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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 28 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.

PETITION FOR WRIT OF SUPERSEDEAS

This is an appeal from the denial of a request for a permanent injunction. By statute that is automatically appealable. Despite this, the circuit court is placing this matter on the trial roster for June. Such action, if the case is tried before this appeal is concluded, will moot certain issues now on appeal. This Court must necessarily issue a supersedeas to recognize the stay in the trial court.

Appellant Jonathan Ramaci files this petition seeking a writ of supersedeas pursuant to Rule 241 of the South Carolina Appellate Court Rules. Ramaci appealed the circuit court's February 22, 2017 order which, among other things, denied Ramaci's motion for a permanent injunction. (Certified Copy of Order, **Exhibit A**; Notice of Appeal, **Exhibit B**).

After a considerable back-and-forth exchange of emails, letter briefs, and other filings in which Ramaci maintained the position that the Notice of Appeal automatically stayed all

proceedings in the circuit court during the pendency of his appeal, the circuit court ruled the plaintiffs' claims were "unaffected by the appeal" and informed the parties that it would set the plaintiffs' claims for trial the week of June 5, 2017. *See* (Email chain between Judge Murphy and parties, **Exhibit C**).

Because the circuit court has already ruled that trial of the plaintiffs' claims must proceed during the pendency of his appeal, Ramaci seeks immediate relief from this Court to stay all proceedings in the circuit court.¹ The grounds for this motion are that the appeal divested the circuit court of jurisdiction over all matters and the status quo must be maintained pending a resolution of this appeal in the interest of judicial economy and to avoid rendering the matters on appeal moot.

Factual Background

The plaintiffs in this case filed suit against defendants Jonathan and Haverly Ramaci, Billy Ulm, and Richard Scott in August 2013, alleging numerous causes of action related to the plaintiffs' investments in, and the defendants' management of, a technology startup company known as iCache. In his amended answer, co-defendant Billy Ulm ("Ulm") asserted cross-claims against Ramaci.

¹ Ramaci is aware of the provisions of Rule 241(d), SCACR, which provide that a petition for a writ of supersedeas must generally be made first to the lower court that entered the order on appeal. It is unnecessary for Ramaci to file a petition with the circuit court in this case for several reasons. First, Ramaci already requested that the circuit court stay proceedings pending the outcome of this appeal, but the court denied Ramaci's request. (Apr. 21, 2017 email from Luke Allen, **Exhibit C**). Further, the circuit court appears to have already lifted the automatic stay in response to the plaintiffs' motion to sever. (*Id.*; Motion to Sever filed Mar. 24, 2017, **Exhibit D**). Therefore, it would be futile for Ramaci to file an additional petition for a writ of supersedeas after the circuit court lifted the stay. *See* Rule 241(d)(2), SCACR. Finally, in the alternative, Ramaci is seeking review of the circuit court's order lifting the stay, which is permitted under Rule 241(d)(2), SCACR.

Nearly two and a half years after the initial complaint was filed, Ulm filed a motion seeking to substitute The William L. Ulm, Sr. 2006 Delaware Trust (the “Trust”)—which was the actual owner of Ulm’s shares in iCache—as the proper cross-claimant. (Motion to Substitute “The William L. Ulm, Sr. 2006 Delaware Trust” As Cross-Claimant (“the Substitution Motion”), **Exhibit E**). Ramaci opposed Ulm’s Substitution Motion on the basis that the substitution was improper and barred by the statute of limitations. (Ramaci’s Motion for Sum. J. filed Feb. 3, 2016, **Exhibit F**).

Two days before a hearing on the Substitution Motion was to take place, counsel for Ulm informed the circuit court and the parties that the Trust had purportedly assigned its right to prosecute the cross-claims to Ulm individually, although the Trust retained actual ownership of the iCache shares. *See* (Ulm’s Memo in Opp. to Ramaci’s Motion for Sum. J., **Exhibit G**). Ulm later withdrew the Substitution Motion. After learning of the withdrawal and with no other way to challenge the purported assignment, Ramaci moved to permanently enjoin any assignment of the cross-claims because the claims were stale or, in the alternative, permanently enjoin Ulm from attempting to assert any claims acquired pursuant to the assignment in this action. *See* (Ramaci’s Motion for Perm. Inj., **Exhibit H**). The circuit court denied Ramaci’s motion. (Order, **Exhibit B**). Ramaci filed his Notice of Appeal from that order on February 27, 2017, and filed his Initial Brief of Appellant on March 29, 2017. (Notice of Appeal, **Exhibit B**; Initial Brief of Appellant, **Exhibit I**).

After denying Ramaci’s motion for an injunction—and after Ramaci filed his Notice of Appeal—the circuit court informed the parties that the week of June 5, 2017, was the earliest date available for trial. *See* (Mar. 7, 2017 email from Luke Allen to Benjamin Traywick, Cory Manning, and Julie Moore, **Exhibit C**). Ramaci asserted that a trial would undoubtedly affect

matters on appeal and argued the circuit court lacked jurisdiction to proceed with the trial of this matter. *See* (Mar. 8, 2017 email from Cory Manning to Judge Murphy, **Exhibit C**). The plaintiffs, however, insisted that trial proceed on June 5th.² *See* (Mar. 8, 2017 email from Benjamin Traywick to Judge Murphy, **Exhibit C**). The circuit court then requested that the parties outline their position “in a more detailed form” as to the grounds of the appeal and whether the circuit court should retain jurisdiction over matters not affected by the appeal. (Mar. 17, 2017 email from Luke Allen, **Exhibit C**).

Ramaci obliged the circuit court’s request and submitted a letter brief explaining that both the plaintiffs’ claims and Ulm’s cross-claims were matters affected by the appeal and, therefore, the circuit court did not have jurisdiction to move this case forward to trial. *See* (Mar. 24, 2017 letter from Matt Bogan to Judge Murphy, **Exhibit H**). Instead of further outlining their argument as the circuit court requested, the plaintiffs moved to sever their claims from Ulm’s cross-claims and proceed with a trial of their claims. (Motion to Sever, **Exhibit D**). In an email to the circuit court, the plaintiffs argued Rules 205 and 241 of the South Carolina Appellate Court Rules provide for an automatic severance that allows the circuit court to proceed with the trial of their claims during the pendency of Ramaci’s appeal. (Mar. 24, 2017 email from Benjamin Traywick to Luke Allen, **Exhibit C**). Ramaci objected to the plaintiffs’ argument and asserted that the proceedings in the circuit court were automatically stayed when Ramaci filed his Notice of Appeal, and the

² Despite the plaintiffs’ insistence on moving forward to trial, on March 29, 2017, counsel for the plaintiffs filed for protection and indicated that he will be vacationing with his family the week of June 2-9, and the request to proceed on June 5th had presumably been abandoned. *See* (Request for Protection filed March 29, 2017, **Exhibit J**) (requesting “protection from *trials*, motions and other appearances in the Charleston County Common Pleas cases” in all cases for which Mr. Traywick is counsel of record for several dates, including June 2-9 (emphasis added)).

automatic stay is unaffected by the plaintiffs' untimely motion to sever. (Mar. 27, 2017 email from Matt Bogan to Benjamin Traywick and Luke Allen, **Exhibit C**).

After this back-and-forth exchange, the circuit court notified the parties via email that the plaintiffs' claims "are unaffected by the appeal . . . and are to proceed to trial during the June 5th term in Charleston."³ (Apr. 21, 2017 email from Luke Allen, **Exhibit C**).

Law and Analysis

Pursuant to the South Carolina Appellate Court Rules, the filing of Ramaci's Notice of Appeal divests the circuit court of jurisdiction over all matters affected by the appeal and an automatic stay applies. *See* Rules 205 & 241, SCACR. Any further proceedings on this case in the circuit court would be affected by the appeal.

There is no question that the order denying Ramaci's motion for a permanent injunction is immediately appealable and stays the trial of this case until the appeal is resolved. *See* S.C. Code Ann. § 14-3-330(4) (providing an "interlocutory order . . . refusing an injunction" is immediately appealable); Rule 241(a), SCACR ("[T]he service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order"); *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 23, 594 S.E.2d 478, 485 (2004) ("The automatic stay continues in effect for the duration of the appeal"). In fact, Ramaci was required to immediately appeal the circuit court's order to avoid waiving his right to an injunction. *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997) (providing a party that fails to appeal an order affecting a substantial right waives the right to appeal that issue).

³ The circuit court has not ruled upon the motion to sever, and it cannot do so. *See* Rule 241, SCACR.

A circuit court only retains jurisdiction to consider matters not affected by an appeal. Rule 241(a), SCACR; *see also* Rule 205, SCACR. Thus, under Rule 241, the circuit court is automatically stripped of its jurisdiction to entertain matters affected by this appeal unless an exception enumerated in subsection (b) applies. Rule 241(a)-(b), SCACR. The denial of a motion for injunctive relief is not a listed exception to the automatic stay and, therefore, the circuit court does not have jurisdiction to proceed with the trial of this matter pending Ramaci's appeal. *See* Rule 241(b), SCACR; *Grosshuesch v. Cramer*, 377 S.C. 12, 31 n.7, 659 S.E.2d 112, 122 n.7 (2008) ("We take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.").

Our appellate court rules provide the grounds for granting a writ of supersedeas. Rule 241 provides that a supersedeas is proper when "such an order is necessary . . . to prevent a contested issue from becoming moot." Rule 241(c)(2), SCACR; *see also Brown v. Harper*, 409 S.C. 470, 474, 761 S.E.2d 779, 781 (Ct. App. 2014), *aff'd sub nom. Brown v. Baby Girl Harper*, 410 S.C. 446, 766 S.E.2d 375 (2014) ("A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy."). Our supreme court has recognized that "it is difficult, if not impossible, to unring a bell." *State Record Co. v. State*, 332 S.C. 346, 356 n.19, 504 S.E.2d 592, 597 n.19 (1998). As a result, a supersedeas should be used to "stay proceedings in the [circuit] court, to preserve the status quo pending the determination of the appeal . . . , and to preserve to appellant the fruits of a meritorious appeal where they might otherwise be lost to him." *Graham v. Graham*, 301 S.C. 128, 130, 390 S.E.2d 469, 470 (1990). The appellate courts should exercise their power to "supersede an order of a circuit judge . . . when it is made to appear to be necessary to prevent irreparable injury or a miscarriage of justice." *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 304, 69 S.E. 604, 606 (1910).

Nothing in this action, including the plaintiffs' claims, is left unaffected by the appeal. Ramaci's request for an injunction is based on an argument that the improper and untimely cross-claims are standing in the way of a settlement of the plaintiffs' claims. *See* (Ramaci's Motion for Perm. Inj., **Exhibit H**; Initial Brief of Appellant, **Exhibit I**). Ramaci has argued that the parties were near settlement at the time of the assignment, but the assertion of the improper cross-claims undermined the consummation of that settlement. (Mar. 24, 2017 letter from Matt Bogan to Judge Murphy, **Exhibit K**). Ulm's untimely action is the only thing prohibiting the end of the case. A trial of the plaintiffs' claims, therefore, would moot the issues now on appeal. *See* Rule 241(c)(2), SCACR ("In determining whether an order should issue pursuant to this Rule, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot."). Thus, the entire case must be stayed pending a resolution of this appeal. *See Berry v. Ianuario*, 281 S.C. 21, 21, 314 S.E.2d 308, 308 (1983) (granting an appellant's petition for supersedeas "in order to prevent the appeal from becoming moot").

The circuit court's decision to proceed with a trial prior to the resolution of the appeal is contrary to the automatic stay provided by the appellate court rules. *See* Rule 241(a), SCACR. Unless this Court grants Ramaci's request for a writ of supersedeas, Ramaci will be severely prejudiced and will face the prospect of a trial on claims he was close to resolving before Ulm injected improper cross-claims into the case. A supersedeas will prevent this injustice, will maintain the status quo, and will prevent the appeal from being rendered moot. Further, both plaintiffs' claims and Ulm's cross-claims remain part of a single action arising from the same factual allegations and background and should be tried in a single trial, not piecemeal. Therefore, a supersedeas will serve the interest of judicial economy by preventing the circuit court from

holding two separate trials in this matter and will prevent the issues from being addressed by both this Court and the circuit court.

Finally, contrary to the plaintiffs' argument to the circuit court, the South Carolina Appellate Court Rules do not "effectuate [a] severance" and the circuit court cannot sever the claims. *See* (Mar. 24, 2017 email from Benjamin Traywick to Luke Allen, **Exhibit C**). Instead, the rules provide that this entire case is automatically stayed until Ramaci's appeal is finally resolved. *See generally* Rule 241, SCACR. Accordingly, Ramaci requests that this Court issue a supersedeas order staying the proceedings in the circuit court.

Conclusion

For the reasons set forth above, Ramaci respectfully requests that this Court grant a writ of supersedeas that stays all further proceedings in the circuit court in this action pending a final resolution of Ramaci's appeal.

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April 28, 2017

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In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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The Honorable Maite D. Murphy, Circuit Court Judge

Case No. 2013-CP-10-4874
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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.

VERIFICATION

I, Jonathan Ramaci, verify that, to the best of my knowledge and belief, the facts set forth
in the foregoing Petition for Writ of Supersedeas are accurate.

Executed on April 28, 2017.

SWORN to and subscribed before me

this 28th day of April, 2017

[Signature] (L.S.)

Notary Public for Charleston, SC
My Commission Expires: 03-07-2017

[Signature]

Jonathan Ramaci
Defendant/Appellant

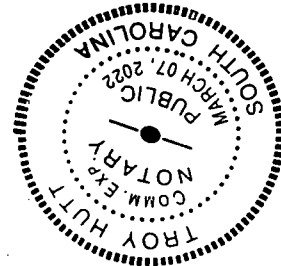


Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

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

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

Plaintiffs,

v.

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

Defendants.

ORDER

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FEB 27 2017

SC Court of Appeals

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CLERK OF COURT

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

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

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

FACTUAL BACKGROUND

1. Factual Background as to Plaintiffs' Claims

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

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

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

2. Factual Background as to Defendant Ulm's Crossclaims

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. The Plaintiffs' UTPA claims are dismissed.

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

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

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

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

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

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

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

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

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

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

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

1. Johnathan Ramaci failed to demonstrate irreparable harm.

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

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

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

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

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

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

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

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

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

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

3. Johnathan Ramaci has an adequate remedy at law.

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

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

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

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

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

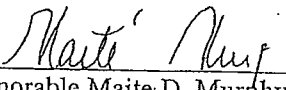
The Court finds no cause in the record of this case to permit the further or additional deposition of the witnesses identified in this motion, and therefore respectfully deny the motion.

CONCLUSION

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

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

AND IT IS SO ORDERED.


Honorable Maite D. Murphy

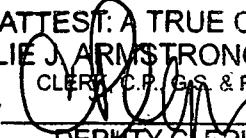
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By 
DEPUTY CLERK

Exhibit B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Maite D. Murphy, Circuit Court Judge

Case No. 2013-CP-10-4874

RECEIVED

FEB 27 2017

SC Court of Appeals

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.

NOTICE OF APPEAL

Johnathan Ramaci ("Appellant") appeals the order of the Honorable Maite Murphy filed February 21, 2017 (attached as Exhibit A). Appellant received written notice of entry of this order on February 21, 2017.

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February 27, 2017

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Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

v.

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

Defendants.

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

ORDER

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FEB 27 2017

SC Court of Appeals

FILED
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JUDICIAL CIRCUIT
CLERK OF COURT

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

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

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

FACTUAL BACKGROUND

1. Factual Background as to Plaintiffs' Claims

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

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

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

2. Factual Background as to Defendant Ulm's Crossclaims

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

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

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

ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. The Plaintiffs' UTPA claims are dismissed.

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

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

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

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

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

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

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

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

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

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

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

1. Johnathan Ramaci failed to demonstrate irreparable harm.

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

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

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

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

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

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

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

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

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

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

3. Johnathan Ramaci has an adequate remedy at law.

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

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

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

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

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

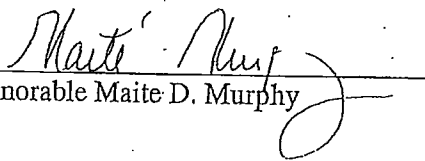
The Court finds no cause in the record of this case to permit the further or additional deposition of the witnesses identified in this motion, and therefore respectfully deny the motion.

CONCLUSION

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

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

AND IT IS SO ORDERED.


Honorable Maite D. Murphy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Maite D. Murphy, Circuit Court Judge

Case No. 2013-CP-10-4874

RECEIVED

FEB 27 2017

SC Court of Appeals

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:

Notice of Appeal

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 Whitehurst
Administrative Assistant

February 27, 2017

Exhibit C

From: "Murphy, Maite Law Clerk (Luke Allen)" <mmurphy@sccourts.org>
Date: April 21, 2017 at 3:47:21 PM EDT
To: Cory Manning <Cory.Manning@nelsonmullins.com>
Cc: Matt Bogan <Matt.Bogan@nelsonmullins.com>, Benjamin Traywick <ben@bentraywicklaw.com>, Julie Moore <jmoore@duffyandyoung.com>, Adam Hegler <adam.hegler@nelsonmullins.com>, Wes Moran <wes.moran@nelsonmullins.com>, Rutledge Young <ryoung@duffyandyoung.com>, Sarah Malphrus <smalphrus@duffyandyoung.com>, Ali Williams <ali@bentraywicklaw.com>, "Jenni Jokerst" <jenni.jokerst@nelsonmullins.com>, Ann Brock <ann.brock@nelsonmullins.com>, Patty Alexander <patty.alexander@nelsonmullins.com>, Lisa Whitehurst <lisa.whitehurst@nelsonmullins.com>
Subject: RE: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Cory:

That is correct and I apologize for my misunderstanding. The email was meant to give notice of the ruling and is the decision of the Court as to this matter.

Thank you,

Luke M. Allen
Law Clerk to the Hon. Maité Murphy
P.O. Box 802
5200 E. Jim Bilton Blvd.
St. George, SC 29477
Office: (843) 832-0391

From: Cory Manning [<mailto:Cory.Manning@nelsonmullins.com>]
Sent: Friday, April 21, 2017 3:30 PM
To: Murphy, Maite Law Clerk (Luke Allen) <mmurphy@sccourts.org>

Cc: Matt Bogan <Matt.Bogan@nelsonmullins.com>; Benjamin Traywick <ben@bentraywicklaw.com>; Julie Moore <jmoore@duffyandyoung.com>; Adam Hegler <adam.hegler@nelsonmullins.com>; Wes Moran <wes.moran@nelsonmullins.com>; Rutledge Young <ryoung@duffyandyoung.com>; Sarah Malphrus <smalphrus@duffyandyoung.com>; Ali Williams <ali@bentraywicklaw.com>; Jenni Jokerst <jenni.jokerst@nelsonmullins.com>; Ann Brock <ann.brock@nelsonmullins.com>; Patty Alexander <patty.alexander@nelsonmullins.com>; Lisa Whitehurst <lisa.whitehurst@nelsonmullins.com>
Subject: Re: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Luke: if you are representing to me that the email is the judge's order, then I am fine with that. If otherwise, I would appreciate an order (Form 4 is fine) from the judge.

Have a great weekend.
Cory

Sent from my iPhone

On Apr 21, 2017, at 3:14 PM, Murphy, Maite Law Clerk (Luke Allen) <mmurphy1c@sccourts.org> wrote:

Mr. Manning:

I do not know if a formal order is necessary, but if the parties would like I will see if Judge Murphy is willing to execute a written order or Form 4 so that there will be something for the record.

Have a great weekend as well.

Luke M. Allen
Law Clerk to the Hon. Maité Murphy
P.O. Box 802
5200 E. Jim Bilton Blvd.
St. George, SC 29477
Office: (843) 832-0391

From: Cory Manning [<mailto:Cory.Manning@nelsonmullins.com>]
Sent: Friday, April 21, 2017 2:51 PM
To: Murphy, Maite Law Clerk (Luke Allen) <mmurphy1c@sccourts.org>
Cc: Matt Bogan <Matt.Bogan@nelsonmullins.com>; Benjamin Traywick <ben@bentraywicklaw.com>; Julie Moore <jmoore@duffyandyoung.com>; Adam Hegler <adam.hegler@nelsonmullins.com>; Wes Moran <wes.moran@nelsonmullins.com>; Rutledge Young <ryoung@duffyandyoung.com>; Sarah Malphrus <smalphrus@duffyandyoung.com>; Ali Williams <ali@bentraywicklaw.com>; Jenni Jokerst <jenni.jokerst@nelsonmullins.com>; Ann Brock <ann.brock@nelsonmullins.com>; Patty Alexander <patty.alexander@nelsonmullins.com>; Lisa Whitehurst <lisa.whitehurst@nelsonmullins.com>
Subject: Re: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Thank you, Luke. Two housekeeping items:

First, will Judge Murphy be issuing a further written order or Form 4 on the stay issue? Or does your email constitute her order? Please advise.

Second, Mr. Traywick filed a notice for request for protection for June 2-9.

Have a nice weekend.

Cory

Sent from my iPhone

On Apr 21, 2017, at 11:10 AM, Murphy, Maite Law Clerk (Luke Allen) <mmurphylc@sccourts.org> wrote:

Good morning,

Thank you for your submissions regarding the appeal of the February Order and its effect on the stay of this case. After considering the arguments of the parties, the Court finds that Plaintiffs' claims are unaffected by the appeal of the Order and are to proceed to trial during the June 5th term in Charleston.

The Court is declining to rule on Plaintiff's Motion to Sever at this point but will be in contact with the parties once a decision on that matter is reached or if further arguments are necessary.

Thank you and please contact me with any questions.

Luke M. Allen
Law Clerk to the Hon. Maité Murphy
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Office: (843) 832-0391

From: Matt Bogan [<mailto:Matt.Bogan@nelsonmullins.com>]
Sent: Monday, March 27, 2017 9:03 AM
To: Benjamin Traywick <ben@bentraywicklaw.com>; Murphy, Maite Law Clerk (Luke Allen) <mmurphylc@sccourts.org>
Cc: Cory Manning <Cory.Manning@nelsonmullins.com>; Julie Moore <jmoore@duffyandyoung.com>; Adam Hegler <adam.hegler@nelsonmullins.com>; Wes Moran <wes.moran@nelsonmullins.com>; Rutledge Young <ryoung@duffyandyoung.com>; Sarah Malphrus <smalphrus@duffyandyoung.com>; Ali Williams <ali@bentraywicklaw.com>; Jenni Jokerst <jenni.jokerst@nelsonmullins.com>; Ann Brock <ann.brock@nelsonmullins.com>; Patty Alexander <patty.alexander@nelsonmullins.com>; Lisa Whitehurst

<lisa.whitehurst@nelsonmullins.com>

Subject: RE: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Mr. Allen,

We are in receipt of the papers from the plaintiff and cross-claimant.

The plaintiff, rather than address the stay as he 1) asked to do and 2) the court permitted, attempts to avoid the automatic stay by filing a tardy motion to sever. The stay is in effect once the appeal is taken and cannot be avoided in the trial court through such a late measure. We of course oppose the motion to sever on this basis, among others. Should the court decide to take up that motion while the appeal is ongoing, we will respond at such time as directed by the court prior to any hearing on it.

I will also provide this group our appellate brief upon filing this week as requested.

Matt Bogan

From: Benjamin Traywick [mailto:ben@bentraywicklaw.com]

Sent: Friday, March 24, 2017 2:54 PM

To: Matt Bogan <Matt.Bogan@nelsonmullins.com>

Cc: mmurphy@cscourts.org; Cory Manning

<Cory.Manning@nelsonmullins.com>; Julie Moore

<jmoore@duffyandyoung.com>; Adam Hegler

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<ann.brock@nelsonmullins.com>; Patty Alexander

<patty.alexander@nelsonmullins.com>; Lisa Whitehurst

<lisa.whitehurst@nelsonmullins.com>

Subject: Re: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Luke- good afternoon. I attach the Plaintiffs' motion on this issue, filed today, which moves to sever the Plaintiffs' claims (which clearly are unaffected by the appeal) from Ulm's cross-claims (which clearly are affected by the appeal) and proceed forthwith to trial of the Plaintiffs' claims. Thus, this motion refutes the "nobody has moved to proceed otherwise than as one action" technicality on

which Mr. Bogan bases Ramaci's most recent effort to prevent this case from getting to trial.

Candidly I don't think formally severing them is strictly necessary: I agree with Mr. Bogan that Ulm's cross-claims cannot proceed because they are affected by the appeal; but under Rules 205 and 241, and the case law cited in our memorandum, Judge Murphy retains jurisdiction over the Plaintiffs' claims. So the Appellate Court Rules themselves effectuate the "severance" needed for the Plaintiffs' claims to proceed. At any rate, I understand Mr. Bogan's letter to acknowledge that once severed, the Plaintiffs' claims are unaffected by the appeal and may proceed to trial.

The only other thing I'll address is the idea in Mr. Bogan's letter that the Plaintiffs' claims somehow are affected by the appeal because "the parties had essentially resolved this matter" at one point. Mr. Bogan of course was not involved at that time, but the near-settlement occurred in excess of one year ago, and the sums discussed at that time--as I have conveyed to Ramaci's legal team--are now utterly irrelevant and obsolete. Since settlement was last discussed--more than a year ago--the plaintiffs have incurred several hundred thousand of dollars in costs, fees and interest, all of which are recoverable under the Uniform Securities Act claim. A fair description of where are the negotiations is: nowhere. I note that Mr. Bogan cites no authority for how last year's failed negotiations support staying the Plaintiffs' claims.

As set out in our motion, under Rules 205 and 241, the Plaintiffs' claims should be severed and set for trial, as they are unaffected by the appeal. Thanks in advance- have a great weekend if we don't speak with you before. Ben

<image001.jpg>

Benjamin A. C. Traywick, Esquire
Ben Traywick Law Firm, LLC

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On Fri, Mar 24, 2017 at 1:37 PM, Matt Bogan
<Matt.Bogan@nelsonmullins.com> wrote:

Mr. Allen,

Please see attached per the Court's request. Thank you.

Matt Bogan

From: Matt Bogan
Sent: Wednesday, March 22, 2017 8:20 AM
To: Benjamin Traywick <ben@bentraywicklaw.com>
Cc: Murphy, Maite Law Clerk (Luke Allen) <mmurphy@sccourts.org>; Cory Manning <Cory.Manning@nelsonmullins.com>; Julie Moore <jmoore@duffyandyoung.com>; Adam Hegler <adam.hegler@nelsonmullins.com>; Wes Moran <wes.moran@nelsonmullins.com>; Rutledge Young <ryoung@duffyandyoung.com>; Sarah Malphrus <smalphrus@duffyandyoung.com>; Ali Williams <ali@bentraywicklaw.com>; Jenni Jokerst <jenni.jokerst@nelsonmullins.com>; Ann Brock <ann.brock@nelsonmullins.com>; Patty Alexander <patty.alexander@nelsonmullins.com>
Subject: Re: Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v. John Ramaci, et al - C.A. No.: 2013-CP-10-4874

Mr. Allen,

We have no objection to his request for more time on the Court's desired submission. We will provide our papers to you, however, by the end of the week as directed.

We will also provide a copy of the filed appellate brief from the court of appeals on the same day we file it. What that appellate brief will reveal is that all issues as pled currently are stayed based on our appeal. It is a matter of the procedural posture of the case that subsumes the entire matter within the automatic stay under Rule 241.

Thank you.

Matt Bogan

On Mar 21, 2017, at 9:09 PM, Benjamin Traywick
<ben@bentraywicklaw.com> wrote:

Luke- good evening. I understand Judge Murphy's instruction that we brief this issue by the end of this week and and, of course, would like very much to get the Plaintiffs' claims to trial in June as proposed. Nevertheless, I'd like respectfully to request that the Court extend the deadline for briefing on this issue through Friday, March 31st.

The reason for my request is that, as you may recall, Mr. Bogán has committed to submitting Mr. Ramaci's appellate brief before March 31st. In that brief, Mr. Ramaci presumably will acknowledge what is already obvious: that Section III of Judge Murphy's order--concerned solely with the denial of Mr. Ramaci's motion for injunctive relief--is the only portion of the Order subject to appeal (which in turns would make it clear that the Plaintiffs' claims, which have no connection whatsoever to injunctive relief requested, can proceed to trial).

Simply put, with the appellant's brief in hand Judge Murphy will know with certainty the scope of the appeal, rather than listen to lawyers argue about its scope. Armed with this knowledge, it should be quite simple to decide exactly what elements of the case the appeal stays, and what elements can proceed to trial in June.

Alternatively, if Her Honor prefers us to submit briefs by March 24th as previously instructed, I presume that Mr. Ramaci's counsel will have no objection to providing a copy of the appellate brief to Judge Murphy, immediately upon filing with the Court of Appeals, so that Her Honor will have its benefit in rendering her decision on this issue.

Thank you in advance for your consideration- Ben

<image001.jpg>

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On Fri, Mar 17, 2017 at 12:11 PM, Murphy, Maite
Law Clerk (Luke Allen)

<mmurphylc@sccourts.org> wrote:

Good afternoon to all.

The Court is mindful of the parties' positions regarding the appeal of the February 21, 2017 Order and its effect on the stay of this case. Given the multiple moving parts and the short window of time that is available, the Court believes it is necessary for us to act promptly if we are to preserve a courtroom for the week of June 5th-9th or any other time in the foreseeable future. Therefore, the parties will have until the end of next week to outline their positions in a more detailed form as to the grounds of the appeal and whether this court should retain jurisdiction over matters not affected by the appeal.

Thank you,

Luke M. Allen

Law Clerk to the Hon. Maité Murphy

P.O. Box 802
5200 E. Jim Bilton Blvd.
St. George, SC 29477

Office: (843) 832-0391

From: Matt Bogan
[mailto:Matt.Bogan@nelsonmullins.com]
Sent: Thursday, March 9, 2017 7:47 AM
To: Benjamin Traywick <ben@bentraywicklaw.com>
Cc: Cory Manning
<Cory.Manning@nelsonmullins.com>; Murphy, Maite
Law Clerk (Luke Allen) <mmurphy1c@sccourts.org>;
Julie Moore <jmoore@duffyandyoung.com>; Adam
Hegler <adam.hegler@nelsonmullins.com>; Wes
Moran <wes.moran@nelsonmullins.com>; Rutledge
Young <ryoung@duffyandyoung.com>; Sarah
Malphrus <smalphrus@duffyandyoung.com>; Ali
Williams <ali@bentraywicklaw.com>; Jenni Jokerst
<jenni.jokerst@nelsonmullins.com>; Ann Brock
<ann.brock@nelsonmullins.com>; Patty Alexander
<patty.alexander@nelsonmullins.com>
Subject: Re: Byrdnest, LLC, Craig Sedmak, Stephanie
Sedmak, and Wesley Nau v. John Ramaci, et al - C.A.
No.: 2013-CP-10-4874

Dear Judge Murphy and Chambers:

I am new to this esteemed list. I did not file an appeal to delay. I filed because I had to for our client to protect his rights. *See Lester v. Dawson* (immediately appealable issues are waived if not appealed prior to trial).

I respectfully disagree with Mr. Traywick. Rule 205 does not provide the answer. It is Rule 241.

Rule 241(a), SCACR, provides for an automatic stay unless an exception applies. Rule 241(b) provides the enumerated list of exceptions. 241(b)(8) says the grant of an injunction is an exception to the automatic stay. Not listed is the denial of an injunction. Thus, our appeal stays this matter by rule subject to no exception. No further briefing is necessary on this issue based on the express language of the rule.

If your honor deems otherwise and concludes the matter is not stayed, let us know and we can seek supersedeas from the appellate courts in the normal course to protect our appellate rights provided by rule and statute to permit the appeal to proceed to conclusion. Our initial appellate brief is due before the end of the month and we will file it timely at the Court of Appeals without extension to expeditiously prosecute our appeal.

Thank you very much.

Matt Bogan

On Mar 8, 2017, at 7:00 PM, Benjamin Traywick <ben@bentraywicklaw.com> wrote:

Luke- good evening. While we appreciate Mr. Ramaci's most recent effort to delay the trial of this case, his appeal concerns--and can only concern--issues related to Mr. Ulm's cross-claims against Mr. Ramaci. Because the appeal does not affect the Plaintiffs' claims against Ramaci, Rule 205, SCACR clearly authorizes us to proceed with setting the plaintiffs' claims for trial. As such, I respectfully reiterate my request that we set the case for trial during the week that you have suggested: June 5th-9th.

If Judge Murphy would like, I am happy to brief the Rule 205 issue from the Plaintiffs' perspective. Thanks in advance- Ben

<image001.jpg>

Benjamin A. C. Traywick,
Esquire

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Charleston, South Carolina 29401

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On Wed, Mar 8, 2017 at 8:59 AM,
Cory Manning
<Cory.Manning@nelsonmullins.com> wrote:

Luke:

The appeal of Judge Murphy's February 21, 2017 order stays the case, because issues in that order must be decided with finality before a trial (or setting of a trial date) can proceed. Our notice of appeal was filed with the Court of

Appeals and served on the parties on February 27, 2017. A copy of that notice (with the order as an exhibit to the same) is attached.

Thanks.

Cory Manning

From: Murphy, Maite Law Clerk
(Luke Allen)
[mailto:mmurphylc@sccourts.org]
]

Sent: Tuesday, March 7, 2017
4:47 PM

To: Benjamin Traywick
<ben@bentraywicklaw.com>;
Cory Manning
<Cory.Manning@nelsonmullins.com>; Julie Moore
<jmoore@duffyandyoung.com>

Cc: Adam Hegler
<adam.hegler@nelsonmullins.com>; Wes Moran
<wes.moran@nelsonmullins.com>; Rutledge Young
<ryoung@duffyandyoung.com>; Sarah Malphrus
<smalphrus@duffyandyoung.com>; Ali Williams
<ali@bentraywicklaw.com>; Jenni Jokerst
<jenni.jokerst@nelsonmullins.com>; Ann Brock
<ann.brock@nelsonmullins.com>; Patty Alexander
<patty.alexander@nelsonmullins.com>

Subject: RE: Byrdnest, LLC,
Craig Sedmak, Stephanie
Sedmak, and Wesley Nau v. John
Ramaci, et al - C.A. No.: 2013-
CP-10-4874

Good afternoon.

I contacted the Charleston Clerk of Court to request potential open dates the trial of this case. Julie Armstrong informed me that the only available date during the months of May and June is the week of June 5th – 9th. I believe this is the earliest available date.

Luke M. Allen

Law Clerk to the Hon. Maité
Murphy

P.O. Box 802
5200 E. Jim Bilton Blvd.
St. George, SC 29477

Office: (843) 832-0391

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## **Exhibit D**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
BYRDNEST, LLC, CRAIG SEDMAK, )  
STEPHANIE SEDMAK, AND WESLEY )  
NAU, )

PLAINTIFFS, )

VS. )

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

DEFENDANTS. )

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

**PLAINTIFFS' MOTION PURSUANT TO  
RULES 16 AND 42, SCRPC, AND RULES  
205 AND 241, SCACR, TO SEVER AND TO  
SET FOR TRIAL PLAINTIFFS' CLAIMS  
OR, IN THE ALTERNATIVE, TO LIFT  
AUTOMATIC STAY AND SET  
PLAINTIFFS' CLAIMS FOR TRIAL**

YOU WILL PLEASE TAKE NOTICE that the Plaintiffs will move, ten (10) days or as soon thereafter as counsel may be heard, for an order severing (if necessary) the Plaintiffs' claims and setting them for trial in June, 2017, as proposed; announcing that the Court has retained jurisdiction over the Plaintiffs' claims, and that Plaintiffs' claims are unaffected by Defendant Jonathan Ramaci's pending appeal; or, in the alternative, lifting the automatic stay to the extent the Court concludes that it applies to the Plaintiffs' claims, severing them if necessary, and setting them for trial in June, 2017. The Plaintiffs move pursuant to Rules 16 and 42 *SCRCP*, and Rules 205 and 241 *SCACR*, and for the reasons set forth below.

**I. Under Rule 205, the Plaintiffs' claims should proceed to trial in June, because these claims are "matters not affected by the appeal."**

In circumstances like those at hand—i.e., when a litigant appeals just one of dozens of issues in multi-party, multi-claim litigation—Rule 205, *SCACR*, expresses our judicial system’s clear preference that trial courts proceed with the parts of the case that are not related to the appeal.

The Plaintiffs respectfully assert that their claims fall into this category. Here is Rule 205's text:

**RULE 205  
EFFECT OF APPEAL**

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

The language announcing this Court's authority to proceed is unusually blunt: "*Nothing in these rules*" shall be treated as a bar to the Court's hearing matters unrelated to the appeal: not Rule 205's first sentence, which vests exclusive jurisdiction in the appellate courts (for matters at issue in the appeal); nor Rule 241, cited by Ramaci, which enacts an automatic stay (but only, contrary to Ramaci's overly broad interpretation, of the trial court's carrying out or execution of specific relief granted in the order). Read together the Rules' intent is clear: though this Court has no authority to act in respect to the matters actually affected by the appeal, its authority to act in respect to matters not actually affected by the appeal continues unabated.

As Ramaci knows, the only aspect of the Order legitimately under appeal (Exhibit #1: Appeal, with Order attached) is Section III, in which the Court denied Ramaci's motion to enjoin Ulm's Family Trust from assigning its iCache shares to Ulm.<sup>1</sup> We know that the appeal concerns only Section III—and thus can affect only matters related to Section III—because *only Section III is immediately appealable*. See *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015)(itemizing the immediately appealable, non-final orders under South Carolina law). *Morrow* identifies, among the exclusive list, the denial of a motion for injunctive relief, which is the subject of Section III. But *Morrow*'s list plainly does not include the

---

<sup>1</sup> Indeed, the baseless motion for injunctive relief appears to be Ramaci's latest procedural gambit to prevent the case from getting to trial.

Court's rulings in Section I of the Order (denying Ramaci's motions for summary judgment); the Court's rulings in Section II (granting Ramaci's motions for judgment on the pleadings as to certain causes of action; denying it as to others); or the Court's rulings in Section IV (denying another of Ramaci's frivolous motions: that his second attorney be permitted to take the same depositions that his first attorney already had taken).

In seeking to delay the entire case, Ramaci asks the Court to validate his elevation of form over substance: the Notice of Appeal states by its terms that it appeals the Order in its entirety, *ergo* for Rule 205 purposes, the Court should conclude that the appeal might affect matters related to all of the Order's rulings- not just those in Section III. But, to the contrary, the leading case law on Rules 205 and 241 instructs that only the portions of the order actually, substantively at issue in the appeal should be given consideration for Rule 205 purposes. In *Tillman v. Oakes*, the Court of Appeals reversed a trial court, which had declined to act, because it found that the Petitioner's request was a matter affected by the appeal. The Court of Appeals explained the trial court's error:

The order on appeal in this case changed custody from Oakes to Tillman and established Oakes' visitation rights. Tillman's petition relates to Oakes' visitation rights. It would appear at first, therefore, that the appeal affected Oakes' visitation rights, and the family court did not retain the power to proceed. However, answering the question of whether a matter is "affected by the appeal" requires a closer examination of the appeal. Oakes challenges only the custody portion of the order in her appeal... Tillman did not file an appeal. Thus, there is no action the appellate courts could take resolving this appeal that would affect the visitation established in the appealed order...

*Tillman v. Oakes*, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012).

The *Tillman* court's rationale is directly on point to the matter at hand. As in *Tillman*, in this case the Order appealed makes rulings that concern the Plaintiffs' claims—at Sections I and II—so “it would appear at first” that the Plaintiffs' claims are matters than can be “affected by the

appeal.” But upon the “closer examination of the appeal” that *Tillman* requires, one sees that the appeal does not concern the portions of the Order (Sections I and II) which, were an appellate court to consider them, could affect the Plaintiffs’ claims. We know that the appellate courts will not consider Sections I and II, because those portions of the Order are not immediately appealable. So here, just as in *Tillman*, “there is no action the appellate courts could take resolving this appeal that would affect” the trial court petition, which in this case is the Plaintiffs’ request to proceed promptly to trial on their claims.

Simply put, the only matter the Court of Appeals can or will take up is the Court’s denial of Ramaci’s motion to enjoin the assignment of Ulm’s trust’s shares; thus, for purposes of Rule 205 the only matters in this case that can even theoretically be “affected by the appeal” are the cross-claims of Defendant Ulm against Ramaci. In light of this, the Court should conclude that the Plaintiffs’ claims are matters unaffected by the appeal, and set them for trial in June.

**II. Should the Court find that an automatic stay applies, the Court should lift the stay for matters unaffected by the appeal, as contemplated under 241(c) and (d)**

***A. The automatic stay, to the extent it exists, does not affect the Plaintiffs’ claims, and accordingly does not limit the Court’s ability to set this case for trial.***

As an initial matter, Ramaci’s reliance on Rule 241’s automatic stay provision is misplaced and erroneous. First, “the existence or nonexistence of a stay under Rule 241 does not control the [trial] court’s power to proceed with the action and address matters not affected by the appeal.” *Id.* at 255, 728 S.E.2d at 51. Second, the stay is far less broad than Ramaci asserts: the automatic stay does not freeze the case in time; its effect, far less drastic, is simply that “the appealed order may not be carried out or enforced during the pendency of the appeal.” *Id.* at 257, 728 S.E.2d at 51. In other words, the thing stayed is not the case as a whole, but the hand of a trial court which otherwise would carry out or enforce the specific relief meted out in the order. “This is the purpose

of a stay under Rule 241—to determine whether the appealed order may be carried out or enforced—not to determine whether the action may proceed in the lower court while the appeal is pending.” *Id.* The time-sensitive nature of each of Rule 241’s exceptions to the automatic stay—ejectment orders; orders authorizing the sale of perishable goods; family court orders concerning a child—illustrate that it is the particular relief ordered that is stayed, not the case as a whole. Likewise, the last sentence in 241(a) echoes and reinforces Rule 205’s instruction that trial courts proceed in the ordinary course with matters unaffected by the appeal: “The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.”

Applying these legal principles to the matter at hand, we see that, even if the court finds that the automatic stay exists, it does nothing more than stay the Court’s ability to enforce or to carry out the specific relief granted in Section III of the Order.<sup>2</sup> Fortunately for those wishing to prosecute this nearly four-year-old case to its conclusion, Section III grants no relief that can be stayed: Section III does nothing beyond simply denying Ramaci’s request for injunctive relief. To the extent Ramaci contends he is entitled to a stay of the Court’s denial of injunctive relief, the Plaintiffs would disagree but ultimately would not care because that injunctive relief, no matter what its status—granted, denied, stayed, appealed, reversed, affirmed, or otherwise—has no effect on the Plaintiffs’ claims. No action the Appellate Court can take in respect to Section III can affect the Plaintiffs’ claims.

***B. Even if the automatic stay applies, initially, to the Plaintiffs’ claims, the Court should exercise its prerogative to lift the stay and set the Plaintiffs’ claims for trial.***

As set forth above, though the appeal ostensibly is of the entire Order, applicable law limits

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<sup>2</sup> As discussed above, Sections I, II and IV concern matters which are not appealable and which, accordingly, play no part in the appeal and can be ignored for Rule 205 and Rule 241 purposes.

its substance to Section III's denial of Ramaci's motion for injunctive relief.<sup>3</sup> Thus, even in the event that the Court finds that Rule 241(a)'s automatic stay applies, initially, to all matters addressed in the Order, Rule 241(c) and (d) provide the mechanism for this Court to lift the stay, when doing so would effectuate the Rules' intent that the trial court proceed with shepherding forward claims which, like the Plaintiffs', have no genuine susceptibility to being "affected by the appeal."

This intention is writ large all over the Rules: not just 205, but in 241(a) (the "automatic stay continues in effect...unless lifted by order of the lower court" which "retains jurisdiction over matters not affected by the appeal"); Rule 241(c) (after the notice of appeal is filed "any party may move for an order lifting the automatic stay"); Rule 241(d)(1), which requires that the motion to lift the stay "must first be made to the lower court...which entered the order or decision on appeal." Case law confirms the propriety of this approach: "[A]n automatic stay under Rules 205 and 241 is not unassailable: a party to the action need only petition...the trial court...for an order lifting the stay." *In Estate of Connor*, Opinion No. 2009-UP-502 (S.C. App. 10/29/2009) (Ct. App. 2009)

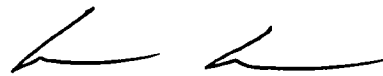
The circumstances at hand are the classic instance of why these procedures exist: the Plaintiffs' claims are the very definition of matters which are not affected by the appeal. Plaintiffs' claims are the substance of this case: the subject matter over which tens of thousands of pages of documents have been exchanged, a dozen depositions taken, a dozen motions filed and decided. Ulm's taking assignment of the iCache shares from a Trust, by contrast, is a sideshow, a minimally connected distraction, an essentially unrelated throw-in to the case. In no sense, in no conceivable way do the Plaintiffs' claims—that Ramaci made material misrepresentations in soliciting the Plaintiffs' investment, and that Ulm and Scott, as iCache directors, are jointly responsible—

---

<sup>3</sup> Plaintiffs' counsel respectfully requests that the Court postpone its ruling on this issue until it has had an opportunity to consider Ramaci's appellate brief, in which the appeal's substance will be revealed.

involve or relate to or depend upon whether the Ulm Family Trust could assign iCache shares to Ulm himself. As a result, the only appealable finding or ruling in the Order—the Court’s declining to enjoin the Ulm Family Trust/Ulm assignment—has no bearing whatsoever on the Plaintiffs’ claims. Accordingly, even if as an initial matter the automatic stay applies to the Plaintiffs’ claims—in whole or in part—the Plaintiffs respectfully urge the Court to deploy the authority vested in it by Rule 241(c) and (d); to lift the stay as to the Plaintiffs’ claims; and to set this 2013 civil action for trial in June, as proposed.

BEN TRAYWICK LAW FIRM, LLC



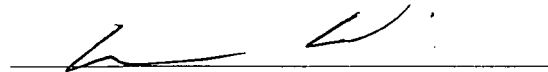
Benjamin A.C. Traywick  
Alexandra Scott Williams  
171 Church Street, Suite 340  
Charleston, SC 29401  
Telephone: 843-872-1709  
Fax: 843-695-7839  
ben@bentraywicklaw.com  
ali@bentraywicklaw.com

Attorneys for the Plaintiffs

March 24, 2017  
Charleston, South Carolina

#### CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed and/or emailed to all counsel of record in this proceeding this 24th day of March, 2017.



## **Exhibit E**

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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:

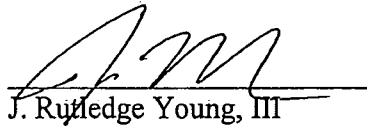
YOU WILL PLEASE TAKE NOTICE that Defendant Billy Ulm, by and through his  
undersigned counsel, will move this Court to enter an Order, pursuant to Rules 17 and 21 of the  
South Carolina Rules of Civil Procedure, substituting "The William L. Ulm, Sr. 2006 Delaware  
Trust" ("the Trust") for Defendant 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](mailto:ryoung@duffyandyoung.com)  
[jmoore@duffyandyoung.com](mailto:jmoore@duffyandyoung.com)

*Attorneys for Defendants  
Richard Scott and Billy Ulm*

December 21, 2015

## **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, )  
 )  
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. ARMSTRONG  
CLERK OF COURT  
BY

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.<sup>1</sup> (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

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<sup>1</sup> 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.<sup>2</sup>

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.

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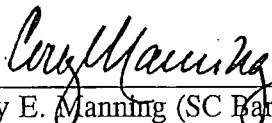
<sup>2</sup> On November 25, 2015, Defendant Ramaci filed a Motion for Judgment on the Pleadings Pursuant to Rule 12(C) as to Certain Causes of Action in Defendant Ulm's Cross Claim. Defendant Ramaci moved for Judgment on the pleadings on Ulm's cross-claims for breach of fiduciary duty and negligence 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: \_\_\_\_\_

  
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*Attorneys for Jonathan Ramaci*

Columbia, SC  
February 3, 2016

## **Exhibit G**

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

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

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

Plaintiffs,

v.

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 2:46  
JULIE J. CLEGG  
BY

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), SCRCP.

### **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.").<sup>1</sup>

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

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<sup>1</sup> 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).<sup>2</sup> 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

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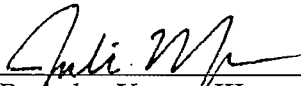
<sup>2</sup> Defendant Ulm notes that Ramaci's argument cites and relies upon Delaware's Tooley case, which has not been cited or adopted by any state or federal South Carolina court.

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.

  
\_\_\_\_\_  
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*Attorneys for Defendants  
Richard Scott and Billy Ulm*

## **Exhibit H**

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 MOTION FOR  
PERMANENT INJUNCTION**

FILED  
2016 FEB 25 AM 10:52  
CLERK OF COURT  
JUDICIAL CIRCUIT  
NINTH

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

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*Attorneys for Jonathan and Haverly Ramaci*

Columbia, SC  
February 24, 2016

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.<sup>1</sup>
- 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

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<sup>1</sup> 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.<sup>2</sup>

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<sup>2</sup> 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,<sup>3</sup> 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

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<sup>3</sup> 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.).<sup>4</sup>

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

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<sup>4</sup> 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.<sup>5</sup>

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

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<sup>5</sup> 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.<sup>6</sup> 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

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<sup>6</sup> 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.<sup>7</sup> 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.

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<sup>7</sup> 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.)<sup>8</sup> 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;

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<sup>8</sup> 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.)<sup>9</sup>

Ulm (and consequently the Ulm Trust)<sup>10</sup> 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.<sup>11</sup>

- 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.)

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<sup>9</sup> 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.)

<sup>10</sup> 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.

<sup>11</sup> 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.**

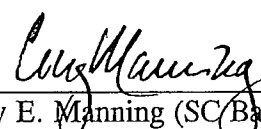
As noted at the February 24 hearing and above, counsel for Ulm withdrew this motion and is no longer seeking to substitute the Ulm Trust as the sole cross-claimant. (See E-Mail from Moore to Manning et al., February 23, 2016 ("Yes, we will be withdrawing the motion for substitution."), attached as Exhibit 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" ad Cross-Claimant," filed on February 4, 2016.

### CONCLUSION

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

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Columbia, SC  
March 24, 2016

# **Exhibit I**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Maite D. Murphy, Circuit Court Judge

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

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.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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**Statement of the Issues on Appeal**

Did the circuit court err in denying Ramaci's motion for a permanent injunction?

### Statement of the Case

Plaintiffs filed suit against Defendants Jonathan<sup>1</sup> and Haverly Ramaci, Billy Ulm, and Richard Scott on August 19, 2013, alleging numerous causes of action related to Plaintiffs' investments in, and Defendants' management of, a technology startup company known as iCache. (Compl., R. \_\_\_\_). Billy Ulm ("Ulm") filed his initial answer and a simultaneous motion to dismiss on November 14, 2013. (Ulm's Answer, R. \_\_\_\_). Ulm filed an Amended Answer and Cross-Claims on January 23, 2014, asserting causes of action against Defendant Jonathan Ramaci ("Ramaci") for negligence, breach of fiduciary duty, and negligent misrepresentation. (Ulm's Am. Answer & Cross-Claims, R. \_\_\_\_).

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 Motion"). (Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" As Cross-Claimant ("Substitution Motion"), R. \_\_\_\_). 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 p.1, R. \_\_\_\_) (emphasis added). Ramaci filed a memorandum of law in opposition to Ulm's Substitution Motion on February 4, 2016, arguing that the substitution was improper under the South Carolina Rules of Civil Procedure and barred by the statute of limitations. (Ramaci's Memo

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<sup>1</sup> The case caption in this case incorrectly spells Mr. Ramaci's first name. The parties have a pending consent motion before the circuit court to correct the caption. For purposes of this brief, the correct spelling, Jonathan, has been used throughout.

in Opp. to Substitution Motion pp. 2, 9, R. \_\_\_\_). Ramaci concurrently filed a Summary Judgment Motion as to the cross-claims asserted by Defendant Ulm on the basis of the admission in the Substitution Motion that Defendant Ulm was not the proper party to prosecute the cross-claims. (Ramaci's Motion for Summ. J. filed Feb. 4, 2016, R. \_\_\_\_).

On February 22, 2016, just two days before a hearing on the substitution motion was to take place, counsel for Defendant 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 informed the 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., R. \_\_\_\_).

The circuit court heard arguments on pending motions on February 24, 2016. (Tr. of Feb. 24, 2016 Hr'g p. 1, R. \_\_\_\_). Counsel for Ulm informed the Court and the parties to this case that it would be withdrawing the Substitution Motion. (*Id.* p. 39, R. \_\_\_\_). After learning of the withdrawal and with no other way to challenge the purported assignment, Ramaci informed the court and the parties to this action at the motions hearing that he was moving to permanently enjoin any assignment of the cross-claims because the claims were stale. (*Id.* p. 42, R. \_\_\_\_). Ramaci filed his Motion for Permanent Injunction on February 25, 2016, requesting an order from the circuit 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., R. \_\_\_\_).

By Order entered February 22, 2017, the circuit court denied Ramaci's Motion for Permanent Injunction, finding that Ramaci had failed to demonstrate irreparable harm and likelihood of success on the merits, and that Ramaci had an adequate remedy at law. (Order pp. 14-18, R. \_\_\_\_). In denying the motion for injunctive relief, the court rejected Ramaci's argument that the assigned claims were time-barred. (Order p. 17 n.2, R. \_\_\_\_). Ramaci timely appealed this Order on February 27, 2017.

### Statement of the Facts

This action arises out of Plaintiffs' purchase of shares in iCache, Inc., a technology company founded by Defendant Jonathan Ramaci to develop and market a digital wallet, known as the Geode, which attached to and interfaced with the Apple iPhone 4. (Ramaci Memo in Support of Summ J. filed Feb. 18, 2016 p. 1, R. \_\_\_\_). Plaintiffs each invested various amounts in iCache in early 2012: Craig Sedmak ("Sedmak") invested \$300,000 on February 1, 2012; Jeff Byrd ("Byrd"), as manager of Byrdnest, LLC, invested \$500,000 on February 27, 2012; and Wesley "Nau" invested \$50,000 on March 2, 2012. (Ramaci Memo in Support of Summ J. filed Feb. 18, 2016 p. 2, R. \_\_\_\_). Ulm, by and through the Trust, and Richard Scott ("Scott") also invested in iCache, each on two separate occasions. (Ramaci Memo in Support of Summ J. filed Feb. 18, 2016 Ex. 4, R. \_\_\_\_). Richard Scott invested \$500,000 on March 21, 2011, and another \$600,000 on September 23, 2011. (*Id.*, R. \_\_\_\_). On May 2, 2011, \$500,000 was invested by and through the Trust, and another \$200,000 was invested by and through the Trust on December 19, 2011. (*Id.*, R. \_\_\_\_).

By the middle of 2012, a series of macroeconomic events threatened to derail iCache's successful release of the Geode, including Apple's release of the iPhone 5 that required a new hardware interface for the Geode, the removal from the market of key security technology used in the Geode prototypes, and problems in the functionality of the Geode dynamic card developed by a supplier. (Ramaci Memo in Support of Summ. J. filed Feb. 18, 2016 p. 2, R. \_\_\_\_). In an effort to address these changes, Ramaci resigned as the CEO of iCache and assumed a new position as iCache's Chief Innovation and Design Officer ("CIDO") on October 25, 2012, as part of a realignment plan enabling him to focus on product development. (Ramaci Memo in Support of Summ. J. filed Feb. 18, 2016, Ramaci Aff. ¶ 5, R. \_\_\_\_). At this time, Ramaci remained the majority

shareholder of the company. (Ramaci Memo in Support of Summ. J. filed Feb. 18, 2016, Ramaci Aff. ¶ 7, R. \_\_\_\_).

In December 2012, Byrd and Scott approached Ramaci about his ownership of shares in and control of iCache, after which a dispute ensued. (Jeff Byrd, August 13, 2015 Depo. at 121:17-122:15, R. \_\_\_\_; Richard Scott, June 17, 2015 Depo. at 151:10-152:23, R. \_\_\_\_). Scott and Byrd demanded a recapitalization of iCache in order to raise additional money for the company to redesign the product for the iPhone 5 and to sustain business operations. (Ramaci Memo in Support of Summ. J. filed Feb. 18, 2016, Ramaci Aff. ¶ 14, R. \_\_\_\_). After negotiations with Scott and Byrd, Ramaci ultimately agreed to relinquish stock he owned in iCache and forgive documented debt owed to him by the company. (Ramaci Memo in Support of Summ. J. filed Feb. 18, 2016, Ramaci Aff. ¶ 15, R. \_\_\_\_). The new leadership team of Scott (still leading the company in his authority as Chairman of the Board of Directors) and Ulm, with the assistance of Byrd and Sedmak, was unable to lead the company successfully, and the Geode was never delivered to market. (Ramaci Memo in Support of Summ J. filed Feb. 18, 2016 p. 3, R. \_\_\_\_).

On August 19, 2013, Plaintiffs filed this action against Defendants Jonathan and Haverly Ramaci, Ulm, and Scott seeking to recover for the loss of their investment as the result of the alleged mismanagement of the company by Defendants, and for the alleged wrongful inducement of their investments in iCache based on misrepresentations purportedly made by Ramaci. (Compl., R. \_\_\_\_). Plaintiffs have asserted numerous causes of action related to Plaintiffs' investment in, and Defendants' alleged mismanagement of, iCache, including claims for negligent misrepresentation, negligence, breach of fiduciary duty, conversion, fraud, violation of the South Carolina Uniform Securities Act, violation of the South Carolina Unfair Trade Practices Act, and equitable claims under the doctrines of unjust enrichment, restitution, and constructive trust.

(Compl., R. \_\_\_\_). Ulm subsequently asserted cross-claims against Ramaci for negligent misrepresentation, negligence, and breach of fiduciary duty premised on allegations substantially similar to Plaintiffs' allegations for the same causes of action. (Ulm's Am. Answer & Cross-Claims, R. \_\_\_\_).

Nearly two and a half years after this case was filed, Ulm attempted to substitute the Trust as the proper cross-claimant because the shares in iCache were purchased by the Trust and not Ulm individually. (Substitution Motion, R. \_\_\_\_). On February 4, 2016, Ramaci filed a memorandum in opposition to the Substitution Motion, in which he objected to the substitution as improper under the South Carolina Rules of Civil Procedure and because the claims were time barred, and reasserted his position that the cross-claims for negligence and breach of fiduciary should be dismissed as improperly pled derivative claims. (Ramaci's Memo in Opp. to Substitution Motion, R. \_\_\_\_). Ramaci also simultaneously filed a Motion for Summary Judgment against Defendant Ulm on the grounds that Defendant Ulm lacked standing to pursue the cross-claims based on the admission in his Substitution Motion that he did not own the shares in iCache. (Ramaci's Motion for Summ. J. filed Feb. 3, 2016, R. \_\_\_\_). Ramaci had previously moved for judgment on the pleadings as to certain causes of action asserted by both Plaintiffs and Defendant Ulm as improperly pled derivative claims, which was pending at this time. (Motion for J. on the Pleadings Pursuant to Rule 12(c) as to Certain Causes of Action in Plaintiffs' Compl. filed November 25, 2015, R. \_\_\_\_, and Motion for J. on the Pleadings Pursuant to Rule 12(c) as to Certain Causes of Action in Defendant Ulm's Cross-claim filed November 25, 2015, R. \_\_\_\_).

The circuit court had previously scheduled a motions hearing for February 24, 2016 to hear all pending motions. (Tr. of Feb. 24, 2016 Hr'g, R. \_\_\_\_). A mere two days before this scheduled motions hearing, counsel for Defendant 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. (Ulm's Memo in Opp. to Motion for Summ. J., R. \_\_\_\_). In this response, Defendant Ulm abruptly informed the Court and the parties to this case that the Trust had executed an Assignment of Claims, whereby the Trust purported to assign its rights to prosecute the cross-claims to Ulm on February 19, 2016, in exchange for ten dollars. (Ulm's Memo in Opp. to Motion for Summ. J. p. 4, R. \_\_\_\_). In other words, rather than join the Trust as a party to prosecute its claims, Defendant Ulm instead had an assignment executed whereby the Trust purported to assign its rights to prosecute claims related to iCache to Ulm individually.<sup>2</sup> However, at the time the Assignment of Claims was executed, the claims purportedly assigned were barred by the applicable three year statute of limitations, and the negligence and fiduciary duty claims were derivative and could not be asserted by Defendant Ulm regardless of the impropriety of the assignment.

At the scheduled motions hearing just two days later, counsel for Ulm notified the Court and the parties in this case that he was withdrawing the Substitution Motion. (Tr. of Feb. 24, 2016 Hr'g p. 39, R. \_\_\_\_). When Defendant Ulm withdrew the substitution motion on the basis of the purported assignment, Ramaci was left with no choice but to seek to permanently enjoin the assignment of the time-barred claims and derivative claims or alternatively, to prohibit Ulm from seeking to assert any claims allegedly acquired from the purported assignment.

In an omnibus order entered February 21, 2017 ("Order"), the circuit court dismissed certain claims on various grounds. (Order, R. \_\_\_\_). Specifically, Plaintiffs' cause of action for violation of the South Carolina Unfair Trade Practices Act against all Defendants, and their

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<sup>2</sup> Additionally, under the terms of the Assignment of Claims, the Trust retained ultimate ownership over the iCache shares. (Assignment of Claims, R. \_\_\_\_).

Securities Act claim against Haverly Ramaci only, were dismissed upon consent and agreement of Plaintiffs. (Order pp. 10-11, 13, R. \_\_\_\_). The Court also dismissed Plaintiffs' conversion claim against Jonathan and Haverly Ramaci,<sup>3</sup> and Defendant Ulm's cross-claim for negligence against Jonathan Ramaci, as improperly pleaded derivative claims. (Order pp. 11-12, R. \_\_\_\_). Finally, the court dismissed Plaintiffs' equitable claims against all defendants, finding there was an adequate remedy at law.<sup>4</sup> (Order p. 13, R. \_\_\_\_).

Importantly, the court also denied Ramaci's Motion for Permanent Injunction, finding that Ramaci had failed to demonstrate irreparable harm and likelihood of success on the merits, and that Ramaci had an adequate remedy at law. (Order pp. 14-18, R. \_\_\_\_). Further, the court rejected Ramaci's argument that the assigned claims were time-barred and that he should be granted relief as a matter of law on this issue in determining that injunctive relief was not warranted. (Order p. 17 n.2, R. \_\_\_\_). The Court also rejected the claim that the breach of fiduciary duty cross-claim was derivative and that Ulm lacked standing to assert such claim since he did not own the stock at the time of the conduct complained of. (Order pp. 12, 14, R. \_\_\_\_). Ramaci timely appealed this Order on February 27, 2017. The denial of this motion for permanent injunctive relief is at issue on appeal.

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<sup>3</sup> However, the court's Order is inconsistent as to the propriety of Plaintiffs' conversion claim against Haverly Ramaci, as the court denied Haverly Ramaci's summary judgment motion as to the conversion claim, but later in the Order stated the claim was dismissed in its findings on the Ramaci Defendants' Motion for Judgment on the Pleadings as to certain claims by Plaintiffs. (Order pp. 11, 13, R. \_\_\_\_). Given this inconsistency, it is unclear if the conversion claim remains pending against Haverly Ramaci.

<sup>4</sup> The remaining viable causes of action include Plaintiffs' claims for negligence, negligent misrepresentation, and violation of the Securities Act against Defendants Ulm, Scott, and Jonathan Ramaci; Plaintiffs' claim for fraud against Jonathan Ramaci; Plaintiffs' claim for breach of fiduciary duty against all defendants; Plaintiffs' claim for conversion against Defendants Ulm and Scott; and Defendant Ulm's cross-claims for negligent misrepresentation and breach of fiduciary duty against Jonathan Ramaci. (See Order, R. \_\_\_\_).

## Argument

The circuit court erred in its analysis and denial of Ramaci's motion for permanent injunctive relief. Actions for injunctive relief are equitable in nature, and this court may make factual findings based on its own view of the preponderance of the evidence. *Shaw v. Coleman*, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct. App. 2007) ("In an action in equity tried by the judge without a reference, we have jurisdiction to find facts in accordance with our own view of the preponderance of the evidence." (quoting *LeFurgy v. Long Cove Club Owners Ass'n*, 313 S.C. 555, 557, 443 S.E.2d 577, 578 (Ct. App. 1994))). This court will also reverse a circuit court's decision if it is based on an error of law. *S.C. Dep't of Transp. v. Horry Cty.*, 391 S.C. 76, 82, 705 S.E.2d 21, 24 (2011) (citing S.C. Const. art. V, § 5).

### **I. The Circuit Court Applied the Wrong Legal Standard in Determining Whether to Grant the Permanent Injunction.**

The circuit court applied the incorrect legal standard when considering whether to grant the permanent injunction, applying the standard for a preliminary injunction instead. In denying Ramaci's motion for permanent injunction, the circuit court stated that "[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." (Order p. 14, R. \_\_\_\_). However, as several decisions of the South Carolina Supreme Court indicate, this standard is applicable only to petitions for *preliminary* injunctive relief, and not the permanent injunctive relief Ramaci seeks. See *Compton v. S.C. Dep't of Corr.*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) ("An applicant for a *preliminary* injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. Accordingly, the applicant must establish three elements to receive this relief: (1) he will suffer immediate,

irreparable harm without the injunction; (2) he has a likelihood of success on the merits; and (3) he has no adequate remedy at law.” (internal citation omitted) (emphasis added)); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010) (“A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” (emphasis added)); *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004) (“For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law.” (emphasis added)).

Contrary to the circuit court’s Order, Ramaci was not required to show a likelihood of success on the merits, as this is not an element that must be proven for a permanent injunction. *See Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12 (1987) (noting that “[t]he standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success”). Instead, under the correct standard for permanent injunction, the party seeking permanent injunctive relief must show:

(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) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Furthermore, 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*, 191 S.C. 205, 4 S.E.2d 13, 16 (1939).

The circuit court committed an error of law in applying the incorrect legal standard to Ramaci's motion for permanent injunction, and its decision denying Ramaci's motion for permanent injunction should be reversed.

## **II. The Circuit Court Erred in Denying Ramaci's Motion for Permanent Injunction on the Merits.**

The circuit court further erred in denying Ramaci's motion for permanent injunctive relief on the merits. As a threshold issue, the circuit court erred in finding that the cross-claims purportedly assigned were not time barred. The record in this case makes it clear that Ulm knew or should of known of a potential right to assert the causes of action he now seeks to assert more than three years before the attempted substitution and later assignment of claims. Thus, at the time the Assignment was executed, the cross-claims it purportedly assigned were barred by the applicable statute of limitations. The Trust could not resuscitate these time-barred claims by simply assigning them to Ulm. Furthermore, South Carolina Rule of Civil Procedure 17 does not apply to confer real party in interest status upon Ulm or allow him to circumvent the statute of limitations applicable to the cross-claims.

Applying the correct legal standard, Ramaci has proven that he is entitled to permanent injunctive relief barring the Assignment of Claims and any attempts by Ulm to assert the claims purportedly assigned because he will be irreparably harmed if Ulm is allowed to assert the time-barred cross-claims that were improperly assigned, for which he has no adequate legal remedy. Furthermore, considering the balance of hardships and the public interest, a permanent injunction is warranted in this case.

Finally, the circuit court should have, at the very least, enjoined Ulm from asserting the negligence and breach of fiduciary duty cross-claims, which are derivative claims, under the contemporaneous ownership requirement, and the court erred in failing to do so.

**A. The Circuit Court Erred in Finding That Ulm's Claims Were Not Time Barred.**

In denying Ramaci's Motion for Permanent Injunction, the circuit court considered but summarily dismissed Ramaci's argument that the cross-claims purportedly assigned were improper because they were time-barred at the time they were allegedly assigned by the Ulm Trust to Defendant Ulm individually. (Order p. 17 n.2, R. \_\_\_\_). The court's analysis of this issue is unsupported by the evidence. The only evidence is that the claims were tardy.

**1. At the Time of the Assignment of Claims, Any Claims the Trust Could Conceivably Assert Were Expired.**

The Trust purports to assign claims that are barred by the applicable three-year statutes of limitations. In his Amended Answer and Cross-Claim, Defendant Ulm asserted cross-claims against Ramaci for negligent misrepresentation, negligence, and breach of fiduciary duty, each of which has a three-year statute of limitations. (Ulm's Am. Answer & Cross-Claim, R. \_\_\_\_). See S.C. Code Ann. § 15-3-530(5) (providing three-year statute of limitations for tort actions); *Moore v. Benson*, 390 S.C. 153, 160, 700 S.E.2d 273, 277 (Ct. App. 2010) (citing three-year statute of limitations in breach of fiduciary duty action). According to Defendant Ulm's Amended Answer and Cross-Claims, Ulm purchased shares of iCache stock in April 2011 and December 2011. (Ulm's Am. Answer & Cross-Cl. ¶ 65, R. \_\_\_\_). In his Substitution Motion filed more than a year later, Defendant Ulm conceded that it was the Ulm Trust that actually purchased these interests in 2011. (Substitution Motion p. 1, R. \_\_\_\_). The three-year statute of limitations for causes of action arising from such purchases has now expired—and was expired at the time of the purported

Assignment of Claims from the Trust to Ulm in February 2016. Thus, the Trust is barred from bringing any action relating to these purchases.

The Trust is also barred from bringing any of the actions Ulm seeks to assert against Ramaci even if the statute of limitations was tolled by the discovery rule. South Carolina recognizes the discovery rule, whereby “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.*, 313 S.C. 520, 524, 443 S.E.2d 537, 539 (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).

Even if the discovery rule were applied in this case, the undisputed facts show that the Trust was aware, or could have been aware through the exercise of reasonable diligence, of a possible cause of action more than three years ago. In his Amended Answer and Cross-Claims, Defendant 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, and that 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. (Ulm's Am. Answer & Cross-Claim ¶¶ 65, 71, R. \_\_\_\_).

Ulm (and consequently the Ulm Trust)<sup>5</sup> was on notice of any potential causes of action against Ramaci based on this alleged conduct relating to iCache more than three years ago. Most notably, 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, R. \_\_\_\_). 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, and in fact owed a duty under the law to do so. See S.C. Code Ann. § 33-8-300 (providing that "[a] director shall discharge his duties as a director, including his duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders"). 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., (Compl. ¶¶ 7, 10, 16, & 18).

Notwithstanding Ulm's failure to exercise reasonable diligence while a board member, the undisputed record shows that Ulm had knowledge of the allegations 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 concern

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<sup>5</sup> 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 p.1) (emphasis added). Thus, any knowledge that Ulm has regarding the allegations in his cross-claim is properly attributed to the Ulm Trust.

regarding alleged inaccuracies in the company financials. (Ulm Depo. at 55:8-58:6 dated July 24, 2015, R. \_\_\_\_).

- 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-claims, notably his inability to make informed decisions, the lack of board meetings, and the unavailability of financial information on the status of the company. (November 18, 2012 e-mail from Billy Ulm to Richard Scott, R. \_\_\_\_).
- 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., R. \_\_\_\_, and December 9, 2012 email from Richard Scott to Billy Ulm, R. \_\_\_\_).
- 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, R. \_\_\_\_).
- 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., R. \_\_\_\_). 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., R. \_\_\_\_).
- 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., R. \_\_\_\_).
- 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, R. \_\_\_\_).
- 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 Depo. dated July 24, 2015 at 29:18-30:2, 17:25-18:2, R. \_\_\_\_).
  - 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 Depo. dated July 24, 2015 at 18:3-18:4, 134:3-134:16, R. \_\_\_\_).
  - 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 Depo. Dated July 24, 2015 at 16:23-18:21, 142:22-143:14, R. \_\_) (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. *See* (Ulm Depo. dated July 24, 2015 at 29:18-30:2, 17:25-18:2, R. \_\_). 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. (November 18, 2012 e-mail from Billy Ulm to Richard Scott, R. \_\_). Ulm was also included in communications with Richard Scott and others in December 2012, after iCache began to falter, from which he received company financials, letters setting forth 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*, 313 S.C. at 524, 443 S.E.2d at 539.

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-claims 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, at the time the Assignment of Claims was executed, the claims purportedly assigned to Ulm by the Trust, having accrued more than three years ago, were time barred and could not be properly assigned.

## **2. The Trust Could Not Resuscitate the Time Barred Claims Through the Purported Assignment.**

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.*, 316 S.C. 199, 201-02, 447 S.E.2d 869, 870 (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.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992) (“[T]he assignee of a non-negotiable chose in action takes it subject to all equities and defenses which could have been set up against the assignor at the time of the assignment”). Thus, the Assignment of Claims conveyed to Ulm only those rights that the Trust possessed at the time of the conveyance, and the issue 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.”).

At the time of the conveyance, the claims the Trust sought to assign were barred by the three year statute of limitations, meaning the Trust, and consequently Ulm as the assignee, had no rights to enforce through the purported assignment, as Ulm cannot acquire any greater rights in the claims than those the Trust possessed. The claims of the Trust, which were purportedly conveyed to Ulm in the Assignment of Claims for ten dollars,<sup>6</sup> cannot receive a longer statute of limitations merely because they were assigned to Ulm, as it is well settled that an assignment of claims cannot be used to resuscitate time barred claims after the statute of limitations has run. *See Murphy*, 657 F. Supp. 2d at 692 n.2 (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 limitations beyond November 1, 1949, so that the applicable

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<sup>6</sup> Not only was the purported assignment invalid because the claims were time barred at the time of execution, the purchase of the right to prosecute the claims by Ulm for ten dollars is improper as barratry. *See* S.C. Code Ann. § 16-17-10 (prohibiting a person from soliciting or inciting another to bring, prosecute, or maintain an action in court where that person “directly or indirectly pays or promises to pay any money or other thing of value to any other person to bring about the prosecution or maintenance of such an action”).

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 \*2, 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.").

In its Order, the circuit court found that "at the time of the Trust's assignment of the crossclaims to Ulm, the statute of limitations defense did not bar the claims of the assignor Trust because the Ulm crossclaims had already been filed within the three-year statute of limitations prescribed by Section 15-3-530 of the South Carolina Code." (Order p. 6, R. \_\_\_\_). However, the court's focus on whether Ulm's initial cross-claims were filed within the three year statute of limitations ignores the fact that Ulm did not have standing to assert those claims when they were filed and could not subsequently obtain standing by way of an improper and invalid assignment *after* the statute of limitations had run and the claims purportedly being assigned were time barred. The Ulm Trust cannot avoid this statute of limitations bar through an assignment of its claims.

The fact that Ulm asserted someone else's cross-claims within the three year statute of limitations does not automatically give the Trust the ability to resuscitate time barred claims or assign rights it did not have. 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 the Trust's assignment were considered valid, Defendant Ulm's cross-claims should have been dismissed as barred by the applicable statute of limitations.

**3. South Carolina Rule of Civil Procedure 17 Does Not Apply to Allow the Assignment in this Case.**

In its Order, the circuit court relied on *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 84 (D.S.C. 1979), *affd sub nom.*, *Campus Sweater & Sportswear Co. v. M.B. Kahn Const. Co.*, 644 F.2d 877 (4th Cir. 1981) in noting that the purported assignment "was not required to be executed before the commencement of litigation." (Order p. 5, R. \_\_\_\_). Such reliance is misplaced. The issue is not whether the assignment had to be executed before the commencement of litigation. Rather, the issue is whether such assignment can be effectuated when the statute of limitations has already run on the claims purportedly being assigned, which the law clearly answers in the negative. Importantly, *Campus Sweater*, where the court did allow a party to become a real party in interest by way of an assignment, did not involve an assignment of time-barred claims, and, therefore, cannot support allowing an assignment in this case.

Moreover, Rule 17 does not allow Defendant Ulm to get around the statute of limitations bar on the purportedly assigned claims. In its Order, the circuit court found that "[w]here an action brought by one other than the real party in interest, dismissal for lack of subject matter jurisdiction is not the proper remedy." (Order pp. 4-5, R. \_\_\_\_). However, Rule 17 provides that dismissal is only inappropriate "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." Rule 17(a),

SCRCP. As Ramaci argued in his opposition to Defendant Ulm's Motion for Substitution, the Trust could not be substituted in this case because Plaintiffs have asserted claims against Defendant Ulm. Nor can the purported assignment of the claims from the Trust to Ulm be considered a proper ratification. To construe it as such would directly contradict the well-established case law that time-barred claims cannot be assigned after the statute of limitations has run. Thus, the Trust, the real party in interest, has not properly ratified commencement of the action, or been joined or substituted in this action, and Rule 17 does not apply.<sup>7</sup>

Furthermore, even if Rule 17 did apply, Ulm should not be considered the real party in interest pursuant to Rule 17(a). 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* Rule 17(a) Notes, SCRCP ("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

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<sup>7</sup> 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.

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, R. \_\_\_\_). 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 p. 1, R. \_\_\_\_). Ulm has been represented by (multiple) very able counsel throughout this matter. 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 Ulm instead of the 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.

Ulm is improperly attempting to resuscitate time-barred claims through a tortured use of Rule 17's real-party-in-interest procedures. After his first attempt through the substitution gambit was met with resistance, he then attempted 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. Such procedural gamesmanship should not be condoned. As this Court has previously noted:

[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*, 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995) (emphasis added).

This panel of the Court should refuse to do the same.

**B. The Court Erred in Allowing the Assignment of Derivative Claims Under the Contemporaneous Ownership Rule.**

The circuit court erred in denying Ramaci's request for injunctive relief as to claims that cannot be maintained by Ulm individually under the contemporaneous ownership rule. Under the terms of the Assignment of Claims, 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." (Assignment of Claims p. 1, R. \_\_\_\_ ) (emphasis added). Thus, even if the Assignment were considered valid, Ulm, individually, does not have any ownership interest in the stock. Under South Carolina law, "[t]he 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.'" *Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 589 (1952) (quoting 19 C.J.S., Corporations, § 824, page 228); *see also* Rule 23(b)(1), SCRCF (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"). As such, not only does Ulm lack proper standing to assert any derivative claims as direct claims against Ramaci, but he also lacks standing to assert any derivative claims on behalf of iCache against any of the defendants, including the negligence and breach of fiduciary duty claims, because he was not a shareholder at the time of the conduct complained of, nor did he later become one by operation of law. *See* (Ramaci's Memo in Support of Motion for Permanent Injunction pp. 7 n.4, 13 n.7, R. \_\_\_\_).

In its Order as to the Ramaci Defendants' Motion for Judgment on the Pleadings as to Certain Claims of Defendant Ulm, the circuit court found Defendant Ulm's cross-claim for negligence was an improperly pleaded derivative claim and dismissed that cause of action. (Order

p. 11, R. \_\_\_\_). However, the circuit court found “that Ulm seeks damages for Johnathan Ramaci’s breaches of fiduciary duty which induced him to invest in iCache” and that “Ulm’s claim for breach of fiduciary duty is therefore separate and distinct from the claims of other shareholders, which seek redress for diminution in stock value due to Johnathan Ramaci’s mismanagement of iCache.” (Order p. 12, R. \_\_\_\_). Thus, the circuit court allowed the breach of fiduciary duty claim to go forward as a direct claim, notwithstanding the arguments Ramaci raised in his briefing on the injunction motion that that such claim is derivative and cannot be maintained as a direct claim, and that Ulm lacks standing to bring the claim derivatively under the contemporaneous ownership rule. (Order p. 12, R. \_\_\_\_); *see also* (Ramaci’s Memo in Support of Motion for Permanent Injunction pp. 7 n.4, 13 n.7 R. \_\_\_\_). This decision was in error. In addition to being untimely, the purported assignment attempts to assign negligence<sup>8</sup> and breach of fiduciary duty claims that Ulm does not have standing to assert either directly, as they are improperly pled derivative claims, or on behalf of the corporation, as he did not own stock at the time of the conduct complained of and is barred from asserting such claims derivatively under the contemporaneous ownership rule. As such, the circuit court erred as a matter of law in denying the request for a permanent injunction.

“In order to determine whether a claim is direct or derivative, the Court looks to the nature of the harm and the relief available upon success of the suit.” *Manzo v. Rite Aid Corp.*, No. CIV. A. 18451-NC, 2002 WL 31926606, at \*5 (Del. Ch. Dec. 19, 2002), *aff’d*, 825 A.2d 239 (Del. 2003).<sup>9</sup> For a shareholder’s claim to be considered direct as opposed to derivative, “[t]he

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<sup>8</sup> The circuit court properly held that the negligence claim was a derivative claim and dismissed it. *See* (Order p. 11, R. \_\_\_\_).

<sup>9</sup> South Carolina courts frequently look to the laws of other states, particularly Delaware, in the absence of applicable precedent under South Carolina law. *See Santee Oil Co., Inc. v. Cox*, 265 S.C. 270, 272-73, 217 S.E.2d 789, 791 (1975) (“No prior decision of this Court has come to our attention which is at all helpful, but courts of other states, particularly the courts of Delaware, the

stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004); *see also Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (noting that "an individual stockholder has no right to bring an action in his own name and in his own behalf for a wrong committed solely against the corporation." (quoting 19 Am. Jur. 2d Corporations § 2245, at 147-48 (1986))).

Claims of alleged mismanagement and misappropriation of corporate assets are derivative in nature. *See Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that "where a plaintiff shareholder claims that the value of his stock will deteriorate and that the value of his proportionate share of the stock will be decreased as a result of alleged director mismanagement, his cause of action is derivative in nature") (quoting *Lewis v. Spencer*, 577 A.2d 753 (Del.1990)); *see also Davis v. Hamm*, 300 S.C. 284, 288, 387 S.E.2d 676, 678 (Ct. App. 1989) (discussing the "well established principle" that "the liability of directors or officers of a corporation for loss to the corporation due to their mismanagement is an asset of the corporation and that any recovery on such a cause of action belongs solely to the corporation"). Indeed, under South Carolina law, "[t]he liability of directors for a loss to a corporation because of their mismanagement or *breach of fiduciary duties* is an asset of the corporation and any recovery on such a cause of action belongs to the corporation." *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, No. 2:09-CV-03171-MBS, 2015 WL 5024349, at \*7 (D.S.C. Aug. 21, 2015) (emphasis added) (applying South Carolina law).

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home of so many corporations, have had fairly frequent occasion to define and apply such term under corporation law similar to ours.").

Defendant Ulm's cross-claims for negligence and breach of fiduciary duty are premised on Ramaci's alleged mismanagement of iCache and their investments. (Ulm's Am. Answer & Cross-Claim p. 8-11, R. \_\_\_\_). Indeed, the allegations as to breach of fiduciary duty and negligence, which are substantively identical, allege that Ramaci breached his fiduciary duties and acted negligently by:

- a) failing to keep adequate financial records;
- b) converting iCache funds;
- c) failing to keep the board of directors and shareholders informed of the true status of iCache operations and financial condition;
- d) refusing to conduct an audit and accounting of company financials despite requests by shareholders and directors; and
- e) diverting company funds to entities and people who were not creditors in order to benefit himself.

(Ulm's Am. Answer & Cross-Claims, ¶¶ 71, 75, R. \_\_\_\_). These are all allegations related to Ramaci's management of the company and harm that would have been suffered by the company and not Ulm individually. Furthermore, the alleged conversion of iCache funds and diversion of company funds for Ramaci's benefit are undoubtedly injuries to the corporation, and any financial loss Ulm may have suffered as the result of the same would be an injury suffered equally by all iCache shareholders.<sup>10</sup> Moreover, the only concrete loss alleged by Ulm as a result of Ramaci's

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<sup>10</sup> Plaintiffs have taken the position that this appeal does not automatically stay the entirety of this case, including trial. However, Plaintiffs' remaining claims for negligence and breach of fiduciary duty (and possibly conversion against Haverly Ramaci), which the circuit allowed to continue notwithstanding Ramaci's argument that they are improperly pled derivative claims, make similar factual allegations regarding mismanagement of the company and resulting loss of investment money. *See, e.g.*, (Compl. ¶¶ 17, R. \_\_\_\_) (describing alleged acts of negligence and breach of trust); (Compl. ¶ 21, R. \_\_\_\_) (alleging that Defendants' breaches "proximately caused the entire

misconduct—the loss of Ulm’s investment when the company failed to produce a viable product—is an injury to iCache, and is an injury suffered equally by all iCache shareholders. *See* (Ulm’s Am. Answer & Cross-Claims ¶¶ 73, 76, R. \_\_\_\_ ) (alleging “financial and other losses”); *see also* (*id.* ¶ 68, R. \_\_\_\_ ) (alleging that “Ramaci proximately caused the entire loss of Defendant Ulm’s investment”). Therefore, any right to bring an action against Ramaci for the alleged conduct belongs solely to the corporation, and the breach of fiduciary duty and negligence claims are properly considered derivative in nature. Because Ulm was not the owner of the stock at the time of the conduct complained of and ownership was not later devolved on him by operation of law since the Trust expressly maintained ownership of the stock under the terms of the Assignment of Claims, he cannot maintain a breach of fiduciary duty or negligence claim in a derivative capacity.

The circuit court’s finding that Ulm is seeking damages for alleged breaches of fiduciary duties in the wrongful inducement of Ulm’s investment ignores the fact that the “gravamen of the complaint” as to the breach of fiduciary duty and negligence claims is Ramaci’s alleged mismanagement and resulting loss to the company, which are quintessential derivative claims.<sup>11</sup> *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (“A shareholder’s suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.”); *see also* (Tr. of Feb. 24, 2016 Hr’g pp. 29-33, R. \_\_\_\_). Indeed, it would have to be, as Defendant Ulm has failed to allege a special relationship sufficient to create a fiduciary relationship between Ulm and Ramaci *prior* to his investment. To find that Ramaci owed

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loss of Plaintiffs’ investments”); (Compl. ¶ 31, R. \_\_\_\_ ) (alleging “financial and other losses”). Thus, a favorable decision from this Court on the injunction based on the derivative nature of the cross-claims would necessarily strike at the heart of Plaintiffs’ claims alleging the same conduct and injuries.

<sup>11</sup> Additionally, any claims regarding Ramaci’s alleged wrongful inducement of Ulm’s investment are subsumed by the negligent misrepresentation cross-claim he has asserted.

Ulm (or the Trust) a fiduciary duty simply because he was a potential investor would lead to the absurd result that Ramaci, and any other company founder for that matter, owes a fiduciary duty to *every person* he talks to, as anyone can be considered a potential investor. This cannot be the result the circuit court intended.

The circuit court erred in rejecting Ramaci's contention that the assignment of the derivative cross-claims, including the negligence and breach of fiduciary duty causes of action, were barred because the Trust expressly retained ownership of the shares in iCache and thus Ulm did not have standing to assert the claims. The court should have enjoined Ulm from asserting the negligence and breach of fiduciary duty claims and erred in failing to do so.<sup>12</sup>

### **III. Under the Correct Standard For Permanent Injunction, Ramaci is Entitled to Permanent Injunctive Relief.**

In order to prevail on a claim for permanent injunctive relief, a party seeking such relief must show:

(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*, 58 F. Supp. at 531 (quoting *eBay Inc.*, 547 U.S. at 391). Applying this standard, Ramaci is entitled to the permanent injunctive relief he seeks.

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<sup>12</sup> As discussed above, this Court should reverse and find an injunction should have issued because, among other things, the cross-claims are improper derivative claims. Such a ruling would necessarily and equally apply to certain of Plaintiffs' claims. This too demonstrates why the automatic stay is properly in place and has been properly followed by the trial court. As noted in footnote 10, *infra*, Plaintiffs' position that the automatic stay does not apply to their claims in this case ignores this fact. It also ignores the procedural posture of the case as pled by Plaintiffs. As of the filing of this brief, the trial court has abided by the automatic stay despite Plaintiffs' attempts to push this matter to trial, and Plaintiffs have not asked this Court or otherwise to lift the automatic stay.

**A. Ramaci Will Suffer Irreparable Harm and Has No Adequate Remedy at Law if Permanent Injunctive Relief is Not Granted.**

The South Carolina Supreme Court has noted that “whether a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law for a wrong, are questions that are not decided by narrow and artificial rules.” *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15 (1939).

The Courts proceed realistically if the threatened wrong involves actual damage; the mere uncertainty of fixing the measure of such damage to the injured party may itself be sufficient to justify the exercise of equitable jurisdiction; and if the available legal remedy in a given case reduces itself to a matter of words, rather than to a matter of efficacy, because of its impracticability, or because the threatened acts may continue during the progress of an action at law, or because successive actions at law would be necessary to protect the plaintiff’s rights, equity will hold that the existence of the legal remedy is not an obstacle to the exertion of the equitable power.

*Id.* In determining whether permanent injunctive relief is warranted, “inadequacy of damages and irreparability of harm are often treated interchangeably.” *Markets v. Maria, LLC*, No. CV 7:14-4828-MGL, 2016 WL 6080426, at \*4 (D.S.C. Oct. 18, 2016) (quoting *Palmetto Conservation Foundation v. Smith*, 642 F. Supp. 2d 518, 531 (D.S.C. 2009)). Moreover, “[f]or the existence of a legal remedy to bar injunctive relief, it must appear that the legal remedy is as practical and efficient to secure the ends of justice and its prompt administration as injunctive relief.” *Wade v. Hous. Mgmt., Inc.*, No. 1:14-CV-04923-JMC, 2016 WL 4168605, at \*3 (D.S.C. Aug. 8, 2016) (quoting *Patrick Henry Estates Homeowners Ass’n v. Miller*, 462 Fed. App’x 339, 344 (4th Cir. 2012)); *see also Kirk*, 191 S.C. at 205, 4 S.E.2d at 15 (finding that 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).

Allowing the Assignment and permitting Billy Ulm to assert the claims of the Trust in this matter as his own claims will irreparably harm Ramaci because he will be forced to continue to litigate this case and incur substantial legal fees, after negotiating and agreeing to the material terms of the settlement with Plaintiffs. *See* (Tr. of Feb. 24, 2016 Hr'g pp. 50-51, R. \_\_\_\_). 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, 86, 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 88-90.

That is the case here. 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 dated January 19, 2016, R. \_\_\_\_); (Tr. of Feb. 24, 2016 Hr'g pp. 50-51, R. \_\_\_\_).<sup>13</sup> Billy Ulm's attempt to insert the time-barred claims of the Trust into this matter as his own claims upset the parties' agreed upon framework and thwarted the settlement, presenting Ramaci with no choice but to seek to enjoin the purported transfer in an attempt to effectuate the agreement.<sup>14</sup> Cross-claimant's actions are not without consequences. Plaintiffs now say the deal is off and settlement is nowhere.

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<sup>13</sup> Plaintiffs now claim the appeal does not stay the entire matter. Rule 241, SCACR, however, does stay the entire case based on the procedural posture at the time of appeal.

<sup>14</sup> Having identified an agreeable framework, however, Ramaci is optimistic that the resolution of the matters addressed will allow the parties to resume and conclude the settlement negotiations.

An injunction would have prevented this harm. This is why the injunction should have been issued, thereby placing Ramaci in the same position as the day before the alleged assignment.

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. An alternative to injunctive relief is adequate "if plaintiff either can bring a legal action and seek damages that will provide full compensation, or if plaintiff can assert the claim as a defense in some other proceeding." 11A Fed. Prac. & Proc. Civ. § 2944 (3d ed.). If this Court allows the assignment, Ramaci will be without recourse, as Ramaci will have no remedy for the thwarted settlement negotiations resulting from Ulm's attempt to inject time barred claims into this action. Certainly Ramaci cannot bring a legal action or seek damages for the interference with the potential settlement because of the legal immunity doctrine. Instead, Ramaci will 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*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (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.

**B. The Balance of Hardships Weighs in Favor of Granting the Permanent Injunctive Relief Ramaci Requests, and the Permanent Injunctive Relief Sought Is In the Public Interest.**

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’”).

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 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 Trust sought, 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*, 389 S.C. 422, 428, 699 S.E.2d 687, 690 (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.*, 407 S.C. 112, 120, 54 S.E.2d 486, 490 (2014), *reh'g denied* (Mar. 6, 2014) ("Our courts have a long standing policy favoring settlements."); *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. 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 necessary to prevent the purported assignment.

### **Conclusion**

This Court should reverse the circuit court's denial of Ramaci's motion for permanent injunction and order the circuit court to grant a permanent injunction in favor of Ramaci enjoining the assignment of the time barred cross-claims from the Trust to Defendant Ulm, or alternatively, enjoining Defendant Ulm from asserting those claims in this action. In the alternative, this Court

should reverse and remand this case to the circuit court for application of the correct legal standard and findings of whether permanent injunctive relief is warranted under the same.

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March 29, 2017

## **Exhibit J**

BENTRAYWICK [B]  
LAW [T]

March 29<sup>th</sup>, 2017

The Honorable Deadra L. Jefferson  
Charleston County Judicial Center  
100 Broad St., Suite 336  
Charleston, SC 29401-2236

Re: *Request for Protection*

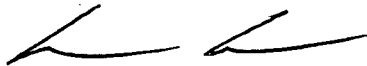
Dear Judge Jefferson,

I hope this letter finds you doing well. I enclose for Your Honor's consideration a proposed order granting me protection from trials, motions and other appearances in the Charleston County Common Pleas cases in which I am counsel of record. The reason for each request is set forth in the proposed order, and I have copied all affected counsel via email.

I have enclosed a self-addressed, stamped envelope; if the order meets your approval, I am happy to handle filing and serving it.

I thank you in advance for your consideration and of course am at the Court's disposal should you require anything further.

Respectfully,



Benjamin A.C. Traywick

Enclosures  
cc via email

All BTL Charleston County CP counsel of record

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

**ORDER OF PROTECTION**

It appearing to the Court that Benjamin A.C. Traywick, Esquire, of the Ben Traywick Law Firm, LLC, will be out of town for the following reasons and on the following dates in 2017:

- April 10<sup>th</sup> through April 14<sup>th</sup>- family vacation
- April 24<sup>th</sup> and April 25<sup>th</sup>- out-of-state depositions
- May 8<sup>th</sup> and May 9<sup>th</sup>- out-of-state depositions
- June 2<sup>nd</sup> through June 9<sup>th</sup>- family vacation
- July 3<sup>rd</sup> through July 11<sup>th</sup>- family vacation

I find that there is good cause to grant, and do hereby grant, Mr. Traywick protection from all court appearances and proceedings in cases for which he is counsel of record in the Charleston County Court of Common Pleas for the dates set forth above.

**AND IT IS SO ORDERED.**

\_\_\_\_\_  
Hon. Deadra L. Jefferson  
Resident Circuit Judge, 9<sup>th</sup> Judicial Circuit  
Charleston, South Carolina

\_\_\_\_\_  
Date

## **Exhibit K**

# Nelson Mullins

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Attorneys and Counselors at Law  
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www.nelsonmullins.com

A. Mattison Bogan  
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March 24, 2017

**By Express Mail**

The Honorable Maite D. Murphy  
5200 E. Jim Bilton Blvd  
St. George, SC 29477

Re: *Byrdnest, LLC, Craig Sedmak, Stephanie Sedmak, and Wesley Nau v.  
John Ramaci, Haverly Ramaci, Richard Scott, and Billy Ulm*  
C/A No.: 2013-CP-10-4874  
Our File No.: 47061/01500

Dear Judge Murphy:

The Ramaci Defendants respectfully submit this letter in response to the Court's March 17, 2017 email requesting a more detailed outline of the parties' respective positions regarding the stay of this matter pending appeal.

Jonathan Ramaci filed a notice of appeal with the South Carolina Court of Appeals, which was served on all parties on February 27, 2017. Mr. Ramaci is appealing this Court's February 21, 2017 Order, specifically the Court's denial of his request to permanently enjoin the improper assignment of time-barred and derivative cross-claims, and the effect the denial of the injunction had on the remaining claims.

As set forth in my previous email to the Court, South Carolina Rule of Appellate Procedure 241 governs the stay of this matter pending appeal. Rule 241(a) provides for an automatic stay of "matters decided in the order, judgment, decree or decision on appeal," and "automatically stay[s] the relief ordered in the appealed order, judgment, or decree or decision." SCRAP 241(a): A trial court only retains jurisdiction to consider matters not affected by an appeal. Thus, under Rule 241, the trial court is automatically stripped of its jurisdiction to entertain matters affected by an appeal unless an exception enumerated in subsection (b) applies. The denial of a motion for injunctive relief is not a listed exception to the automatic stay, and therefore, this court does not have jurisdiction to proceed with the trial of this matter pending Mr. Ramaci's appeal. *See Grosshuesch v. Cramer*, 659 S.E.2d 112, 122 n.7 (S.C. 2008) ("We

The Honorable Maite D. Murphy

March 24, 2017

Page 2

take this opportunity to reiterate that while an appeal is pending, a lower court cannot act on matters affecting the issue on appeal.”).

The trial of this matter, which would necessarily include the prosecution and defense of Defendant Ulm’s cross-claims, is undoubtedly a matter affected by the appeal. In his prior motion before this Court and now in his appeal, Mr. Ramaci seeks to enjoin the assignment of the time-barred cross-claims from the Ulm Trust to Defendant Ulm, or alternatively, enjoin Defendant Ulm from attempting to assert any of the time-barred cross-claims purportedly acquired from the assignment. Allowing trial to proceed and Defendant Ulm to assert the cross-claims would render Mr. Ramaci’s appeal moot and the requested relief meaningless, as the assertion of the time-barred claims is the very act Mr. Ramaci seeks to enjoin. Moreover, nothing in this action, including Plaintiffs’ claims, is left unaffected by the appeal, as the parties had essentially resolved this matter, including Plaintiffs’ claims, until the issue with the cross-claimant’s purported assignment of time-barred cross-claims arose. The cross-claimant’s untimely action is the only thing prohibiting the end of the case. Thus, all matters before this Court in this case, as pled, are necessarily affected by the appeal. A trial while the appeal remains pending would moot the appeal. Such action is impermissible and supersedeas would be necessary if the Court declines to recognize the automatic stay.

Mr. Traywick’s contention that the appeal concerns only issues related to Defendant Ulm’s cross-claims and that the trial of this action should proceed ignores the procedural posture of this case. Both Plaintiffs’ claims and Defendant Ulm’s cross-claims remain part of a single action arising from the same factual allegations and background and should be tried in a single trial, not piecemeal. No party to this action has moved to proceed in a different posture.

Because proceeding with the trial of this case is clearly a matter affected by Mr. Ramaci’s appeal of this Court’s order denying injunctive relief as to Defendant Ulm’s cross-claims, the matter is automatically stayed pursuant to SCRAP 241(a).

Very truly yours,



A. Mattison Bogan

*Attorney for Defendants*

*Jonathan and Haverly Ramaci*

AMB:jj

cc: Benjamin A. Traywick, Esq.  
Rutledge Young, Esq.  
Julie Moore Rode, Esq.

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APR 28 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Maite D. Murphy, Circuit Court Judge

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

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):

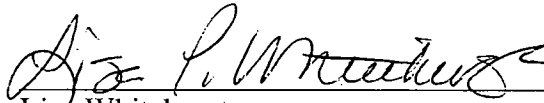
Pleadings:

Petition for Writ of Supersedeas

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

A handwritten signature in cursive script, appearing to read "Lisa Whitehurst", written over a horizontal line.

Lisa Whitehurst  
Administrative Assistant

April 28, 2017

# Nelson Mullins

## Nelson Mullins Riley & Scarborough LLP

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April 28, 2017

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APR 28 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, et al v. Johnathan Ramaci, et al. (Civil Action No. 2013-CP-10-04874)  
Appellate Case No. 2017-000529  
Our File No. 47061/01500

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of a Petition for Writ of Supersedeas 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. We are filing the petition with a scanned copy of the signed client verification required by Rule 241(d)(3), SCACR, and we will submit the original verification to the court as soon as we receive it.

Please assist us in directing this petition to the proper internal avenues at the Court. Our client's appeal is currently pending. With the trial court's recent directive that a stay not be recognized, the matter to be tried the week of June 5 would moot our appeal before the Court. Thus, this request is necessary to preserve our appellate rights. By copy of this letter to counsel of record, we are serving them with a copy of this Petition.

Very truly yours,



A. Mattison Bogan

AMB:lpw  
Enclosures

cc: Benjamin A. Traywick, Esquire  
Rutledge Young III, Esquire  
Julie Lauren Moore, Esquire  
The Honorable Julie J. Armstrong