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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

MAY 19 2017

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

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.

PETITION FOR REHEARING

Pursuant to Rule 221(a) and 221(c), SCACR, Jonathan Ramaci requests rehearing of the Court's May 11, 2017 order dismissing his appeal. Ramaci respectfully submits that this Court overlooked or misapprehended the procedural history of this case and the nature of the appellate issues raised by Ramaci.

Ramaci appealed only one issue in this case—the denial of his motion for a permanent injunction. Orders denying injunctive relief are immediately appealable. Therefore, this court must consider the merits of Ramaci's appeal. It appears that the court's dismissal of Ramaci's appeal is based on a confusion of the sequence in which several motions were filed in the circuit court and a misunderstanding of the nature of Ramaci's arguments. Ramaci respectfully requests that this court withdraw its order of dismissal and reinstate the appeal.

FACTUAL BACKGROUND¹

The plaintiffs in this case sued 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 an amended answer, co-defendant Billy Ulm asserted cross-claims against Ramaci.

The parties made significant progress in settlement negotiations and were nearing a settlement when, in December 2015, Ulm filed a motion to substitute "The William L. Ulm, Sr. 2006 Delaware Trust" (the "Trust") as the cross-claimant. In the motion to substitute, Ulm admitted he did not purchase shares in iCache individually; instead, the Trust owned the shares on which he based his cross-claims. Ramaci opposed the motion to substitute on the ground that the substitution was improper under the South Carolina Rules of Civil Procedure and was barred by the statute of limitations. On February 3, 2016, Ramaci filed a motion for summary judgment on the basis that Ulm *lacked standing* to prosecute the cross-claims because he did not personally own the shares in iCache. (Mot. for Sum. J. filed Feb. 3, 2016, Exhibit A).

The parties continued to make progress in their settlement negotiations until, as a last-minute procedural gambit, Ulm informed the Court and the parties that he intended to withdraw his motion to substitute and that the Trust had purportedly assigned its right to prosecute the cross-claims to Ulm on February 19, 2016. The assignment, if valid, rendered Ramaci's standing argument moot. Therefore, in an effort to obtain immediate relief and preserve the parties'

¹ Ramaci offers this explanation of the factual background to clarify the procedural history relevant to the appealability of the denial of his motion for a permanent injunction. Accordingly, Ramaci has attached as exhibits only those documents relevant to whether the denial of that motion is immediately appealable. For a more detailed explanation of the facts of this case, see Ramaci's Initial Brief of Appellant, Return to Respondent's Motion to Dismiss, Petition for Writ of Supersedeas, and the exhibits attached to those filings—all of which are on file with this court.

settlement negotiations, Ramaci filed a motion for a permanent injunction on February 25, 2016, in which he requested that the circuit court “enjoin[] the purported Assignment or, in the alternative, enjoin[] Defendant Billy Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action as his own claims.” (Mot. for Perm. Inj. ¶¶ 4–5, **Exhibit B**); *see also* (Memo. in Supp. of Mot. for Perm. Inj., **Exhibit C**).

One month *after* moving for a permanent injunction, Ramaci filed an alternative motion asserting that—if the circuit court denied his motion for a permanent injunction—the court should grant summary judgment and dismiss the cross-claims on the ground that the claims were time-barred. (Mot. for Sum. J. filed Mar. 24, 2016, **Exhibit D**); *see also* (Memo. in Supp. of Mot. for Sum. J. filed Oct. 28, 2016, **Exhibit E**). Approximately one year later, the circuit court filed an omnibus order denying three of Ramaci’s motions:

(1) his February 4, 2016 motion for summary judgment as to whether Ulm lacked standing to bring the cross-claims;

(2) his February 25, 2016 motion for a permanent injunction; and

(3) his March 24, 2016 alternative motion for summary judgment.

See (Order filed Feb. 21, 2017 pp. 3–6, 14–18). The circuit court also ruled upon numerous other motions in the same order.

Ramaci appealed the circuit court’s denial of his motion for a permanent injunction on February 27, 2017. Ulm filed a motion to dismiss the appeal, and Ramaci filed a return in opposition to the motion to dismiss. On April 24, 2017, Ramaci filed a petition for writ of supersedeas requesting that this court order the circuit court to stay proceedings pending a resolution of the appeal. Both Ulm and the plaintiffs in the underlying action filed returns in opposition to Ramaci’s petition. On May 12, 2017, Ramaci filed a reply in support of his petition

for writ of supersedeas. Shortly after filing the reply, Ramaci received this court’s order—filed one day earlier—dismissing his appeal and denying his petition for writ of supersedeas. Ramaci requests that this court grant rehearing, reinstate his appeal, and consider his petition for writ of supersedeas.

ARGUMENT

This court should grant rehearing for two reasons: first, the order of dismissal indicates the court overlooked or misapprehended the procedural history of this case and the relief sought by Ramaci, and second, the court misapprehended the nature of the issues and arguments Ramaci raised on appeal. Therefore, this court should grant rehearing, reinstate the appeal, and direct Ulm to brief his position on the merits of the appeal.

I. The court’s ruling is inconsistent with the procedural history of this case.

This court dismissed Ramaci’s appeal on the ground that his “motion for a permanent injunction was merely a restatement of his arguments in his motion for summary judgment,” and the denial of a motion for summary judgment is not immediately appealable. (Order of Dismissal p. 1). This ruling misapprehends the sequence in which Ramaci filed motions in the circuit court and the nature of the relief he sought in each motion. Ramaci filed his motion for a permanent injunction first, and he filed his motion for summary judgment only as an alternative remedy in the event that the circuit court denied his request for injunctive relief.

Ramaci filed his motion for a permanent injunction on February 25, 2016. *See* (Mot. for Perm. Inj., **Exhibit B**). In the motion, Ramaci argued the assignment of claims from the Trust to Ulm was improper because the claims are time-barred and asked the circuit court to “enjoin[] the purported Assignment or, in the alternative, enjoin[] Defendant Billy Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action as his own claims.” (*Id.* at ¶¶

4–5). On March 24, 2016, Ramaci filed a memorandum in support of his motion for a permanent injunction. (Memo. in Supp. of Mot. for Perm. Inj., **Exhibit C**).

On the same day—approximately one month *after* he filed the motion for a permanent injunction—Ramaci filed a motion for summary judgment seeking alternative relief in the event that the circuit court denied his request for an injunction. (Mot. for Sum. J. filed Mar. 24, 2016, **Exhibit D**). In the motion for summary judgment, Ramaci specifically explained he was seeking summary judgment *only* in the event that the circuit court denied his motion for a permanent injunction. (*Id.*). Similarly, in his memorandum in support of the motion for a permanent injunction, Ramaci explained that he intended the motion for summary judgment to serve as alternative relief in the event that the circuit court denied his motion for a permanent injunction. (Memo in Supp. of Mot. for Perm. Inj. p. 3, **Exhibit C**). Ramaci later filed a memorandum in support of his motion for summary judgment. (Memo. in Supp. of Mot. for Summ J. filed Oct. 28, 2016, **Exhibit E**).

Thus, although both motions were based on the statute of limitations, Ramaci *first* moved for a permanent injunction and only *later* moved for summary judgment as an alternative remedy in the event that the circuit court denied his motion for a permanent injunction.² This court’s statement in the order of dismissal that Ramaci’s motion for a permanent injunction “was merely a restatement of his arguments in his motion for summary judgment,” therefore, is incorrect. The

² The circuit court also denied an earlier summary judgment motion filed by Ramaci. That motion, filed on February 3, 2016, challenged Ulm’s *standing* to assert the cross-claims *before* the purported assignment of the claims from the Trust to Ulm. (Mot. for Sum. J. filed Feb. 3, 2016, **Exhibit A**). Ramaci did not appeal the denial of that motion for summary judgment. *See generally* (Initial Brief of Appellant). Instead, Ramaci appealed only the denial of his motion for a permanent injunction. Ramaci’s motion for a permanent injunction was unrelated to the arguments in the February 3 motion for summary judgment, and that motion has no effect on the appealability of the denial of Ramaci’s motion for a permanent injunction.

motion for a permanent injunction could not “restate” arguments from a motion for summary judgment that had not yet been filed. This court dismissed Ramaci’s appeal based on a misapprehension of the procedural history of this case. Accordingly, this court should grant rehearing and reinstate the appeal.

II. The court misapprehended the nature of the issue and arguments raised by Ramaci on appeal.

The court’s finding that Ramaci’s motion for a permanent injunction merely restated the arguments in his motion for summary judgment is a misapprehension of the arguments raised in those motions and the issues raised on appeal. Ramaci appealed only the denial of his motion for a permanent injunction. *See* (Initial Brief of Appellant p. 1). He did not appeal the denial of his motion for summary judgment.³ *See* (Initial Brief of Appellant p. 1, 3–4). There is no question that the denial of a request for injunctive relief is immediately appealable. S.C. Code Ann. § 14-3-330(4) (providing appellate courts “shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal . . . [a]n interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction”).

As explained above, Ramaci raised his arguments regarding the time-barred nature of Ulm’s cross-claims and the impropriety of the assignment of those claims in his motion for a permanent injunction *before* he filed his March 24, 2016 motion for summary judgment. *See* (Mot. for Perm. Inj. p. 1, **Exhibit B**); (Mot. for Sum. J. filed Mar. 24, 2016 p. 1, **Exhibit D**). Ramaci then *specifically and repeatedly* stated—in each of his subsequent filings—that his motion for summary judgment was a request for alternative relief that he sought only in the event that the

³ To the extent that Ramaci cited to his motion for summary judgment and memorandum in support of that motion in the Statement of Facts section of his brief, *see* (Initial Brief of Appellant pp. 5–9), he did so only to convey the factual background of this case.

circuit court denied his motion for a permanent injunction. *See, e.g.*, (Memo in Supp. of Mot. for Perm. Inj. p. 3, **Exhibit C**) (“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.”); (Mot. for Sum. J. ¶ 9, **Exhibit D**) (“In the event this Court declines to enjoin the assignment or otherwise grant the relief requested in Ramaci’s Injunction Motion and Injunction Memo, the cross-claims asserted by Defendant Billy Ulm should be dismissed as a matter of law because the claims are barred by the statute of limitations.”); (Memo in Supp. of Mot. for Sum. J. p. 2 n.3, **Exhibit E**) (“Ramaci maintains and reasserts his argument that 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 pursuant to the Assignment in this action as his own claims. In the event that this Court denies Ramaci’s Motion for Permanent Injunction, which Ramaci argues it should not, this Court should grant Summary Judgment and dismiss Ulm’s cross-claims because they are time-barred under the applicable statute of limitations.”).⁴

Parties are entitled to raise alternative arguments and request alternative relief. *See, e.g.*, *Cunningham v. Anderson Cty.*, 414 S.C. 298, 303, 778 S.E.2d 884, 886 (2015) (noting that “[n]othing precluded [the appellant] from making alternative arguments based on whether he was

⁴ *See also* (Memo in Supp. of Mot. for Perm. Inj. p. 3, **Exhibit C**) (“*Alternatively*, Ramaci filed a Motion for Summary Judgment Seeking Dismissal of the Trust’s Assigned, Time-Barred Claims.” (emphasis added)); (*Id.* at p. 5 n.3) (“Ramaci contends that these claims should not be allowed into this litigation as the assignment is improper. However, if this Court declines to enjoin the assignment, the claims should still be dismissed as time barred for the reasons set forth in Ramaci’s Motion for Summary Judgment, filed contemporaneously herewith.”); (Mot. for Sum. J. ¶ 21, **Exhibit D**) (“Thus, even if the Court declines to enjoin the assignment, Ulm cannot assert the cross-claims because the claims conveyed to Ulm in the Assignment of Claims are time barred.”); (Memo in Supp. of Mot. for Sum. J. p. 9, **Exhibit E**) (“[E]ven if this Court were to consider the Trust’s assignment to be valid, Defendant Ulm’s cross-claims should be dismissed as time-barred by the applicable statute of limitations.”).

deemed a contractual or at-will employee”); *Sickora v. Metro. Life Ins. Co.*, 278 S.C. 99, 101, 292 S.E.2d 593, 595 (1982) (noting, in a case in which a party made three alternative motions to the trial court and appealed the denial of one of the motions, that “[i]f the primary relief had been granted, . . . the alternative motion would have been unnecessary”); Rule 8(a), SCRC (“Relief in the alternative . . . may be demanded.”); Rule 8(e)(2), SCRC (“A party may set forth two or more statements of a cause of action or defense alternatively or hypothetically . . .”). Ramaci requested primary relief in the form of an injunction and alternative relief in the form of summary judgment. If Ramaci’s motion for a permanent injunction had been granted, his alternative motion for summary judgment would have been unnecessary. *See Sickora*, 278 S.C. at 101, 292 S.E.2d at 595.

Ramaci’s motion for summary judgment—filed approximately one month after his primary motion for a permanent injunction—is a proper request for alternative relief. That request does not cancel his request for an injunction or convert his injunction motion into a summary judgment motion, thereby rendering any ruling by the circuit court not immediately appealable. The court’s dismissal of Ramaci’s appeal is akin to a ruling that a motion for summary judgment converts all previously-filed motions based on similar grounds into a motion for summary judgment and eliminates any right to an immediate appeal. Such a rule does not exist under South Carolina law.

Thus, although the arguments in support of the motion for summary judgment are similar to those raised in the previously-filed motion for a permanent injunction, the summary judgment request was only a request for alternative relief. Based on the timing of the motions and Ramaci’s express statements that his primary request was for injunctive relief, the motion for a permanent injunction cannot be “merely a restatement” of the arguments in support of summary judgment. The “substance” of Ramaci’s requested relief, therefore, is a request for a permanent injunction.

See (Order of Dismissal p. 1) (“It is the substance of the requested relief that matters ‘regardless of the form in which the request for relief was framed.’” (quoting *Richland Cty. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002))). Ramaci was faced with a last-minute procedural gambit by Ulm that attempted to insert time-barred cross-claims into this matter and disrupt the progress of settlement negotiations. Needing an immediate remedy, Ramaci moved to enjoin Ulm’s improper attempt to skirt the procedural rules. *See* (Mot. for Perm. Inj. ¶ 14, **Exhibit B**).

Further, the case law cited in the order of dismissal does not support the dismissal of Ramaci’s appeal. Each of the cases cited by the court in its analysis of the motion to dismiss—*Richland Cty. v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002), and *Standard Fed. Sav. & Loan Ass’n v. Mungo*, 306 S.C. 22, 410 S.E.2d 18 (Ct. App. 1991), which was quoted in *Kaiser*—analyzed a situation in which a party improperly labeled its requested relief. In *Kaiser*, a public entity moved for a writ of mandamus. 351 S.C. at 94, 567 S.E.2d at 262. Because it asked the court to compel performance from a private party, however, this court found the request should properly be considered a motion for an injunction. *Id.* Therefore, the court considered the motion under the standard for an injunction. *Id.*

Similarly, in *Mungo*, a party sought relief via a procedure commonly used before the adoption of the South Carolina Rules of Civil Procedure. 306 S.C. at 26, 410 S.E.2d at 20. A master-in-equity treated the request as a Rule 60(b), SCRCF, motion. *Id.* This court affirmed based on the mandate in Rule 61, SCRCF, that “[t]he court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” *Id.* at 25-26, 410 S.E.2d at 20.

Neither of those cases is applicable to Ramaci's appeal. Ramaci properly moved for a permanent injunction and articulated the correct standard for a permanent injunction. (Mot. for Perm. Inj. pp. 2–3, **Exhibit B**); *see also* (Memo. in Supp. of Mot. for Perm. Inj. pp. 3–7, **Exhibit C**). Ramaci did not mistakenly move for summary judgment in the form of a permanent injunction. Therefore, the “substance” of Ramaci's motion for a permanent injunction is just that—a request for a permanent injunction.

Ramaci's appeal seeks review only of the circuit court's denial of his motion for a permanent injunction. Ramaci did not appeal the denial of his motion for summary judgment and does not ask this court to review or rule upon the circuit court's denial of summary judgment. The denial of a motion for injunctive relief is immediately appealable, S.C. Code Ann. § 14-3-330(4), and this court should reinstate Ramaci's appeal.

III. If the court reinstates Ramaci's appeal, the court should consider Ramaci's petition for writ of supersedeas.

Ramaci filed a petition for writ of supersedeas on April 28, 2017, requesting that this court order the circuit court to stay all proceedings pending a resolution of Ramaci's appeal. Ulm and the plaintiffs each filed a return to Ramaci's petition. On May 12, 2017, before receiving the order of dismissal filed the previous day, Ramaci filed a reply in support of his supersedeas petition. In the order of dismissal, this court denied Ramaci's petition for writ of supersedeas on the ground that the underlying order was not immediately appealable. (Order of Dismissal p. 2). If this court grants rehearing and reinstates Ramaci's appeal, Ramaci respectfully requests that the court consider Ramaci's reply in support of supersedeas and rule upon Ramaci's petition.

CONCLUSION

Ramaci respectfully requests that this court grant rehearing, deny Ulm's motion to dismiss, and reinstate Ramaci's appeal.

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May 19, 2017

Exhibit A

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
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.¹ (*See* Defendant Billy Ulm's Amended Answer and Cross-Claims ¶¶ 63-76.)

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

¹ These causes of action were brought solely against Ramaci.

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

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

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

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

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

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

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

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

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February 3, 2016

Exhibit B

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
JULIE L. ANDERSON
CLERK OF COURT

TO: ATTORNEYS FOR THE ABOVE-NAMED PLAINTIFFS

PLEASE TAKE NOTICE THAT, as soon as he may be heard, Jonathan Ramaci ("Ramaci"), through undersigned counsel respectfully moves this Court pursuant to South Carolina Rule of Civil Procedure 65 to enter a permanent injunction barring the attempted Assignment of Claims by and between The William L. Ulm, Sr. 2006 Delaware Trust (the "Trust") and Billy Ulm. Ramaci respectfully requests an order from this Court enjoining the purported Assignment of Claims by the Trust to Billy Ulm or in the alternative, enjoining Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action.

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

2. On February 4, 2016, Ramaci filed a memorandum of law in opposition to Ulm's Substitution Motion, arguing that the substitution was improper under the South Carolina Rules of Civil Procedure and barred by the statute of limitations. On February 4, 2016, Ramaci also filed a Summary Judgment motion as to the cross-claims asserted by Billy Ulm on the basis of the admission in the Substitution Motion that Billy Ulm was not the proper party to prosecute the cross-claims.

3. On February 22, 2016, apparently in response to the arguments and authority in Ramaci's February 4 opposition, counsel for Billy Ulm filed a Memorandum in Opposition to Defendant John [sic] Ramaci's Motion for Summary Judgment as to the Ulm Crossclaims and Motion for Judgment on the Pleadings as to the Ulm Crossclaims, in which counsel abruptly informed the Court and parties to this case that the Trust had executed an Assignment of Claims whereby the Trust assigned its right to prosecute the cross-claims to Billy Ulm on February 19, 2016.

4. On February 24, 2016, Ramaci filed a Reply to Defendant Ulm's Memorandum in Opposition, challenging the purported Assignment of stale claims as improper because the claims are time barred.

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

6. A party seeking a permanent injunction must demonstrate the following: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Bradacs v. Haley*, 58 F. Supp. 3d 514 (D.S.C. 2014).

7. In South Carolina, the existence of a legal remedy is no obstacle to injunctive relief if the available legal remedy is ineffective because it is impractical, because the threatened acts may continue while a legal action is pending, or because successive actions at law would be necessary to protect plaintiff's rights. *See Kirk v. Clark*, 4 S.E.2d 13 (S.C. 1939).

8. If the Court permits the Assignment and allows Billy Ulm to assert the claims of the Trust in this matter as his own claims, the Ramaci Defendants will be irreparably harmed because they will be forced to continue to litigate this case and incur substantial legal fees.

9. As stated in the parties most recent Consent Motion to Amend Scheduling Order, the parties have continued to be involved in settlement negotiations and have recently made progress as to the same. Indeed, there is a settlement agreement that has been approved by the plaintiffs and with a few relatively non-controversial edits, by Defendant Scott.

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

11. Ramaci does not have an adequate remedy at law because he will be forced to continue to litigate this matter at substantial cost and effort without the means to recoup either.

12. The balance of hardships weighs in favor of granting the equitable relief requested because continued litigation would impose a burden on all parties to this matter, who have been actively pursuing settlement. On the other hand, any harm resulting from the injunction would be borne by the Trust, who is not, and should not be, a party to this action.

13. The relief sought herein would be in the public interest because it would give effect to the goals of the substantive and procedural law of this state to protect defendants against stale claims and provide continuity and uniformity for the resolution of claims.

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

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

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

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

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

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Attorneys for Jonathan and Haverly Ramaci

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February 24, 2016

Exhibit C

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

Byrdnest LLC, Craig Sedmak,) Civil Action No. 2013-CP-10-4874
Stephanie Sedmak, and Wesley Nau,)
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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
JULIA M. ARMSTRONG
CLERK OF COURT

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

STATEMENT OF FACTS

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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


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

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:  _____

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Attorneys for Jonathan and Haverly Ramaci

Columbia, SC
March 24, 2016

Exhibit D

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 MAR 24 PM 3:12
JULIE A. ARMSTRONG
CLERK OF COURT

TO: ATTORNEYS FOR THE DEFENDANT BILLY ULM

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

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

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

¹ These causes of action were brought solely against Ramaci.

² On November 25, 2015, 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. Ramaci continues

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

3. 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.

4. On February 4, 2016, Ramaci responded by filing a Memorandum of Law in Opposition to Ulm's Motion to Substitute, arguing that the substitution was improper under the South Carolina Rules of Civil Procedure and barred by the applicable statute of limitations.³

5. 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.

6. 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.

7. On February 25, 2016, Ramaci filed a Motion for Permanent Injunction ("Injunction Motion") seeking to enjoin the purported assignment, or in the alternative,

to assert that Ulm's cross-claims for breach of fiduciary duty and negligence are improperly pleaded derivative claims, and should be dismissed for the reasons set forth in that motion.

³ On February 4, 2016, Ramaci also filed a Motion for Summary Judgment as to the cross-claims, on the grounds that Ulm lacked standing to assert the claims, based on the admission in Ulm's Motion to Substitute that Billy Ulm was not the proper party to prosecute the cross-claims. (See Motion to Substitute "The William L. Ulm, Sr. 2006 Delaware Trust" as Cross-Claimant, at p.1) ("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 [sic] Ramaci.")

enjoining Defendant Billy Ulm from attempting to assert any claims acquired pursuant to the Assignment in this action as his own claims.

8. As set forth in Ramaci's Memorandum in Support of Motion for Permanent Injunction ("Injunction Memo"), the Trust's assignment is improper and should be enjoined.

9. In the event this Court declines to enjoin the assignment or otherwise grant the relief requested in Ramaci's Injunction Motion and Injunction Memo, the cross-claims asserted by Defendant Billy Ulm should be dismissed as a matter of law because the claims are barred by the statute of limitations.

10. "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).

11. 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).

12. Moreover, an assignee takes such assignment subject to the same defenses that would be applicable to the assignor, including the defense of statute of limitations. *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").

13. The cross-claims Ulm seeks to assert are governed by 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).

14. 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.

15. Further, even if the discovery rule were to apply, the overwhelming evidence produced thus far in discovery shows that Ulm (and consequently the Ulm Trust) was aware of a potential cause of action against Ramaci more than three years ago.

16. As described in Ramaci's Injunction Memo, incorporated here by reference, 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. (*See* Defendant Ramaci's Memorandum in Support of Motion for Permanent Injunction, Section IV.B.)

17. In addition, Ulm became a member of the Board of Directors on April 21, 2011, as part of his initial purchase of iCache stock.

18. As a member of the Board of Directors, Defendant Ulm was in a position to investigate the validity of many of the claims he now asserts, particularly the claims related to any alleged misrepresentations that induced him to purchase iCache stock.⁴

19. The claims of the Trust cannot receive a longer statute of limitations merely because they were assigned to Ulm, as Ulm can acquire no greater rights in the claims than those the Ulm Trust possessed.

20. At the time of the purported conveyance, the Ulm Trust had no right to assert the cross-claims at issue because the three-year statute of limitations on the claims had expired.

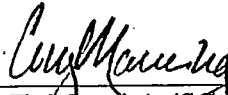
21. Thus, even if the Court declines to enjoin the assignment, Ulm cannot assert the cross-claims because the claims conveyed to Ulm in the Assignment of Claims are time barred.

⁴ 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.)

22. This motion is supported by the authority cited herein, the arguments and authority cited in Defendant Ramaci's Memorandum in Support of Motion for Permanent Injunction, 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, 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.

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March 24, 2016

Exhibit E

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

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

Plaintiffs,

vs.

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

Defendants.

Civil Action No. 2013-CP-10-4874

DEFENDANT JONATHAN RAMACI'S
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AS TO
DEFENDANT ULM'S CROSS-CLAIM

2016 OCT 28 AM 10:56
JAMES ARNSTRONG
CLERK OF COURT

FILED

Defendant Jonathan Ramaci ("Ramaci") submits this Memorandum of Law in Support of his Motion for Summary Judgment as to Defendant Ulm's Cross-Claims filed March 24, 2016.

STATEMENT OF FACTS

Plaintiffs filed the underlying actions 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. After this Court denied his motion to dismiss, Ulm filed an Amended Answer on January 23, 2014, which asserted three cross-claims against Ramaci for Negligent Misrepresentation, Breach of Fiduciary Duty, and Negligence.¹ (See Defendant Billy Ulm's Amended Answer and Cross Claim ¶¶ 63-76.)

Ulm alleges that Ramaci made various negligent misrepresentations and omissions that fraudulently induced 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. Ramaci categorically denies each of these allegations.

¹ These causes of action were brought solely against Jonathan Ramaci.

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 the Cross-Claimant (the “Substitution Motion”). In the Substitution 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. (Substitution Motion, at 1.) Ramaci responded by filing a Memorandum of Law in Opposition to Ulm’s Motion to Substitute, arguing that the substitution was improper under the South Carolina Rules of Civil Procedure and barred by the applicable statute of limitations.² Ulm apparently agreed with the authority cited by Ramaci, and withdrew his Substitution Motion.

On February 19, 2016, Ulm once again attempted to revive the stale cross-claims by executing an Assignment of Claims with the Trust. However, this attempt to revive the Trust’s claims fails, and for the reasons set forth below, Ramaci respectfully requests that this Court dismiss the cross-claims as time-barred under the applicable statute of limitations.³

SUMMARY JUDGMENT STANDARD

Pursuant to South Carolina Rule of Civil Procedure 56, summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on

² On February 4, 2016, Ramaci also filed a Motion for Summary Judgment as to the cross-claims, on the grounds that Ulm lacked standing to assert the claims, based on the admission in Ulm’s Motion to Substitute that Billy Ulm was not the proper party to prosecute the cross-claims. (*See* The Substitution Motion, at p.1.) (“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 [sic] Ramaci.”)

³ Ramaci maintains and reasserts his argument that this Court should enjoin the Trust purported Assignment of Claims or, in the alternative, enjoin Defendant/Cross-Claimant Ulm from attempting to assert any claims pursuant to the Assignment in this action as his own claims. (*See* Def. Jonathan Ramaci’s Mot. for Permanent Injunction, filed February 25, 2016 and Def. Jonathan Ramaci’s Memorandum in Support of Motion for Permanent Injunction, filed March 24, 2016). In the event that this Court denies Ramaci’s Motion for Permanent Injunction, which Ramaci argues it should not, this Court should grant Summary Judgment and dismiss Ulm’s cross-claims because they are time-barred under the applicable statute of limitations.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” S.C. R. Civ. P. 56(c). The purpose of summary judgment is to expedite the disposition of cases that do not require a fact finder. *George v. Fabri*, 548 S.E.2d 868, 874 (S.C. 2001). Under S.C. R. Civ. P. 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Ellis v. Davidson*, 595 S.E.2d 817, 822 (Ct. App. 2004). Once the party moving for summary judgment meets this initial burden, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* Rather, the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Id.*

ARGUMENT

I. The Claims Ulm Seeks to Assert Pursuant to the Assignment of Claims are Time-Barred by the Three-Year Statute of Limitations.

Defendant Ulm and the 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, attached as Exhibit 1.)⁴ The Assignment of Claims conveyed to Ulm those rights (and only those rights) that the Trust possessed at the time of conveyance.

⁴ The assignment further provides that the “Assignor [the Trust] *expressly retains ownership of the Stock* and hereby conveys to Assignee no interests or rights in the Stock other than the 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 Claim, 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, p.228)).

Under South Carolina law, “[an] 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 [the assignor] himself would have had had [he] chosen to pursue the claims himself.”). Moreover, an assignee takes such assignment subject to the same defenses that would be applicable to the assignor, including the defense of statute of limitations. *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.”).

At the time of the Assignment, the Trust had a right to bring a lawsuit against Ramaci and anyone else that if 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. *See Chet Adams Co.*, 418 S.E.2d at 338.

The question before the Court is whether the 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 [the assignor] knew or should have known of such a claim.”). As established below, any claims that the Trust might have against Ramaci that mirror the claims Ulm pleaded in his cross-claim are time-barred.

Ulm asserted cross-claims against Ramaci for negligent misrepresentation, negligence, and breach of fiduciary duty.⁵ These claims that the Trust now seeks to assign to Ulm are all subject to a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(5) (providing a three-year statute of limitations for tort actions; *Moore v. Benson*, 700 S.E.2d 273, 277 (S.C. Ct. App. 2010) (citing a three-year statute of limitations in a 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. Later, in his Substitution Motion, Ulm admitted that the Trust was the actual purchaser of these interests. In an effort to avoid the statute of limitations, Ulm attempts to have the Trust assign the right to prosecute the claims directly to him. However, the assignment does not revive the stale claims. The three-year statute of limitations for causes of action arising from such purchases has long been expired, and at the time of purported assignment, February 19, 2016, the Trust was barred from bringing any action related to these purchases. Therefore, because the Trust, as assignor, is barred from bringing the same claims that Ulm now attempts to assert, Ulm, as assignee, is also barred from bringing any of purportedly assigned claims under South Carolina law. *See, e.g., Chet Adams Co.*, 418 S.E.2d at 338 ("An assignee of claims takes the claims subject to all of the defenses that are applicable to the assignor.").

II. The Claims are Time Barred Even if the Discovery Rule Applies.

⁵ 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 find that the claims are not barred by the statute of limitations, 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 such an 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.

Even if the discovery rule applies to toll the triggering of the statute of limitations beyond the initial purchase date, the undisputed facts show that the Trust was, or should have been aware 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 have 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 on 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.)⁶ 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;

⁶ 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.)⁷

Given Ulm's involvement and position within iCache, Ulm (and consequently the Ulm Trust)⁸ 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 exercise reasonable diligence and 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., Pls.' Compl. ¶¶ 7, 10, 16, & 18.)

In addition to Ulm's failure to exercise reasonable diligence while a board member, the undisputed evidence shows that Ulm had knowledge of the allegations purportedly supporting these claims at least as early as August 2011, and no later than December 2012. As set forth in Ramaci's Injunction Memo, incorporated here by reference, between August 2011 and December 2012, Ulm was involved in numerous communications detailing his concerns related to the financials, technologies, and management of iCache. (See Defendant Ramaci's

⁷ 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 of 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.)

⁸ 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.

Memorandum in Support of Motion for Permanent Injunction, Section IV.B.) In fact, several of these concerns were raised before Ulm ever invested in iCache. *Id.* But, according to his own deposition testimony, Ulm disregarded these concerns, made a “business decision,” and invested in iCache on multiple occasions. (Ulm. Dep., Ex. 9, attached as Exhibit 3.) Based on these communications and Ulm’s own testimony, Ulm’s concerns with iCache “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. As such, the claims purportedly assigned to Ulm by the Trust, having accrued more than three years ago, are time-barred and cannot be properly assigned or asserted.

III. The Assignment of Claims has No Effect on the Status of the Claims Being Time Barred.

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 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. Ct. App. 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.*, 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 & Sportswear 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 Claims 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 time-barred by the applicable statute of limitations.

CONCLUSION

Based on the foregoing arguments, Defendant Jonathan Ramaci respectfully requests that this Court enter summary judgment and dismiss Ulm's cross-claims for negligent misrepresentation, negligence, and breach of fiduciary duty, as time-barred by the applicable statute of limitations.

Respectfully submitted,
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October 27, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

RECEIVED

MAY 19 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:

Appellant's Petition for Rehearing

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May 19, 2017

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May 19, 2017

Via Hand Delivery

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

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MAY 19 2017

SC Court of Appeals

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 Rehearing 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.

By copy of this letter to counsel of record, we are serving them with a copy of this Petition.

Very truly yours,


Cory E. Manning

CEM:jlt

Enclosures

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