STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701
South Carolina Court of Appeals
Opinion No. 4810, filed March 23, 2011

Brian P. Menezes,.....Petitioner,

v.

WL Ross & Co. LLC, Wilbur, L. Ross, Jr., Michael J. Gibbons, David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P, WLR Recovery Associates II LLC, and WLR Recovery Associates III LLC,.....Respondents.

PETITIONER'S REPLY BRIEF

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I. Introduction

The narrow question before this Court is whether, at the time Menezes signed the Release in his employment lawsuit, his claims seeking monetary damages for breaches of fiduciary duty against the Respondents had accrued. The question is narrow because, as discussed in Section II *infra*, that is the narrow question framed by the Respondents at the circuit court. And the answer to that narrow question is no. Menezes claims had not accrued when he signed the Release.

II. Contingent Claims

"It is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). The Respondents advance a legal argument in this Court that was never advanced in the circuit court. Respondents argue that,

> Assuming that, at the time Plaintiff signed the Release, his claims depended on the occurrence of some future event, the claims were simply contingent and were as effectively surrendered by the execution of the Release as any claim that had fully accrued by then.

(Respondents Brief, p.15.)

This legal argument is not preserved for appellate review. The Respondents did not raise this argument to the circuit court and the circuit court did not rule on this argument. "At a minimum, issue preservation requires that

an issue be raised to and ruled upon by the trial judge." *Herron*, 395 S.C. at 465, 719 S.E.2d at 642.

A. Argument Presented to the Circuit Court

A chronology of the Respondents' briefing and argument to the circuit court demonstrate beyond question that this issue is not properly before this Court.

July 28, 2008: Respondents Memorandum in Support of Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment:

- "The sole issue is whether the claims asserted by Plaintiff in the current Complaint existed at the time the Plaintiff executed the Settlement Agreement and Release on September 28, 2006." (App. 129.)

July 31, 2008: Transcript of Oral Argument at Motions Hearing, Counsel for the Respondents Arguing:

- "So as presented we think under the Plaintiff's own memo the sole issue for the Court is one of law, and that is when did the claims alleged in the current Complaint accrue under Delaware law? If they accrued or arose prior to September 28th, 2006, which is the date of the Settlement Agreement and Release, then as a matter of law all the Plaintiff's claims in this case are barred. If they did not accrue prior to September 28th, 2006, then we think as a matter – logically as a matter of law the Release does not bar these claims. (App. 564-65.)

August 8, 2008: Reply Memorandum in Support of Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment:

- "As framed by the parties' briefs and the questions asked by the Court at the end of the July 31, 2008 hearing, Defendants' Motion boils down to a single decisive issue: when did Plaintiff's claims challenging the merger at first accrue?" (App. p. 294.)

- "Defendants concede that if the court finds that Plaintiff's claims accrued after he signed the Release, a ruling denying Defendants' Motion would mean that the affirmative defense of Release and Defendants' counterclaim for breach of release should be stricken . . . ." (App. 307 n.8.)

August 21, 2008: Sur-Reply Memorandum in Support of Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment:

- "[T]his Motion . . . come[s] down to one pure legal question: when did Plaintiff's alleged claims arise?" (App. 374.)

B. The Circuit Court's Orders

Consistent with the briefing and argument of the Respondents, the circuit court issued an Order deciding the question presented to it:

- "The pertinent question is whether Plaintiff's claims regarding the merger accrued when the merger closed on October 20, 2006, as Plaintiff contends, or sometime before September 28, 2006, as Defendants argue." (App. 4-5.)

- "Under controlling Delaware law, these claims accrue no earlier than the closing of the merger." (App. 5.)

The Respondents next moved the circuit court to reconsider its ruling pursuant to Rule 59(e), SCRCP, but still did not raise this argument.[1] (App. 385-92.) Following a review of the Respondents' Motion, the circuit court issued an order finding that after "careful[] review[] [of] the Motion for Reconsideration

[1] Even if the argument had been raised at this point, which it was not, it would still not be preserved for appellate review. "A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial." *MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

and the arguments made therein[,] [t]he Court finds no basis to change its prior ruling." (App. 7.)

C. The Respondents Raised this Argument for the First Time in the Court of Appeals

Instead of exclusively relying upon a line of inapposite case law that the circuit court did not find persuasive, once the Respondents arrived at the court of appeals they added the instant legal argument in the hopes of securing a reversal. (Brief of then-Appellant, App. 1149-51.) This type of legal maneuvering is precisely why the "raised to and ruled upon" requirement exists. "It prevents a party from keeping an ace card[2] up his sleeve--intentionally or by chance--in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

The Respondents' contingency argument was never presented to the circuit court for review. Consequently, it is not preserved for appellate review. Moreover, this Court is not in a position to review this argument. *See Herron*, 395 S.C. at 465, 719 S.E.2d at 642 (noting that "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review").

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[2] As discussed below, however, this argument is not an "ace card."

D. The Contingency Argument Fails

Even if the Court determines this issue is preserved for appellate review, the argument has likely been conceded. The Respondents essentially argue that the release also captures claims that are based on events occurring after he signed the release: "[a]ssuming . . . his claims depended on the occurrence of some future event, the claims were simply contingent and were as effectively surrendered by the execution of the Release as any claim that had fully accrued by then." (Respondents Brief, p. 15.) But at the circuit court, counsel for the Respondent argued that, "[i]f they did not accrue prior to September 28th, 2006, then we think as a matter – logically as a matter of law the Release does not bar these claims." (App. 565.) These two statements are at odds with each other.

The Respondents argument is not supported by the South Carolina law it cites. To support their position that South Carolina "endorses the rights of parties to release contingent and even future claims," (Respondents Brief, p.15), the Respondents cite to the case of *Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 626 S.E.2d 19 (Ct. App. 2005). *Duke* does not support the proposition that a party may release another party from liability, presently, for conduct that has not occurred, but will occur in the future.

Duke involved a lawsuit surrounding the payment of a bonus check to a former employee of Southern Glass & Plastics (the company). The relevant facts

provided that husband and wife owned the company together in equal shares. The couple's marriage turned irreconcilable and divorce proceedings were instituted. In addition, a parallel shareholder derivative action was instituted regarding the company. *Duke*, 367 S.C. at 425, 626 S.E.2d at 21. The check was allegedly paid in contravention of an order issued in the derivative action.

Ultimately, the husband and wife entered into a settlement and full release of all claims in the divorce and derivative action. *Id.* at 425, 626 S.E.2d at 21. Soon thereafter, husband sued Ms. Duke over the bonus check. Her defense to that action was that the claim had been released in the settlement of the divorce and derivative action. In relevant part, the release provided that the parties agreed to:

> release . . . each other, together with any and all . . . employees . . . who are or may be responsible for . . . all liabilities, causes of action . . . known or unknown, now existing or which may accrue hereafter . . . which they now have, have had in the past, or may have in the future

Id. at 427-28, 626 S.E.2d at 22. While the language of the release purported to release claims that did not presently exist, *Duke* did not even acknowledge the existence of that language. It just happened to be cited by the Court in the process of setting forth its opinion.

Duke held that based upon the terms of the release, husband agreed to release all employees for claims related to the derivative action. And that since the payment of the bonus check was allegedly in violation of an order from the

derivative action, that claim had been released. *Id.* at 429, 626 S.E.2d at 23. *Duke* does not "endorse[] the rights of parties to release contingent and even future claims." (Respondents Brief, p.15.) The Respondents position is incorrect.

Duke does not even inferentially support the Respondents citation of the case. The allegedly wrongful payment of the bonus check in *Duke* occurred on August 13, 2011. *Id.* at 425, 626 S.E.2d at 21. The parties entered into the settlement and release on October 4, 2011. *Id.* at 425, 626 S.E.2d at 21. Accordingly, the release captured the complained of conduct, as the conduct occurred prior to the execution of the document.

South Carolina law provides that a party may release all claims he has at the time the release is executed. *See Gardner v. City of Columbia Police Dep't.*, 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950) (noting that general release "covers all claims and demands due at the time of execution"); *see also* S.C. JURISPRUDENCE, RELEASE § 11 (noting that release will "cover all claims in existence at the time of the execution of the release that were contemplated by the parties"). Counsel for Respondent understood this very point of law when he argued at the July 31, 2008 circuit court hearing:

> And if you look at the Release itself it is not in any way limited to the claims in that underlying case. It talks in terms of any and all manner of action claims, whether known or unknown, which Plaintiff either has or now has against the released person or are related to any matter or thing whatsoever completely unlimited

from the beginning of time ***up to and including the date of execution hereof.***

(App. 565-66, emphasis added.) The Respondents position is without merit.

III. Menezes's claim accrued after he signed the Release.

This Court is asked to determine when Menezes's claims for breach of fiduciary duty accrued. "A cause of action generally accrues and the statute of limitations begins to run when a suit may be maintained, and ordinarily, this is when the wrongful act is done and the obligation or the liability arises, but it does not accrue until the party owning it is entitled to begin and prosecute an action thereon." 51 Am.Jur.2d *Limitation of Actions* § 127 (2012).

In his complaint, Menezes's asserts claims against Respondents and seeks to recover money damages. Necessarily, the wrongful act giving rise to these claims is one that caused Menezes's pecuniary harm – the closing of the merger. This event occurred after he signed the Release, thus for the reasons stated below this Court should reverse the court of appeals.

Notwithstanding Menezes's straightforward position, Respondents twist his claims and state that the act he alleges to have been wrongful was the setting of the terms of the merger. Quite simply, this is a gross mischaracterization of the complaint, but necessary to support the Respondent's otherwise untenable argument that this Court should affirm the decision of the court of appeals. While it is true that Menezes makes general allegations in his complaint that

various other acts of Respondents were improper and nefarious – including the setting of the terms of the merger – it is the closing of the merger that gives rise to this claim for breach of fiduciary duty seeking money damages. It is this alleged wrongful act that is critical when considering when Menezes's claims accrued.

Naturally, Respondents disagree and would like this court to believe that the result they advocate is "crystal clear."[3] Their problem is that this would only be true in some alternate universe where the facts of this case and the law of Delaware were as they wished. However, when applying Delaware law as it truly exists to the properly characterized allegations in his complaint, Menezes is confident that his claims accrued after he signed the Release and this Court should reverse the court of appeals' decision.

A. Pursuant to general principles of Delaware law, a cause of action for breach of fiduciary duty accrues at the time of injury because it is in the nature of a tort

This court need look no further than the general principles of claim accrual under Delaware law to see that the claims Menezes asserts accrued at the time he suffered injury – the closing. It is a longstanding principle of Delaware law that a

[3] If the resolution of this issue was "crystal clear," we would not be on appeal to this Court with conflicting rulings from the lower courts. Menezes is confident, however, that this Court can wade through Respondents' dubious attempts to mischaracterize the facts of this case and the law of Delaware and reach what he firmly believes is a correct result under Delaware law.

cause of action accrues at the time of the alleged "wrongful act." *Kaufman v. C.L. MCabe & Sons, Inc.*, 603 A.2d 831, 834 (Del. 1992). For tort claims, the term "wrongful act" is synonymous with "injury." *See Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892 n. 16 (Del. Supr. 2009).

In their brief, Respondents attempt to persuade this Court that a claim for breach of fiduciary duty is not a tort, thus general principles of tort claim accrual do not apply here. Their analysis is flawed for two reasons.

First, where a cause of action for breach of fiduciary duty is asserted **and the plaintiff seeks the remedy of money damages** the claim is in the nature of a tort under Delaware law. *Cf. Baron v. Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983) ("The cause of action for damages is in the nature of an action in tort for breach of the fiduciary duty...."). Because tort claims accrue at injury and Menezes was injured by the closing, his claims for breach of fiduciary duty accrued after he executed the Release.

Second, multiple times in their brief Respondents refer to the Delaware Law Review article first raised by Menezes in his opening brief. (Respondent's Brief, pp. 30-32, 42; *citing* J. Travis Laster and Michelle D. Morris, *Breach of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 Del. L. Rev. 71 (2010).) These references attempt to convince this court that the article does not stand for the proposition for which Menezes cites it – that a claim for breach of

fiduciary duty under Delaware law is a tort. However, Respondents simply reference points in the article where, as you would expect in any scholarly article, the authors consider all possible arguments. This includes the minority view that a breach of fiduciary duty is something other than a tort. Nonetheless, no matter how many out-of-context citations to the article Respondents make, they cannot change the fact that the authors ultimately concluded that under Delaware law "a breach of fiduciary duty is in fact a tort." *Id.* at 71. Thus, this article supports Menezes's position that his claims accrued after he signed the Release. For these reasons, Respondents arguments concerning the general principles of claim accrual under Delaware law are unavailing and this Court should reverse the ruling of the court of appeals.

B. Notwithstanding whether it is a tort under Delaware law, a cause of action for breach of fiduciary duty concerning a merger accrues at the time of the alleged wrongful act, which in this case was the closing of the merger

Notwithstanding whether a claim for breach of fiduciary is a tort under Delaware law, such a cause of action accrues at the time of the allegedly wrongful act under principles of claim accrual specific to merger disputes. To their credit, Respondents correctly state Delaware as to this point. (See Respondents' Brief p. 20 ("[u]nder Delaware law, a cause of action for breach of fiduciary duty first accrues 'at the time of the wrongful act'"); *citing Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004).) However, as

mentioned earlier, Respondents self-servingly misconstrue Menezes's allegations and assert that the allegedly wrongful act underlying Menezes's claim for breach of fiduciary duty was the fixing of the terms of the merger agreement. This is incorrect.

In this suit, Menezes asserts a claim for breach of fiduciary duty and seeks money damages as a remedy. Necessarily, the allegedly wrongful act underlying his claims is the event that caused his injury (*i.e.*, the closing). Therefore, the allegedly wrongful act underlying his claims occurred after he signed the Release and this Court should reverse the decision of the court of appeals.

In an attempt to confuse the issue, Respondents raise the point that the elements of a cause of action for breach of fiduciary duty under Delaware law include only (1) duty and (2) breach. Notably absent is the element of damages, which is commonly required in other jurisdictions, including South Carolina. *See RFT Mgmt. Co., LLC v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335 (2012). This is a distinction without a difference.

For the purposes of this appeal, it makes no difference whether or not Menezes has to prove damages in order to sustain his claim for breach of fiduciary duty concerning the shareholder's vote allowing the merger to close. The fact that the elements of breach of fiduciary duty under Delaware law include only the elements of (1) duty and (2) breach means only that Menezes

could have asserted a claim prior to the closing seeking injunctive relief. However, the fact that he did not assert such a claim, does not foreclose him from asserting a cause of action for breach of fiduciary duty arising out of the shareholder's actions concerning the closing of the merger. *See Baron*, 717 F.2d at 108-109 (finding that a cause of action seeking an injunction is separate and distinct from a cause of action for breach of fiduciary duty seeking the recovery of money damages); *see also Dofflemyer v. W.F. Hall Printing Co.*, 558 F. Supp. 372, 379 (D. Del. 1983) ("[t]he plaintiffs could not have sued for damages until the merger was actually accomplished....").

C. Pursuant to Delaware law, Menezes's cause of action for breach of fiduciary duty seeking money damages could not have accrued until after various conditions precedent were satisfied and the merger closed

Pursuant to Delaware law, Menezes's cause of action for breach of fiduciary duty seeking money damages could not have accrued until after the myriad of conditions precedent to the closing of the merger were satisfied and the merger became legally enforceable. *In re Coca-Cola Enterprises, Inc., aff'd Industrial Brotherhood Teamsters v. Coca-Cola, Inc.*, 2008 WL 2484587 (Del. 2008). Furthermore, "[i]f a right of action depends upon some contingency or a condition precedent, the cause of action does not accrue and the statute of limitations does not begin to run until that contingency occurs or the conditions

precedent is complied with." 51 Am.Jur.2d, *Limitation of Actions* § 127 (1970); *see also Teachers' Retirement System of Louisiana v. Aidinoff*, 900 A.2d 654 (Del. Ch. 2006) (holding that a cause of action for breach of fiduciary duty does not accrue when the terms of the agreement are set where there are intervening contingencies that prohibit the legal enforceability of the agreement). In an attempt to do an end-run around this point of law, Respondents once again misconstrue the allegations in Menezes's complaint.

In their brief, Respondents claim that Menezes alleged that the closing was a mere formality and thus no conditions precedent needed to be satisfied prior to closing. (Respondents' Brief at 33.) This is not true - Menezes did not allege that the closing of the merger was a formality such that the conditions precedent to the agreement were illusory and have no bearing on the issues of claim accrual. In actuality, he used the word "formality" in his complaint to underscore the fact that approval by the stockholders was certain because Respondents had absolute control over the matter because they controlled 75.6% of the relevant stock. (App. 14-15.) Notwithstanding the fact that the shareholder vote was a practical formality, the conditions precedent were real and are very much relevant to this Court's analysis concerning accrual.

The merger agreement is long and detailed - more than fifty (50) single-spaced pages. (App. 1044-1099.) The "conditions precedent" section of the

agreement is, on its own, several single-spaced pages long. (App. 1081-1083.) An indication of the material and important nature of the conditions precedent is that they are separately summarized in the main body of the Proxy. The summary itself is more than two single-spaced pages long. (App. 859-860; App. 1081-1083.)

Further, apart from the explicit conditions precedent, the transaction was subject to multiple termination events, any one of which could have scuttled it. For example, the merger could have been terminated by "mutual agreement" of SCI and ITG, which meant that it could be terminated by Respondents at any time since they controlled SCI and ITG. It could have been terminated by either party if the merger was not consummated by March 31, 2007." And it could have been terminated by either party if the other "breached or failed to perform" in any "material respect" any of the representations or warranties and the failure had not been cured in thirty days of written notice. (App. 860-861.)

Additionally, the merger was subject to conditions outside the control of the parties. For instance, the merger agreement states that the merger was subject to the "obtaining of all necessary consents, approvals or waivers from third parties." (App. 1079.) Further, the Proxy states that "[t]he merger is subject to the receipt of consents and approvals from various governmental entities, which may impose conditions on, jeopardize or delay completion of the merger. . . ."

(App. 800.) One obvious example of an independent third-party approval that had to be obtained would be that of SCI's lender (i.e., Wachovia bank [App. 900].).

A plaintiff cannot assert a cause of action for breach of fiduciary duty relating to an underlying contract under Delaware law until the relevant legal rights are established. *In re Coca-Cola Enterprises, Inc.* 2007 WL 3122370 (Del. Ch. 2007), *aff'd Industrial Brotherhood Teamsters v. Coca-Cola, Inc.*, 2008 WL 2484587 (Del 2008). Menezes's claims seek the recovery of money damages caused by the legal rights established at the closing. Because these legal rights were not established until after the previously listed conditions precedent were satisfied and the closing entered into, it is clear that Menezes's claim for breach of fiduciary duty did not accrue until after he signed the Release.

The court of appeals accepted as true Respondents' assertion that the relevant legal rights were established at the time the terms of the merger were set. But, as explained earlier, Menezes seeks the recovery of money damages and he was not injured – in a pecuniary sense – at the setting of the terms, but rather at the closing. Because Menezes was injured at the closing, it is clear that the relevant legal rights were not established until that time. Therefore, this Court should reverse the decision of the court of appeals.

D. Despite Respondents' arguments to the contrary, the question of standing is necessarily different than the question of accrual

Respondents argue that there is no difference between the questions of standing and claim accrual. Respondents might as well argue that there is no difference between the questions of "who?" and "when?", because those questions are the crux of standing and claim accrual, respectively.

In this matter, Respondents rely on a collection of cases that address the question of **who** has the standing to challenge a merger to support their position as to **when** Menezes's claim accrued. *See Brambles USA, Inc. v. Blocker*, 731 F.Supp. 643 (D. Del. 1990); *Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782 (Del. Ch. 1982); *Dieter v. Prime Computer Co.*, 681 A.2d 1068 (Del. Ch. 1996); *FMC Corp. v. R.P. Scherer Corp.*, 1982 WL 17888 (Del. Ch. 1982); *In re Beatrice Cos., Inc. Litig.*, 522 WL 36708 (Del. 1987); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163 (Del. Ch. 2002). The simple fact of the matter is that these cases concern the contemporaneous ownership rule, which as a matter of Delaware public policy provides that a plaintiff must own stock in a corporation at the time the terms of

the merger were set in order to have standing to ever challenge the merger.[4] This principle applies regardless of whether a plaintiff's claim accrued before or after a merger is consummated – that is, it has nothing to do with claim accrual.

The distinction between standing and claim accrual was drawn by the court in *Dofflemyer*, which is a case that addresses the issue of claim accrual:

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[4] Respondents seriously mischaracterize *Brown*, *Omnicare* and *Beatrice*. As for *Brown*, they write in their brief that when a "shareholder challenges the terms of a merger, the claim arises or accrues at the time that the board 'pass[es] a resolution approving the merger on terms which [the plaintiff] feels to be unfair.'" (Respondent Brief, at 21) (emphasis added). A simple reading of the case reveals, however, that the opinion does not even address when a claim "arises" or "accrues." Indeed, these words are not used anywhere in the opinion. The holding is simple: plaintiff "lack[ed] standing to maintain the cause of action alleged." 1982 WL 8782 at *3. *Beatrice* and *Omnicare* are the same. Neither of them discusses or deals with when a claim "arises" or "accrues."

Defendants' misstatement of *Brown*, *Beatrice*, and *Omnicare* has never been accepted by any court or commentator. To the contrary, the characterization of *Brown* has been expressly rejected by the only court to consider it, the United States District Court for the District of Delaware in *Dofflemyer*, as is clear from the quote in the text below.

Further, the *Folk* treatise, which Respondents cite as support for their contention (pages 22, 36, 46-47), does not deal with when a claim "arises" or "accrues" either. Indeed, the section referenced by Respondents (section 327.3) specifically addresses the point in time when a party must have an ownership interest in the stock in order to have standing to file and litigate a derivative action. While Respondents seek to conflate the concept of standing with accrual, the referenced section does not. *See* 2 Edward P. Welch, et al., *Folk on the Delaware General Corporation Law*, § 327.3.2 (5th ed. 2006 & Supp. 2007).

Finally, *Brown*, *Omnicare*, and *Beatrice* are all pre-merger cases and do not go to the issue of when claims relating to consummated mergers accrue. Only *Kaufman*, *Baron*, and *Dofflemyer* address that question and, as discussed in the text above, all show that claims such as Mr. Menezes's do not accrue until the closing of the merger at issue.

> *Brown* [*Brown v. Automated Mktg. Sys., Inc.*, 1982 WL 8782 (Del. Ch. 1982)] is also...inapplicable. In that case, the Court of Chancery held that a plaintiff who purchased shares after reading a press release indicating that the board of directors had approved a plan of merger did not have standing to challenge the merger when it was carried out according to the plan. *The holding of that case involved a determination of the times when a plaintiff must own stock in a corporation in order to have* ***standing*** *to challenge a merger and* ***is not pertinent to when****, if standing had existed, the plaintiff could have sued for damages.*

558 F. Supp. at 379 n.5 (emphasis added).[5] Because the standing cases relied upon by Respondents speak to the question of who can assert a claim challenging a merger and say nothing as to when such a claim accrues, this Court should ignore these cases and any analysis concerning standing and the contemporaneous ownership rule.

IV. Additional Sustaining Grounds

The party prevailing at the circuit court "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On*, 338 S.C. at 419, 526 S.E.2d at 723. In his opening brief, Menezes discussed Judge Pieper's concurring opinion from the court of appeals' decision. (Petitioner's Brief, p.10-11.) The concurring opinion recognized that

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[5] The only court that has ever disagreed with the *Dofflemyer* decision is the court of appeals decision now before this Court. *Dofflemyer*, 558 F. Supp. 372 (review "citing references" option on Westlaw). That is the only reason it has a "yellow flag" on Westlaw. As noted in the briefing, the Respondents were able to convince the court of appeals to incorrectly conflate the issue of standing with accrual.

Menezes complained of multiple factual allegations that each constituted a breach of fiduciary duty.

The Respondent's legal argument that the setting of the terms of the merger constitutes the single event upon which Menezes's breach of fiduciary duty claims accrued is, as discussed above, legally incorrect. Nevertheless, even if the Court were to determine that the setting of the merger terms constituted an accruing event for Menezes's claims, subsequent factual events occurring after he signed the Release also constituted breaches of fiduciary. Accordingly, if the Court determines that the setting of the merger terms is an event that Mr. Menezes has released the Respondents from, the Court can still affirm the circuit court's decision.

Menezes's pleaded breach of fiduciary duty claims against Respondents Ross, Gibbons, Storper and Gorga as board members (Count II of Complaint (App. 32-33)) and claims against them and the other Respondents as controlling shareholders (Count I of Complaint (App. 31-32).) Under Delaware law, a controlling shareholder owes a fiduciary duty to the minority shareholders. *E.g.*, *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 26 n.74 (Del. Ch. 2010) (noting that controlling shareholder owes a fiduciary duty to other shareholders).

Some of the specific allegations in the Complaint with respect to the claims for breach of fiduciary duty are as follows:

(a) by proposing the Merger and then allowing it to close notwithstanding the financial condition of FITG; **[post-Release]**
(f) by allowing the representation at the merger closing that the Material Adverse Conditions (MAC) Clause condition was satisfied; **[post-Release]**
(g) by failing to call of or renegotiating the merger (or cause it to be called off or renegotiated) because of the financial condition of FITG; **[post-Release]**
(i) by allowing the debt previously held by FITG to be transferred to the Combined Company and/or by allowing that debt to be converted into preferred stock; **[post-Release]**
(j) by allowing or causing the renegotiation of the SCI's credit facility and/or obtaining $100 million of additional preferred stock in connection therewith; and/or **[post-Release]**
(k) by otherwise failing to protect the interests of the minority stockholders of SCI. **[post-Release]**

(App. 31-33.) These post-Release actions caused the damages that Menezes filed the subject action over. For example, the SCI controlling shareholders (who are defendants in this action) voted to approve the merger on October 20, 2006. That conduct constituted a breach of fiduciary duty to the minority shareholders. Another example is the MAC Clause. There are two possibilities here – both of which would be breaches of fiduciary duty on October 20, 2006. The first is that the SCI Board of Directors allowed the merger to close notwithstanding a representation by FITG that there had been material adverse changes concerning FITG's financial health between the time of the merger agreement and the time of

the closing, namely, that FITG had begun to collapse financially.[6] The second is that the SCI Board of Directors allowed the merger to close without any representation at all regarding FITG's financial condition. In both cases, the breach of fiduciary duty would have happened on October 20, 2006. Accordingly, Menezes claims for breach of fiduciary duty were not released.

CONCLUSION

For the reasons stated, this Court should (1) find that the contingency argument was not preserved, (2) if the Court finds that the issue was preserved, determine that the Release does not bar Menezes's claims, (3) find that Menezes's claims for breach of fiduciary duty accrued after he executed the Release, or (4) affirm the decision of the circuit court for the additional reasons stated above. Therefore, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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[6] In the weeks prior to the merger, FITG was losing more than eight million dollars per month and had borrowed $31 million between September 22, 2006 (when the Proxy was issued), and October 20, 2006 (the closing). (App. 23.)

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November 29, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal From The Court Of Common Pleas
For Greenville County
The Honorable Edward W. Miller, Circuit Court Judge
C.A. No. 2008-CP-23-2701
South Carolina Court of Appeals
Opinion No. 4810, filed March 23, 2011

Brian P. Menezes,.....Petitioner,

v.

WL Ross & Co. LLC, Wilbur, L. Ross, Jr., Michael J. Gibbons, David H. Storper, David L. Wax, Joseph L. Gorga, Stephen B. Duerk, WLR Recovery Fund II, L.P., WLR Recovery Fund III, L.P, WLR Recovery Associates II LLC, and WLR Recovery Associates III LLC,.....Respondents.

PROOF OF SERVICE

I certify that on this day I have served the Petitioner's Reply Brief, by depositing a copy of same in the United States mail, postage prepaid, addressed to the following counsel of record:

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Via Hand Delivery

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

Re: *Menezes v. WL Ross & Co., et al.*
Appellate Case No. 2011-194626

Dear Mr. Shearouse:

Enclosed for filing please find the original and 15 copies of the Petitioner's Reply Brief in connection with the above-referenced matter. Please file the originals and return one (1) filed-stamped copy of the document to me in the enclosed, self-addressed, stamped envelope.

As noted on this letter and as further evidenced by the Proof of Service, opposing counsel is being served.

Thank you for your assistance in this matter.

Sincerely,

Russell T. Burke - JDLO

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