

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

APR 14 2017

SC Court of Appeals

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

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

Respondents,

v.

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

Defendants,

Of whom

Johnathan Ramaci is,

Appellant.

RETURN TO RESPONDENT'S MOTION TO DISMISS

A. Mattison Bogan
SC Bar No. 72629
Cory E. Manning
SC Bar No. 14702
Adam J. Hegler
SC Bar No. 100115
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street/17th Floor
Columbia, SC 29211
(803) 799-2000

Attorneys for Appellant

The actions of respondent Billy Ulm (“Ulm”) necessitated this appeal. Ulm’s Motion to Dismiss accuses appellant Jonathan Ramaci (“Ramaci”) of manufacturing an immediately appealable issue, but it is the actions of Ulm—not Ramaci—that require this appeal.

Ulm’s attempt to revive stale claims and insert them into the underlying case through an improper and belated assignment to circumvent the statute of limitations created the issue Ramaci now appeals. Ramaci moved to enjoin the improper assignment. The trial court denied Ramaci’s request for a permanent injunction. By statute, the denial of a motion for an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4).

Despite going to great lengths to accuse Ramaci of attempting to appeal issues which are not subject to immediate appeal, Ulm fails to address the fact that Ramaci properly appealed from the denial of an injunction. This Court has jurisdiction by statute and cannot dismiss this timely and proper appeal. Therefore, the Court should deny the Motion to Dismiss.

BACKGROUND

The plaintiffs filed suit against defendants Jonathan and Haverly Ramaci, Billy Ulm, and Richard Scott on August 19, 2013, alleging numerous causes of action related to the plaintiffs’ investments in, and Defendants’ management of, a technology startup company known as iCache. Ulm filed an Amended Answer and Cross-Claims on January 23, 2014, asserting causes of action against Ramaci.¹

Nearly two and a half years after the initial complaint was filed, on December 21, 2015, Ulm filed a Motion seeking to substitute The William L. Ulm, Sr. 2006 Delaware Trust (the “Trust”) as the proper cross-claimant in the claims brought against Ramaci (the “Substitution

¹ A more detailed background of the case and procedural posture of the appeal is included in the Initial Brief of Appellant. *See* (Initial Brief of Appellant, at 2-9). Ramaci fully incorporates his brief and each issue raised therein by express reference.

Motion”). (Motion to Substitute “The William L. Ulm, Sr. 2006 Delaware Trust” As Cross-Claimant (“Substitution Motion”), attached as **Exhibit A**). Ramaci opposed Ulm’s substitution motion in both a memorandum of law in opposition to Ulm’s Substitution Motion on February 4, 2016, (Ramaci’s Memo in Opp. to Substitution Motion pp. 2, 9, attached as **Exhibit B**), and a Summary Judgment Motion as to the cross-claims asserted by Ulm, on the basis that the substitution was improper and barred by the statute of limitations. (Ramaci’s Motion for Summ. J. filed Feb. 4, 2016, attached as **Exhibit C**).

On February 22, 2016, *just two days before a hearing on the Substitution Motion* was to take place, counsel for Ulm informed the trial court and parties to this case that the Trust had executed an Assignment of Claims (“Assignment”) whereby the Trust purported to assign its right to prosecute the cross-claims to Ulm individually on February 19, 2016, though the Trust retained actual ownership of the iCache shares. (Ulm’s Memo in Opp. to Motion for Summ. J. p. 4, attached as **Exhibit D**). The trial court heard arguments on pending motions on February 24, 2016. (Tr. of Feb. 24, 2016 Hr’g p. 1, attached as **Exhibit E**). Counsel for Ulm informed the trial court and the parties to this case that he would be withdrawing the Substitution Motion. (*Id.* p. 39). The substitution motion was thereby never ruled on. Based on the alleged assignment, Ramaci moved to permanently enjoin any assignment of the cross-claims because the claims were stale and the assignee could not revive the tardy claims by the assignment. (*Id.* pp. 42-43). Ramaci filed his Motion for Permanent Injunction on February 25, 2016, requesting an order from the trial court enjoining the purported Assignment of Claims by the Trust to Ulm or, in the alternative, enjoining Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action. (Motion for Perm. Inj. p. 1, attached as **Exhibit F**). By Order entered February 22, 2017, the trial court denied Ramaci’s Motion for Permanent Injunction. (Order). Ramaci filed his Notice of

Appeal from that order on February 27, 2017 and filed this Initial Brief of Appellant on March 29, 2017. Respondent Ulm's initial brief would have been due on April 28, 2017. Rather than substantively respond to the brief, Ulm filed this motion to dismiss hoping the Court will look the other way on the untimely claims and bless the unlawful assignment.

ARGUMENT

Defendant Ulm has moved to dismiss Ramaci's appeal, claiming that "[b]y 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's Motion to Dismiss at 8). Not only are the allegations in Ulm's Motion to Dismiss unfounded, they are unsupported by the facts and procedural history of this case. Ulm's Motion to Dismiss and his accusations of delay ignore the facts that (1) a denial of a permanent injunction is immediately appealable by statute; (2) all of the arguments in the Initial Brief of Appellant were raised by Ramaci and considered by the trial court in his briefing in support of his motion for permanent injunction; and (3) Ramaci was left with no choice but to move for a permanent injunction as a result of Ulm's procedural gamesmanship.

I. Ramaci Has Appealed the Trial Court's Denial of His Motion for Permanent Injunction, Which is an Immediately Appealable Order.

Under South Carolina law, it is well established that the denial of a permanent injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4) (providing appellate jurisdiction to immediately review "[a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver"). It is undisputed that Ramaci filed a motion for a permanent injunction seeking to enjoin the improper assignment or Ulm's assertion of the improperly assigned cross-claims, and that the trial court considered and denied the motion. This decision, which is the basis for Ramaci's appeal, is clearly properly appealable at this time.

II. The Trial Court Considered and Rejected Ramaci's Arguments Regarding Timeliness and Real Party in Interest in Denying His Motion for Permanent Injunction.

Ulm's Motion to Dismiss does not contest that the denial of an injunction may be immediately appealed. Instead, Ulm argues that a denial of a motion for summary judgment is not immediately appealable and contends Ramaci "simply repackaged his rejected arguments for summary judgment as reasons the trial court erred in denying his motion for injunctive relief." However, Ulm conveniently overlooks the fact that Ramaci undeniably raised the issues addressed in his Initial Brief of Appellant, including the fact that the cross-claims are stale and derivative in nature, in his Memorandum in Support of his Motion for Permanent Injunction. *See* (Memo. In Supp. Motion for Perm. Inj., attached as **Exhibit G**). The trial court expressly considered these arguments in denying the injunction.

Ramaci does not appeal from the denial of his motion for summary judgment or his motion to dismiss. While these arguments may overlap with those advanced in Ramaci's corresponding motion for summary judgment, they nonetheless serve as the basis for Ramaci's contention regarding the impropriety of the assignment and support his request for injunctive relief. The Court cannot determine whether to grant an injunction without first analyzing whether Ulm should be barred from asserting the cross-claims. Thus, Ulm's attempt to assign the stale claims via an improper assignment necessarily required the trial court to inquire into the timeliness of the claims. The trial court specifically considered these arguments and rejected them in denying Ramaci's motion for injunctive relief. *See* (Order at 17, n.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."); *see also* (Order at 1) ("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.”). Having served as grounds for the trial court’s denial of his motion for permanent injunction, these issues were properly raised on appeal in support of Ramaci’s claim that the trial court erred in denying his request for injunctive relief.²

III. Ramaci Did Not “Manufacture” Any Issues, and Instead Was Forced To Move for Permanent Injunction As the Only Way to Challenge the Improper Assignment As a Result of Ulm’s Procedural Gamesmanship.

Ramaci’s appeal is not, as Ulm suggests, a thinly veiled attempt to reargue the motion for summary judgment. Instead, this appeal is necessary to prevent the procedural attempts by Ulm to manufacture claims otherwise barred by law. Contrary to Defendant Ulm’s accusation that Ramaci somehow manufactured an appealable issue to delay the trial of this case, Ramaci filed the motion for a permanent injunction because an injunction was the *only available legal procedure* to prevent the improper assignment by the Trust of its stale claims to Ulm.

Ramaci’s motion came in response to the eleventh-hour attempt of the Trust to revive the stale claims prior to a hearing on his Substitution Motion. As Ulm’s Motion to Dismiss concedes, Ulm—not the Ulm Trust—filed the cross-claims. (Ulm’s Motion to Dismiss at 2). It was only on December 21, 2015, over two and half years after filing his initial cross claims, that Ulm attempted to substitute the Trust as the real party in interest. (Substitution Motion, **Exhibit A**). Ramaci fully briefed his opposition to Ulm’s Substitution Motion, and the issue was scheduled to be heard by the trial court. However, apparently realizing that substitution was improper, Ulm changed course

² Importantly, the trial court found no impropriety in the filing of the motion for permanent injunction and issued its decision on the merits of Ramaci’s claim. Indeed, this is the first time any party has argued that the injunction sought by Ramaci is somehow improper. Thus, Ulm has waived the ability to raise it now. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (providing an issue must have been *raised* to the trial court, even an additional sustaining ground for the winner); *see infra* Section IV.

and attempted to acquire the claims from the Trust via assignment. Ramaci opposed each of these attempts to transfer the claims on the grounds that the claims of the Ulm Trust were barred by the statute of limitations.³ Instead of allowing the trial court to decide the substitution issue on its merits, Ulm attempted yet another procedural mechanism to avoid Ramaci's contention that the claims were time-barred, leaving Ramaci no option but to seek to enjoin the improper assignment.

Ulm's changing tactics necessitated Ramaci first filing a motion for summary judgment in conjunction with his opposition to the Substitution Motion contending Ulm lacked standing as the real party in interest. When Ulm withdrew the Substitution Motion in favor of the assignment, Ramaci again moved to prevent the improper procedural gambit. (Motion for Perm. Inj., **Exhibit F**). Ulm's Motion to Dismiss now suggests an improper purpose for Ramaci filing multiple motions. There is nothing improper. Contrary to Ulm's assertion, Ramaci did not "manufacture" any of these issues. Instead, Ulm created the moving target, and Ramaci was simply reacting to each of Ulm's attempts to torture the rules of civil procedure to bypass the statute of limitations bar. Ramaci sought to prevent the assignment via injunction because that was the only relief available to him. If the trial court had found the injunction to be improper—which it did not—Ramaci would have been left with no method or procedure under the law with which to contest the improper assignment.

IV. Ulm's Arguments Were Not Raised to the Trial Court and are Not Properly Before This Court.

The arguments Ulm raises in the Motion to Dismiss for the Court of Appeals were not placed before the trial court and thus are not properly raised for the first time on appeal. *I'On, L.L.C.*, 338 S.C. at 421, 526 S.E.2d at 724 (explaining an "appellate court likely would perceive it

³ See (Ramaci's Memo in Opp. to Substitution Motion pp. 9-11, **Exhibit B**; Motion for Perm. Inj. pp. 1-2, **Exhibit F**; Memo in Support of Motion for Perm. Inj. pp. 13-18, **Exhibit G**).

as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it”). Ulm argues in his motion that the injunctive relief sought by Ramaci is “illusory” and that Ramaci seeks injunctive relief only as a delay tactic, but he did not raise those issues to the trial court. (Ulm’s Memo in Opp. to Motion for Perm. Inj., attached as **Exhibit H**). Instead, Ulm argued only that the motion should be denied on the merits. (*Id.*). The trial court accepted the motion for injunction as proper and ruled upon it. The trial court did not consider or rule upon the issue Ulm tries to raise now. He is late once again.

Therefore, Ulm’s arguments are unpreserved, late, and he cannot raise them as additional sustaining grounds because the arguments do not appear in the record below. *I’On, L.L.C.*, 338 S.C. at 420, 526 S.E.2d at 723 (“The basis for respondent’s additional sustaining grounds must appear in the record on appeal. . . . An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case.”). The trial court did not find an injunction was improperly filed or that it was not a viable option. The trial court merely denied the injunction. Ulm’s Motion to Dismiss, as with the assignment that is the subject of the underlying appeal, is a belated attempt to raise these issues.

Further, Ulm’s arguments are an attempt to litigate the merits of this appeal in his motion to dismiss. If Ulm wants this Court to decide that the request for injunctive relief was “illusory” or that Ramaci would not suffer irreparable harm in the absence of an injunction, he must raise those arguments in his respondent’s brief. As to the merits of those arguments, the relief sought by the injunction is not illusory. An injunction would have prevented the improper assignment.

The cross-claims brought by Ulm, who otherwise has no standing to bring any claims, would have been dismissed. With Ulm dismissed, Ramaci and the plaintiffs could have—and may yet be able to—return to the table to continue the settlement negotiations they had all previously indicated that they wanted to pursue.

CONCLUSION

Ramaci did not file this appeal to delay the underlying case. Ramaci filed this appeal to protect his rights. *See Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 242 (1997) (finding a party waived an immediately appealable issue by failing to file an interlocutory appeal). Ulm now delays the appeal by not filing his initial brief. When faced with the eleventh-hour assignment by Ulm in an attempt to circumvent the statute of limitations, Ramaci moved to enjoin the improper procedure. For the reasons argued in Ramaci's appeal, he contends that the trial court improperly denied that injunction. As set forth above, the denial of an injunction is proper for immediate appeal. Ulm's Motion to Dismiss this appeal should be denied.

(signature on following page)

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: A. Mattison Bogan

A. Mattison Bogan

SC Bar No. 72629

E-Mail: matt.bogan@nelsonmullins.com

Cory E. Manning

SC Bar No. 14702

E-Mail: cory.manning@nelsonmullins.com

Adam J. Hegler

SC Bar No. 100115

E-Mail: adam.hegler@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Appellant

Columbia, South Carolina

April 14, 2017

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2013-CP-10-4874

BYRDNES, LLC, CRAIG SEDMAK,
STEPHANIE SEDMAK, AND WESLEY
NAU,

Plaintiffs,

v.

JOHN RAMACI, HAVERLY RAMACI,
RICHARD SCOTT, AND BILLY ULM,

Defendants.

MOTION TO SUBSTITUTE "THE
WILLIAM L. ULM, SR. 2006 DELAWARE
TRUST" AS CROSS-CLAIMANT

FILED
2015 DEC 21 PM 2:48
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: DAVID P. TRAYWICK, ESQ. AND BENJAMIN A. TRAYWICK, ESQ., COUNSEL FOR THE PLAINTIFFS AND CORY E. MANNING, ESQ. AND ADAM J. HEGLER, COUNSEL FOR DEFENDANTS JOHN RAMACI AND HAVERLY RAMACI:

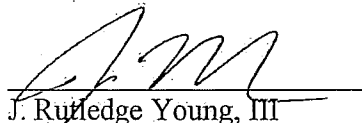
YOU WILL PLEASE TAKE NOTICE that Defendant Billy Ulm, by and through his undersigned counsel, will move this Court to enter an Order, pursuant to Rules 17 and 21 of the South Carolina Rules of Civil Procedure, substituting "The William L. Ulm, Sr. 2006 Delaware Trust" ("the Trust") for Defendant Billy Ulm as the proper cross-claimant in the cross-claims brought against Defendant John Ramaci.

On January 23, 2014, Defendant Billy Ulm amended his answer and asserted cross-claims against Defendant John Ramaci for negligent misrepresentation, breach of fiduciary duty, and negligence related to Ramaci's solicitation of Ulm's investment in iCache. 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-claims against Defendant John Ramaci.

The substitution of The William L. Ulm, Sr. 2006 Delaware Trust as the cross-claimant results in no substantive changes to any of the claims in this action. The undersigned counsel has in good faith conferred with counsel for Defendant John Ramaci in an effort to obtain consent to this substitution. Defendant John Ramaci opposes this motion.

WHEREFORE, based on the law of South Carolina, the pleadings and papers before this Court, and evidence to be presented at the hearing on this motion, and the arguments of counsel, Defendant Billy Ulm respectfully prays this Court grant his Motion for Substitution and grant such other and further relief as it may deem just and proper.

Respectfully submitted,



J. Rutledge Young, III
Julie L. Moore
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
ryoung@duffyandyoung.com
jmoore@duffyandyoung.com

*Attorneys for Defendants
Richard Scott and Billy Ulm*

December 21, 2015

Exhibit B

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

Civil Action No. 2013-CP-10-4874

Plaintiffs,)

vs.)

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

Defendants.)

**DEFENDANT JONATHAN
RAMACI'S OPPOSITION
TO DEFENDANT BILLY ULM'S
MOTION TO SUBSTITUTE
"THE WILLIAM L. ULM, SR. 2006
DELAWARE TRUST" AS
CROSS-CLAIMANT**

FILED
2016 FEB -4 PM 4:11
BY JULIE J. ARMSTRONG
CLERK OF COURT

Defendant Jonathan Ramaci ("Ramaci") submits this Memorandum of Law in Opposition to Defendant Billy Ulm's Motion to Substitute The William L. Ulm, Sr. 2006 Delaware Trust as Cross-Claimant (the "Substitution Motion").

INTRODUCTION

This action arises out of the Plaintiffs' purchase of stock in iCache, Inc., a company founded by Ramaci. 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 his cross-claims, Ulm has filed this Substitution Motion seeking to substitute The William L. Ulm, Sr. 2006 Delaware Trust (the "Ulm Trust") as the proper cross-claimant in the cross-claims brought against Ramaci. Ulm is not seeking to add the trust as a co-party to his cross-claims. Instead, Ulm seeks to insert a non-party (the Ulm Trust) into this action for the limited purpose of seeking affirmative relief in a cross-claim against Ramaci. For the reasons set forth below, Ramaci respectfully requests that this Court deny Ulm's Substitution Motion.

ARGUMENT

I. Substitution of the Ulm Trust for Ulm as Cross-Claimant is Improper Under the South Carolina Rules of Civil Procedure.

Plaintiffs named the individual Billy Ulm, a member of the iCache Board of Directors, as a Defendant in this action. Ulm must remain as a Defendant, unless he moves for dismissal of the claims against him and receives an order from this Court dismissing those claims. The Ulm Trust is not a party to this action, and Ulm cannot make the Ulm Trust a party to this action through his Substitution Motion.

A. Non-parties cannot bring cross-claims.

South Carolina Rule of Civil Procedure 13(g) permits "as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein." S.C. R. Civ. P. 13(g) (emphasis added). Because the Ulm Trust is not a party to this action it cannot bring a cross-claim in this action or be substituted as the sole cross-claimant in Ulm's cross-claim.¹

On its face, Rule 13(g) requires that a person asserting a cross-claim in a matter actually be a party. Not only is this interpretation clear from a plain reading of the rule, it is also in accord with the federal courts' interpretation of the Federal Rule of Civil Procedure 13(g), which is identical to South Carolina's rule in all material respects.² See *United States v. Thomas Steel*, 107 F. Supp. 418, 422 (N.D. Ohio 1952) (holding that Rule 13(g) does not allow a non-party to

¹ Ulm does not have a valid claim against Ramaci. In his Substitution Motion, Ulm admits that he does 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 this basis, Ramaci has moved to dismiss Ulm's cross-claim in its entirety. (See Jonathan Ramaci's Motion for Summary Judgment of the Cross-Claims of Billy Ulm, filed February 3, 2016.)

² South Carolina courts look to interpretation of the federal rules for guidance. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 404 S.E.2d 200, 201 (S.C. 1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.")

bring a cross-claim and noting, "Such a claim is a separate cause of action and the subject of an independent suit." (emphasis added); *see also City of Tampa v. Fourth Tug/Barge Corp.*, 163 F.R.D. 622, 624 (M.D. Fla. 1995) (holding that the limitation on the right to assert a cross claim is that the claim must be against a party to the action and Rule 13(g) will not allow pleading by one who is not a party to the action) (citing *Thomas Steel and Glaziers and Glassworks Union Local 252 Annuity Fund v. Newbridge Securities, Inc.*, 823 F. Supp. 1188, 1190 (E.D. Pa. 1993) (holding that Rule 13(g) limits a party's right to assert a cross-claim to claims made against other parties in the action)); *cf. Oil Mop, LLC v. Summitt Environmental Services, LLC*, 2011 WL 2601006, at *2 (E.D. La. June 30, 2011) ("It is elementary that '[o]nly defending parties may assert counterclaims' and that '[d]efending parties are parties against whom a claim has been filed." (quoting 3 Moore's Fed. Prac. §13.09[2][a] (3d ed. 2000))).

Through the subterfuge of his Substitution Motion, Ulm is asking this Court to allow a non-party (the Ulm Trust) to bring a cross-claim in this matter. Such a tactic is contrary to the plain reading of South Carolina Rule of Civil Procedure 13(g) and all of the case law addressing this very situation.³ For this reason alone, this Court should deny Ulm's Substitution Motion.

B. There is no Valid Cross Claim for the Ulm Trust to Join Due to Ulm's Admission that He Lacks Standing to Bring the Cross-Claim.

The Ulm Trust cannot be *substituted*, but rather, it can only, where permissible, be *joined* to a valid cross-claim. The proper procedure for adding a non-party to a valid cross-claim is provided in SCRCP 13(h): "Parties other than those to the original action may be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20." The problem here is that Ulm does not seek to join the Ulm Trust to a valid cross-claim, but rather, he seeks to "substitute" the Ulm Trust as the cross-claimant in Ulm's current cross-claim

³ Counsel for Ramaci has been unable to identify *any* authority supporting the argument that a non-party can bring a cross claim under South Carolina Rule of Civil Procedure 13(g) or the federal analogue.

against Ramaci. This substitution ruse is necessary, in part, because Ulm does not have a claim against Ramaci in his personal capacity.⁴

Ulm's attempt to "substitute" the Ulm Trust as the cross-claim plaintiff is identical to the Ulm Trust itself attempting to join in this matter for the sole purpose of seeking affirmative relief against Ramaci, which courts have held to be improper under Rules 13(h) or Rule 20(a). In *City of Tampa*, Sheridan, an entity that leased a vessel from a party in the underlying case under a bareboat charter,⁵ sought to join itself under Rule 20(a) in the lawsuit as a co-party cross-claimant to recover damages and expenses it incurred as a result of a shipping accident that damaged a sea wall and involved several named defendants in the underlying matter. 163 F.R.D. at 623. One of the named defendants in the action objected to Sheridan's joinder motion on several bases, including the fact that Sheridan was not a party to the underlying action. *Id.* The District Court denied Sheridan's motion to join as a co-party cross-claimant, stating the following:

Sheridan, as the bareboat charterer of the ITB Philadelphia, has established that its claims arise out of the same transactions or occurrences as the above entitled action. However, Sheridan does not request that it be joined as a plaintiff or defendant, as the rule provides. Instead, Sheridan requests that it be joined solely as a co-party to the cross-claims brought by Fourth Tug/Barge.

Rule 20(a) specifically provides for the addition of a *plaintiff* or *defendant*. The rule does not indicate, nor is there case law supporting Sheridan's claim that a party can be joined under Rule 20(a) as a co-party cross-claimant solely for the purposes of affirmative relief.

Moreover, Rule 13(g), Fed. R. Civ. P. addresses the issue of when a cross-claim may be brought. Under the rule a cross-claim may be brought by a *party* against a co-party. In *Glaziers and*

⁴ As noted, Ulm has admitted that he personally does not have a valid claim against Ramaci. (See note 1, *supra*; see also Jonathan Ramaci's Motion for Summary Judgment of the Cross-Claims of Billy Ulm, filed February 3, 2016.)

⁵ A bareboat charter is an arrangement for the chartering or hiring of a ship or boat, whereby no crew or provisions are included as part of the agreement; instead, those who rent the vessel from the owner are responsible for taking care of such things.

Glassworkers Union Local 252 Annuity Fund v. Newbridge Securities, Inc., 823 F. Supp. 1188, 1190 (E.D. Pa. 1993), the court, in interpreting Rule 13(g), found that the limitation on a party's right to assert a cross-claim is that the claim must be against a party to the action. (emphasis added). Additionally, the court in *U.S. v. Thomas Steel Corp.*, 107 F. Supp. 418, 422 (N.D. Ohio 1952), stated that Rule 13(g) did not include "such a pleading by one who is not a party to the action."

City of Tampa, 163 F.R.D. at 624. Importantly, Ulm is not trying to join the Ulm Trust as a co-party cross-claimant, which was rejected by the court in *City of Tampa*, he is going one step further. He is asking this Court to substitute a non-party as the sole cross-claimant for the limited purpose of seeking affirmative relief.

Ulm, as the current cross-claimant who admits he lacks standing to bring the cross-claim individually, is inviting this Court to allow a non-party to come into the case for the limited purpose of bringing affirmative relief against another named defendant—i.e., "joined under Rule 20(a) as a . . . cross-claimant solely for the purposes of affirmative relief." *Id.* The Ulm Trust should not be allowed to step halfway into this matter, disrupt and delay discovery and the trial preparation process, and seek affirmative relief without having ever been a party to the action or being subjected to the rigors of motion practice that provide Ramaci (and other parties in this matter) the due process to which he is entitled.

To the extent that the Ulm Trust's claim that this substitution will result "in no substantive changes to any of the claims in this action" is even relevant, it is false. (Substitution Motion p.2.) The introduction of a new entity, another set of lawyers, new issues, additional motion practice, and new defenses for Ramaci to consider in his response to the claims from the Ulm Trust will be accompanied by significant substantive changes in Ramaci's defense and will impair Ramaci's right to proffer a vigorous and fair defense.

This Court should decline Ulm's invitation and deny his Substitution Motion. The Ulm Trust, if it has a claim, should file a lawsuit and serve process on Ramaci in an action independent of this matter. *See, e.g., Thomas Steel*, 107 F. Supp. at 422 (holding that non-party cannot bring a cross-claim under Rule 13(g) and noting, "Such a claim is a separate cause of action and the subject of an independent suit.").

C. Substitution of the Ulm Trust Is Not Proper Under South Carolina Rule of Civil Procedure 17.

Ulm's Substitution Motion is purportedly based on Rule 17(a), which relates to the real party in interest. In his Substitution Motion, Ulm states that his "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).) Again, Ulm is not seeking to add the Ulm Trust as a Defendant in this matter; he simply wants the Ulm Trust to replace him as the cross-claimant.

Ulm cannot shoehorn a non-party into this matter for the limited purpose of seeking affirmative relief by moving under Rule 17. Nothing in Rule 17 provides for the substitution that Ulm seeks. The rule states as follows:

No actions 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 shall have the same effect as if the action had been commenced in the name of the real party in interest.

S.C. R. Civ. P. 17(a). "Although Rule 17 does limit *dismissal* of an action on the grounds that it is not prosecuted in the name of the real party in interest, nothing in the text of the rule provides a non-party a right to *join* a case on those grounds." *Intown Properties Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 169 (4th Cir. 2001).⁶

Moreover, 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) note. "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

⁶ South Carolina courts look to interpretation of the federal rules for guidance. *Gardner*, 404 S.E.2d at 201. The advisory committee notes to SCRCP 17(a) state that the rule is based on the federal rule, and although the rule has since been amended, the current federal rule contains substantially similar language.

action in his own name, he did so as the result of an honest and understandable mistake." *Feist v. Consolidated Freightways Corp.*, 100 F. Supp. 2d 273, 276 (E.D. Pa. 1999); *see also Intown Properties*, 271 F.3d at 171 (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 after the limitations problem with its own action became apparent); *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*, 100 F. Supp. 2d at 276 (refusing to find honest and understandable, good faith mistake where debtor filed suit in his own name rather than trustee's name and debtor had waited several years until his bankruptcy closed to file the suit).

The determination of the proper cross-claimant was not difficult in this case. And the mistake in bringing suit in the name of the wrong party was neither honest nor understandable. 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.) In fact, Ulm admits in his motion that the purchase of the stock was made through the Trust "at the direction of Billy Ulm." (Substitution Motion p.1.) Ulm has been represented by 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.

In the face of these uncontested facts, it is also 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 is not a basis for substituting the Ulm Trust.

Should this Court find that the Ulm Trust is the real party in interest under South Carolina Rule of Civil Procedure 17(a), it nonetheless should deny Ulm's Substitution Motion. Ulm is not seeking to join the Ulm Trust in his cross-claim. Rather, he is seeking to replace himself with the Ulm Trust, the actual party who owns the interest in iCache. This substitution is not a joinder in any sense of the word. Instead, as noted above, it is an attempt to insert a non-party into this dispute for the limited purpose of seeking affirmative relief and is improper. The Ulm Trust can file a lawsuit to seek the relief it believes it is entitled to.

In addition, should this Court find that Ulm's Substitution Motion is somehow a proper way to insert the non-party Ulm Trust into this matter, which Ramaci contends is improper, it should still deny the Substitution Motion as untimely. Ulm failed to move within a reasonable time, as required by Rule 17(a), which specifically provides only a "reasonable time" for joinder of 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.

Finally, any substitution or joinder of 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. Inserting the non-party Ulm Trust as cross-claimant at this stage would require extending the scheduling order; conducting further discovery related to the Trust, including the production of Trust records, re-deposing Billy Ulm regarding his involvement with and control over the Trust, and deposing the trustee (or trustees) of the Ulm Trust; and filing additional dispositive motions. Such delay and additional discovery at this point would prejudice Ramaci, as well the other parties to the present action.

II. Substitution of the Ulm Trust as Cross-Claimant is Barred by the Statute of Limitations.

Similar to his decision to bring the cross-claim in his own name, Ulm framed his motion as a substitution under Rule 17 for strategic reasons, including avoiding the statute of limitations bar. For this additional reason, this Court should deny Ulm's Substitution Motion.

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, he 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.

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. 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).)

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.

Thus, any knowledge that Ulm has regarding the allegations in his cross-claim is attributed to the Ulm Trust.

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 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, Defendant 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.)

Moreover, Ulm 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; 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 The evidence taken in discovery thus far shows that Ulm had knowledge of alleged "facts" purportedly supporting these claims at least as early as August 2011.

- In his deposition, Ulm admitted to having attended a meeting in Boston in August 2011, and shortly thereafter expressing

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

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.)

concern regarding alleged inaccuracies in the company financials. (Ulm Dep. at 55:8-58:6, July 24, 2015, excerpt attached as Exhibit 3.)

- Ulm also 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.)
- Ulm received a 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 5.)

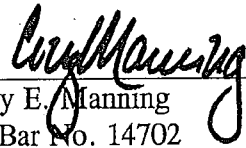
Ulm (and consequently the Ulm Trust) was on notice of any potential causes of action against Ramaci based on his alleged conduct relating to iCache more than three years ago. Therefore, the non-party Ulm Trust cannot be substituted as a cross-claimant for the limited purpose of seeking affirmative relief, because any claims it may have had are now time barred. *See Gillman v. City of Beaufort*, 627 S.E.2d 746, 748 (S.C. Ct. App. 2006) (holding that joinder rule did not prevent a party from asserting statute of limitation defense and that a party could not be joined after the expiration of statute of limitations).

For this additional reason, the Court should deny Ulm's Substitution Motion.

WHEREFORE, Defendant Jonathan Ramaci respectfully requests that this Court deny Defendant Billy Ulm's Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" as Cross-Claimant for failing to comply with the South Carolina Rules of Civil Procedure and as barred by applicable statute of limitations.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____


Cory E. Manning
SC Bar No. 14702

E-Mail: cory.manning@nelsonmullins.com

Adam J. Hegler

SC Bar No. 100115

E-Mail: adam.hegler@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for Jonathan and Haverly Ramaci

Columbia, SC
February 4, 2016

Exhibit C

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2013-CP-10-4874

**DEFENDANT JONATHAN
RAMACI'S MOTION FOR
SUMMARY JUDGMENT AS TO
DEFENDANT ULM'S
CROSS-CLAIMS**

FILED
2016 FEB -3 AM 11:06
JULIE J. ARNSTEIN
CLERK OF COURT

TO: ATTORNEYS FOR THE DEFENDANT BILLY ULM

PLEASE TAKE NOTICE THAT, as soon as he may be heard, Jonathan Ramaci, through undersigned counsel and pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, respectfully moves this Court to enter judgment as a matter of law and dismiss the causes of action asserted in Defendant Billy Ulm's cross-claims. This Court should enter summary judgment and dismiss the cross-claims in their entirety because the individual Defendant Billy Ulm lacks standing to assert the claims.

1. On January 23, 2014, Defendant Billy Ulm filed an Amended Answer and Cross Claims against Defendant John (sic) Ramaci ("Ramaci"). Billy Ulm asserted claims for Negligent Misrepresentation, Breach of Fiduciary Duty, and Negligence.¹ (*See* Defendant Billy Ulm's Amended Answer and Cross-Claims ¶¶ 63-76.)

2. Ulm alleges that Ramaci committed various negligent misrepresentations and omissions that fraudulently induced Billy Ulm to invest in iCache, Inc. In addition, Ulm alleges that Ramaci was negligent in numerous ways including his management of company finances, communications with the board, and receipt of deferred compensation. The damages

¹ These causes of action were brought solely against Ramaci.

alleged by Ulm arise from the loss of funds he allegedly invested in iCache. Ramaci categorically denies each of these allegations.

3. The cross-claims asserted by Defendant Billy Ulm should be dismissed as a matter of law because Defendant Ulm has admitted in filings with this Court that he did not invest in iCache personally and, therefore, he does not have standing to bring the claims in his individual capacity against Ramaci.

4. On December 21, 2015, almost two years after bringing his cross-claims, Billy Ulm filed a Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" (the "Trust") as Cross-Claimant. In that motion, Ulm admits that he did not purchase the shares in iCache individually and that he is not the proper party to prosecute the cross-claims: "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-claims against Defendant John Ramaci." (Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" as Cross-Claimant, at pg. 1.) The Trust, not the individual Billy Ulm, invested in iCache. Accordingly, Ramaci now moves to dismiss the cross-claims asserted by the individual Billy Ulm in their entirety.²

5. "Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Lawson v. S. Carolina Dep't of Corr.*, 532 S.E.2d 259, 260 (S.C. 2000); S.C. R. Civ. P. 56(c).

6. Because Defendant Billy Ulm has admitted that the investment was made by and through the Trust, Mr. Ulm lacks standing to bring the cross-claims. Accordingly, this Court should dismiss the cross-claims in their entirety as a matter of law.

² On November 25, 2015, Defendant Ramaci filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(C) as to Certain Causes of Action in Defendant Ulm's Cross Claim. Defendant Ramaci moved for Judgment on the pleadings on Ulm's cross-claims for breach of fiduciary duty and negligence on the grounds that those causes of action were improperly pleaded derivative claims. Accordingly, even if Defendant Billy Ulm had standing to bring the cross-claims, which he does not, the breach of fiduciary duty and negligence claims should be dismissed for the reasons set forth in that motion.

7. This Motion is supported by the authority cited herein, the arguments that will be made at the hearing on the Motion, and such other and further authority or memoranda of law as Ramaci may file prior to or present at any hearing on this Motion.

WHEREFORE, Ramaci respectfully requests that this Court enter summary judgment and dismiss Ulm's cross-claims for Negligent Misrepresentation, Breach of Fiduciary Duty, and Negligence for the reasons set forth above.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Cory Manning
Cory E. Manning (SC Bar No. 14702)
E-Mail: cory.manning@nelsonmullins.com
Adam J. Hegler (SC Bar No. 100115)
E-Mail: adam.hegler@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Jonathan Ramaci

Columbia, SC
February 3, 2016

Exhibit D

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2013-CP-10-4874

BYRDNES, LLC, CRAIG SEDMAK,
STEPHANIE SEDMAK, AND WESLEY
NAU,

Plaintiffs,

v.

JOHN RAMACI, HAVERLY RAMACI,
RICHARD SCOTT, AND BILLY ULM,

Defendants.

MEMORANDUM IN OPPOSITION TO
DEFENDANT JOHN RAMACI'S MOTION
FOR SUMMARY JUDGMENT AS TO THE
ULM CROSSCLAIMS AND MOTION FOR
JUDGMENT ON THE PLEADINGS AS TO
THE ULM CROSSCLAIMS

FILED
2016 FEB 22 PM 2:16
JULIE J. CLEGG, CLERK

Defendant Billy Ulm, by and through his undersigned counsel, submits this Memorandum in Opposition to Defendant John Ramaci's Motions for Summary Judgment and Judgment on the Pleadings as to Ulm's crossclaims. For the reasons set forth below, the Court should deny the motions.

FACTS

This lawsuit concerns the sale and ownership of stock in iCache, Inc. ("iCache"), a corporation founded by Defendant John Ramaci. In April and December 2011, Ulm directed The William L. Ulm, Sr. 2006 Delaware Trust (the "Trust") to purchase shares of iCache. Ulm was asked to join the Board of Directors. Ulm alleges that 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.

Ramaci's wrongful actions continued throughout Ulm's relationship with iCache. Ramaci failed to keep financial records, converted corporate funds for improper use, and kept shareholders in the dark with respect to iCache operations. Plaintiffs filed the instant lawsuit against Ramaci

and the members of the iCache Board of Directors in 2013 based on Ramaci's mismanagement of iCache. Ulm answered Plaintiffs' Complaint and asserted crossclaims against Ramaci for negligence, negligent misrepresentation and breach of fiduciary duty in inducing his monetary and personal investment in iCache. Because the Trust, and not Ulm individually, owns the subject iCache stock, Ramaci claims the crossclaims must be dismissed for lack of standing and for failure to prosecute the crossclaims in the name of the real party in interest.

STANDARD OF REVIEW

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).

Judgment on the pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure is considered to be a drastic procedure. Falk v. Sadler, 533 S.E.2d 350 (S.C. App. 2000). A judgment on the pleadings is not proper if there is any issue of fact raised by the complainant which, if resolved in favor of the complainant, would entitle the complainant to judgment. Id.; Baker Hosp. v. Firemans Fund Ins. Co., 441 S.E.2d 822 (S.C. 1994). When considering a motion for judgment on the pleadings, the Court must regard all properly pleaded factual allegations as admitted. Falk, 533 S.E.2d at 353. The Court must indulge all inferences "deducible therefrom [as] would entitle [complainant] to any relief on any theory of the case." Hous. Auth. of Columbia v. Cornerstone Hous., L.L.C., 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). And on review of a motion for judgment on the pleadings, the Court may not consider matters outside the pleadings. Firemen's Ins. Co. of Newark, N.J. v. Cincinnati Ins. Co.,

302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990). If the Court considers matters outside the pleadings it must treat the motion as a motion for summary judgment. Rule 12(c), SCRPC.

MOTION FOR SUMMARY JUDGMENT

Ramaci's Motion for Summary judgment is based on the assertion that, because the Trust owns the subject iCache stock and not Ulm personally, Ulm is not the real party in interest and therefore lacks standing to prosecute the crossclaims. This is not the case.

"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.").

"South Carolina 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). The assignee of a claim stands in the shoes of the assignor and has "all the same rights and privileges" as the assignor. 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). It matters not whether the assignment is executed before or after 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.")¹

The Trust purchased the subject stock in iCache. However, on February 22, 2016 the Trust assigned its right to prosecute the crossclaims to Ulm. True and complete copies of the Assignment of Claims and Affidavit of Ryan J. Rasmussen are attached hereto and incorporated herein as Exhibits A and B. By virtue of the Assignment of Claims, Ulm is the real party interest with standing to prosecute the crossclaims and the Court no longer needs to consider in whose name the stock was purchased. Ulm further notes that the Assignment does not prejudice Ramaci, as it does not deprive him of any defenses. See Campus Sweater, 515 F. Supp. at 85. Ramaci's Motion for Summary Judgment must be denied.

MOTION FOR JUDGMENT ON THE PLEADINGS

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. Ramaci claims that Ulm is seeking

¹ In Campus Sweater, Judge Hemphill further stated:

Rule 17(a) in part provides that no action shall be dismissed on the ground that it is not prosecuted by 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. The rule further provides that 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. Some courts have interpreted the word "ratification" to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability. See Wright & Miller, Federal Practice and Procedure, § 1555 at 709 (West Pub. Co. 1978). 515 F. Supp. at 84; Bank of Am., N.A. v. Draper, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) (stating that "The South Carolina rule with respect to the real party in interest requirement is patterned after the comparable federal rule").

damages for “the loss of [his] investment,” which “is an injury to iCache, and is an injury suffered equally by all iCache shareholders.” See Ramaci’s Memorandum in Support of Motions for Judgment on the Pleadings at 4. Ulm actually seeks damages for Ramaci’s wrongful *inducement* of the investment in iCache, which never would have occurred had Ramaci been truthful to Ulm about the company.

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.”).

The South Carolina Court of Appeals directly addressed the present issue and ruled that wrongful inducement of an investment constitutes a separate and distinct injury that allows a party 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.”).

Many other courts have also acknowledged this rule. See In re Smith Barney Transfer Agent Litig., 765 F.Supp.2d 391, 399 (S.D.N.Y.2011) (finding plaintiffs’ claim that

misrepresentations induced their investment was direct); Stephenson v. Citco Grp. Ltd., 700 F.Supp.2d 599, 610-24 (S.D.N.Y.2010) (finding that fraudulent inducement claims against an auditor are direct claims under Delaware law); Anwar v. Fairfield Greenwich Ltd., 728 F.Supp.2d 372, 401 (S.D.N.Y.2010) (“[A]llegations by investors of having been tortuously induced to invest or to retain an investment are not derivative claims.”); Albert v. Alex. Brown Mgmt. Serv., Inc., Nos. Civ. A. 762–N, Civ. A. 763–N, 2005 WL 2130607, at *12 (Del.Ch. Aug. 26, 2005) (“Generally, non-disclosure claims are direct claims.”); Mann v. Kemper Fin. Companies, Inc., 247 Ill. App. 3d 966, 976, 618 N.E.2d 317, 324 (1992) (“Fraudulent representations made for the purpose of inducing shareholders to agree to the sale of the assets and made directly to shareholders by the corporation were proper allegations of individual shareholder injury”); McPhail v. Wilson, 733 F. Supp. 1011, 1014 (W.D.N.C. 1990) (ruling that investment resulting from misrepresentations warrants direct claims, and stating “[t]he complaint further alleges that the misrepresentations occurred during a specific written and oral presentation which took place in December, 1987. McPhail and Gunter allege that the misrepresentations induced *them* (not all shareholders in general) to purchase stock in HyperDril. This alleged harm is one suffered by the plaintiffs in their *individual* capacities, and is not a harm suffered by all shareholders of HyperDril stock generally. This is the *type* of claim which may be asserted by an individual shareholder in his individual capacity.”) (emphasis in original).

“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), disapproved of by Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004) (allowing a direct claim for a board

of directors' failure to disclose facts to shareholders).² 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).

Ramaci's Motion for Judgment on the Pleadings mischaracterizes the crossclaims. Ulm seeks damages for Ramaci's negligent acts and breaches of fiduciary duty which *induced* him to invest in iCache. Defendant Billy Ulm's Amended Answer and Crossclaims ¶¶ 65, 71, 74. Ramaci made false and misleading misrepresentations to Ulm in an effort to secure investment in iCache. Id. These misrepresentations were made directly to Ulm during multiple meetings between Ramaci and Ulm. Ulm's claims are therefore separate from Plaintiffs' claims, which seek redress for diminution in stock value due to Ramaci's mismanagement of iCache. Viewed in a light most favorable to Defendant Ulm, these facts warrant the Court's denial of the Motion for Judgment on the Pleadings.

Further, Ulm and iCache executed a Board of Directors Retainer Agreement dated April 21, 2011. Pursuant to this contract Ulm was granted stock options in iCache. A true and complete copy of the Board of Directors Retainer Agreement is attached hereto and incorporated herein as Exhibit C. The stock options were not afforded to other non-director shareholders. Ramaci's negligent acts and breaches of fiduciary duties destroyed the value of Ulm's stock options; this distinct harm cannot be rectified by a derivative claim. See Lipton, 514 A.2d at 1078.

Alternatively, should this Court find that Ulm has not sufficiently pled his crossclaims, he requests pursuant to South Carolina Rules of Civil Procedure Rule 15(a) that the Court grant him leave to amend the crossclaims. Ulm requests an amendment on the grounds that judgment on the

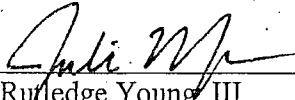
² Defendant Ulm notes that Ramaci's argument cites and relies upon Delaware's Tooley case, which has not been cited or adopted by any state or federal South Carolina court.

pleadings is a drastic remedy, justice would require such, and the parties would not be prejudiced by an amendment. "Where a judgment on the pleadings is appropriate, the court has the discretion to grant the opposing party leave to amend. Amendments should be readily allowed so as to preclude entry of such judgment. In order to protect a plaintiff's right to amend, when a party challenges the sufficiency of a petition to state a cause of action, a motion for judgment on the pleadings should be sustained only when an amendment cannot cure the defect. Leave to amend should be granted if a party can show that he or she is able to state a claim for relief." 61A Am. Jur. 2d Pleading § 551.

CONCLUSION

Based on the foregoing, Defendant Billy Ulm requests that the Court deny Defendant John Ramaci's Motion for Summary Judgment and Motion for Judgment on the Pleadings.

This 22 day of February, 2016 at Charleston, South Carolina.



J. Rutledge Young, III
Julie L. Moore
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
ryoung@duffyandyoung.com
jmoore@duffyandyoung.com

*Attorneys for Defendants
Richard Scott and Billy Ulm*

Exhibit E

1 Court to when it is considering these motions to
2 look and see what kind of standing the Plaintiffs
3 have to seek money for damage to the company and
4 have they satisfied the pleading standards
5 necessary to fall in those standing requirements.

6 THE COURT: All right. Next motion?

7 MR. MANNING: Now we are to the motion
8 to substitute.

9 MS. MOORE: Your Honor, that was a
10 motion Mr. Ulm filed. We are withdrawing that
11 motion because since the motion was filed we have
12 been discussing the case with Mr. Manning. The
13 trust who purchased the shares of stock in iCache
14 has assigned its claims to Mr. Ulm so we no longer
15 need to have you rule on the motion to substitute.

16 THE COURT: That makes it easy. So
17 then the next one would be motion for summary
18 judgment as to the Defendant Ulm's cross-claim.

19 MR. MANNING: Yes. And we had filed a
20 standing motion that he lacks standing because he
21 didn't own the shares. And the opposition was
22 filed by the individual -- excuse me -- by Ulm's
23 counsel. In that opposition we find that the trust
24 has assigned its claims to Mr. Ulm so we no longer
25 have a standing issue, but we certainly want to

1 respond to this new 11th hour development of the
2 assignment of these claims because we think it's
3 improper.

4 MS. MOORE: Your Honor, we can talk
5 about that now. I don't think that's the subject
6 of his pending motion. I think he only moved for
7 summary judgment on the basis of standing. If he
8 is not going to make an argument as to Mr. Ulm's
9 standing I think he has got to file a new motion.

10 MR. MANNING: Well, I think he doesn't
11 have standing because the assignment is improper.
12 So he still doesn't have any interest going on
13 here.

14 THE COURT: That would be a separate
15 motion.

16 MR. MANNING: He doesn't have standing.
17 I find out about this two days ago with the
18 individuals opposition to this, Mr. Ulm's
19 opposition to my standing motion. I find out that
20 JP Morgan has assigned to him their interests in
21 these shares -- excuse me -- their interest in the
22 litigation with respect to these shares. They
23 still own the shares. He is not even a
24 shareholder. He just owns the right to bring the
25 claims. So I found out about that two days ago. I

1 think that's improper. I think he still lacks
2 standing because he still doesn't own the shares.

3 THE COURT: Ms. Moore, what's your
4 position on that?

5 MS. MOORE: If I understand, he owns
6 the claims. So he has standing to pursue those
7 claims. As to whether it's a timely assignment, I
8 would respond to that because this -- as Mr.
9 Manning pointed out, there was other counsel
10 involved, but this case has been pending for two
11 and-a-half years. For the first -- until Mr.
12 Manning got involved there had been no discussion
13 that Mr. Ulm wasn't the proper party to bring the
14 cross-claim. We were litigating the merits of the
15 case. When Mr. Manning got involved, maybe to his
16 credit it's a great argument, and we were
17 discussing settlement, that was the first time the
18 issue of whether Mr. Ulm could pursue the claims
19 individually or whether the trust needed to bring
20 them arose. It was discussed back and forth. For
21 a while we thought Mr. Manning could consent to the
22 substitution of the trust. We were trying to set
23 the proper framework for these claims to be
24 prosecuted.

25 After this motion was filed we thought

1 about it and we thought we can resolve our issue
2 for substitution and his argument as to standing by
3 simply assigning the rights to pursue those claims
4 back to Mr. Ulm. So that's what we did. I think
5 that that satisfies the motion for summary judgment
6 as to the fact that Mr. Ulm doesn't own the claim.
7 This is the only thing that's been filed so far,
8 Your Honor.

9 MR. MANNING: The claims are time
10 barred.

11 THE COURT: Why don't we do this: Go
12 ahead and put your argument on the record, Mr.
13 Manning, and then I'll review all the documents.

14 MR. MANNING: I am -- actually I have
15 -- would like to give the Court right here which is
16 on its way to Charleston to be filed, this is a
17 motion for injunction. I'd like to enjoin the
18 transfer and assignment of the stock. If I might
19 approach, Your Honor. I'd like to enjoin the
20 assignment of the claims or in the alternative
21 enjoin Mr. Ulm's ability to act on those claims.

22 And the reasons are quite simple. We
23 made a standing argument and then that was met with
24 a substitution motion. We responded to the
25 substitution motion saying how that was improper

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.

Exhibit F

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

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

Civil Action No. 2013-CP-10-4874

)
)
Plaintiffs,)

vs.)

**DEFENDANT JONATHAN
RAMACI'S MOTION FOR
PERMANENT INJUNCTION**

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

)
)
Defendants.)
)

FILED
2016 FEB 25 AM 10:52
CLERK OF COURT

TO: ATTORNEYS FOR THE ABOVE-NAMED PLAINTIFFS

PLEASE TAKE NOTICE THAT, as soon as he may be heard, Jonathan Ramaci ("Ramaci"), through undersigned counsel respectfully moves 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.

1. On December 21, 2015, Ulm filed a Motion seeking to substitute the Trust as the proper cross-claimant in the claims brought against Ramaci (the "Substitution Motion").

2. 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.

3. 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 assigned its right to prosecute the cross-claims to Billy Ulm on February 19, 2016.

4. On February 24, 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.

5. Ramaci now seeks an order from this Court enjoining the purported Assignment or, in the alternative, enjoining Defendant Billy Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action as his own claims.

6. 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 (D.S.C. 2014).

7. In South Carolina, 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 (S.C. 1939).

8. 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.

9. 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, there is a settlement agreement that has been approved by the plaintiffs and with a few relatively non-controversial edits, by Defendant Scott.

10. If Billy Ulm is allowed to insert the time-barred claims of the Trust into this matter as his own claims, the parties' substantial progress toward settlement over the past months will be rendered useless. Indeed, such action may very likely force all of the parties back into a full litigation posture.

11. 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.

12. 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. 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.

13. 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.

14. The procedural subterfuge Ulm pursued with his substitution motion was foiled by Ramaci's arguments and authority in opposition to the same. Now with an eleventh-hour assignment, Ulm attempts to skirt the same authority that foreclosed his substitution.

15. Simply put, Ulm should not be allowed to proceed with the Trust's time-barred claims as if they were his own whether by substitution, assignment, or otherwise.

16. This Motion is supported by the authority cited herein, the arguments that will be made at the hearing on the Motion, and such other and further authority or memoranda of law that is on file or that Ramaci may file prior to or present at any hearing on this Motion.

WHEREFORE, for the reasons set forth above, Ramaci respectfully requests that this Court enter an order enjoining the purported Assignment of Claims by the Trust to Billy Ulm

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Cory Manning
Cory E. Manning (SC Bar No. 14702)
E-Mail: cory.manning@nelsonmullins.com
Adam J. Hegler (SC Bar No. 100115)
E-Mail: adam.hegler@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Jonathan and Haverly Ramaci

Columbia, SC
February 24, 2016

Exhibit G

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).)

- o 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.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Cory E. Manning (SC Bar No. 14702)
E-Mail: cory.manning@nelsonmullins.com
Adam J. Hegler (SC Bar No. 100115)
E-Mail: adam.hegler@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Jonathan and Haverly Ramaci

Columbia, SC
March 24, 2016

Exhibit H

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2013-CP-10-4874

BYRDNES, LLC, CRAIG SEDMAK,
STEPHANIE SEDMAK, AND WESLEY
NAU,

Plaintiffs,

v.

JOHN RAMACI, HAVERLY RAMACI,
RICHARD SCOTT, AND BILLY ULM,

Defendants.

FILED
2016 MAR 24 PM 2:47
JULIE J. ARMSTRONG
CLERK OF COURT

MEMORANDUM IN OPPOSITION TO
DEFENDANT JOHN RAMACI'S MOTION
FOR PERMANENT INJUNCTION

Defendant Billy Ulm hereby submits this Memorandum of Law in Opposition to Defendant John Ramaci's Motion for Permanent Injunction.

FACTUAL BACKGROUND

On January 23, 2014, Ulm amended his answer and asserted cross-claims against Ramaci, alleging negligent misrepresentation, breach of fiduciary duty and negligence. On February 19, 2016, the Trust assigned all of its rights to prosecute the crossclaims to Billy Ulm. Ex. A: Affidavit of Rasmussen; Ex. B: Assignment of Claims. As a result, Ulm became a real party in interest with standing to prosecute the crossclaims. Ramaci now seeks to enjoin the assignment of the crossclaims—which has already occurred—or, in the alternative, seeks an order enjoining Ulm from exercising the rights he obtained pursuant to the Assignment of Claims.

STANDARD

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). 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).

ARGUMENT

An injunction is not an appropriate remedy for a party who simply does not like the fact that an opposing party pursues claims against him. Ramaci cannot demonstrate that the assignment of the Trust's claims to Ulm constitutes irreparable harm, the likelihood that he will defeat Ulm's crossclaims on the merits, and that the law does not afford him a remedy. While failure to demonstrate any one of these elements is fatal to Ramaci's motion, he cannot meet his burden as to any. His motion should be denied.

I. THE CONTINUATION OF ONGOING LITIGATION TO ITS PROPER RESOLUTION DOES NOT CONSTITUTE IRREPARABLE HARM.

Ramaci claims "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." *See Ramaci Motion at ¶ 8.* The crossclaims against Ramaci have been pending since January of 2014. The persistence of and continued costs of ongoing litigation does not constitute irreparable harm. To claim otherwise ignores the most basic principles of our American System

of Justice. Ramaci cannot establish his burden as to this element and his motion for injunctive relief should be denied on this basis alone.

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).

While it is not disputed that litigation is a burden for *any* defendant, litigation itself cannot constitute irreparable harm, otherwise all defendants would be irreparably harmed. Likewise, all defendants incur litigation costs. 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). A South Carolina court has never held that litigation costs incurred by a defendant constitute irreparable harm.

Importantly, Ramaci’s contentions neither accurately reflect the posture of the case nor support the Court’s conclusion that he will suffer irreparable harm absent an injunction. Ramaci concludes that if Ulm “is allowed to insert the time-barred claims of the Trust into this matter as his own claims, the parties’ substantial progress toward settlement over the past months will be rendered useless. Indeed, such action may very likely force all of the parties back into a full litigation posture.” See Ramaci Motion at ¶ 10. This statement is flawed: 1) Ramaci has not challenged the validity of the assignment; 2) there has been no factual finding that the crossclaims are time-barred; and 3) Ramaci’s counsel has informed all parties that any previous settlement offers have been rescinded. See Exhibit C: March 11, 2016 Email.

Ramaci cannot demonstrate irreparable harm and thus, his motion should be denied.

II. LIKELIHOOD OF SUCCESS ON THE MERITS.

In addition to the motion itself, the pleadings and discovery in this matter warrant denial of Ramaci's motion, as he has failed to show a likelihood of success on the merits. In fact, Ramaci did not address this requirement in his motion. The motion is therefore fatally silent as to Ramaci's likelihood of success on the merits. *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).

In analyzing Ramaci's motion, the Court need not decide the case on the merits. It should instead take a limited consideration of the facts to determine whether Ramaci has clearly shown he will succeed on the merits. *See Transcon. Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 481, 167 S.E.2d 313, 315 (1969) (when analyzing a motion for an injunction, "the merits of the case are not to be considered, except in so far as they may enable the court to determine whether a prima facie showing has been made").

Ramaci has not shown he can defeat Ulm's crossclaims for negligent misrepresentation, breach of fiduciary duty or negligence. Discovery has confirmed numerous genuine issues of material fact regarding the scope of Mr. Ramaci's misrepresentations of fraud. The parties do not dispute that Ramaci induced Ulm's investment in iCache, Inc. or that the company ultimately failed. The evidence on record supports Ulm's claims that Ramaci was negligent in his management of the company, that he converted company funds and that he misrepresented the true state of the company to induce both Ulm's and the Plaintiffs' investments. *See Ulm Amended Answer and Crossclaims*. Ramaci's ultimate argument to contest Ulm's crossclaims is that they are barred by the applicable statute of limitations. *See generally Ramaci Opp. to Ulm's Motion to Substitute*. If anything, Ramaci's argument should be presented by a motion for summary

judgment. Discovery in the case has confirmed that at best such an argument would create a genuine issue of material fact. There is nothing to support that Ramaci has already shown a likelihood of success on the merits of such an argument. Because this defense raises a question of fact, it cannot constitute a prima facie showing that Ramaci will succeed on the merits. *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) (“Whether a claimant knew or should have known that they had a cause of action is question for the jury.”). The motion should be denied.

III. ADEQUATE REMEDY AT LAW.

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. This is most certainly a complaint that enjoys popularity amongst any party who has been named as a defendant in a lawsuit. However, such a sentiment ignores the existence of several remedies available to any defendant. Ramaci does have an adequate remedy at law in the absence of any injunction because if he is correct he will win in the defense of the crossclaims. By definition, this is an adequate remedy for Ramaci. If the crossclaims were improper or frivolous, then Ramaci has an adequate remedy at law under the S.C. Frivolous Civil Proceedings Sanctions Act § 15-36-10.

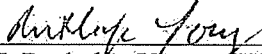
Ulm has prosecuted these crossclaims against Ramaci for more than two years. See Ulm Amended Answer and Crossclaims. Throughout the duration of this litigation, Ramaci has voraciously defended and challenged the merits of these claims. The assignment does nothing to change this. The ordinary process of law provides 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: 1) Ramaci can challenge the validity of the assignment; 2) Ramaci can challenge the statute of limitations issue he has raised in other motions; 3) Ramaci can defend the merits of Ulm’s

crossclaims at trial. Any of these measures would provide 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.”).

CONCLUSION

Ramaci has failed to demonstrate the elements necessary to warrant the imposition of such a drastic remedy. Ramaci’s Motion for Permanent Injunction should be denied.

This 27 day of March, 2016 at Charleston, South Carolina.



J. Rutledge Young III
Julie L. Moore
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, South Carolina 29401
(843) 720-2044 (phone)
(843) 720-2047 (fax)
ryoung@duffyandyoung.com
jmoore@duffyandyoung.com

*Attorneys for Defendants
Richard Scott and Billy Ulm*

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

APR 14 2017

SC Court of Appeals

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

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

Respondents,

v.

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

Defendants,

Of whom

Johnathan Ramaci is,

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Appellant's Return to Respondent's Motion to Dismiss

Counsel Served:

Benjamin A. Traywick
BEN TRAYWICK LAW FIRM, LLC
171 Church Street, #340
Charleston, SC 29401

Rutledge Young, III
Julie Lauren Moore
DUFFY & YOUNG, LLC
96 Broad Street
Charleston, SC 29401

Lisa P. Whitehurst

Lisa Whitehurst
Administrative Assistant

April 14, 2017

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law

1320 Main Street / 17th Floor / Columbia, SC 29201

Tel: 803.799.2000 Fax: 803.255.5916

www.nelsonmullins.com

A. Mattison Bogan

Tel: 803.255.9589

Fax: 803.255.5916

matt.bogan@nelsonmullins.com

April 14, 2017

RECEIVED

APR 14 2017

SC Court of Appeals

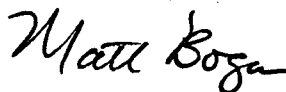
The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia SC 29211

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
Our File No. 47061/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Return to Respondent's Motion to Dismiss in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier.

Very truly yours,



A. Mattison Bogan

AMB:lpw

Enclosures

cc: Benjamin A. Traywick, Esquire
Rutledge Young III, Esquire
Julie Lauren Moore, Esquire