litigation." (2/19/16 Assignment of Claims, p. 1 (emphasis added).) Because Billy Ulm, individually, does not have any ownership interest in the stock, he does not have proper standing to assert any derivative claims against Ramaci, including the negligence and breach of fiduciary duty claims. *See* S.C. R. Civ. P. 23(b)(1) (providing that in a derivative action, "the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law"); *Johnson v. Baldwin*, 69 S.E.2d 585, 589 (S.C. 1952) ("The right of a stockholder to maintain a derivative action against the directors of a corporation 'inheres in and attaches to his ownership of its stock and does not exist apart from such ownership.'" (quoting 19 C.J.S., Corporations, § 824, page 228)).

subject to all equities and defenses which could have been set up against the assignor at the time of the assignment").

At the time of the Assignment, the Trust had a right to bring a lawsuit against Ramaci and anyone else that it felt was responsible for an alleged breach of some alleged duty. However, that right of the Trust was subject to any defenses that Ramaci could bring in response to such a lawsuit, including the defense of statute of limitations.

The issue, then, is whether the Ulm Trust, as the assignor, would be barred from bringing the claims at the time of assignment, as this Court should look to the rights of the assignor for purposes of the statute of limitations analysis. *See Murphy*, 657 F. Supp. 2d at 692 ("Since '[a]n assignee stands in the shoes of its assignor,' the relevant inquiry for when the statute of limitations began to run is not when the Plaintiffs knew or should have known that they had the basis for an interference with contractual relationship and civil conspiracy claim, but rather when Feldman [the assignor] knew or should have known of such a claim."). Any claims that the Trust might have against Ramaci that mirror the claims Ulm pleaded in his cross-claim are time barred.⁵

The Ulm Trust cannot avoid this statute of limitations bar through an assignment of its claims. *See Murphy*, 657 F. Supp. 2d at 692 (refusing to rule for Plaintiffs because to do so "would essentially be ruling that an assignment of claims could serve to resuscitate time-barred claims"); *United States v. Hunter*, 700 F. Supp. 26, 27 (M.D. Fla. 1988) ("In the absence of a specific federal rule providing a longer limitation period, mere assignment to the United States of a claim already barred under a state statute of limitations does not revive the time-barred claim."); *United States v. Taylor*, 144 F. Supp. 15, 17-18 (E.D. Pa. 1956) ("In this case, the assignment, which is attached as an exhibit to the complaint, is dated December 15, 1953, and there is nothing in the record which would indicate a tolling of the start of the period of

⁵ The claims assigned by the Ulm Trust to Ulm are time barred for the reasons set forth in Section IV, *infra*.

limitations beyond November 1, 1949, so that the applicable statute of limitations had barred the assignor's claim more than a year prior to its assignment to plaintiff."); *Vaughan v. Moore*, 366 S.E.2d 518, 520 (N.C. 1988) ("Plaintiff obtained the waiver and assignment from her mother on 21 September 1987, more than four years after the cause of action arose. Thus, in order to give effect to the waiver, we would essentially extend the parent's claim beyond its three-year statute of limitations."); *Madison Fund, Inc. v. Midland Glass Co.*, No. 394 CIV.A. 1974, 1980 WL 332958, at *3 (Del. Super. Aug. 11, 1980) (holding that "Defenses such as the statute of limitations may be interposed against the assignee if it was available against the assignor" and barring claims that were assigned a year after the statute had run); *Woolett v. Am. Employers Ins. Co.*, 77 Cal. App. 3d 619, 625, 143 Cal. Rptr. 799, 802 (Ct. App. 1978) ("In this case, the judgment which plaintiff recovered against Crawford became final in October 1970, hence Crawford's cause of action for defendant's wrongful refusal to settle was barred by the statute of limitations after October 1974. It follows, then, that when Crawford purported to assign this cause of action to plaintiff in February 1976, Crawford had nothing of value to assign."). *Campus Sweater & Sportswears Co. v. M.B. Khan*, 515 F. Supp. 64 (D.S.C. 1979) *aff'd sub nom. Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 644 F.2d 877 (4th Cir. 1981), cited by Ulm in support of the Trust's assignment, did not involve the assignment of time-barred claims. *Campus Sweater*, therefore, cannot support the validity of the assignment here.

The claims of the Trust, which were purportedly conveyed to Ulm in the Assignment of Rights for \$10 dollars, cannot receive a longer statute of limitations merely because they were assigned to Ulm. Stated another way, Ulm cannot acquire any greater rights in the claims than those the Ulm Trust possessed. At the time of the conveyance, February 19, 2016, the Ulm Trust had no right to assert the claims at issue, because the three-year statute of limitations on the claims had run. For this reason, even if this Court were to consider the Trust's assignment to be valid, Defendant Ulm's cross-claims should be dismissed as barred by the applicable statute of limitations.

III. Ulm Cannot Avail Himself of Real Party in Interest Status Pursuant to South Carolina Rule of Civil Procedure 17.

First, through the subterfuge of his Substitution Motion, which is addressed below, and now through an attempted eleventh-hour assignment of questionable propriety, Ulm is again asking this Court to allow a non-party (the Ulm Trust) to bring a cross-claim in this matter that is barred by the statute of limitations. For the reasons initially set forth in Ramaci's Memorandum in Opposition to the Substitution Motion, Ulm should not be considered the real party in interest pursuant to Rule 17(a). Although Ulm has withdrawn his Substitution Motion through representation of counsel at the February 24 hearing, many of the arguments, as outlined briefly below, apply with equal force to Ulm's latest procedural machinations.

A. Ulm's mistake in bringing his cross-claim was neither honest nor understandable.

Rule 17 was intended to provide a mechanism for mistakes to be corrected when the determination of the proper party to sue is difficult or there has been an honest and understandable mistake. *See* S.C. R. Civ. P. 17(a) Notes ("The last sentence of the rule is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake."); *Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 171 (4th Cir. 2001) (denying motion to join party under Rule 17 where the court determined that the mistake had not been "understandable," because the party was represented by counsel and had notice from an early date, and yet failed to seek to join until later); *Metal Forming Techs., Inc. v. Marsh & McLennan Co.*, 224 F.R.D. 431, 437 (S.D. Ind. 2004) (dismissing suit and finding that substitution under Rule 17(a) was not appropriate where plaintiff made the strategic and tactical decision to bring suit in individual's name when claims had been assigned); *Feist v. Consolidated Freightways Corp.*, 100 F. Supp. 2d 273, 276 (E.D. Pa. 1999) ("Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. In order to substitute the trustee as the

real party in interest, Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable mistake.").

The determination of the proper cross-claimant was not difficult in this case. The Stock Purchase Agreement was executed by and between iCache and the William L. Ulm, Sr. 2006 Delaware Trust Agreement. (See Stock Purchase Agreements, attached as Exhibit 1, to the Ramaci Defendants Opposition to the Substitution Motion.) In fact, Ulm admits in his Substitution Motion that the purchase of the stock was made through the Trust "at the direction of Billy Ulm." (Substitution Motion, at p.1.) The Trust has now, as of February 19, attempted to assign the claims to the individual Billy Ulm. Ulm has been represented by (multiple) very able counsel throughout this matter. Therefore, Ulm was well aware that the stock was purchased and held in the name of the Ulm Trust, and there was no difficulty in determining the proper party, as required by the rule.

Nor was the mistake in naming Billy Ulm individually understandable. In the face of these uncontested facts, it is difficult to conclude that the determination to sue in the name of Mr. Ulm rather in the name of the true owner of the iCache stock (the Ulm Trust) was an honest and understandable mistake. Rather, in the face of clear stock purchase documents and with the number of persons involved in those transactions (including a trustee, multiple counsel, Ulm, and the trust beneficiaries), it seems more likely that Ulm and/or his counsel intentionally chose to bring the suit in Ulm's name individually as part of an overall strategy. That this strategic and tactical decision proved to be a poor choice, and that Ulm has once again changed directions and engineered an assignment of the claim in an attempt to avoid the statute of limitation, is not an appropriate basis to allow Ulm to proceed as a real party in interest under Rule 17.

B. Ulm's attempt to correct his mistake is untimely.

Should this Court find that Ulm's assignment is somehow a proper way to allow Ulm to become the real party in interest, which Ramaci contends is improper, it should still refuse to allow the assignment as a ratification under Rule 17, because it is untimely. Ulm failed to

assign the claim within a reasonable time, as required by Rule 17(a), which specifically provides only a "reasonable time" for ratification by the real party in interest. In this case, nearly two and a half years have passed since the original action was filed, and it has now been two years since Ulm amended his answer to assert the cross-claims against Ramaci. This delay is well beyond any time that should be considered "reasonable," especially when Ulm and his cadre of lawyers and fiduciaries were in the best position to know that the stock was purchased by and through the Ulm Trust.

C. Ulm cannot resuscitate time-barred claims through Rule 17.

Ulm is improperly attempting to resuscitate time-barred claims through a tortured use of Rule 17's real-party-in-interest procedures. His first attempt was through the substitution gambit, which he has wisely withdrawn. But now he is attempting the same result through the purported assignment of claims from the Trust. These are improper uses of the rules and improper attempts to skirt the statute of limitations. This Court should not condone such procedural gamesmanship. "[T]he rules of procedure, like statutes, should be given their plain meaning. We are unwilling to torture the rules in such a way to correct possible mistakes in the filing of motions or misjudgments in strategic procedural decisions. To do so would jeopardize the continuity and uniformity that is essential to the orderly administration of the legal system." *Valentine v. Davis*, 460 S.E.2d 218, 220 (S.C. Ct. App. 1995).

Finally, any ratification by the Ulm Trust at this late stage in the case would prejudice Ramaci. The parties have already engaged in extensive discovery, including the deposition of Billy Ulm, and discovery is set to close soon.⁶ Allowing what amounts to the time-barred claim of the non-party Ulm Trust to proceed as the sole cross-claimant at this stage would require extending the scheduling order; conducting further discovery, including the production of Trust records, re-deposing Billy Ulm (and others) regarding his involvement with and

⁶ For example, in *Campus Sweater*, relied on by Ulm, the assignment took place one year prior to trial. 515 F. Supp. at 84-85. Also, as noted above, *Campus Sweater* did not involve the assignment of time-barred claims.

control over the Trust, and possibly deposing the trustee (or trustees) of the Ulm Trust; and filing additional dispositive motions. Such delay and additional discovery has already and will continue to prejudice Ramaci and the other parties to the present action.

IV. The Claims Ulm Seeks to Assert Pursuant to the Assignment of Claims are Time Barred.

The Trust purports to assign claims that are barred by the applicable three-year statutes of limitations.

A. The Three-Year Statute of Limitations has Expired.

Ulm asserted cross-claims against Ramaci for negligent misrepresentation, negligence, and breach of fiduciary duty.⁷ Each of these causes of action has a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(5) (providing three-year statute of limitations for tort actions); *Moore v. Benson*, 700 S.E.2d 273, 277 (S.C. Ct. App. 2010) (citing three-year statute of limitations in breach of fiduciary duty action).

According to Ulm's Amended Answer and Cross-Claims, Ulm purchased shares of iCache stock in April 2011 and December 2011. And in his Substitution Motion, Ulm admitted that the Ulm Trust was the actual purchaser of these interests. The three-year statute of limitations for causes of action arising from such purchases has now expired, and the Ulm Trust is barred from bringing any action relating to these purchases.

⁷ Defendant Ramaci reasserts his position that Defendant Ulm's cross-claims for negligence and breach of fiduciary duty are improperly filed derivative claims. (*See* Motion for Judgment on the Pleadings Pursuant to Rule 12(c) as to Certain Causes of Action in Defendant Ulm's Cross Claim, November 25, 2015.) Thus, even if the Court were to substitute the parties as requested by Defendant Ulm, which Ramaci argues it should not, the Court should still dismiss these claims because they were not pleaded as derivative claims in accordance with the procedures outlined in Rule 23(b)(1) of the South Carolina Rules of Civil Procedure. Further, to the extent Defendant Ulm seeks to amend his cross-claim to conform to the pleading requirements, Ramaci contends amendment would be improper because Ulm lacks standing to assert derivative claims as he has no ownership interest in the company and thus cannot plead such as required by the rule. *See supra* note 4.

B. The Claims are Barred Even if the Discovery Rule Applies.

Even if the discovery rule applies to toll the triggering of the statute beyond the initial purchase date, the undisputed facts show that the Ulm Trust was aware (or easily could have been aware through the exercise of reasonable diligence) of a possible cause of action more than three years ago.

"Under the discovery rule, an action accrues on the date an aggrieved party either discovered or should have discovered, through reasonable diligence, that a claim has occurred." *Brooks v. GAF Materials Corp.*, 284 F.R.D. 352, 357 (D.S.C. 2012) *amended in part*, 2012 WL 5195982 (D.S.C. Oct. 19, 2012) *clarified on denial of reconsideration*, 2013 WL 461468 (D.S.C. Feb. 6, 2013). A cause of action should have reasonably been discovered "when the facts and circumstances of the injury would put a person of common knowledge on notice that some right has been invaded or [that a] claim against another party exists." *Benton v. Roger C. Peace Hosp.*, 443 S.E.2d 537, 539 (S.C. 1994). Importantly, "South Carolina's discovery rule does not require actual notice of or knowledge of the full extent of damages or a claim; rather, the rule only requires a party to act promptly to investigate the existence of a claim where facts and circumstances indicate that one might exist." *Brooks*, 284 F.R.D. at 357-58 (emphasis added).

In his cross-claim, Ulm alleges that Ramaci made false and misleading misrepresentations and failed to disclose material facts, which purportedly induced Ulm to purchase iCache stock in April 2011 and December 2011. (Def. Billy Ulm's Am. Answer & Cross-Cl. ¶ 65.)⁸ Ulm also alleges Ramaci was negligent and breached his fiduciary duties by failing to keep adequate financial records; converting iCache funds without proper authority; failing to keep the board of directors and shareholders informed regarding the status of iCache operations; refusing to conduct an audit and accounting of company financials despite requests;

⁸ Ramaci denies any allegations that he made false or misleading representations or failed to disclose any material information with respect to iCache.

and diverting company funds to other entities and people who were not creditors and for his benefit. (Def. Billy Ulm's Am. Answer & Cross-Cl. ¶ 71.)⁹

Ulm (and consequently the Ulm Trust)¹⁰ was on notice of any potential causes of action against Ramaci based on his alleged conduct relating to iCache more than three years ago. Importantly, Ulm became a member of the Board of Directors on April 21, 2011, as part of his initial purchase of iCache stock. (See Board of Directors Retainer Agreement, Ulm 000071-87, attached as Exhibit 2.) As a member of the Board of Directors, Ulm was in a position to investigate the validity of many of the claims he now asserts, particularly the claims related to any alleged misrepresentations that induced him to purchase iCache stock. Indeed, Ulm's knowledge and awareness of these allegations is precisely the reason he is named as a defendant in Plaintiffs' lawsuit. (See, e.g., Plaintiffs' Complaint ¶¶ 7, 10, 16, & 18.)

Notwithstanding Ulm's failure to exercise reasonable diligence while a board member, the undisputed evidence taken in discovery thus far shows that Ulm had knowledge of the allegations purportedly supporting these claims at least as early as August 2011.¹¹

- In his deposition, Ulm admitted to having attended a meeting in Boston in August 2011, and shortly thereafter expressing concern regarding alleged inaccuracies in the company financials. (Ulm Dep. at 55:8-58:6, July 24, 2015, excerpt attached as Exhibit 3.)

⁹ Ramaci denies any allegation that he was negligent or breached any duty (fiduciary or otherwise) that he may have owed to Ulm, the Ulm Trust, or any if the Plaintiffs in this action. Again, Ramaci reasserts his position that Defendant Ulm's cross-claims for negligence and breach of fiduciary duty are improperly filed derivative claims. (See Motion for Judgment on the Pleadings Pursuant to Rule 12(c) as to Certain Causes of Action in Defendant Ulm's Cross Claim, November 25, 2015.)

¹⁰ In his Substitution Motion, Ulm states that the "purchase of iCache stock was done by and through the Trust, at the direction of Billy Ulm." (Substitution Motion at p.1 (emphasis added).) Thus, any knowledge that Ulm has regarding the allegations in his cross-claim is properly attributed to the Ulm Trust.

¹¹ Ramaci reserves all rights to test and challenge the veracity of any statement or allegation in the exhibits attached to this memorandum. The purpose of these exhibits is simply to show that Ulm was on notice of a potential claim as early as August 2011.

- Ulm wrote an e-mail on November 18, 2012, to Richard Scott, copying other board members and interested parties, expressing many of the concerns complained of in his cross-claim, notably his inability to make informed decisions, the lack of board meetings, and the availability of financial information on the status of the company. (Ulm. Dep., Ex. 9, attached as Exhibit 4.)
- In early December 2012, Ulm received copies of the company financials compiled by Julie Ramaci, which Richard Scott described in the letter attached as Exhibit 7 as raising "numerous questions." (December 3, 2012 email from Jonathan Ramaci to Billy Ulm et al., Scott 000181, and December 9, 2012 email from Richard Scott to Billy Ulm, Scott 000180 (without attachment), attached as Exhibit 5.)
- Ulm was included in email communications with a CPA hired to review iCache financials, in which Jeff Byrd highlighted payments to Ramaci marked as founder repayment for "deferred compensation." (December 8, 2012 email from Jeff Byrd to David E. Selander, Scott 002159-002160, attached as Exhibit 6.)
- Ulm received a draft letter from Richard Scott on December 11, 2012, claiming that the company had been "severely mismanaged" and detailing the alleged mismanagement. (December 11, 2012 E-mail from Richard Scott to Billy Ulm et al., Scott 000040-46, attached as Exhibit 7.) Specific allegations in the letter include the following:
 - "For many years, shareholders have requested full financial disclosure and proper accounting of the company. No such information has been forthcoming until this time."
 - "Throughout the past several years, many investors and board members urged Jon to implement strict financial controls and provide accurate financial documents. Many of these requests were ignored and resulted in a number of changes to personnel and board members."
 - "The board of Directors was never activated in recent years. Resolutions were passed by email after receiving very short summaries from Jon, some of which proved to be misleading."
 - "On December 2, 2012 I flew from Ohio to Charleston and Billy Ulm (the second board member) came in from

North Dakota to meet with shareholder Jeff Byrd. We had planned several meetings and actions including: transfer of the Bank of America checking account over to our control, meet and retain a forensic CPA firm, meet with the Charleston landlord and make arrangements to consolidate our office space in order to significantly reduce our monthly overhead and finally to meet and retain new attorneys to represent the company. The new law firm was necessary because our existing attorney has declined any new work due to our unpaid bills with them for over \$100,000.00. This work was all accomplished before we left to return home on Tuesday, December 4, 2012."

- During the drafting phase of the above-mentioned letter, Ulm was included in discussions during which Artie Pingolt made the statement that "after repeated requests for [financial] information [Ramaci] still would not provide it to the board and others, such as the employees of iCache, who requested it." (December 11, 2012 email from Arthur Pingolt to Billy Ulm et al., Scott 002249-50, attached as Exhibit 8.)
- On December 17, 2012, Richard Scott sent Billy Ulm an email that referenced prior investors and included information about company activities in 2007 and 2008. (December 17, 2012 email from Richard Scott to Billy Ulm et al., Scott 000410-33, attached as Exhibit 9.)
- In December 2012, Ulm was included in email communications between Richard Scott and Ramaci about meeting in Charleston, part of the purpose being to have Ramaci sign the assignment documents for the provisional patent applications. (December 18, 2012 email from Richard Scott to Jonathan Ramaci, Scott 002117, attached as Exhibit 10.)
- In his deposition, Ulm admitted that before he invested his controller had raised concerns about the validity of the financials in the pitch book, but he viewed this as a risk and "made the decision to take the risk." (Ulm Dep. at 29:18-30:2, 17:25-18:2, July 24, 2015, excerpts attached as Exhibit 3.)
 - Ulm's wife also expressed concerns about the investment before he invested, which he ignored, stating "I get the best information from my guys and then I make the decision, right or wrong." (Ulm Dep. at 18:3-18:4,

134:3-134:16, July 24, 2015, excerpts attached as Exhibit 3 (emphasis added).)

- Ulm's information technology employee also told Ulm not to invest because after meeting with Ramaci, this person allegedly expressed concerns about the software and whether it was capable of doing what it was represented it could do. Ulm still invested, admitting at his deposition that he had made a business decision: "The business decision was I saw the potential – which Apple proved it out – if it was done right of where this product could go. But the final decision that I told everybody, it was made based on this. *This is a startup. Startups are high risk. I am willing to risk X number of hundred thousand dollars with the opportunity to make a whole lot more, so that's it.*" (Ulm Dep. at 16:23-18:21, 142:22-143:14, July 24, 2015, excerpts attached as Exhibit 3 (emphasis added).)

The overwhelming and undisputed evidence produced thus far in discovery shows that Ulm was aware of the conduct that he now complains well over three years ago. In fact, several concerns related to financials and technologies were raised *before* Ulm invested. Yet, he made a "business decision" and invested on multiple occasions. Ulm also drafted an e-mail in November 2012 listing many of his concerns regarding the management on the company, indicating that he was aware of, and on notice that, he could have a potential claim related to the management of the company. (Ulm. Dep., Ex. 9, attached as Exhibit 4.)

Further, Ulm was heavily involved in communications with Richard Scott and others in December 2012, after iCache began to falter. During that time he received company financials, letters setting almost all of the allegations contained in his cross-claim, and other comments and information that "would put a person of common knowledge on notice that some right has been invaded or [that a] claim against" Ramaci potentially existed. *Benton*, 443 S.E.2d at 539.

Importantly, South Carolina law does not require a party to have knowledge of the full extent of injuries or of a claim to begin the running of the statute of limitations. Nor must a party have actual knowledge of alleged wrongdoing, as the discovery rule only tolls the statute

of limitations until the party "discover[s] or should have discovered, *through reasonable diligence*, that a claim has occurred." *Brooks*, 284 F.R.D. at 357 (emphasis added). Ulm's status as a Director put him in the position to exercise reasonable diligence and investigate many of the claims he now asserts related to alleged misrepresentations in investor materials. Moreover, Ulm was aware of the conduct he complains of in his Cross-claim related to the management of iCache at least as early as August 2011, and no later than early December 2012, as evidenced by his communications voicing his concerns about the board and management, his participation and inclusion in communications with other board members and shareholders, and his own testimony at his deposition. Thus, the claims purportedly assigned to Ulm by the Ulm Trust, having accrued more than three years ago, are now time barred and cannot be properly assigned.

V. The Attempted Substitution of the Ulm Trust for Ulm as Cross-Claimant Was Improper Under the South Carolina Rules of Civil Procedure.

As noted at the February 24 hearing and above, counsel for Ulm withdrew this motion and is no longer seeking to substitute the Ulm Trust as the sole cross-claimant. (See E-Mail from Moore to Manning et al., February 23, 2016 ("Yes, we will be withdrawing the motion for substitution."), attached as Exhibit 11.) Ramaci will not repeat here any of the arguments addressing Ulm's defective and withdrawn substitution motion. But to the extent the Court seeks to consider any of the arguments in the Substitution Motion, Ramaci respectfully incorporates by reference his Opposition to Defendant Billy Ulm's Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" as Cross-Claimant," filed on February 4, 2016.

CONCLUSION

For the reasons set forth above, Ramaci respectfully requests that this Court enter an order (1) finding that the claims purportedly assigned by the Trust in the Assignment of Claims are time barred and (2) enjoining the assignment by the Trust to Billy Ulm or in the alternative, enjoining Defendant Billy Ulm from attempting to assert any of the time-barred claims he acquired pursuant to the Assignment in this action.

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March 24, 2016

CERTIFICATE OF SERVICE

I, Ann B. Brock, Paralegal at the law offices of Nelson Mullins Riley & Scarborough LLP, do hereby certify that on this 24th day of March, 2016 I have served all counsel in this action with a copy of the pleading specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleading: **DEFENDANT JONATHAN RAMACI'S MEMORANDUM IN SUPPORT OF MOTION FOR PERMANENT INJUNCTION**

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Attorney for Defendants Richard Scott and Billy Ulm

FILED
2016 MAR 24 PM 3:15
JULIE A. ARMSTRONG
CLERK OF COURT



Ann B. Brock
Paralegal

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Maite D. Murphy, Circuit Court Judge

Case No. 2013-CP-10-4874
Appellate Case No. 2017-000529

RECEIVED

APR 07 2017

SC Court of Appeals

Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and
Wesley Nau Plaintiffs,

v.

Johnathan Ramaci, Haverly Ramaci, Richard Scott, and
Billy Ulm Defendants,

Of whom

Johnathan Ramaci is Appellant,

And

Billy Ulm is Respondent

PROOF OF SERVICE

I, Ashley Pyne, paralegal for Duffy & Young, LLC, certify that I have served the
MOTION to Dismiss on all parties in this action by U.S. mail on April 6, 2017 by
depositing a copy of it to their attorneys of record as shown below:

A. Mattison Bogan
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April 6, 2017
Charleston, South Carolina

DUFFY & YOUNG LLC

96 BROAD STREET, CHARLESTON SC 29401

telephone 843-720-2044 facsimile 843-720-2047

ATTORNEYS AT LAW

April 6, 2017

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Byrdnest, LLC , Craig Sedmak, Stephanie Sedmak, and Wesley Nau v.
Johnathan Ramaci, Haverly Ramaci, Richard Scott, and Billy Ulm
Civil Action No . 2013-CP-10-04874
Appellate Case No. 2017-000529
Our File No. 47061/01500

RECEIVED

APR 07 2017

SC Court of Appeals

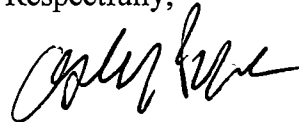
Dear Ms. Kitchings:

Enclosed for filing please find one original and seven copies of a Motion to Dismiss in the above-referenced matter, as well as one original and one copy of the Proof of Service of the Motion to Dismiss. I have also included a check in the amount of \$25.00 for payment of the associated filing fee.

Please file the originals and return a file-stamped copy to me of the Motion and Proof of Service in the enclosed self-addressed stamped envelope.

I appreciate your assistance in this matter. Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,



Ashley Pyne
Legal Assistant

Enclosures

cc: Benjamin A. Traywick, Esquire
A. Mattison Bogan, Esquire

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