David C. Bohrer (SBN 212397)
david.bohrer@valoremlaw.com
VALOREM LAW GROUP, LLP
60 South Market Street, Suite 1250
San Jose, California 95113-2396
Telephone: (408) 938-3882
Facsimile: (408) 915-2672

Nicole N. Auerbach (SBN 6217095) (admitted *pro hac vice*)
nicole.auerbach @valoremlaw.com
Margot Klein (SBN 6256215) (admitted *pro hac vice*)
margot.klein@valoremlaw.com
VALOREM LAW GROUP, LLP
35 East Wacker Drive, Suite 3000
Chicago, Illinois 60601
Telephone: (312) 676-5477
Facsimile: (312) 676-5499

Attorneys for Plaintiffs
DONALD A. NEWELL, PETER C. WITMER, RICHARD RUDOMETKIN, GIRISH MIRCHANDANI, DANIEL CHESTER, MICHELLE CHESTER, and JONATHAN WARNER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

DONALD A. NEWELL, an individual, PETER C. WITMER, an individual, RICHARD RUDOMETKIN, an individual, GIRISH MIRCHANDANI, an individual, DANIEL CHESTER, an individual, MICHELLE CHESTER, an individual, and JONATHAN WARNER, an individual,

Plaintiffs,

v.

YAPSTONE, INC., a Delaware Corporation, MATTHEW GOLIS, an individual, THOMAS J. VILLANTE, an individual, and DOES 1-20, inclusive,

Defendants.

Case No. C13-00081

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION AGAINST PLAINTIFFS RUDOMETKIN, WARNER AND WITMER

Date: September 30, 2014
Time: 9:00 a.m.
Dept: 9
Judge: Hon. Judith Craddick

Second Amended Complaint Filed: July 25, 2013

Trial Date: January 26, 2015

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I. INTRODUCTION

Having successfully deceived Plaintiffs into believing their RentPayment stock converted to YapStone stock, and having continued and concealed that deception for more than a decade, Defendants Matt Golis, Tom Villante and YapStone now seek the ultimate reward for their fiduciary fraud and other misconduct – to deprive Plaintiffs of their day in court. To that end, Defendants have filed eight motions for summary judgment or adjudication – one directed to each Plaintiff based on statute of limitations and other grounds, and one related to Plaintiffs' derivative claims.[1] None have merit.

The gist of the motions is that the statute of limitations (or consent and estoppel as to Witmer only) bars Plaintiffs' fiduciary fraud claim. As discussed in Sections V and VI below, these theories fail because (a) the record demonstrates that based on Defendants' misrepresentations and concealment of material facts both before and after the transaction where YapStone acquired RentPayment's assets ("the Transaction"), neither Rudometkin, Warner nor Witmer knew or had reason to believe they were not YapStone shareholders until 2011, and (b) Witmer did not consent to the draft APA documents as Defendants allege.[2] Defendants also attack the fiduciary mismanagement and vicarious liability claims on a number of bases. As addressed in Sections VII and VIII, these claims do not win the day either.

Because disputed issues of material fact relevant to Plaintiffs' claims and Defendants' affirmative defenses abound, the motions should be denied in their entirety and this case should proceed to trial.

II. FACTUAL BACKGROUND

Golis is the founder and majority shareholder of RentPayment.com, Inc. ("RentPayment"), a

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[1] For the Court's convenience and by agreement of the parties, Plaintiffs file this consolidated opposition to the motions directed against Rudometkin, Warner and Witmer ("Consolidated Opposition"). Where arguments are identical to each, Plaintiffs cite to one of Defendants' Memoranda of Points and Authorities ("MPA") with an "e.g." and the plaintiff's name prior to the citation. Plaintiffs separately address the fiduciary fraud issues on a Plaintiff-by-Plaintiff basis.

[2] In order to buttress their arguments, Defendants mischaracterize Plaintiffs' claims, stating that the misrepresentation at issue is that Golis promised Plaintiffs they would become YapStone stock holders "*as part of the APA*." From this Defendants assert that *receipt* of a draft APA triggered the statute of limitations. But Plaintiffs allege and show that the misrepresentation at issue was that Plaintiffs would become – and later had become – YapStone shareholders "*as a result of the transaction*," regardless of the manner in which the transaction was documented.

company formed in 1999. (Ex. 1,[3] Golis Dep. at 35:8-12, 95:20-23). Golis was elected as the sole director of RentPayment in its initial bylaws dated September 17, 1999. (Ex. 2 at DEF0000687). No board resolution, shareholder consent or other document evidence that anyone other than Golis was ever duly appointed or elected to RentPayment's Board prior to the filing of this lawsuit. (Ex. 1_, Golis Dep. at 32:17-33:1; Ex. 3, 6/17/14 RentPayment counsel Gizzi Decl. ¶ 9 ("up until last Thursday…Golis was the only officer/director at [RentPayment]).[4]

Two of the plaintiffs, Donald Newell and Peter Witmer, were angel investors of RentPayment and kept it afloat for its operative lifetime. Their investments allowed the company to hire and pay employees, create a marketable brand, and develop valuable technology (allowing rent to be paid online via credit cards) which was then used by and ultimately transferred to YapStone. Neither Newell nor Witmer were officers, directors or managers of RentPayment, and neither was involved in or had knowledge about the day-to-day business of RentPayment. (Witmer Decl. ¶ 4).

The other five plaintiffs, Daniel and Michelle Chester, Girish Mirchandani, Rudometkin and Warner, were RentPayment employees who, beginning in early 2000, expended considerable time and effort starting RentPayment and creating a valuable and marketable technology platform. Rudometkin was involved in business development efforts (Ex. 4, Rudometkin Dep. at 77:12-18) and Warner worked in a technology/IT capacity. (Ex. 5, Warner Dep. at 22:9-24:6). Neither were managers nor involved with or knowledgeable about the management of the RentPayment business. (Rudometkin Decl. ¶ 4; Warner Decl. ¶ 4).

As money began to run out in early 2001, each Plaintiff employee, including Rudometkin and Warner, worked for months without pay. (Ex. 4, Rudometkin Dep. at 83:18-25, 84:22-85:6, 86:1-19; Ex.5, Warner Dep. at 34:20-35:13). They did so based on written and oral promises by

[3] Unless otherwise noted, all "Ex." citations are to the exhibits attached to the Declaration of Nicole Auerbach i/s/o Plaintiffs' Consolidated Opposition.

[4] Similarly, on June 7, 2011 (prior to informing Plaintiffs for the first time that they were *not* YapStone shareholders) RentPayment caused an Information Statement to be filed with the California Secretary of State listing Matt Golis as the sole director. (Ex. 6). In 2012, Golis also signed a "Written Consent of the Sole Director of RentPayment.com, Inc." (Ex. 7).

Golis that the past-due pay would be repaid in RentPayment stock, later to be converted to YapStone stock. (Rudometkin Decl. ¶3; Ex. 5, Warner Dep. at 35:14-36:4). Warner testified that he continued to work without pay because he wanted to be a part of the company when YapStone acquired it so that he could be part of the "big payout Golis promised." (*Id*. at 35:14-19.) He testified that Golis promised that "all of our shares in RentPayment that we were supposed to get were supposed to vest instantly and then turn into…YapStone stock because YapStone was buying RentPayment." (*Id*. at 35:20-36:4.) He added, "[t]hat [promise] was the only thing that kept me going." (*Id*.) All employees were laid off by RentPayment by March 2001 and, according to Golis and Villante, Chairman of YapStone, RentPayment had no money as of spring 2001. (Ex.1, Golis Dep. at 94:5-6, 120:04-120:17, Ex. 8, Villante Dep. at 72:23-73:2, 73:20-23, 169:14-171:14.) In lieu of back salary or keeping other debt on the books, RentPayment converted all such debt to RentPayment stock. Ex. 9.

A. The YapStone/RentPayment Relationship and the De Facto Merger.

In early 2001, Golis searched for a company to merge with or buy RentPayment. (Ex. 10). He found YapStone and Tom Villante, and once they teamed up, Golis forgot about the minority RP shareholders and focused only on his own financial interest. For example, although Golis signed a letter-of-intent with YapStone on March 7, 2001, the Transaction did not close until July 31, 2003. (Ex. 8, Villante Dep. at 15:5-17). Golis did not inform RentPayment shareholders that he entered into the letter-of-intent. (Ex. 1, Golis Dep. at 126:12-127:6; 143:2-19). The failure to close the transaction for two-and-a-half years, however, did not stop Golis and Villante from combining ***every*** aspect of the two companies as of September 2001, with no disclosure to Plaintiffs.

As part of the *de facto* merger in 2001, Golis and Villante conspired to allow YapStone to use RentPayment's assets for no charge, even though the parties had not consummated any transaction and no licensing agreement existed. RentPayment's valuable trade name, logo and domain name/url were all transferred to YapStone for its use by the summer of 2001. (*E.g.*, Ex.11; Ex.12; Ex. 8, Villante Dep. at 123:24-124:7; 153:17-154:2; 155:15-22). By at least June 2001, Golis and Villante arranged for YapStone to use RentPayment's proprietary and valuable payment

processing platform to process all rental payment transactions for both companies by migrating all YapStone data to the RentPayment platform. (Ex. 13; Ex.8, Villante Dep. at 160:20-161:5). Golis obtained no consideration from YapStone for the use of these assets although he knew them to be of substantial value. (Ex. 14; Ex. 15). Instead, he secured a position for himself in YapStone, and additional cash payments in the form of $175,000 of "back pay" that YapStone assumed as part of the transaction. (Ex. 1, Golis Dep. 198:25-199:6; Ex. 16 at NEW00197454.)

In the summer of 2001, Golis and Villante merged the companies' bank accounts so that all payments went to YapStone. (Ex. 17). At the same time, Golis held himself out as President and COO of YapStone and of "RentPayment, a YapStone Company" (Ex. 18; Ex. 19; Ex. 8, Villante Dep. 191:18-192:10;241:7-13), and Villante routinely held himself out as Chairman and CEO of RentPayment. (Ex. 20). For example, in an October 11, 2001 email to Capital One, Villante wrote:

> We recently merged with RentPayment.com which is the url that we are using going forward. Several million dollars have been invested in the site and the business logic which is tailored for the residential property market.
> ...
>
> Regards,
>
> Thomas J. Villante
> Chairman & CEO
>
> RentPayment - A YapStone Company
> 233 Wilshire Blvd.
> Suite 100
> Santa Monica, CA 90401

(Ex. 12)). Until as late as July 2002, YapStone's counsel for the supposedly arms' length transaction, Sheppard Mullin, served as the registered agent for RentPayment. (Ex. 21). The fact that Golis and Villante had already combined the companies and that YapStone was using RentPayment's assets for free was not shared with or approved by RentPayment shareholders. (Ex. 1, Golis Dep. at 180:3-10; 191:21-192:3). Instead, Golis took steps to conceal it; falsely stating for example to Plaintiff Dan Chester on February 26, 2002, "the company [RentPayment] is closed[5]

[5] In addition to this misrepresentation to Chester, Golis repeatedly misrepresented that RentPayment was closed. (Ex. 9 ("RentPayment.com Inc. was formerly [sic] closed immediately thereafter on December 3rd 2001") and Ex. 25 ("I am sorry to hear he is resorting to such measures considering the RentPayment.com entity is no longer in existence.")).

with Yapstone using a license to our technology for an infinite period." (Ex. 22). Villante admitted that there was no such licensing agreement. (Ex. 8, Villante Dep. at 166:04-167:20).

Similarly, Golis concealed for at least a year-and-a-half that he had entered into a "Management Services Agreement" with YapStone as of March 1, 2001, which required RentPayment to pay YapStone up to $5,000 monthly for YapStone to "manage" RentPayment even though Golis was able to do so and, by all accounts, RentPayment, was out of money.[6] (Ex. 23, Ex. 1, Golis Dep. at 126:12-127:6). Also, even though RentPayment had paying customers who continued to do business with the new combined entity, beginning in the summer of 2001, none of the money generated from RentPayment customers was paid to RentPayment. (Ex. 8, Villante Dep. at 171:8-19). In contrast, the RentPayment check ledger shows that RentPayment made multiple payments to YapStone in 2001-02, including a $64,800 payment made months after Golis and Villante claim RentPayment had no money.[7] (Ex. 24, (excerpts of RentPayment check ledger); Ex. 1, Golis Dep. at 120:04-120:17, Ex. 8, Villante Dep. at 169:14-171:14; Witmer Decl. ¶ 2.)

Most concerning, however, Defendants concealed from Plaintiffs that Golis was self-interested in the APA Transaction from the start, since he was getting paid by YapStone years prior to the Transaction's closing. (Ex. 8, Villante Dep. at 40:16-25; 108:15-110:16; 162:16-163:12; Ex. 1, Golis Dep. at 206:21-209:13).) Golis testified that because he was out of money at the time, his goal was to obtain employment from YapStone. (Ex. 1, Golis Dep. at 198:25-199:06). Golis's self-interest made him both biased and indebted to YapStone, and colored his ability to act in the best interest of RentPayment minority shareholders. Given that the companies were effectively combined as of September 2001, Golis was already working for and getting paid byYapStone, RentPayment was paying YapStone for illusive "management services," and all of RentPayment's assets were already being used for free by YapStone as of September 2001, the July 31, 2003

[6] Defendants referred to the Management Service Agreement for the first time in an Information Statement and Draft Asset Purchase Agreement sent to shareholders in September 2002, but failed to attach the agreement. (*See* Ex. 16).

[7] Golis was also "under financial duress" then and filed for personal bankruptcy. In so doing, he not only wrote off his personal debt relating to RentPayment, but to dissuade lawsuits against him, he even listed Plaintiffs as creditors despite that the debts owed to them were not personal to Golis. (Ex. 1, Golis Dep. at 76:19-77:19, 150:14-17; Ex. 26).

transaction that Golis, Villante and YapStone portrayed as an arm's-length transaction between two disinterested companies was, in reality, quite the opposite.

The uncompensated use of RentPayment's brand, technology and assets for years prior to the Transaction and without the knowledge or consent of Plaintiffs was the start of financial success for Golis, Villante and YapStone. Golis and Villante have each made millions from their roles with YapStone, and the RentPayment brand and business continue to flourish for YapStone to this day. (*See* www.yapstone.com/company/history/; www.rentpayment.com/). YapStone generated nearly $100 million in revenue in 2013 (http://www.yapstone.com/payments-industry/digital-payment-wars-yapstone-biggest-company-youve-never-heard/) and expects revenue in 2014 to be 40% more, according to a July 31, 2014 article in the *San Francisco Business Times*, "Walnut Creek payments company YapStone signs lease for new headquarters.

B. Representations That Plaintiffs Were YapStone Shareholders Prior to the Close Of The Transaction.

While RentPayment wound down its business in early 2001, and Golis negotiated with YapStone, Golis made repeated promises to Plaintiffs, including Rudometkin, Warner and Witmer, that their RentPayment stock would be converted to YapStone stock as part of the Transaction:

February 24, 2001 Golis email to team@rentpayment.com[8] (Ex. 27 (emphasis in original)):

> I have discussed the possibility of a merger[9] with Yapstone where as a "combined company" we would raise money together for the new organization (let's call it

[8] In addition to oral communications from Golis, Plaintiffs received numerous "team" emails from Golis. The "team" email listserv included Rudometkin,Warner, and Witmer. (Ex. 1, Golis Dep at 84:15-85:14; Ex. 5, Warner Dep. at 94:10-95:4; Ex. 4, Rudometkin Dep. at 81:4-8.) Warner also got information about RentPayment and YapStone from Dan and Michelle Chester, his sister and brother-in-law. (Warner Decl. ¶ 5). Similarly, Witmer exchanged information about RentPayment and YapStone with his brother-in-law Mirchandani (who was Golis' best man in his wedding and maintained a friendship with Golis until 2012). (Witmer Decl. ¶ 6). Witmer and Newell also shared information they received from Golis, RentPayment and/or YapStone. (*Id.* ¶ 7).

[9] Perhaps to argue that Golis's promises only applied in the event of a "merger," Defendants go to great lengths to establish that the Transaction was an "asset purchase transaction." (*See e.g.*, Rudometkin MPA at 5, 6). But Golis and Villante, were the ones, beginning in 2001 and continuing long after they knew the transaction was an "asset purchase transaction," who repeatedly described the deal as a "merger." (*See e.g.*, Ex. 27; Ex. 29; Ex. 8, Villante Dep. at 285:4-286:25. In fact, until just after their depositions were taken in May 2014, both Golis and Villante's biographies on the YapStone and RentPayment websites represented that RentPayment and YapStone "merged in 2001." (Ex. 30, 2014 RentPayment website screenshot; Ex. 1, Golis Dep. at 95:4-96:20; 185:3-8).

> YapPayment). *** In terms of YapPayment, this downsizing move is the BEST move for the stockholders of the combined company (all of us). Tom [Villante] and I have a common goal of building this combined organization up with credibility (funding and our many connections) and selling the organization when it gets big when EVERYONE can cash out on the upside (the stock in YapPayment that we all will hold.)

March 13, 2001 Golis email to team@rentpayment.com (Ex. 28 (emphasis added)):

> YapStone is expecting to raise $2 million at as high a valuation as $13-15 million, of which in the merger we account for 30% of their stock. That means, as compared to trying to sell the company for $1.5-2 million, we will have a paper worth of about $3.5-4 million depending on the valuation – now you see why I am so excited! With approximately 5.5-6 million ***shares of RentPayment that will be converted, the conversion price/share should be around 50 cents…so everyone will (on paper) potentially get a 100% return on those 25 cents/share common stock***.

Golis testified that he was referring to a "conversion of RentPayment stock to YapStone stock" in this email. (Ex. 1, Golis Dep. at 142:17-143:1).

April 11, 2001 Golis email to team@rentpayment.com (Ex. 29 (emphasis added)):

> Although there are no official "team" members, everyone who was a part of RentPayment through the end of February will still receive this message. We are all a team in that ***all of us are shareholders in RentPayment, which will be converted to Yapstone stock*** upon the closure of the pending merger.

December 29, 2001 Golis email to Plaintiff Dan Chester (who at the time, was performing IT consulting work for YapStone) (Ex. 31 (emphasis added, ellipses in original)):

> We need to get the checks out to the properties for January rent as you know…***you will be a large shareholder in Yapstone*** once the deal gets finished (I know it is taking a long time, but I am overloaded with sales requests as is Tom [Villante] and if we don't do sales there will be no Yapstone to matter).

C. The Transaction Documents.

The transaction documents dated between March 30, 2001 and April 2002 were consistent with Golis' representations to Plaintiffs that they would own YapStone stock after the transaction. An April 2001 draft asset purchase agreement that Golis sent to Newell, Witmer, Trevor Loy and other RentPayment shareholders provided that YapStone shares paid in consideration for RentPayment's assets would be "distributed pro rata among the Stockholders pursuant to their respective ownership interests in RentPayment." (Ex. 32 at TL0001200).

In late November 2001, Andrew Frumovitz, then-counsel for RentPayment for the transaction (but paid for by YapStone) informed Golis in the clearest of terms that he did not know whether the contemplated transaction would "be for fair market of the company." (Ex. 19; Ex. 1, Golis Dep. at 214:10-215:5). He warned of "significant potential exposure" for fraudulent conveyance actions by RentPayment's creditors against Golis, Villante and YapStone as a "successor in interest" to RentPayment. (Ex. 19.)

To make it less likely that RentPayment's creditors would sue Golis, Villante or YapStone for stripping RentPayment's assets and leaving only its liabilities, YapStone's lawyers restructured the transaction so that YapStone stock would be paid to RentPayment, and not to its shareholders as had been promised. (Ex. 8, Villante Dep. at 233:13-234:23; 237:8-239:9). Since the YapStone stock would be left in the shell company, creditors could come after that first. (*Id*.)

By April 2002, Golis was well aware that the structure of the transaction had changed in this way. (Ex. 1, Golis Dep. at 219:20-220:4; 220:16-20). Yet Golis never alerted Rudometkin, Warner, Witmer or any of the RentPayment shareholders about this significant change. (Ex. 1, Golis Dep. at 213:21-214:2; 218:9-219:10; 235:22-236:7; Warner Decl. ¶ 6; Ex. 33, Witmer Dep. at 228:13:229-8; Witmer Decl. ¶ 9, Rudometkin Decl. ¶ 5). On the contrary, Golis, with the substantial assistance of Villante and YapStone, took great steps to misrepresent and conceal it.

1. The Information Statement and Draft APA.

On September 6, 2002, on behalf of YapStone, Villante distributed to RentPayment and YapStone shareholders an Information Statement and unexecuted draft Asset Purchase Agreement ("Draft APA"), dated September 5, 2002, along with forms to consent to the Transaction. (Ex. 16).[10] The Information Statement and Draft APA purported to inform the shareholders that YapStone had purchased RentPayment's assets for a 25% equity interest in YapStone. The Information Statement advised that the boards of directors of both companies had "unanimously

[10] The Information Statement and Draft APA received by Rudometkin, Warner and Witmer are compiled in Group Exhibit 16, and separately identified in their respective factual statements. But for the fact that Witmer was unable to locate a portion of what he had received (*see* Witmer Decl. ¶ 8), the relevant portions are materially the same, so subsequent citations herein are only to Warner's copy, found in Group Exhibit 16 at NEW00197424-519.

approved the Acquisition and are requesting that the shareholders of their respective companies approve the Acquisition." (Ex. 16 at NEW00197424.) Neither document disclosed that YapStone was already paying compensation to Golis at the time; rather, the documents reflected that YapStone would assume a $175,000 liability for "back pay" to Golis. (*Id.* at NEW00197454). No documentation exists to support Golis' "back pay" figure. Also, despite his promises to do so, Golis did not obtain as part of the transaction any commitment for back pay for any of the other RentPayment employees/shareholders. (*See* Ex. 34).

The Information Statement described the ownership structure in YapStone after the transaction as follows:

Name of Beneficial Owner	Amount and Nature of Beneficial Ownership (1)(2)					
	Class A Common Stock		Class B Common Stock		Series A Preferred Stock	
	#	%	#	%	#	%
RentPayment, Inc. (Matthew Golis)(3)	135,431	25.0%	420,125	25.0%	134,250	25.0%
Kirk S. Honour	--	--	55,673	3.3%	--	--
Scott M. Honour	122,222(4)	22.5%	213,462	12.7%	32,600	6.1%
Thomas J. Villante	--	--	991,239	59.0%	189,400	35.3%
Venture Bridge, L.P.	166,667	30.8%	--	--	--	--
All other beneficial owners	117,404	21.7%			180,750	33.6%
Total	*541,724*	*100%*	*1,680,499*	*100%*	*537,000*	*100%*
All directors and executive officers as a group (Golis, K. Honour, S. Honour, Villante)(5)	257,653	47.5%	1,680,499	100%	356,250	66.4%

(Ex. 16 at NEW00197444). Notably, Villante, Golis and other YapStone owners were described as being "beneficial owners" of YapStone. This language is important because it was used again by YapStone with Witmer and Newell in 2008.

2. Material Differences Between the Information Statement/Draft APA Sent to Plaintiffs and the Final Deal Documents Defendants Executed.

The 2002 Draft APA attached to the Information Statement did not appear to be complete to Rudometkin, Warner or Witmer. Among other things, it was not signed, one of the schedules was cut off, and corporations code sections were attached at the end. (Ex. 35; Ex. 36; Ex. 37). In addition, there were significant differences between the materials sent to Plaintiffs in 2002 by Villante and YapStone and the final documents that Golis and the other defendants executed to close the Transaction. For example, a referenced Golis employment agreement, Intercreditor Agreement (with Golis as a party), and Management Services Agreement were *not included* in the materials

sent to Plaintiffs, nor were either company's Board Consents showing that in fact, both boards had "unanimously" approved the transaction. (Ex. 16 at NEW00197424-519). These materials were all included in the final APA that was executed in July 2003. (*See* Ex. 38 at NGE 00050-63, NGE 00097-110, NGE 00238-242, NGE 00244-249, NGE 00252-254.)

Although Defendants claim that these particular transaction documents put Plaintiffs on notice of Golis's fraud, even the terms of the APA changed between the 2002 draft given to Plaintiffs and the 2003 Transaction close, including the promised purchase price. For example, between September 2002 and the July 31, 2003 transaction closing, YapStone granted additional shares to YapStone law firm Nida & Maloney which were never disclosed to Plaintiffs. (Ex. 38 at NGE 00291-294). Thus, RentPayment's ownership in YapStone was already diluted by the time the transaction closed. In addition, without disclosure to Plaintiffs, certain addition RentPayment liabilities (California, Illinois and federal employment taxes) were assumed by YapStone and incorporated into the final APA. (Ex. 38 at NGE 00091-95).

The Draft APA sent to Plaintiffs also included an incorrect capitalization table for RentPayment. (Ex. 16 at NEW00197495). As described further below, Golis revised the capitalization table prior to the transaction closing in order to induce Newell and Witmer's consent, but he never supplemented the materials sent to the other RentPayment shareholders with the revised table, nor included it in the final deal documents. (Ex. 39 at NEW00185749-50; Ex. 1, Golis Dep. at 259:16-24). Golis admitted that the capitalization table negotiated in June-July 2003 with Witmer and Newell was different than the one included in the Draft APA sent to the other RentPayment shareholders in 2002. (*Id.* at 259:6-14). Thus, the 2002 Information Statement and Draft APA circulated by YapStone and Villante to Plaintiffs were incomplete, in draft form and, unbeknownst to Plaintiffs, materially changed by the time the Transaction closed.

3. Golis Did Not Review the Information Statement or Draft APA Before It Went To Plaintiffs.

Although Defendants argue that the statute of limitations began when Plaintiffs received the Information Statement and Draft APA, Golis, the fiduciary in question, testified that he did not

recall reviewing them before Villante and YapStone sent them out. (Ex. 1, Golis Dep. at 226:17-227:9; 227:15-228:22). "I don't recall reviewing it, as I didn't prepare it. I believe it was YapStone's counsel that prepared this document." (*Id.* at 227:2-4). He also did not recall telling Newell or Witmer that the Information Statement would state that "the board of directors of both companies unanimously approved the transaction" and that the boards believed "it was in the best interest of the company to enter into the Asset Purchase Agreement." (*Id.* at 230:1-231:1). Golis did not tell any RentPayment shareholder about the change in the Transaction structure. With respect to communications with Witmer and Newell:

> Q: Can you describe any specific conversation that you had with Peter Witmer or Don Newell in which you described the structure of the transaction as one in which RentPayment.com, Inc. would receive the YapStone shares rather than the shareholders, prior to September 6, 2002?
>
> A: I can't recall specifically talking about that one deal point of many deal points in this negotiation.

(*Id*. at 233:3-10; *see also* 213:21-214:15).

Golis admits that the Information Statement/Draft APA falsely stated that RentPayment was in good standing. (*Id.* at 236:8-237:7) When asked why he nevertheless allowed documents with false statements to be sent to RentPayment shareholders, Golis testified: "I don't recall reviewing this particular point in the document." (*Id.*). Golis also admitted that the Information Statement/Draft APA falsely stated that RentPayment was in compliance with its tax obligations, and testified that he didn't "recall reviewing this particular section" either. (*Id.* at 237:22-238:9). Yet by their present motions, Golis and Defendants would like to bind Plaintiffs to language in the very documents that Golis, the fiduciary, did not even review himself.

D. Rudometkin's Understanding of the Information Statement and Draft APA Prior to the Close of the Transaction.

Rudometkin testified that he believed that his RentPayment stock would be converted to YapStone stock as part of the Transaction because Golis said so "many times in verbal conversations and emails." (Ex. 4, Rudometkin Dep. at 138:12-20; 140:6-9; 279:5-18). Upon reviewing the Draft APA in 2003, Rudometkin believed that reference to RentPayment "was consistent with what Matt had been telling [me] previously." (*Id.* at 139:8-14). Specifically,

Rudometkin believed that "RentPayment" in the Draft APA "was referring to RentPayment inclusive shareholders" and that the RentPayment shareholders would receive the YapStone stock. (*Id.* at 137:12-138:1; 160:24-161:9; 184:6-185:4) ("I believed that the term 'RentPayment' collectively meant the shareholders, the company, us."). Rudometkin confirmed, "I believed then, I believe today that RentPayment.com, RentPayment.com, Inc., means and meant the shareholders." (*Id.* at 161:25-162:2). With this understanding, he signed the consent to the transaction on February 25, 2003.[11] (*Id*. at 184:6-185:4.) Rudometkin never received a final copy of the APA. (*Id.* at 105:4-12). Thereafter, Rudometkin had "no reason to believe" he was not a YapStone shareholder. (*Id.* at 164:5-9). In fact, as discussed further below, Matt Golis, YapStone personnel and two YapStone CFOs confirmed his belief orally and in writing in 2008 and later.

E. Warner's Understanding of the Information Statement and APA Prior to the Close of the Transaction.

Warner was in his mid-20s when he received the Information Statement and Draft APA, and was unsophisticated about commercial transactions. (Ex. 5, Warner Dep. at 83:24-84:4). Prior to receiving the voluminous materials, he had had oral and written communications emails from Golis, including those referenced above, promising him RentPayment stock for working without pay and that the stock would convert to YapStone stock as part of the Transaction. (*Id*. at 94:6-95:4.) Warner testified that in February 2001, while he was working for RentPayment without pay, Golis assured [him] in a phone call "that our RentPayment stock would turn into YapStone stock. We would vest – or RentPayment would vest instantly and then turn into YapStone." (*Id*. at 93:16-94:5.).

Warner testified that although he read the documents provided by YapStone, the materials were "scary" and he procrastinated in consenting to the transaction "because I was basically afraid." (*Id*. at 66:10-15; 65:17-19; 71:22-72:3) ("[T]he Information statement, the asset purchase agreement, and this consent altogether is a lot of paper and very scary if you've never signed legal

[11] As described below, the RentPayment capitalization table attached to the Draft APA changed without Rudometkin's knowledge *after* he signed the consent. (Ex. 4, Rudometkin Dep. at 150:24-151:9).

documents like this before.") Based on the emails he got and the conversation he had with Golis prior to receiving the Draft APA, Warner' understood the materials to mean that YapStone was going to issue stock to RentPayment shareholders and employees. (*Id*. 73:18-74:18; 75:7-20). "My understanding of this is that, so you say RentPayment gets these shares, but then they go to all the people because, I mean – that's my best understanding of this." (*Id*. at 77:2-21). "[S]o when I see shares in connection, I think of them going to the people who own -- like RentPayment *is* the people who own the shares." (*Id*.; *see also* 78:25-79:13 ("And my understanding is those [YapStone] certificates…basically – it gets delivered to the [RentPayment] company and then to the employees because the employees as shareholders *are* the company.") (emphasis added).

Warner testified, "I read it and tried to understand it as best I could. But I was mid 20s or something like that. And I had been working [for RentPayment] without money, so I couldn't afford a lawyer. So I read it and did the best I could. And that was part of why I procrastinated even signing it because I wasn't positive what I was actually signing." (*Id.* at 83:12-84:4). Warner did not understand "dissenter's rights", and still does not understand "preemptive rights," "conversion rights," or "subscription rights." (*Id*. at 84:25-85:3; 87:24-88:4). He has never seen YapStone's certificate of incorporation and does not know what one is. (*Id*., 88:5-9). So unsure of what the Information Statement and Draft APA actually meant, however, Warner held on to the materials for months. (*Id.* at 101:19-102:9). Warner called Golis around June 2003, concerned that his delay was "screwing things up for the acquisition." *Id.* Golis told him not to worry about signing a consent and said the transaction would go through anyway. (*Id.*) Warner believes that Golis assured him again in that conversation that his RentPayment stock would convert to YapStone stock. (Ex. 36; Ex. 5, Warner Dep. at 108:15-19; Warner Decl. ¶ 7). Relying on what Golis told him in June 2003, Warner never consented to the transaction. (Ex. 5, Warner Dep. at 109:5-7; Warner Decl. ¶ 8).

After speaking with Golis in June 2003, Warner believed the transaction would go through and that he would be a YapStone shareholder. (Warner Decl. ¶¶ 3, 7). Warner said he did not contact Golis or anyone else to determine why he had not received YapStone stock certificates because, "I didn't know that I was supposed to receive a certificate." (Ex. 5, Warner Dep. at 110:23-

111:8). Between 2003 and 2011 when he received the YapStone dividend announcement, however, Warner checked up on the company online. (*Id*. at 113:18-114:5). He said he did not do anything else to see how his investment in YapStone was doing because "I felt like everything was still moving along and things just took a long time." (*Id*. at 114:8-12).

F. Witmer's Understanding of the Information Statement and APA Prior to theClose of the Transaction.

1. Golis Engages in Additional Negotiations in 2003 to Induce Witmer's Consent.

As noted above, Golis provided Witmer with an early draft APA that provided that RentPayment shareholders would receive the YapStone stock as part of the transaction. (Ex. 32). Subsequent conversations with Golis established that the purchase price would be 30% of YapStone's outstanding stock. (Ex. 32; Ex. 33, Witmer Dep. at 70:3-25, 72:1-73:2.). When Witmer received the 2002 Draft APA, he did not read the whole document. Instead, he flipped through to find the purchase price and capitalization table, as he believed there was no point in reading further if those two items were not to his satisfaction. (*Id*. at 74:22-75:2, 83:7-14, 87:4-14, 103:15-21). Witmer quickly discovered that the purchase price had dropped from 30% to 25%, and that the capitalization table did not accurately reflect the investment he had made into RentPayment. (*Id.*) Accordingly, he declined to consent to the Transaction. (*Id.* at 87:4-14, 103:15-21.)

Months elapsed without any contact from Golis or action by Witmer. Then, beginning in March 2003 and continuing into July 2003, Golis initiated a series of oral and written communications with Witmer and Newell designed to get their approval to the Transaction. (Ex. 33, Witmer Dep. at 113:4-6; Ex. 1, Golis Dep. at 251:1-10). Newell and Witmer refused to consent, questioning, among other things, the accuracy of the schedules demonstrating RentPayment's ownership structure and whether RentPayment shareholder**s** would receive the YapStone stock. (Ex. 33, Witmer Dep. at 87:4-14; 93:2-17; Witmer Decl. ¶ 10). To induce them to consent to the Transaction, Golis concealed and misrepresented the structure of the Transaction.

Defendants incorrectly contend that Witmer's claims are based on one single representation by Golis that Witmer's RentPayment stock would convert to YapStone stock as part of the

Transaction. (Witmer MPA at 8, 15). This is simply belied by the evidence. For example, in a May 5, 2003 email, Witmer clearly still believed the Transaction would provide RentPayment shareholders with YapStone stock. He wrote to Golis, "We need…the agreement with yapstone for what percentage of ownership ***the shareholders*** in rentpayment have." (Ex. 40 (emphasis added)). Golis did not tell Witmer that, now, the Transaction was structured differently. (Witmer Decl. ¶ 11; Ex. 33, Witmer Dep. at 104:8-20). In fact, shortly thereafter, Golis lied about the Transaction in an email to Newell, who Witmer had been relying on to address the stock issues since Newell understood the issues better. (*Id.* at 98:16-19.) Witmer and Newell spoke often and shared information about what Golis was saying during this period. (Witmer Decl. ¶ 7). On June 4, 2003, after receiving another draft APA from Golis, Newell wrote to Golis:

> The asset purchase agreement document references shareholder – SINGULAR – is this a legal term? Why wouldn't it reference shareholderS (plural) of Rent payment?

Golis responded that same day:

> The document states that "***RentPayment shareholders*** will receive 25% of the outstanding Yapstone Class A Preferred and 25% of the outstanding Yapstone common stock."[12]

(Ex. 41 (emphasis added)). Newell accepted Golis' representation, and wrote in an email to Golis (copied to Witmer) hours later:

> I know the document entitles rentpayment shareholders to 25% of outstanding stock. Does Yapstone have any other classes of stock than a, b and preferred?

(Ex. 42). Again, Golis did not clarify the true terms of the Transaction. (Witmer Decl. ¶ 12). Rather, in phone calls over the next several days Golis reiterated that RentPayment *shareholders* would receive the YapStone stock. (Ex. 33, Witmer Dep. at 116:9-117:8; 117:24-8). At no time did

[12] This representation was consistent with representations Golis made during this same time frame to plaintiff Mirchandani who, in reliance thereon, signed the shareholder consent on June 26, 2003. (Ex. 43, Mirchandani Dep. at 314:11-16, 315:3-15, 316:7-13). The many additional representations made to Mirchandani before and after the transaction closed will be discussed in more detail in response to the motion directed specifically to him.

Golis ever tell Witmer that RentPayment and not its shareholders would get the stock. (Witmer Decl. ¶¶ 3, 9, 11-12; Ex. 33, Witmer Dep. at 104:8-20).

Golis continued to pressure Newell and Witmer to consent to the Transaction, writing on June 9, 2003: "now the timing of not getting signatures from you and Pete is impeding the completion of the merger (everything else is done)." (Ex. 42). Golis' urgency escalated from there. (Ex. 33, Witmer Dep. at 98:4-15; 111:8-15; 113:4-13; 120:1-5). Newell and Witmer had other concerns, however, because they believed the RentPayment capitalization table included in the Draft APA did not accurately reflect their investments into the company. (*Id.* at 74:22-75:22.) As a result of numerous conversations with Golis during June and July 2003, Golis agreed to revise the capitalization table. (Witmer Decl. ¶¶ 13-14). On July 9, 2003 Golis sent a revised RentPayment capitalization table ("Revised Cap Table") to Witmer and Newell that Witmer believed accurately reflected his investment, and Golis promised that the Revised Cap Table would be incorporated into the Transaction materials. (Ex. 39; Ex. 33, Witmer Dep. at 112:21-113:13). Notably, in the Revised Cap Table, Golis not only increased the share allocation to Newell and Witmer, but also awarded himself an additional 3,317,953 shares, thereby bringing the total shares outstanding to 9,998,939 (rather than the 3,985,939 total shares that are listed in Schedule 3.7 of the Draft APA). (*Compare* Ex. 39 at NEW00185750 *with* Ex. 16 at NEW00197495).

Upon Golis's representations as to the Transaction structure and his promise to incorporate the Revised Cap Table, Witmer signed a shareholder consent to the Transaction. (Witmer Decl. ¶ 14; Ex. 33, Witmer Dep. at 113:4-13; 111:16-24; 136:22-25; 140:20-141-22). "[T]his is the shareholder consent, certificate that I signed in the agreement that we made [with Golis] over the phone….we had an agreement over the phone that I understood, and then I signed this document [shareholder consent]." (*Id*. at 138:5-18). Witmer understood when he signed the shareholder consent "that it was an agreement between Matt, Matt's agreement, too, that we – and Don, that all three of us agreed that the equity I put in would be transferred to YapStone shares of 25 percent, and that my percentage in, of equity that I put into RentPayment would be a portion of that 25 percent. That's what I understood Matt, myself and Don agreed to." (*Id*. at 146:13-147:2). Even though

Golis, Witmer and Newell had reached an agreement as to the Revised Cap Table and Golis promised it would be included in the Transaction, the shareholder consent form that Golis sent Witmer to sign referred only to the 2002 Draft APA. (Witmer Decl. ¶ 14; Ex. 44).

Despite his promises to Newell and Witmer, which induced Witmer's shareholder consent, Golis did *not* include the Revised Cap Table in the final deal documents, although he later provided it and caused YapStone to use it in the years after the Transaction closed. (Ex. 1, Golis Dep. 259:21-24). Golis never provided any other shareholder, however, with the Revised Cap Table. (*Id.* at 259:16-20). As a result, Rudometkin and Warner, for example, never saw it. (Rudometkin Decl. ¶ 6; Ex. 4, Rudometkin Dep. at 152:10-14; Warner Decl. ¶ 8). Rudometkin, instead, consented to the Draft APA months before the Revised Cap Table was agreed to by Golis, Witmer and Newell. That Draft APA contained the previous cap table showing 3.9 million outstanding shares. (Rudometkin Decl. ¶ 6; Warner Decl. ¶ 8). Golis knew the APA that had been sent to all RentPayment shareholders containing Schedule 3.7 was incorrect as soon as he revised it, which was of course prior to the close of the transaction. (Ex. 1, Golis Dep. 259:6-14.)

In addition, despite Villante's prior representation in the September 6, 2002 Information Statement that the Board of Directors of RentPayment had "unanimously approved" the transaction (Ex. 16 at NEW00197424), Golis pressured Newell and Witmer to sign a RentPayment Board of Directors' resolution in the summer of 2003 or risk the deal collapsing. (Ex. 33, Witmer Dep. 112:21-113:20; 121:1-5 ("Matt made it very clear to us on the phone that if we don't get this [board resolution consent] done, you'll have nothing.")). On June 9, 2003, Golis told Witmer and Newell that they could not "officially complete the merger" until both shareholder consents ***and*** a RentPayment directors' resolution approving the transaction were signed. (Ex. 42); Ex. 1, Golis Dep. at 254:1-8). Newell and Witmer objected to signing the directors' resolution because they had never been appointed or accepted responsibility to act as directors. (Ex. 33, Witmer Dep. at 119:10-16; 122:13-123:10). On June 10, Don Newell sent an email to Golis about his reluctance to sign, stating:

> Matt, I hope you've had a second or two to think through some of these issues. I'd love to talk on the phone so that we don't misinterpret tone (hard to do in an email!) Please call me when you have a second.

(Ex. 45). In subsequent calls, Newell and Witmer reiterated their concerns, but Golis nonetheless continued to push them to sign as directors. (Ex. 33, Witmer Dep. at 122:20-123:2). Golis insisted that there was no way the transaction could close, and consequently, no way they or any other RentPayment shareholder could realize anything on their RentPayment investment, unless they signed the directors resolution. (*Id.* at 120:1-5; 123:3-10).

Golis next obtained a copy of YapStone's board resolution from YapStone's lawyer, who admonished him that it was for "informational purposes only" and stressed that he should consult with counsel with respect to any intended modifications. (Ex. 46). Golis ignored that advice and instead began to modify the resolution for RentPayment himself. (Ex. 47). Golis even instructed Newell and Witmer to further modify it so that all three could sign it. (Ex. 33, Witmer Dep. at 123:25-124:4). In a telephone conversation, Golis, Witmer, and Newell agreed that the resolution would "reflect that the shareholders were getting the stock, as opposed to the company." (*Id*. at 124:22-125:6).

Witmer and Newell ultimately relented to Golis' pressure to sign the board resolution but only after the resolution was changed to state that ***RentPayment's shareholders*** would own 25% of YapStone's issued and outstanding shares. (Ex. 33, Witmer Dep. at 117:24-118:9; 118:23-120:9; 139:16-140:16).

Draft provided by Golis on June 17, 2003:

> Yapstone will issue a number of shares of the Corporation's capital stock…such that immediately following issuance thereof RentPayment will own a sum equal to 25% of the Corporation's issued and outstanding shares of Class A Common Stock, Class B Common Stock, and Series A Preferred Stock, respectively;

(Ex. 47).

Final version of RentPayment Board Resolution signed by Golis, Newell and Witmer and caused to be notarized by Golis on July 10, 2003:

> Yapstone***, Inc***. will issue a number of shares of ***it's*** [*sic*] capital stock to the Corporation such that immediately following issuance thereof RentPayment***'s shareholders (shareholder schedule hereto Exhibit B)*** will own a sum equal to 25%

> of ***Yapstone's*** issued and outstanding shares of Class A Common Stock, Class B Common Stock, and Series A Preferred Stock, respectively.

(Ex. 48 (emphasis added)). Witmer understood that these changes reflected the agreement he and Newell reached with Golis which, along with Golis's pressure and the resolution of the cap table issue, induced him to sign the consent and directors resolution. (Ex. 33, Witmer Dep. at 129:21-130:3). Golis signed the directors' resolution with the revised language stating that RentPayment shareholders would receive the YapStone stock, and had it notarized on July 10, 2003, weeks before the Transaction closed. (Ex. 48). Golis caused the RentPayment board resolution to be included in the final Transaction documents by providing them to YapStone's lawyers. (Ex. 38 at NGE 00252-254).

Based on the prior representations and the specific agreement that Golis, Witmer and Newell arrived at between May and July 2003, Witmer believed that "the RentPayment shareholders would own 25 percent of YapStone stock." (Ex. 33, Witmer Dep. 150:10-151:10). "In substance, I remember Matt saying, 'You will own, you and Don will own shares in YapStone after the, after the Asset Purchase Agreement.'" (*Id.* at 152:23-153:13). Accordingly, Witmer believed he was a YapStone shareholder from 2003 until June 16, 2011 when he received a letter from YapStone's and RentPayment's counsel saying otherwise. (Witmer Decl. ¶ 3). Until then, Witmer "had no belief that I didn't have YapStone shares." (Ex. 33, Witmer Dep. at 221:10-17; 94:7-10).

G. Representations to Plaintiffs and RentPayment Shareholders Made After the Close of the Transaction Until June 2011.

After the APA Transaction closed in July 2003, Golis and others at YapStone continued to represent to RentPayment shareholders that they ***were*** YapStone shareholders, and concealed the fact that they were not. For example, on April 27, 2004, in response to an email from Newell where Newell requested final documentation of the Transaction, Golis (then COO of YapStone) referred to the agreement that he, Newell and Witmer had reached in July 2003 and said:

> I will ask Tom [Villante] to email me a copy of the final Asset Purchase Agreement…. RentPayments ***shareholders*** received preferred and common shares in YapStone, Inc. (we just have not paid the attorneys yet to actually generate the stock

> certificates but the RentPayment shareholders have now been included in Yapstone's balance sheet as of recently).
>
> The Yapstone purchase of RentPayment's assets was a purchase funded by Yapstone preferred and common stock (that I in "good faith" shared with RentPayment's shareholders per the final ownership structure that you, Pete, and I approved about two years ago).

(Ex. 25 (emphasis added)). This email was shared by Newell with Witmer. (Witmer Decl. ¶ 15).

On August 18, 2005, RentPayment shareholder Trevor Loy, whose deposition Defendants took in this case, exchanged emails with Golis. Loy stated:

> Just to confirm our verbal conversation, you stated that I own approximately 0.5 pct of Yapstone's current common shares and 0.5 pct of Series A preferred shares. * * * Per my request, could you please get me confirmation of the actual number of shares I own and the number of currently outstanding shares on a fully diluted basis.

Golis responded:

> I don't have our most recent cap table to calculate the actual # of shares. I will check with Tom [Villante] today to see if I can get that information (to figure out the approximate 0.5% that you own).

(Ex. 49). Although Golis continued to tell Loy that he was a YapStone shareholder in the ensuing years, he never provided Loy with the promised YapStone stock certificates. (Ex.50). In March 2006, Loy again wrote to Golis and said "I know that I own 0.5% of the company [YapStone], but I need to have that translated into number of shares (I am not sure I ever got a new stock certificate in YapStone after the merger)." (Ex. 51). In March 2009, Golis continued the lie and strung Loy along by telling him, "I will have our CFO check into the Yapstone certificates." (Ex. 50). Because Loy did not hear back from either Golis or the CFO, he had his lawyer attempt to obtain the certificates for him.

In February 2008, YapStone Corporate Secretary John Martin wrote to Witmer confirming the amount of shares he owned in YapStone: "Your investment in Yapstone, Inc. is proportional to your ownership of RentPayment.com, Inc.'s common stock." (Ex. 52). Defendants highlight that the letter began, "We are pleased to confirm your beneficial investment in YapStone, Inc." (*Id.*) But the phrase "beneficial" ownership was consistent with the way YapStone described its owners in the Information Statement. (*See* Ex. 16 at NEW00197444). There, Golis, Villante and other

YapStone board members were listed as "beneficial owners" of YapStone stock. *Id*. Witmer testified that at the time he received the letter from John Martin in 2008, he understood that it told him what he owned in YapStone: 5,206 shares of Class A common YapStone stock and 4,983 of Series A Preferred YapStone stock. (Ex. 33, Witmer Dep. at 189:8-20). As a result, Witmer believed that the February 13, 2008 letter was consistent with his understanding of his YapStone ownership - - "I owned something in YapStone." (*Id*. at 192:3-14).

Later communications also confirmed Plaintiffs' ownership in YapStone.[13] Specifically, on October 21, 2008, as CEO of YapStone, Golis sent a package of documents labeled "YapStone, Inc. Stockholder Consent" to Rudometkin and other Plaintiffs, addressed to "***Stockholder of Yapstone***." (Ex. 53 (emphasis added)).[14] The materials sought YapStone shareholders' approval of a stock option plan and related amendments to YapStone's Articles of Incorporation. Prior to receiving the materials, Rudometkin had received a call from YapStone requesting confirmation of his address and indicating that materials for YapStone shareholders would be distributed shortly. (Ex. 4, Rudometkin Dep. at 201:14-22, 265:1-266:9; Rudometkin Decl. ¶ 7.) Rudometkin signed the YapStone shareholder consent forms as a YapStone shareholder and returned them to YapStone in 2008 as instructed. (Ex. 53 at NEW00197529-30). Villante and Golis both received notice that Rudometkin (and other RentPayment shareholders) received and returned the signed YapStone consents. (Ex. 54; Ex. 55). No one from YapStone ever contacted Rudometkin to say the materials were sent in error or that he was not a YapStone shareholder, and Rudometkin's receipt and return of the materials further confirmed his belief that he was one. (Rudometkin Decl. ¶ 7).

Later in 2008, Rudometkin emailed YapStone CFO Matt Mancuso to determine how many YapStone shares he owned. (Ex. 56). Mancuso confirmed what Golis had represented before and after the transaction, and what Rudometkin and the other Plaintiffs believed – RentPayment

[13] Tellingly, Defendants gloss over these communications as a means of minimizing them because they are significant in demonstrating a material issue of fact. (*See* Rudometkin MPA at n.8, 9 (stating only in a footnote that Rudometkin "claims he received a letter from YapStone in October 2008" followed by "Rudometkin next heard from YapStone in June 2011")).

[14] For example, plaintiff Mirchandani also received these materials. (Ex. 43, Mirchandani Dep. at 362:21-364:2).

shareholders became YapStone shareholders upon the close of the Transaction. Mancuso's November 14, 2008 email advised Rudometkin:

> According to our records you owned 76,000 RentPayment shares out of a total outstanding amount of 9,990,939 shares or 0.76% of RentPayment's outstanding shares at the date of the acquisition by Yapstone. ***RentPayment shareholders received 25% of the then outstanding shares of Yapstone***. *** Using the above amounts and your percentage share of 0.76%, ***you received the following amount of shares in Yapstone*** in conjunction with the acquisition:
>
> Class A – 618.13 shares
> Class B – 1,917.51 shares
> Preferred A – 612.74 shares.

(*Id*. (emphasis added)).[15]

Other correspondence shared with Rudometkin confirmed his belief in his YapStone ownership. In 2009, YapStone's new CFO Robert Price advised Trevor Loy's lawyer:

> As a result of the acquisition of RentPayment's assets, Mr. Loy, by virtue of his ownership in RentPayment would be deemed to own the following shares of YapStone:
>
> - Series A Preferred Stock: 1,007.79 shares
> - Class A Common Stock: 1,016.65 shares
> - Class B Common Stock: 3,153.80 shares.

(Ex. 57 at DEF0001985). An attached spreadsheet included a column named "YapStone shares allocated to Loy." (*Id.* at DEF0001986). Loy and his lawyer shared this letter with Rudometkin, further confirming Rudometkin's belief that RentPayment shareholders became YapStone shareholders upon the close of the Transaction. (Ex. 4, Rudometkin Dep. at 297:14-23; Rudometkin Decl. ¶ 9).

[15] Mancuso's email to Rudometkin demonstrates YapStone's use of the Revised Cap Table (showing 9.9 million outstanding shares) that Golis agreed to with Witmer and Newell and which induced Witmer to sign a consent. Yet, the Draft APA to which Rudometkin consented contained a different Cap Table with only 3.9 million RentPayment shares outstanding. (Ex. 16 at NEW00197495). YapStone continued to use the Revised Cap Table in dealings with other RentPayment shareholders in the years after the Transaction closed.

On June 1 and June 2, 2011, Joy Melendez at YapStone sent to Plaintiffs and RentPayment's minority shareholders an email stating, "[Y]ou are receiving this email because you hold shares of common or preferred stock of Yapstone, Inc." (Ex. 58). The email announced that:

> …the Company's Board of Directors anticipates declaring a dividend on June 2, 2011 in the aggregate amount of $40 million, or approximately $4.66 per share on a fully diluted basis assuming all currently held outstanding options are exercised. This dividend will be paid pro rata to each holder of the Company's common stock and Series A Preferred Stock as of June 2, 2011.

Multiple iterations of this email were distributed to Plaintiffs. (Ex. 59). A week before the June 1 dividend emails were sent, Melendez emailed Plaintiff Dan Chester with the subject line: "YapStone Shareholder Address Book," stating that Golis had asked her to reach out to try to obtain contact information for certain former RentPayment employees – presumably to include them in the anticipated June 1 YapStone dividend announcement. (Ex. 60). Melendez also contacted Warner in May 2011 to confirm his contact information. (Warner Decl. ¶ 9; Ex. 60). In addition, in late May, prior to the dividend emails being sent, Golis separately called Witmer and Plaintiff Mirchandani and told them both that YapStone was issuing a dividend. (Ex. 33, Witmer Dep. at 194:13-23; Ex. 43, Mirchandani Dep. at 410:3-411:25).

Defendants' argument that Plaintiffs received the dividend emails because of a "clerical error," (*e.g.* Witmer MPA at 9) is belied not only by Defendants' statements and actions in the years leading up to the 2011 announcement but also by their statements *after* the announcement. For example, YapStone's Corporate Controller Amanda Speakman told Plaintiffs Dan and Michelle Chester the exact number of YapStone shares they owned in response to inquiries they made following receipt of the June 1 dividend announcements. (Ex. 61). And YapStone's lawyer Robert Gerber confirmed that RentPayment shareholders were YapStone shareholders when former RentPayment employee Charlene O'Connell contacted him on June 1 after getting the dividend announcement. (Ex. 62). O'Connell wrote:

> "I just want to clarify that I am only receiving a dividend for the 3,297 shares of stock I hold with Yapstone and not selling the stock."

Gerber responded:

"That is correct. This is ***not*** a redemption of your YapStone, Inc. stock."

(*Id*. (emphasis in original)). Moreover, not only was O'Connell wired her YapStone dividend on June 1, 2011 as calculated using the $4.66/share price described in the Melendez email, but so too was Golis.[16] (Ex. 63; Ex. 64).

When the dividend was announced, Warner was thrilled to finally see a reward for the time he worked without pay. (Warner Decl. ¶ 9). Witmer was "ecstatic." (Ex. 33, Witmer Dep. at 195:11-16). That reaction was short-lived, however, because on June 16, 2011, Gerber, counsel for YapStone, Golis and Villante, and, now all-of-a-sudden, counsel for RentPayment too, sent an email to Plaintiffs stating:

> Recently, you received an e-mail regarding a dividend payment that was made by Yapstone, Inc. That e-mail incorrectly stated that you are a stockholder of Yapstone, and that you would be receiving cash payment of the dividend. We would like to apologize to you for this error. Rentpayment.com, Inc. is the stockholder of record of the shares of Yapstone. As a result, Rentpayment.com received the dividend from Yapstone.

(Ex 65). For all three plaintiffs at issue, this was the first time they were told they were not and never had been YapStone shareholders. (Rudometkin Decl. ¶¶ 3, 10; Warner Decl. ¶¶ 3, 10; Witmer Decl. ¶¶ 3, 16).

Upon receipt of this message and for fear that the Revised Cap Table had not been included in the final Transaction as Golis promised, Witmer and Newell hired counsel (Stoel Rives) to determine their ownership interest in RentPayment. (Ex. 33, Witmer Dep. at 197:15-198:6; Ex. 66, Newell Dep. at 285:18-21, 292:21-293:15, 296:18-297:1, 297:25-299:10; Witmer Decl. ¶ 16). They saw this as the first step of a two-part inquiry: (1) to determine if the ownership interest they thought

[16] At her deposition, O'Connell testified that to this day, she does not know if she is a YapStone shareholder or not. (Ex. 67, O'Connell Dep. at 60:13-19). The same holds true for Jody Thelander, a former RentPayment consultant and shareholder. (Ex. 68, Thelander Dep. at 68:15-20). Like Rudometkin and other plaintiffs, Thelander received the 2008 YapStone Stock Option Plan materials from Golis in 2008. (*Id.* at 14:8-20; 36:7-11).

they had in RentPayment was correctly reflected and then, (2) to determine why they were not considered YapStone stockholders. (Ex. 66, Newell Dep. at 292:21-293:15, 296:18-297:1, 297:25-299:10; Ex. 33, Witmer Dep. at 213:11-218:1; Witmer Decl. ¶ 16). Neither Witmer nor Newell released their claims in any manner. (Ex. 69, Snider Dep. at 167:20-168:18; Ex. E to Declaration of David Bohrer ("Bohrer Decl."), Gerber Dep. (Vol.I) at 49:13-17; Ex. F to Bohrer Decl., Gerber Dep. (Vol. II) at 181:11-16; Witmer Decl. ¶ 16).

On September 24, 2012, Gerber again surprised Plaintiffs when he wrote that the pro rata dividend to RentPayment shareholders as a result of the YapStone dividend was not equal to $4.66 per share as earlier declared, but rather, 17¢ per share for the RentPayment shareholders. (Ex.70; Ex. 33, Witmer Dep. at 221:3-4) (Gerber letter "was my realization that what my understanding of the deal that we had was not the deal that we had…."). Plaintiffs soon learned that Golis has failed to follow even the most basic corporate governance during RentPayment's operative life and that a host of accountants and lawyers needed to create years of records for RentPayment to bring it back into good standing in order to open a bank account and accept the YapStone dividend. (Ex. 70); Ex. 64; Ex. F. to Declaration of David Bohrer ("Bohrer Decl."), Gerber Dep. (Vol. II) at 174:14-175:07). The dividend payment to RentPayment was reduced by more than $1 million as a result of such taxes, tax penalties, and fees and costs. (Ex. 64). In addition, due to a series of transactions about which Plaintiffs were never informed and involving Golis and Villante's extensive self-dealing in awarding themselves excessive YapStone stock, RentPayment's percentage of ownership of YapStone has been reduced from 25% in 2003 to less than 5% today. (Ex. 71; Ex. F to Bohrer Decl., Gerber Dep. (Vol. II) at 167:23-168:04, 257:01-258:15). Plaintiffs filed this lawsuit on January 14, 2013.

III. DEFENDANTS MISCHARACTERIZE PLAINTIFFS' CLAIMS

Defendants mischaracterize Plaintiffs' direct claims in the second, third and fourth causes of action in a transparent attempt to recast them as susceptible to summary judgment.[17] Properly

[17] Plaintiffs also sue derivatively on behalf of RentPayment in the fifth through tenth causes of action. Defendants' do not seek summary judgment in these motions on the derivative causes of action. *See* Defs' Notice of Mots. & Mots. for Sum. Judg. against Rudometkin, Warner and Witmer, filed June 20, 2014.

understood, however, Plaintiffs' claims present triable issues of fact that defeat summary judgment. A brief review of Plaintiffs' actual claims, therefore, is appropriate.

A. Golis' Breach of Fiduciary Duty: Second Cause of Action.

In the second cause of action, Plaintiffs seek direct recovery from Golis for breach of fiduciary duty. The gist of this claim is twofold: Golis' breach was both fraudulent – he misrepresented that RentPayment shareholders would receive Yapstone stock, and non-fraudulent – his mismanagement and self-dealing in connection with his operation of RentPayment disproportionately benefitted him and greatly reduced the minority shareholders' dividend.

1. Actual and Constructive Fraud.

Golis' fraudulent breach of fiduciary duty constitutes both actual[18] and constructive[19] fraud. In breach of his fiduciary duties as RentPayment's sole director, officer and controlling shareholder, Golis misrepresented the material fact that RentPayment stock would convert to Yapstone stock as a result of the transaction between RentPayment and Yapstone. He falsely promised and misrepresented before the transaction that RentPayment shareholders would become Yapstone shareholders, *see, e.g.*, Ex. 72, Plaintiffs' Second Amended Complaint ("SAC") at ¶¶ 87-88, 108, 111, concealed and failed to disclose that the transaction did not convert RentPayment stock to Yapstone stock, *see, e.g., id*. ¶¶ 89, 123, and further misrepresented, concealed and failed to disclose

[18] The elements of actual fraud are: (1) misrepresentation of a material fact (consisting of false representation, concealment or nondisclosure); (2) knowledge of falsity; (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 481 (1998).

[19] Constructive fraud is a unique species of fraud that may arise in a fiduciary or confidential relationship. *Assilzadeh v. California Fed. Bank*, 82 Cal. App. 4th 399, 415 (2000). It consists of "any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." Cal. Civ. Code § 1573. The elements of constructive fraud are: (1) a fiduciary or confidential relationship; (2) an act, omission or concealment involving breach of that duty; (3) reliance; and (4) resulting damage. *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F. Supp. 2d 1009, 1021 (N.D. Cal. 2007).

after the transaction that RentPayment shareholders had not received Yapstone stock, *see, e.g., id.* ¶¶ 140 -143, 160-162.[20]

As noted in Section I, Defendants engage in self-serving sleight of hand regarding the presentation of the fiduciary fraud claim. Defendants erroneously say that misrepresentation for which Plaintiffs are suing is that they "would become a direct shareholder of Yapstone *as a result of the APA*." (*See, e.g.*, Witmer MPA, at 1:16 (emphasis added).) However, a few pages later, Defendants acknowledge that what was in fact said was that Plaintiffs would "own shares in Yapstone *after the Asset Purchase Agreement*." (*See Id*. at 15:7 (emphasis added).) The difference is significant. Defendants want to limit the misrepresentation to what was "in" what they have defined as the "APA," so they may argue that delivery of the "APA" triggered the statute of limitations. To the contrary, Plaintiffs were not relying on Golis' representations of what the "APA" or other Transaction document said, but rather, on Golis' representations regarding the benefits to them of the Yapstone transaction, however it was documented. (Witmer Decl. ¶ 3; Rudometkin Decl. ¶ 3; Warner Decl. ¶ 3.) The circumstances surrounding the drafting, negotiation and approval of the transaction documents are simply too convoluted to allow notice of the fraud claim to turn on the alleged receipt of the "APA," the final and complete version of which was materially changed and not provided to the Plaintiffs until after they filed suit. Instead, Plaintiffs received a draft APA of an asset purchase agreement that was incorrect and incomplete, which in

[20] Plaintiffs have obtained expert reports from economist Blaine Nye, Ph.D, and business valuations expert Jim Timmins, Accredited Senior Appraiser ("ASA") and Master Analyst in Financial Forensics ("MAFF") on the damages to plaintiffs resulting from the fraud. (Bohrer Decl. ¶¶ 3-4.) As explained by Dr. Nye, the reasonable compensation for the detriment proximately caused by the fraud is to award each plaintiff their pro rata share of the Yapstone stock that was paid to RentPayment (excluding and redistributing any pro rata share that would go to Golis to prevent unjust enrichment). (*Id.* ¶ 4, citing Nye Report at 6-7). Each of Rudometkin, Warner and Witmer receive 44,254, 33,918, and 696,461 shares of Yapstone stock, respectively (*id*. ¶ 5, Nye Report, Ex. 3A.), or, alternatively, the fair market value of these shares of $670,892, $514,204 and $10,558,351 respectively. (*Id*., Nye Report, Ex. 4A). In addition, had they been Yapstone shareholders as represented, in connection with the $40 million dividend declared by Yapstone in June 2011, each of Rudometkin, Warner and Witmer would have received an additional payout of $148,306, $193,497, and $3,045,218, respectively. (*Id.* ¶ 7, Nye Report, Ex. 5A.)

turn was followed by a convoluted series of misrepresentations and nondisclosures leading up to and then continuing long after the closing.[21]

Notably, Defendants' do not challenge the sufficiency of Plaintiffs' evidence establishing the elements of Golis' fraudulent breach of fiduciary duties. Defendants do not assert the fiduciary fraud claim has no merit because "one or more of the elements of the cause of action cannot be separately established," pursuant to CCP § 437c, sub. (*o*)(1). Instead, Defendants are making the separate and independent argument that "[D]efendant[s] [can] establish[] an affirmative defense to that cause of action" pursuant to CCP § 437c, sub. (*o*)(2). As discussed in Parts V and VI, below, Defendants' proffered affirmative defenses of statute of limitations and consent and equitable estoppel (the latter raised as to Witmer only), at a minimum, present triable issues of fact regarding the fiduciary fraud claim that preclude summary judgment on this claim.

2. Mismanagement and Self-Dealing.

While the Plaintiffs' fiduciary fraud claim is significant, it is by no means the only significant cause of action on which Plaintiffs seek direct recovery in Count II. Defendants' efforts to suggest otherwise by differentiating what Defendants mischaracterize as Plaintiffs' "core" misrepresentation claim from Plaintiffs' other "fallback" or "ancillary" claims is simply not accurate. Separate from fiduciary fraud, Golis breached his fiduciary duty through his mismanagement and self-dealing in his operation of RentPayment that enabled him to completely control the company and use it for his personal benefit without regard to the impact his actions had on the minority shareholders, causing, among other things, wholly improper reductions in the dividend paid by RentPayment to its shareholders in 2012 from the dividend that RentPayment

[21] California civil jury instruction 1906 provides that if a defendant made a misrepresentation to one person intending or reasonably expecting that it would be repeated, then that defendant is responsible for it even if not made directly to the plaintiff. CACI 1906. Since so many of the RentPayment shareholders and Plaintiffs shared information with one another over the years, this instruction would cover most of the misrepresentations Golis, YapStone and YapStone's officers, attorneys and personnel made to one RentPayment shareholder but not directly to another. For example, Rudometkin told Chester and Mirchandani about getting the 2008 YapStone Plan. (Ex 73). Similarly, Witmer and Newell shared information with each other, and Witmer also shared information with his brother-in-law Mirchandani. (Witmer Decl. ¶¶ 6-7).

received from Yapstone. The fiduciary and mismanagement claim arises out of the 2011 $40 million dividend YapStone declared upon receipt of a $50 million investment from outside investors. RentPayment, as an alleged shareholder of Yapstone, received its pro rata distribution of the Yapstone dividend and then endeavored to further distribute the payment to its shareholders via its dividend in 2012. But the dividend received from Yapstone was not distributed in its entirety to the minority shareholders, nor was it distributed proportionately to all RentPayment shareholders. Instead, the dividend ultimately paid to the minority shareholders was greatly reduced by significant payments of professional fees, taxes, penalties and other costs attributable not only to Golis' mismanagement but also to his self-dealing. Golis' mismanagement and self-dealing are summarized among other places in the Nye Report (*id.* ¶ 11, Nye Report at 7-8):

a. Golis' mismanagement: 1) failing to dissolve RentPayment shortly after the 2003 transaction closed; 2) maintaining RentPayment as a C corporation rather than as an S one; 3) failing to file RentPayment federal and state tax returns and pay taxes; 4) failing to file annual reports with the California Secretary of State; 5) failure to maintain RentPayment in good standing with the State of California; 6) incurring legal and accounting fees and costs required to remedy these failures; 7) making dividend overpayments to himself and RentPayment shareholder Charlene O'Connell from the gross YapStone dividend owed to RentPayment shareholders; and 8) paying himself a dividend of $1.287 million over a year before RentPayment distributed any dividends to other RentPayment shareholders.

b. Golis' mismanagement and self-dealing: orchestrating a loan in 2011 of $148,754.53 from RentPayment to pay back overpayments that he received, with no evidence that the loan has been repaid; and

c. Golis' mismanagement and self-dealing: orchestrating a set-aside of $298,500 from the gross dividend received by Plaintiffs and other minority shareholders, with no itemization provided or evidence as to how the set-aside was determined or used to date.[22]

[22] Plaintiffs' experts Nye and Timmins have also offered opinions regarding the additional dividend damages sustained by each of the plaintiffs in 2012 as a result of Golis's fiduciary mismanagement and self-dealing. (*Id.* ¶ 9). As explained by Dr. Nye, the reasonable additional dividend (excluding

Once again, Defendants' do not challenge the sufficiency of Plaintiffs' evidence to establish mismanagement and self-dealing by Golis in breach of his fiduciary duties. Defendants argue only that their affirmative defense avoids any issue of fact under CCP § 437c, sub. (o)(2) (providing that a cause is deemed without merit because "a defendant establishes an affirmative defense to that cause of action"). As discussed in Part VII, below, Defendants' proffered affirmative defenses of lack of capacity to bring direct shareholder claims (as opposed to derivative claims), statute of limitations, consent and equitable estoppel (the latter as to Witmer only), at a minimum, present triable issues of fact regarding the fiduciary mismanagement and self-dealing claim that defeat summary judgment on this claim. As also discussed in Part VII.B, below, the fiduciary mismanagement and self-dealing claim did not accrue until 2012 and suit was timely brought thereafter. Defendants focus on five mischaracterized "fallback" evidentiary facts, two of which ("(1) "[f]ailing to protect RentPayment's stock ownership in YapStone against dilution;" and "(2) "[f]ailing to investigate or obtain fair market value for RentPayment assets;") are not even asserted in support of Plaintiffs' direct claims for fiduciary mismanagement and self-dealing and are therefore irrelevant to whether these direct claims present triable issues of fact that defeat summary judgment.[23] And the other three: ("(3) "[f]ailing to complete formation of RentPayment and implement basic corporate procedures;" (4) "[f]ailing to file tax returns for eleven years;" and (5) "[f]ailing to structure RentPayment in a way that would reduce tax liability"), while these items are part of the evidence establishing the ultimate fact of breach of Golis' duties in connection with the 2012 dividend, in comparison to the above summary of facts on which the fiduciary mismanagement and self-dealing claim is based, they are but a few of the wealth of evidentiary facts upon which Plaintiffs will rely to establish the breach. Moreover, even assuming the applicable statute of limitations ran before suit was brought on this claim, which is not the case,

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RentPayment shareholder Golis and redistributing any pro rata share that would go to Golis to prevent unjust enrichment) that each of Rudometkin, Warner and Witmer should receive is $86,153, $66,032, and $1,355,853 respectively (*Id.*, Nye Report, Ex. 6A).

[23] Having now completed all fact discovery and expert discovery except for expert depositions, Plaintiffs do not anticipate asserting either of these two "fallback" allegations in support of the direct claims made by Plaintiffs under the second, third and fourth causes of action in the operative complaint.

Defendants fail to meet their burden of making a *prima facie* showing that Plaintiffs somehow knew or should have known of these three "fallback" allegations any earlier than late 2011; therefore, the statute of limitations was tolled under the discovery rule and did not begin to run until well within four years (the limitations period applicable to non-fraudulent fiduciary claims) of Plaintiffs' commencement of their fiduciary mismanagement and self-dealing claim. Likewise, Defendants' assertion of consent or estoppel as to Witmer in connection with these three "fallback" allegations is wholly unsupported. Finally, Defendants' argument that a claim based in part on these three "fallback" allegations to show breach of fiduciary duty is, as a matter of law, derivative, is based on the erroneous application of the relevant legal authority.

B. Vicarious Liability: Third and Fourth Causes of Action.

Correcting the Defendants' mischaracterization of the fiduciary fraud and fiduciary mismanagement and self-dealing claims in Count II further demonstrates that there are triable issues of fact that defeat summary judgment on the third and fourth causes of action as well. In Count III, Plaintiffs seek direct recovery from Villante and Yapstone for aiding and abetting both the fraudulent and non-fraudulent breaches of fiduciary duty. In Count IV, Plaintiffs seek direct recovery against Defendants for civil conspiracy to commit both the fraudulent and non-fraudulent breaches of fiduciary duty. As discussed in Part VIII, properly understood, the vicarious liability causes of action are well-supported and there is substantial evidence establishing both the actual knowledge element and substantial assistance and encouragement of aiding and abetting and the existence of the requisite duty to establish a civil conspiracy.

IV. LEGAL STANDARD: SUMMARY JUDGMENT

The California Supreme Court's decision in *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 850 (2001) provides the relevant summary judgment standards. As the moving parties, Defendants bear the ultimate burden of persuasion that there is no triable issue of material fact and that they are entitled to judgment as a matter of law. *Id.* In addition, Defendants bear the initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact. *Id.* If they carry their burden, it causes a shift, and Plaintiffs have the burden of

production to make a prima facie showing of the existence of a triable issue of material fact. *Id.* Plaintiffs satisfy the burden of production if their evidence and any inferences drawn therefrom imply or show to a reasonable trier of fact that a material fact is more likely than not. *Id.* at 856-857. If the Court determines that a reasonable trier of fact could find for the Plaintiff, "it must then deny the defendants' motion for summary judgment, even in the face of contradictory evidence or inference presented or drawn by the defendants." *Id.* Put another way, "if a defendant moves for summary judgment . . . he must present evidence that would require a reasonable trier of fact *not* to find any underlying material fact more likely than not – otherwise, *he* would not be entitled to judgment *as a matter of law*, but would have to present *his* evidence to a trier of fact." *Id*. at 851 (emphasis in original).

Defendants carry neither their burden of persuasion nor production because there are triable issues of fact with respect to all of the arguments raised in each of the three motions at issue.

V. THERE ARE TRIABLE ISSUES OF FACT REGARDING THE TIMELINESS OF THE FIDUCIARY FRAUD CLAIMS.

Defendants contend that Rudometkin's, Warner's and Witmer's claims that they should have received YapStone stock as part of the YapStone transaction are barred by the three-year statute of limitations for breach of fiduciary duty.[24] (*See e.g.*, Rudometkin MPA at 12). However, as to each plaintiff, the evidence and the inferences drawn therefrom show or imply to a reasonable trier of fact that it is more likely that the fiduciary fraud was not known or discoverable until RentPayment issued its June 16, 2011 email countermanding YapStone's June 1, 2011 dividend email and numerous earlier representations that Plaintiffs were Yapstone shareholders. Thus, there are triable issues of fact that compel the Court to deny the motions even in the face of any purported contradictory evidence or inferences presented or drawn by defendants. *See Aguilar*, 25 Cal. 4th at

[24] Plaintiffs agree that this part of their fiduciary duty claim sounds in fraud and thus, the three year statute applies. *American Master Lease LLC v. Idanta Partners, Ltd.*, 225 Cal. App. 4th 1451, 1479-79 (2014) (statute of limitations for aiding and abetting is same as underlying tort). However, the four year "catchall" provision of CCP § 343 governs the claims for mismanagement and self-dealing. *Id.* at 1479 ("[b]reach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure Section 343.") (quotations & citations omitted).

856-857 (since there are triable issues regarding the accrual of the fiduciary fraud claim, they "must be submitted to a trier of fact for determination in favor of either the plaintiff or the defendants, and may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and against plaintiff.").

A. Discovery Rule Applicable to Breach of Fiduciary Claims.

It is well-settled that the accrual of the three year statute of limitations applicable to fraud claims is postponed until plaintiff discovers, or through the exercise of reasonable diligence could have discovered, facts constituting the fraud. Code Civ. Proc. § 338(d); CACI 1925 ("Affirmative Defense-Statute of Limitations-Fraud or Mistake"). It is equally well-settled that this discovery rule applies to a cause of action involving the breach of a fiduciary relationship. *April Enters, Inc. v. KTTV,* 147 Cal. App. 3d 805, 827 (1983) (fiduciary relationship tolled limitations period for breach until plaintiff actually discovered wrongdoing). "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud." *Neel v. Magana, Olney, Levy, Cathcart & Gelfand,* 6 Cal. 3d 176, 188-189 (1971) (internal quotations and citations omitted). The court's observations in *April Enterprises* are especially apt here:

> In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus, there is an underlying notion that plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance.

147 Cal. App. 3d at 831. As recognized in *Bedolla v. Logan & Frazer*, 52 Cal. App. 3d 118, 131 (1975), a case cited by defendants (*e.g.*,Witmer MPA at 14:3 and 14:15), there is a significant distinction between rules excusing late discovery of fraud and those allowing late discovery where there is a fiduciary relationship. As stated in *Bedolla*, "in the latter fiduciary] situation, the duty to investigate may arise later by reason of the fact that plaintiff is entitled to rely upon the assumption that his fiduciary is acting in his behalf." *Id.* at 131. *Bedolla* relies primarily on the California

Supreme Court decision in *Hobart v. Hobart Estate Co.*, 26 Cal. 2d 412, 440 (1945) in stating this rule. *Hobart* states in pertinent part:

> Another pertinent factor is that there was a fiduciary relationship between the parties at the time of the fraudulent representations. Although the general rules relating to pleading and proof of facts excusing a late discovery of fraud remain applicable, **it is recognized that in cases involving such a relationship facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required.** In *Rutherford v. Rideout Bank*, 11 Cal.2d 479, 486 [80 P.2d 978, 117 A.L.R. 383], it was said that because of such a relationship plaintiff could not be charged with lack of diligence even though an inquiry would have disclosed the true value of the property involved. [Citations.]

26 Cal. 2d at 439-40 (emphasis added). The Court in *Lee v. Escrow Consults., Inc.* 210 Cal. App. 3d 915, 921 (1989) likewise emphasized the fiduciary relationship:

> [T]he fiduciary relationship between plaintiff and defendant relaxed plaintiff's duty to inquire into the circumstances surrounding defendant's alleged fraud. As Witkin explains: 'If the plaintiff and defendant are in a confidential relationship there is no duty of inquiry until the relationship is repudiated. The nature of the relationship is such as to cause the plaintiff to rely on the fiduciary, and awareness of facts which would ordinarily call for investigation does not excite suspicion under these circumstances.'

Id. (reversing dismissal of fiduciary duty claim as time-barred)(quoting 3 Witkin, Cal. Procedure § 456, p. 487 (3rd ed. 1985)). Only after a plaintiff becomes aware of facts that would make a reasonably prudent person suspicious does the duty to investigate arise and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation. *Bedolla*, 52 Cal. App. 3d at 131 (*citing Hobart*, 26 Cal. 2d at 441-442).

The *Bedolla* line of cases contradict rather than support Defendants' argument that there is no material issue of fact regarding whether Defendants' evidence aroused suspicion under the fiduciary circumstances existing here. It is not mere coincidence that these cases were appeals of ***jury verdicts*** on the timeliness of the fiduciary claims at issue. *See, e.g.*,129, 137-139 (affirmed judgment on jury verdict that fiduciary claims barred by statute of limitations based on the appellate court's finding that jury properly instructed on burden of proof); *Hobart*, 26 Cal. 2d at 441 ("[t]he evidence is clearly sufficient to support the implied finding of the jury that plaintiff learned nothing to arouse his suspicions during the period between the completion of the transaction and the alleged discovery of the fraud"); *see also Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal. App. 3d

174, 202-204 (1985) (affirmed judgment entered on jury verdict finding fiduciary fraud; evidence at trial sufficient to show plaintiff not aware of facts that would have made her suspicious and therefore had no duty to investigate).

Of course, the inquiry into when the limitations period begins is generally regarded as a factual question inappropriate for resolution on a motion for summary judgment or summary adjudication. *Baker v. Beech Aircraft Corp,.* 39 Cal. App. 3d 315, 323 (1974). Similarly, "Where the rule of discovery applies, the issue of whether discovery of the cause of action was reasonably delayed is a question of fact. The question becomes a matter of law only where reasonable minds can draw only ***one*** conclusion from the proffered evidence." *Periera v. Dow Chem. Co*., 129 Cal. App. 3d 865, 874 (1982) (emphasis added); *see also Jolly v. Eli Lily & Co.*, 44 Cal. 3d 1103, 1112 (1988).

As discussed below, based on Plaintiff's evidence and inferences drawn therefrom, a reasonable juror could find both that Plaintiffs did not learn of the facts constituting fraudulent misrepresentation and concealment by Golis until June 2011, and, in addition, that it was appropriate for Plaintiffs to rely up until that time on what they were being told (or not told) by their fiduciary, Golis. Any purported contradictory statements from the non-fiduciary Defendants was not sufficient to arouse suspicion under the special fiduciary circumstances that existed between Golis and Plaintiffs. These circumstances stand in sharp contrast to the very rare circumstances where reasonable minds could draw only one conclusion from the evidence.

B. It is a Question of Fact Whether the Information Statement/APA Put Rudometkin on Notice of Golis' Breach of Fiduciary Duty.

It is a question of fact whether the Draft APA and/or Information Statement contained language which, under the circumstances allows only ***one*** reasonable inference to be drawn. Rudometkin testified that he interpreted the Draft APA (a nearly 60 page legal document) to mean that the RentPayment shareholders *would* receive YapStone stock. (Ex. 4, Rudometkin Dep. at 137:12-138:1; 138:12-20; 139:8-14; 140:6-9; 160:24-161:9;161:25-162:2.) He interpreted the reference to "RentPayment" therein to include RentPayment shareholders. (*Id.*) Based on the

representations Golis had previously made to him orally and in emails, Rudometkin believed that the transaction documents he saw were *consistent* with Golis' earlier representations saying the same thing. (*Id*.) Thus, the documents did not put Rudometkin on notice that anything was amiss.

Rudometkin had "no reason to believe" he was not a YapStone shareholder between when he signed the consent in February 2003 and when Golis and YapStone confirmed, repeatedly, that he was a YapStone shareholder in 2008. (Ex. 4, Rudometkin Dep. at 164:5-19). Without a final APA following the close of the APA Transaction, Rudometkin determined on his own that the deal had closed by going to the website. (*Id.* at 105:10-12).[25]

Whether Rudometkin's interpretation of the Information Statement/APA, in light of Golis's previous statements, was "reasonable" is a quintessential issue of fact inappropriate for determination on summary judgment. *Baker*, 39 Cal. App. 3d at 323. A trier of fact would have to assess the myriad of statements, promises and omissions, both oral and written, that Golis made to Rudometkin leading up to his receipt of the Draft APA, and whether, under the discovery rule, a reasonable person in Rudometkin's position would have been put on notice that Golis had been lying. This would also have to be assessed in light of the many representations and acts of concealment by Defendants after the transaction, including:

- YapStone personnel called Rudometkin in 2008 to confirm his address so that they could send him materials for YapStone shareholders (Ex. 4, Rudometkin Dep.at 201:14-22, 265:1-266:9; Rudometkin Decl. ¶ 7);
- Golis, on behalf of YapStone, sent Rudometkin the YapStone 2008 Stock Option Plan and requested his consent as a YapStone shareholder (Ex. 53; Rudometkin Decl. ¶ 7);
- Although Golis and Villante knew that Rudometkin had signed and returned the YapStone shareholder consent form, no one informed Rudometkin then that he was not a YapStone shareholder (Ex. 54; Ex. 55; Rudometkin Decl. ¶ 8);
- YapStone CFO Mancuso confirmed in November 2008 that as part of the 2003 transaction, "RentPayment shareholders" received 25% of YapStone's outstanding stock (Ex. 56);

[25] Golis's failure to deliver the final APA to any of the Plaintiffs is yet another example of fraudulent concealment. By failing to do so, he was able to conceal material terms of the deal, including, the Management Services Agreement he had entered into earlier. He was also able to conceal from Newell and Witmer specifically, that the Revised Cap Table they negotiated had ***not*** been included in the final version of the transaction documents.

- CFO Mancuso informed Rudometkin of the exact number of YapStone shares he owned (*id.*);
- YapStone CFO Price informed Trevor Loy's lawyer in 2009 about the number of YapStone shares that were allocated to Loy as part of the transaction, and this information was shared with Rudometkin (Ex. 57; Rudometkin Decl. ¶ 9);
- YapStone sent an email to Rudometkin in June 2011 informing him that as a YapStone shareholder, he was entitled to a portion of the $40 million dividend it was declaring (Ex. 58);

Arguably, these subsequent communications establish that Rudometkin's interpretation of the APA was not only reasonable, but that it was Golis', YapStone's, Villante's, Mancuso's and Price's stated interpretation of the APA as well. Rudometkin was not put on notice that anything was amiss with respect to his ownership of YapStone stock until after receiving Gerber's June 16, 2011 letter telling him for the first time that he was not a YapStone shareholder. (Rudometkin Decl. ¶ 10). Simply put, Defendants cannot carry their burden of showing as a matter of law that Rudometkin's fiduciary fraud claim is time barred.

C. It is a Question of Fact Whether the Information Statement/APA Put Warner on Notice of Golis' Breach of Fiduciary Duty.

Like Rudometkin, Warner interpreted the transaction documents to mean that RentPayment shareholders would receive YapStone stock. (Ex. 5, Warner Dep. at 73:18-74:18; 75:7-20; 77:2-21; 78:25-79:13). He believed that the reference to "RentPayment" in the documents meant RentPayment shareholders. *Id*. In June 2003, ***after*** he had reviewed the materials, Warner talked to Golis who told him that his RentPayment stock would convert to YapStone stock as part of the transaction. (Warner Decl. ¶ 7; Ex. 36; Ex. 5, Warner Dep. at 100:9-21; 101:19-102:4; 108:15-19).

Warner also testified that he was "afraid" of the transaction documents since he did not understand them and that he contacted Golis directly to ensure he wasn't "screwing up" the transaction by not signing the consent. (Ex. 5, Warner Dep. at 71:24-25; 108:25-109:2). Golis told Warner not to worry about the documents and assured him the transaction would close without his consent. (*Id*. at 108:7-14, 141:24-8) In a fiduciary context like this one, the failure of a plaintiff to read unfamiliar documents is excused when he is deceived as to their nature and effect by the fiduciary. *See, e.g., Kane v. Mendenhall,* 5 Cal. 2d 749, 758 (1936); *Brown v. Wells Fargo Bank,*

NA, 168 Cal. App. 4th 938, 958 (2008); *Lynch v. Cruttenden & Co.*, 18 Cal. App. 4th 802, 811 (1993). It follows that failure to understand documents in such a circumstance is also excused, particularly when the fiduciary instructs as irrelevant the need to understand and consent to the documents.

Warner did not receive further information from Golis or a final APA and had no access to information that would have put him on notice that anything was amiss. (Ex. 5, Warner Dep. at 113:11-114:12). He was not on actual or inquiry notice that he was not a YapStone shareholder until he received the June 16, 2011 Gerber communication. For the same reasons stated above with respect to Rudometkin, whether the statute of limitations began to run when Warner reviewed the APA, in light of the prior and subsequent statements by Golis, is a quintessential issue of fact inappropriate for determination on summary judgment. *Baker*, 39 Cal. App. 3d at 323. Defendants cannot carry their burden of showing that Warner's fiduciary fraud claim is time barred.

D. It is a Question of Fact Whether the Information Statement/APA Put Witmer on Notice of Golis' Breach of Fiduciary Duty.

1. Witmer had negotiations and an agreement with Golis after receiving the transaction documents and consented based on this subsequent agreement.

Witmer's situation is quite different than Rudometkin's and Warner's since Golis engaged in protracted negotiations with him from March through July 2003, long ***after*** his receipt of the 2002 deal documents at issue were transmitted. Golis either remained silent or repeated the original misrepresentation about RentPayment shareholders becoming YapStone stock holders after the Transaction in oral and written communications with Witmer in 2003 which induced Witmer into believing that, consistent with Golis' previous representations, he was a YapStone shareholder.

Defendants are simply wrong in asserting that Golis told Witmer he would receive YapStone shares in a *single* representation. (Witmer MPA at 8, 15). The evidence that disputes that includes:

- The May 5, 2003 email where Witmer made it clear he thought RentPayment shareholders would receive YapStone stock as part of the transaction and Golis said nothing to correct that misimpression (Ex. 40; Witmer Decl. ¶ 11);
- The June 4 emails between Golis and Newell and Golis, Newell and Witmer where Golis advised that the transaction documents say that "RentPayment

shareholders" would receive YapStone stock as part of the transactions, and Newell repeated this understanding in his communications back, yet Golis did not correct their misunderstanding (Ex. 41; Ex. 42);

- A phone call on June 10 or 11 where Golis repeated that RentPayment shareholders would receive YapStone stock, which, along with the cap table resolution, caused Witmer to sign the shareholder consent (Ex. 33, Witmer Dep. at 116:17-117:3; 138:5-18; 146:13-147:2);
- Telephone conversations where Golis insisted Witmer and Newell sign a RentPayment Board resolution and Golis, Witmer and Newell agreed that the resolution reflect that RentPayment shareholders would receive YapStone stock (*Id.* at 117:19-118:13; 118:23-120:9; 139:16-140:16);
- Golis' signature on the RentPayment Board resolution, which was modified to comport with Witmer's, Golis' and Newell's agreement that RentPayment shareholders would receive YapStone stock (Ex. 48);
- Golis' 2004 email to Newell (and shared with Witmer) advising that RentPayment shareholders received YapStone stock, they just hadn't paid the lawyers to generate certificates, and confirming that the transaction went forward based on the agreement reached by Golis, Newell and Witmer in the June-July 2003 time frame (Ex. 25; Witmer Decl. ¶ 15);
- John Martin's letter informing Witmer of the precise number of YapStone shares he owned as a result of the RentPayment transaction and using the same language of "beneficial ownership" that was used in the Information Statement (Ex. 52; Ex. 16 at NEW00197444);
- Golis' telephone call to Witmer shortly before June 1, 2011 where he informed Witmer that YapStone shareholders would be getting a dividend and that Witmer would receive materials from YapStone shortly (Ex. 33, Witmer Dep. 194:13-23); and
- An email from YapStone in June 2011 informing Witmer that as a YapStone shareholder, he would receive a portion of the $40 million dividend that YapStone declared (Ex. 58).

Defendants also claim that Witmer can "no longer hide behind liberal pleading requirements" because Witmer admits he received the Information Statement/Draft APA and signed a consent to the Transaction. (Witmer MPA at 2). First, as described in the Section II, Witmer did not receive or consent to the final APA. Instead, he received a draft document which was incomplete and incorrect in that it omitted relevant information and exhibits (Management Services Agreement, Golis Employment Agreement, an Intercreditor Agreement involving Golis, evidence that the Boards of both companies had "unanimously approved the transaction," and disclosure that Golis had been paid by YapStone long before the transaction closed, among other things). In

addition, the 2002 APA contained material misrepresentations, include a representation from Golis that RentPayment was in good standing and had complied with its tax obligations. (Ex. 1, Golis Dep. at 236:8-237:7; 237:22-238:9). Second, the issue at hand is not ***receipt*** of the Transaction documents, but rather, that a trier of fact, with all of the evidence presented (not just purported disclosures in certain Transaction documents), could reasonably find it was more likely than not that Witmer did not know nor reasonably should have known that there had been false promises, misrepresentations and concealment as of the time these disclosures were made. (Ex. 33, Witmer Dep. at 230:14-20 (Witmer "entrusted" Golis in negotiations with YapStone on behalf of the RentPayment shareholders.)).

As set forth in Section II above, after receiving the Draft APA, Golis, Witmer and Newell agreed on a Revised Cap Table and that the transaction would reflect RentPayment shareholders receiving YapStone stock. (Ex. 33, Witmer Dep. at 113:4-13; 111:16-24; 136:22-25; 140:20-141:22; 124:22-125:6; 117:24-118:9; 118:23-120:9; 139:16-140:16). Golis's promises in connection with that agreement and his pressure regarding closing the deal induced Witmer's consent. (*Id.*) Thus, any "suspicion" or notice that Witmer might have had earlier by virtue of the 2002 documents was superseded by his subsequent negotiations and agreement with Golis. *See Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 739 F.2d 1434, 1435 (9th Cir. 1984); *Twomey v. Mitchum, Jones and Templeton, Inc.*, 262 Cal. App. 2d 690, 723-29 (1968).

In addition, although Defendants claim that the statute of limitations for the fiduciary fraud claim began to run when Witmer received the Information Statement and Draft APA, Witmer testified, and Defendants even note, that he did not review the material sent by Villante in September 2002 except to determine the purchase price and whether his ownership of stock was accurately depicted. (Witmer MPA at 8:3; Ex. 33, Witmer Dep. at 83:5-13; 103:9-105:7). Once he saw that those items were unacceptable to him, he stopped reading. (*Id.*)

Moreover, there was an undisputed fiduciary relationship between Golis and Witmer, and all of the subsequent negotiations between them and misrepresentations and omissions by Golis excused Witmer from reading the transaction documents. *See Kane*, 5 Cal. 2d at 758; *Brown*, 168

Cal. App. 4th at 958; *Lynch*, 18 Cal. App. 4th at 811. His receipt of the documents in light of the subsequent misrepresentations and agreements could not have triggered the statute of limitations.

Witmer was not on notice that anything was amiss with regard to his stock ownership until he received Gerber's June 16, 2011 communication. (Witmer Decl.¶ 16). Under the discovery rule, Golis' repeated and intentional misrepresentations made long after the transaction documents were sent to Witmer raise a material issue of fact as to whether a reasonably prudent person in Witmer's position would have questioned whether he was a YapStone shareholder or that Golis was committing fraud.

2. It is a Question of Fact Whether Martin's 2008 Letter Put Witmer on Notice of Golis' Fraud.

Summary judgment must likewise be denied on defendants' alternate argument that Witmer "blew the statute of limitations a second time" by failing to file suit within four years of receiving a 2008 letter from YapStone Controller John Martin describing Witmer's "beneficial interest" in YapStone. (*See* Witmer MPA at 15). Defendants' arguments notwithstanding, Martin's use of the term "beneficial" to describe Witmer's ownership interest was consistent with the Information Statement description of direct YapStone owners having a "beneficial ownership" in YapStone after the transaction. (Ex. 16 at NEW00197444). Indeed, Witmer testified that he believed the letter was consistent with his understanding that "I owned something in YapStone." (Ex. 33, Witmer Dep. at 192:3-14). Specifically, he learned that he owned 5,206 shares of Class A Common YapStone stock and 4,983 of Series A Preferred YapStone stock. (*Id.* at 189:8-20). Witmer's understanding, of course, had already been reinforced by Golis in 2004 when Golis wrote that "RentPayments [sic] shareholders received preferred and common shares in YapStone, Inc." (Ex. 25).

Defendants also contend that because Witmer understood from Martin's letter "that YapStone stock had been issued in the name of RentPayment" put him on notice for purposes of the

statute of limitations.[26] (Witmer MPA at 9,14). Yet the Directors' Consent that Witmer, Newell ***and*** Golis signed at Golis' insistence in July 2003 stated that YapStone would issue a number of shares of its capital stock "to the Corporation such that immediately following issuance therof, RentPayment's shareholders…will own a sum equal to 25% of YapStone's issued and outstanding shares…." (Ex. 48 at DEF0036599). As Defendants routinely point out, "Corporation" was defined in that Directors' consent as "RentPayment.com, Inc." (*Id.*) Thus, Martin's statement that stock was issued in the name of RentPayment was not inconsistent with the language in the Directors' Consent that Witmer, Golis and Newell signed in 2003. This, coupled with the additional information from Martin about the exact number of shares in YapStone he owned confirmed to Witmer that he was a YapStone shareholder. (Ex. 33, Witmer Dep. at 189:8-20; 192:3-14). It is a question of fact whether the letter would have put a reasonably prudent person on notice of Golis's fraud. *See Baker*, at 323.

E. Defendants' Cited Cases Against Tolling Are Inapposite.

Defendants' argument against application of the discovery rule where a plaintiff receives written documentation contradicting prior statements of a fiduciary fails as it is largely based on out-of-jurisdiction cases readily distinguishable from the facts of this case. (*See, e.g.*, Warner MPA at 12). With one exception,[27] Defendants' cases turn on written materials sent to plaintiffs by the same parties who had allegedly made the prior conflicting representations. Here in stark contrast,

[26] Defendants also point out that Witmer asked Martin for information about his position "with RentPayment," not YapStone. (Witmer MPA at 9:5). But "RentPayment" was a product name that YapStone used for its business. (Ex. 1, Golis Dep.108:20-109:1; Ex. 74, Price Dep.at 57:19-61:3; Ex. 8, Villante Dep. 228:18-25). Golis also routinely used "RentPayment" when describing YapStone after 2003. (*See e.g.,* Ex. 75 (telling Witmer in 2004 that things were going very well "with RentPayment" and describing a "money raise" to expand sales that could only have related to YapStone as RentPayment.com, Inc. did not attempt to raise money and had no sales after 2001)).

[27] This exception, *Bedolla*, 52 Cal. App. 3d 118 (one of only two California decisions cited by Defendants), has no bearing here because the court there considered only whether sufficient evidence had been presented for **a jury to have found** that claims for fraud and breach of fiduciary duty were barred by the statute of limitations. *Id.* at 123, 130-35. *Bedolla* is also factually apposite: while the court in *Bedolla* briefly addressed evidence that the plaintiffs learned of "questionable items" in accounting books, it also recited a litany of other non-document evidence which allowed the jury to find that the plaintiffs' claims were time-barred. *See id.* at 132-34. Thus, contrary to Defendants' characterization of *Bedolla* in their briefs (*see, e.g.,* Witmer MPA at 14), the basis for the court's holding was not that written documentation contradicted statements of a fiduciary.

the transaction documents to which Defendants point were not sent to Plaintiffs ***by Golis***, but rather, by YapStone and Villante, two parties who at that time had no relationship whatsoever with Plaintiffs, let alone a fiduciary relationship like that between Plaintiffs and Golis. Accordingly, Plaintiffs were not required to take the language in these documents as if it came from Golis, their trusted fiduciary. Indeed, even Golis testified that he did not recall reviewing the Draft APA and Information Statement before they went to the Plaintiffs. (Ex. 1, Golis Dep. at 227:2-4; 236:8-237:7; 237:22-238:9.) Except for the 2002 draft materials, all information Plaintiffs received about the transaction at all times came from Golis – the Plaintiffs' fiduciary and the one in whom they reposed trust and confidence to look out for their interests. (Rudometkin Decl. ¶ 5; Warner Decl. ¶ 6; Witmer Decl. ¶ 9).

Second, Defendants' cited cases are further inapplicable because unlike here, in each case the plaintiffs had a contractual relationship with the defendants who had made the misrepresentations. This gave rise to rights of rescission that Plaintiffs in this case do not have. For example, in *Calvi v. Prudential Securities*, the court found the plaintiff's breach of fiduciary duty claims time-barred because the plaintiff had received investment prospectuses that contradicted her broker's alleged concurrent misrepresentations, and regardless of whether the plaintiff had been financially damaged when she received the material, she could have brought an action for rescission. 861 F. Supp. 69, 69-72 (N.D. Cal. 1994) (applying federal law). Similarly, in *Topalian v. Ehrman*, the Fifth Circuit emphasized that the plaintiff investors had been permitted to rescind their purchases of limited partnership interests *after* they received offering memoranda that contradicted earlier representations about their investments. 954 F.2d 1125, 1129, 1132-33 (5th Cir. 1992) (noting rescission offer allowed plaintiffs to enforce previous terms "by walking away from the . . . deal."). In marked contrast here, Plaintiffs were not parties to the transaction nor any other contract that gave rise to the opportunity to sue for rescission.

Finally, none of Defendants' cited authorities involve evidence of affirmative misrepresentations made by a defendant ***after*** the plaintiffs received documents that arguably contradict an earlier representation. *See Nerman v. Alexander Grant & Co.*, 926 F.2d 717, 720-21

(8th Cir. 1991) (applying Missouri law; no discussion of misrepresentation or active concealment of investment terms after plaintiffs received memorandum contradicting prior representation); *Calvi*, 861 F. Supp. at 70-72 (no discussion of misrepresentation or active concealment after plaintiff put on notice of previous misrepresentations); *Alfaro v. Cmty. Hous. Improvement Sys. & Planning Ass'n, Inc.*, 171 Cal. App. 4th 1356, 1393 (2009) (noting lack of allegation that defendants had "affirmatively misled" plaintiffs about grant deeds they received which referenced complained of deed restriction); *Kravetz v. U.S. Trust Co.*, 941 F. Supp. 1295, 1299-1300, 1308-09 (D. Mass. 1996) (applying Massachusetts law; investment advisor's oral misrepresentations did not toll limitations period where they were coupled with written materials disclosing true terms of investment). In *Bull v. Chandler*, also cited by Defendants, the court acknowledged that a broker's active effort to mislead or conceal information about an investment's risk or return *could indeed toll* a claim of fraud, even after an investor's prior receipt of a prospectus that provided the true terms of the investment. 1992 WL 103686, at *4-5 (N.D. Cal. 1992) (focusing inquiry on active concealment).

Here, Golis actively concealed the change in transaction structure after the 2002 materials were sent to Plaintiffs. First, he did not disclose the change in the structure even though it was in stark contrast to his many previous promises. (Ex. 1, Golis Dep. at 219:20-220:4; 220:16-20). Warner testified that Golis confirmed his previous misrepresentations when they spoke by phone in June 2003. (Warner Decl. ¶ 7; Ex. 36). Golis also participated in many email exchanges and phone calls with Witmer and Newell in May through July 2003 in which he either affirmatively represented that the RentPayment shareholders would receive YapStone stock or concealed the true structure of the transaction in the face of Witmer and Newell's statements otherwise. (Ex. 40; Ex. 41; Ex. 42; Witmer Decl.¶ 9-12). Most notably, Golis signed the RentPayment Board resolution which stated that RentPayment shareholders would receive YapStone stock, and this resolution was included in the final deal documents. (Ex. 16 at NGE00252-54). The record is replete with misrepresentations made after the transaction closed by Golis, Villante, Yapstone's Corporate Controllers and CFOs and other personnel, including sending YapStone stockholder materials to

Plaintiffs in 2008, communicating directly with Plaintiffs about their YapStone ownership interests and failing to correct the clear misunderstanding that Plaintiffs appeared to have about their ownership in YapStone.

These facts are consistent with those in *Vucinich*, 739 F.2d 1434, which the *Bull* court discussed as an example of when a defendant's actions *after* the plaintiff's receipt of a document revealing the defendant's fraud *would* toll the statute of limitations. In *Vucinich*, a case decided under California law, the plaintiff followed the defendant broker's advice and invested in short positions to take advantage of a falling stock market. *Id.* at 1435. The broker's strategy proved ineffective, however, and the plaintiff eventually sued for fraud after losing most of her principal. *Id.* Even though the plaintiff had received monthly statements showing that her account was declining for more than three years before she filed suit, the court held that her claim was timely because "[u]nder California law, the statute of limitations may be tolled by a broker reassuring his client on concerns relevant to the possible misrepresentation." *Id.* at 1436-37 (citing *Twomey*, 262 Cal. App. 2d at 723-29). As the court in *Bull* explained, the assurances in *Vucinich* tolled the limitations period because they "were directly related to the misrepresentation." *Bull*, 1992 WL 103686 at *5. Like in *Vucinich*, the representations Golis and other YapStone personnel made after Plaintiffs received the 2002 materials "directly related" to Golis' multiple prior representation that Plaintiffs would become YapStone shareholders as a result of the transaction. In fact, they went to the very heart of those promises.

F. Defendants Should Be Equitably Estopped from Asserting the Statute of Limitations.

It is Defendants who should be estopped from asserting the statute of limitations defense against Rudometkin, Warner and Witmer since Defendants engaged in a scheme of concealment and deception in the years prior to and following the close of the Transaction. After the Transaction documents were received and in some cases after consents were signed, Defendants continued to make false representations that RentPayment shareholders had in fact become YapStone shareholders. "[R]egardless of the relationship imposing a duty to speak, actual fraud will estop the

defense of the statute of limitations where there have been active misrepresentations or purported disclosures which actually suppress material facts." *Baker*, 39 Cal. App. 3d at 323 (referencing 2 Witkin, Cal. Procedure (2d ed. 1970) Actions, § 405, p. 1239); *Vu v. Prudential Prop. & Cas. Ins. Co.* 26 Cal.4th 1142, 1146-48) (2001). "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." *Carruth v. Fritch* 36 Cal. 2d 426, 433 (1950) (quotations & citations omitted). Equitable estoppel is "wholly independent of the limitations period itself and takes its life ... from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice. Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." *Lantzy v. Centex Homes* 31 Cal. 4th 363, 383–384 (2003). "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded." *Id.* at 370. Whether estoppel should be applied in the circumstances presented, however, is a question of fact for the trial court. *John R. v. Oakland Unified Sch. Dist.*, 48 Cal. 3d 438, 446 (1989).

Defendants' pattern of misrepresentation and concealment began in 2001 with Golis's promises about stock ownership, but continued for years after the 2002 draft materials were distributed until June 16, 2011 when Gerber stated for the first time that the plaintiffs were ***not*** YapStone shareholders. The record demonstrates:

- Beginning October 29, 2002 and continuing after the transaction closed, Golis repeatedly falsely told Plaintiffs that RentPayment was "no longer in existence" in an effort to lull them into believing that they were or soon would become YapStone shareholders or to lull them into inaction based on the belief that the underlying company, RentPayment, was gone. (Ex. 22; Ex. 9; Ex. 25).
- Between May and July 2003, Golis engaged in negotiations with Witmer and Newell to induce their consent, and reiterated his previous representations that RentPayment shareholders would become YapStone shareholders. He did so in emails and oral communications, and by signing the modified RentPayment Board Consent document and appending it to the final transaction documents. (*See* Section II(F).)
- Golis specifically told Warner in June 2003 that he did not need to consent to the APA, and that the transaction would close regardless. (Ex. 5, Warner Dep. at 108:7-14, 141:24-142:8).

- Despite doing "extensive due diligence" (Ex. 8, Villante Dep. at 97:13-15), Villante and YapStone disregarded the blatant discrepancy in board resolutions since RentPayment's Board Resolution said that RentPayment's shareholders would receive YapStone stock as part of the transaction. (Ex. 16 at NGE00252-54).
- Despite this "extensive due diligence," Villante and YapStone did not disclose that RentPayment was not in good standing with the State of California when the transaction closed and was not in compliance with its tax obligations. (Ex. 64).
- Despite requests for it, Golis never provided the final APA to Plaintiffs or other RentPayment shareholders. (Ex. 4, Rudometkin Dep. at 101:2-8, 105:04-105:12; Ex. 5, Warner Dep. 113:11-114:12; Ex. 33, Witmer Dep. at 78:18-24, 174:22-175:23; Ex. 4, Rudometkin Decl. ¶¶ 5, 6, 10; Warner Decl. ¶¶ 6, 8, 10; Witmer Decl. ¶¶ 9, 16).
- In 2004, Golis told Newell, who shared the information with Witmer, that RentPayment shareholders "received preferred and common YapStone stock," and that they just had not paid the lawyers to obtain the stock certificates yet. (Ex. 25).
- Beginning at least in 2005, Golis repeatedly told Trevor Loy that as part of the transaction, he owned YapStone stock. He continued these representations for years, including telling Loy in 2009 that he would ask YapStone's CFO to obtain the YapStone stock certificates for Loy. He never did. (Ex. 49; Ex. 51; Ex. 50).
- Using identical language the Information Statement used to describe direct ownership,YapStone's corporate secretary told Witmer and Newell that they had a "beneficial interest" in YapStone stock and even specified the number of YapStone shares they owned. (Ex. 52).
- YapStone contacted Rudometkin in 2008 to confirm his address so that he could receive YapStone shareholder materials. (Ex. 4, Rudometkin Dep. at 201:14-22; 265:1-266:9).
- Golis sent the 2008 YapStone Stock Plan to Rudometkin and other Plaintiffs and RentPayment shareholders, along with consents to be signed by YapStone shareholders. (Ex. 53).
- YapStone CFO Mancuso created a detailed chart showing which shareholders received and consented to the 2008 YapStone Stock Plan, and sent it to Golis and Villante, and sent an updated version to Villante weeks later. (Ex. 54; Ex. 55).
- Rudometkin consented to the YapStone Stock Plan as a YapStone stockholder and appeared on the charts Mancuso sent to Golis and Villante. (Ex. 53 at NEW00197529-30; Ex. 54 at DEF002084; Ex. 55 at DEF0002136).
- CFO Mancuso told Rudometkin later in 2008 that RentPayment ***shareholders*** received YapStone stock as part of the transaction, and told him the specific allotment of YapStone shares that Rudometkin owned. (Ex. 56).
- CFO Price told Trevor Loy who in turn, told Rudometkin how many YapStone shares were allocated to him by virtue of the RentPayment transaction. (Ex. 57; Rudometkin Decl. ¶ 9).
- Golis separately called Witmer and Mirchandani in the days prior to the June 1, 2011 dividend announcement to tell them that YapStone shareholders were going to receive a

dividend. (Ex. 33, Witmer Dep. at 194:13-23; Ex. 43, Mirchandani Dep. at 410:3-411:25).

- Joy Melendez of YapStone contacted Dan Chester in the days before the dividend announcement using a subject line for her emails, "YapStone Shareholder Address Book" and asking for the contact information of RentPayment shareholders to provide them with upcoming YapStone information. (Ex. 60).
- Joy Melendez also contacted Jon Warner in the days before the dividend announcement for the same purpose. (Ex. 60; Warner Decl. ¶ 9).
- Plaintiffs received multiple iterations of the June 1, 2011 dividend announcement directed to "YapStone shareholders." (Ex. 59).
- After the dividend announcement, various people acting on behalf of YapStone, including corporate controller Amanda Speakman and outside counsel Bobby Gerber, confirmed that RentPayment shareholders owned YapStone stock. (Ex. 61; Ex. 62).

This evidence demonstrates the multiple issues of material fact as to Defendants' continuous scheme of misrepresentations and omissions designed to lull Plaintiffs into believing they were YapStone shareholders in the years after the transaction closed.[28]

Defendants should not be allowed to "profit from their own wrongdoing" by arguing that the statute of limitations bars Plaintiffs' claims. *Lantzy,* 31 Cal. 4th at 383–384. The statute of limitations was equitably tolled by Defendants' actions, which began in 2002 and continued until mid-June 2011. *Id.* at 370.

VI. WITMER'S FIDUCIARY FRAUD CLAIM IS NOT BARRED BY CONSENT OR ESTOPPEL.

Defendants' argument that Witmer's fiduciary fraud claim is barred by the affirmative defenses of consent and estoppel must be rejected. (Witmer MPA at 16). Defendants misleadingly suggest that since Witmer signed a shareholder consent he is precluded from asserting that the "APA was somehow improper." *Id*. Witmer does not argue that the APA "was somehow improper." Instead, he contends that Golis violated his fiduciary duties by fraudulently misrepresenting and concealing the issue of ownership of YapStone stock as a result of the transaction. Indeed, Witmer has no claims that rise and fall on the APA or other transaction documents.

[28] Additional post transaction misrepresentations will be set out in response to Defendants' motions directed to plaintiffs Newell, Mirchandani and Dan and Michelle Chester.

Moreover, Defendants cannot even meet the elements of an estoppel claim: "(1) the party to be estopped [knew] the facts; (2) [the party intended] that his conduct [would] be acted upon; (3) the other party [was] ignorant of the true facts; and (4) [the other party relied] upon the conduct to his injury . . . [w]here one of the elements is missing there can be no estoppel." *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 47 (1994) (quotations & citations omitted). Notably, Defendants focus only on the shareholder consent but omit entirely any reference to the directors' resolution which of course says that "RentPayment shareholders" will receive YapStone stock. In any event, both consents were induced by Golis' subsequent misrepresentations and omissions and were not based on the language of documents sent by Villante in 2002. *See Heine v. Wright*, 76 Cal. App. 338, 342 (1926) (consent must be free of fraud, duress, and mistake).

That Defendants even raise this defense is ironic given the record as to their own actions. As the evidence demonstrates, only Defendants knew the "true" facts – that they had no intention of giving RentPayment shareholders YapStone stock as part of the transaction. Witmer only knew that he consented to a transaction based on the agreement Golis made with him and Newell that the Revised Cap Table would govern and that RentPayment shareholders would receive YapStone stock. (Ex. 33, Witmer Dep. at 113:4-13; 111:16-24; 136:22-25; 140:20-141:22; 124:22-125:6; 117:24-118:9; 118:23-120:9; 139:16-140:16). Because that is not what happened, Witmer could not have intended Defendants to rely on a consent that was neither fully informed nor free from Defendant's fraud.

VII. SUMMARY JUDGMENT ON THE FIDUCIARY MISMANAGEMENT CLAIM SHOULD BE DENIED.

A. Plaintiffs Have Standing To Assert Direct Claims.

Plaintiffs' claim for fiduciary mismanagement and self-dealing by Golis (in conspiracy with and as aided and abetted by Villante and Yapstone) is independent of the fiduciary fraud claim. Plaintiffs are entitled to pursue direct recovery of their individual damages in the form of the additional distributions that each of them would have received in 2012 but for this fiduciary mismanagement and self-dealing.

The underlying evidentiary facts establishing the ultimate fact of this breach of fiduciary duty are

several: (1) failing to dissolve RentPayment and distribute YapStone stock shortly after the 2003 transaction closed; (2) maintaining RentPayment as a C Corporation rather than as an S Corporation; (3) failing to file federal and state tax returns and pay taxes for more than 10 years; (4) failing to file annual reports with the California Secretary of State; (5) failing to maintain RentPayment in good standing with the State of California; (6) incurring legal and accounting fees and costs required to remedy these failures; (7) making dividend overpayments to himself and RentPayment shareholder Charlene O'Connell from the gross YapStone dividend; (8) paying himself over $1.2 million more than a year before distribution of any amount to the minority shareholders; (9) issuing a personal promissory note to the company for $148,000 he should not have gotten instead of simply paying it back; (10) providing YapStone free use of RentPayment material assets for more than two years; (11) failing to protect RentPayment minority shareholders from dilution; and (12) and failing to complete formation of RentPayment and implement basic corporate governance procedures. Plaintiffs are entitled to plead in the alternative and do not seek a double recovery. *See, e.g., Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1388 (2012); *Mendoza v. Rast Produce Co., Inc.*, 140 Cal. App. 4th 1395, 1402 (2006).

As the sole director and controlling shareholder of RentPayment, Golis owed fiduciary duties of due care and undivided loyalty to the minority shareholders. *See Jones v. H.F. Ahmanson & Co.*, 1 Cal.3d 93, 108 (1969). California has a strong public interest in assuring that corporate officers, directors, majority shareholders and others are faithful to their fiduciary obligations to minority shareholders. *Id.* The California Supreme Court explained:

> [M]ajority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.

Id. at 108. Minority shareholders may sue directly to recover for damage proximately caused by breach of fiduciary duties where the gravamen of the cause of action is injury to the shareholder. *Id.* at 107. Plaintiffs' claims are direct because the damages inflicted on Plaintiffs were not incidental to

the damages inflicted to the corporation. *See, e.g., id.* at 107; *Schuster v. Gardner*, 127 Cal. App. 4th 305, 313 (2005).

Defendants isolate certain of the allegations of mismanagement so that they sound in injury to the corporation but that misses the point. While some of Golis's misdeeds in isolation inflicted specific harm on Plaintiffs and thus are clearly direct, others must be viewed together as the means by which Golis extracted disproportionate value for himself from RentPayment to the detriment of the minority shareholders. *See Crain v. Elec. Memories & Magnetics*, 50 Cal. App. 3d 59, 51 (1975) (recognizing direct action where majority shareholder deprived plaintiffs of their ownership interests in ongoing businesses without any compensation while generating excessive payment for self). For example, Golis disregarded even his most basic fiduciary obligations to the minority shareholders (numbered points 1-5, 12 above) in order to create an environment where he could control RentPayment, use and give away its assets, and take other acts that disproportionately benefited him. Specifically, because RentPayment had no board governance (see points 2-5 above), Golis was able to manipulate the sale of RentPayment's assets in order to disproportionately benefit himself – he alone chose to give YapStone free access to RentPayment's assets for years before the transaction and he alone secured a lucrative position at YapStone and a $175,000 payment for past due compensation (without any supporting documentation) and no similar commitment for RentPayment's unpaid employees . (Ex. 16 at NEW00197454). *See Low v. Wheeler*, 207 Cal. App. 2d 477, 481-82 (1962) (sale of corporate assets designed to disproportionately benefit majority shareholder gives rise to individual claim). Likewise, Golis alone received a dividend from YapStone in 2011 (points 7, 8) while the minority shareholders waited for more than a year without information and ultimately received less than their proportionate share of RentPayment's value because by that point the company had incurred substantial legal and accounting fees to make up for and correct the very same lapses in good corporate governance that allowed Golis his early and excessive payment. (Ex. 70 at NEW00188363-64.) *See Jara v. Suprema Meats, Inc.*, 121 Cal. App. 4th 1238, 1257 (2004) (allowing individual claim against majority shareholder for breach which results in majority shareholder retaining disproportionate share of corporation's value). Even after Golis acknowledged receiving a greater dividend share than he was due, Golis alone made a

promissory note to RentPayment from himself (point 9) rather than return the money so that it could be distributed to the shareholders. (Ex. 63; Ex. 64; Ex. 1, Golis Dep. at 277:4-278:13.). That each of the plaintiffs, as RentPayment minority shareholders, were similarly harmed as a result of Golis's misdeeds does not mean the claims are not direct. *See Jones v. H.F. Ahmanson & Co.*, 1 Cal. 3d at 107.[29] Accordingly, Plaintiffs' non-fraudulent fiduciary claims are appropriately direct.

B. The Fiduciary Mismanagement Claim Did Not Accrue Until 2012 and Is Therefore Timely.

The fiduciary mismanagement claim was timely brought because it did not even accrue until 2012 when the dividend paid to RentPayment shareholders was greatly reduced due to fees, costs, taxes and penalties incurred to make RentPayment a live company in good corporate standing. Statutes of limitations begin to run when the "cause of action accrues." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005). "Generally speaking, a cause of action accrues at the time when the cause of action is complete with all of its elements." (*Id*.) The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. *Knox v. Dean*, 205 Cal. App. 4th 417, 432 (2012). Where damages are an element of a cause of action, "the cause of action does not accrue until the damages have been sustained." *City of Vista v. Robert Thomas Sec., Inc.*, 84 Cal. App. 4th 882, 886 (2000) ("Therefore, when the wrongful act does not result in immediate damage, the cause of action does not accrue prior to the maturation of perceptible harm"). Plaintiffs'' claim was filed within four years of its accrual.

Even if the claims accrued earlier, Plaintiffs had no way of knowing (and no reason to question) that Golis (with YapStone's and Villante's assistance) had engaged in wrongdoing until, at the earliest, the receipt of Gerber's June 16, 2011 letter, but more likely, Gerber's September 24, 2012 letter outlining for the first time that the dividend amount was severely diminished due to Golis'

[29] Moreover, policy concerns underlying derivative claims are not implicated here where Golis "was the only person running the Company and would not have agreed to sue himself." *See e.g., Sanders v. Langmuir-Logan*, No. GO47997, 2014 WL 1917679 at *9 (Cal. Ct. App. May 14, 2014).

transgressions. Again, the language of the APA that Defendants claim triggered the statute of limitations for the "fallback claims" did not. (*See e.g.*, Witmer MPA at 18) (asserting that language in the APA about (1) no anti-dilution rights; (2) the purchase price; (3) that RentPayment's business had not been appraised; (4) that Plaintiffs should obtain an "independent evaluation" of the terms; and (5) that Plaintiffs could object and demand a repurchase of their shares for fair market value put Plaintiffs on notice of the claims). As discussed below, with respect to (1), RentPayment *did* have anti-dilution rights for the preferred stock it received, so the statement in the Information Statement that it had no such rights was false and could not have provided "notice." Moreover, a pronouncement that Plaintiffs had no anti-dilution rights could not have triggered the statute of limitations until Plaintiffs were on notice that improper dilution had occurred. None of the plaintiffs at issue were privy to YapStone's transactions, stock ledgers or other material to put them on notice of the dilution earlier, and thus, it was not discovered until after 2011. (Rudometkin Decl. ¶ 11, Warner Decl. ¶ 11 ; Witmer Decl. ¶ 17).

As to (2), that the APA disclosed the price YapStone would pay (25% of its stock) for RentPayment's assets did not put Plaintiffs on notice that YapStone had been using the assets *already* for 2 ½ years *for free* or that YapStone was paying Golis compensation well before the Transaction closed, which made Golis more than a disinterested party acting in the best interests of the minority shareholders he represented. With respect to (3), the fact that the APA had boilerplate language telling Plaintiffs they should obtain their "own independent evaluation" of the terms of the APA or that they "could object to the transaction" did not trigger the statute of limitations as there was nothing to alert Plaintiffs that Golis was violating his duties in the manner outlined in the "fallback" claims.[30]

C. Delaware Law Regarding Preemptive Rights Is Not Applicable to the Breach of Fiduciary Duty Claim.

Defendants' brief argument that per the Information Statement, Plaintiffs had no anti-dilution rights as to their YapStone stock must be rejected as contrary to both the facts and the law. (*See, e .g.*,

[30] This is particularly so since Golis and Villante overtly lied in the APA about many of these issues by, among other things, including false certifications that RentPayment was in good standing and in compliance with all tax obligations, saying "no appraisal" was conducted by either party when RentPayment *did* have an appraisal, (Ex. 8, Villante Dep. at 254:2-11), and saying the RentPayment Board had unanimously approved the deal as of September 2002. (*See* Ex. 16 at NEW00197424).

Rudometkin MPA at 16). First, shareholder rights do not stem from an Information Statement, particularly where the shareholders are not party to any transaction. And even if they did, for all of the reasons previously discussed, the Information Statement does not bind Rudometkin, Warner or Witmer since Villante and Golis intentionally misrepresented the transaction so that they were led to reasonably believe the deal was something different than what was described. What's more, though, the Information Statement actually *does* discuss anti-dilution rights. Specifically, it provides that the purchase price for RentPayment assets includes YapStone Preferred Stock, and that Preferred Stock is afforded certain additional "rights and preferences" over holders of common stock as well as certain "anti-dilution adjustments." (Ex. 16 at NEW00197437, NEW00197447).

Finally, contrary to Defendants' unsupported contention, Preferred Stock holders are indeed given substantial anti-dilution rights under YapStone's Amended Certificate of Incorporation and Amended Certificate of Designation, both duly filed with the State of Delaware in accordance with Delaware law. (Ex. 76). The dilution of shares that affected Plaintiffs' interest in YapStone therefore was not only in violation of YapStone's governing documents (*id*.) but also Plaintiffs' express rights under Delaware law. (S*ee, e.g.*, Del. Code tit. 8 § 151(a) (providing for the issuance of stock with special voting powers, preferences or other rights as stated in the resolution providing for issuance such stock)).

D. Witmer's Fiduciary Mismanagement Claim Is Not Barred by Consent or Estoppel.

For the same reasons discussed above, Witmer's non-fraudulent breach of fiduciary duty claims are likewise not barred by consent or equitable estoppel. The consent form Witmer signed did not give Golis freedom to mismanage RentPayment or to breach his fiduciary duties as alleged in these claims. Nor was Witmer bound by the Transaction documents, as they were superseded by subsequent negotiations, misrepresentations and agreements with Golis and they were incomplete and incorrect.

VIII. SUMMARY JUDGMENT ON VICARIOUS LIABILITY CLAIMS SHOULD BE DENIED.

Defendants attempt to shield YapStone and Villante from liability for their substantial assistance to Golis by asserting that: (a) these claims fail because the claims against Golis fail; (b) there is not

enough evidence to support the claims; and (c) no conspiracy claim lies in the absence of an independent duty. (*E.g.*, Witmer MPA at 19-20). None of these arguments has merit.

First, as detailed in Section V, Rudometkin, Warner and Witmer's claims against Golis are timely as to him. Thus, the vicarious liability claims against Villante and YapStone are likewise timely. Second, there is ample evidence to demonstrate material issues of fact in connection with the vicarious claims. In an effort to avoid a trial on these claims, Defendants focus on only one type of evidence that can give rise to vicarious liability – Plaintiffs' *actual knowledge* of what Golis told Villante about the multiple misrepresentations and omissions he made to Plaintiffs prior to the close of the transaction. (*See e.g.*, Witmer MPA at 20). Because Plaintiffs are not (nor could they be) aware of the specific communications between Golis and Villante, Defendants make the unfounded leap that there is no evidence to support the claims. This is erroneous.

Liability for aiding and abetting a breach of fiduciary duty may be imposed upon one who "(a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act ***or*** (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." *American Master Lease*, 225 Cal. App. 4th at 1475 (emphasis added). The record demonstrates that both prongs apply here.

Conspiracies and concert of action are typically proved by circumstantial, not direct evidence. *Rickley v. Goodfriend*, 212 Cal. App. 4th 1136, 1166 (2013). "[S]ince such participation, cooperation or unity of action is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances." *Black v. Sullivan*, 48 Cal.App.3d 557, 566 (1975) (emphasis added); *Chicago Title Ins. Co. v. Great Western Fin. Corp*. 69 Cal.2d 305, 316 (1968). The fact that Plaintiffs cannot recite specific communications between Golis and Villante – especially in light of all of the evidence demonstrating knowledge, encouragement and substantial assistance – does not preclude a trial on the vicarious liability claims.

There is ample evidence in the record to support the vicarious claims. Villante was an officer and director of YapStone before and after the transaction, and at all times, was a controlling shareholder

of YapStone. (Ex. 8, Villante Dep. at 48:5-49:21.) He was aware that Golis owed fiduciary duties to the minority shareholders, including Rudometkin, Warner and Witmer and that he had his own fiduciary duties to minority shareholders of YapStone. (*Id.* at 184:21-24, 187:14-188:17). Villante, on behalf of himself and YapStone, gave "substantial assistance" to Golis' breaches by working in concert with Golis to: (a) use RentPayment's valuable assets for free and without a licensing agreement for more than two years prior to the close of the transaction (*id.* at 166:4-167:17); (b) transfer all of YapStone's "data" and utilize RentPayment's payment processing platform prior to the close of the transaction (Ex. 13; Ex. 11; Ex. 8, Villante Dep. at 160:20-161:5); (c) use RentPayment's url, brand, goodwill and domain name for more than two years prior to the transaction (*id.*); (d) merge the two companies' bank accounts so that all RentPayment payments went to YapStone's account (Ex. 17); (e) divert all payments from RentPayment's existing customers to YapStone (*id.*; Ex. 8, Villante Dep. at 171:8-19); (f) allow YapStone's lawyers for the transaction to serve as the registered agent for RentPayment prior to the close of the transaction (Ex. 21); (g) orchestrate payments from RentPayment (which was supposedly without money at the time) to YapStone in the guise of a Management Services Agreement, including a +$64,000 payment in 2001 (Ex. 23; Ex. 24 at NEW00193293); (h) pay Golis for employment prior to the transaction closing and without disclosure to shareholders, and instead portraying Golis as an independent, non-biased negotiator of an arms' length transaction for RentPayment (Ex. 8, Villante Dep. at 108:15-110:16; 162:16-163:12; Ex. 1, Golis Dep. at 206:21-209:13); (i) repeatedly misrepresenting to third parties that RentPayment and YapStone had "merged" effective 2001 (*e.g.*, Ex. 12); (j) holding himself out as Chairman and CEO of RentPayment in the years prior to the transaction closing (*id.*); (k) knowing and encouraging Golis to hold himself out as President and COO of YapStone well prior to the transaction closing (Ex. 18; Ex. 8, Villante Dep. at 191:18-192:10; 241:7-13); (l) misrepresenting in the Information Statement that the RentPayment Board of Directors "unanimously approved" the transaction and encouraged shareholders to do the same (Ex. 16 at NEW00197424); (m) despite "extensive due diligence" (Ex. 8, Villante Dep. at 97:13-15), ignoring and failing to disclose that RentPayment was not in good standing with the State of California at the time of the transaction close and had not paid federal or state taxes since its inception (and allowing certifications in the APA to

the contrary (Ex. 64; Ex. F. to Bohrer Decl., Gerber Dep. (Vol. II) at 169:6-170:20); (n) declaring the transaction would be a "tax free reorganization" in the Information Statement but failing to ensure that it was by requiring RentPayment to dissolve and distribute the YapStone stock to its shareholders shortly after the transaction closed (Ex. 16 at NEW00197432); (o) failing to provide a final APA to shareholders (Ex. 4, Rudometkin Dep. at 101:2-8; 105:04-105:12; Ex. 5, Warner Dep. at 113:11-114:12); Ex. 33, Witmer Dep. 78:18-24; 174:22-175:23; Ex. 4, Rudometkin Decl. ¶¶ 5-6, 10; Warner Decl. ¶¶ 6, 8, 10; Witmer Decl. ¶¶ 9, 16); (p) closing the transaction on behalf of YapStone despite the clear discrepancy in the description of the transaction between the RentPayment and the YapStone Board resolutions (Ex. 38 at NGE 00244-49 and NGE 00252-54); and (q) even though he was copied on the email from YapStone's lawyer forwarding the YapStone resolution and warning Golis not to modify it (Ex. 46), and in the face of a certification by Golis that RentPayment's bylaws were included in the final transaction documents, allowing a blank sheet of paper in their stead which simply read, "Not provided by RentPayment." (Ex. 38 at NGE 00155-161). All of these actions prior to and in connection with the transaction gave substantial assistance or encouragement to Golis to breach his fiduciary duties.

Following the transaction, every subsequent misrepresentation by Golis was made while Golis was a YapStone officer and eventual board member, so Golis' statements are imputed to YapStone. *Natural Gas Co. v. Superior Ct.*, 64 Cal. App. 3d 983, 992 (1976); *San Diego Hospice v. County of San Diego*, 31 Cal.App.4th 1048, 1056 (1995) (corporation is charged with knowledge of its current agents and information contained in its records). YapStone and Villante also directly participated in further misrepresentations and concealment of Golis' concerted fraud after the transaction by: (a) continuing the charade of YapStone stock ownership by sending the 2008 YapStone Stock Option Plan materials to Rudometkin and other Plaintiffs and by failing to take any subsequent corrective action even though Villante and YapStone's CFO knew that they had been sent to RentPayment shareholders (Rudometkin Decl. ¶ 7; Ex. 53; Ex. 54; Ex. 55);[31] and (b) taking no action despite seeing the representations of

[31] One of the CFO's emails to Villante said: "Tom, the attached Mailing Checklist lists the shareholders and identifies those that we mailed consents to and received responses from and the numbers of shares owned by the shareholders who have responded." (Ex. 54). Villante never informed Plaintiffs – or even Mancuso – that RentPayment shareholders were ***not*** YapStone shareholders. (Ex. 78, Mancuso Dep. at 58:14-23).

YapStone's CFO Mancuso to Rudometkin that "RentPayment shareholders received 25% of the then outstanding shares of Yapstone [in the transaction]" and that Rudometkin "received the following amount of shares in YapStone in conjunction with the acquisition…."[32] (Ex. 79; Ex. 80). Mancuso not only forwarded to Golis and Villante his prior emails confirming Rudometkin's ownership of YapStone stock, but he also directly told Villante and Golis that he had updated certain spreadsheets to reflect this YapStone ownership information:

> Q. And is it your recollection that this is the tab that you indicated to Mr. Villante and Golis that you updated to show the YapStone Class A, B and Preferred Shares that each RentPayment shareholder owned after the acquisition by YapStone?
>
> A. I don't recall.
>
> Q. Do you have any reason to believe that this is not the spreadsheet that you referred to in that email?
>
> A. I do not.
>
> Q. Further down in your email to Mr. Villante and Mr. Golis of October 27th you say,
>
> "Based on the attached file, R. Rudometkin owned 76,000 RP shares out of a total outstanding of 9,990,939 or .76 percent." Do you see that?
>
> A. Yes.
>
> Q. And then you further say, "Based on this he [Rudometkin] owns 3,148.38 YapStone shares." Do you see that?
>
> A. Yes.

(Ex. 78, Mancuso Dep. at 34:24-35:17). Neither Villante nor anyone else at YapStone did anything to correct the representations made to Rudometkin in 2008 that he was a YapStone shareholder and that RentPayment shareholders received YapStone stock as a result of the transaction. (Rudometkin Decl. ¶

[32] Villante also repeatedly and consistently turned a blind eye to the fact that RentPayment shareholders like Rudometkin and Loy continued to raise issues to YapStone's CFOs about the substantial discrepancy in the capitalization table included in the APA they consented to and the one YapStone was clearly using after 2003. Villante was copied on emails (which showed the representations of YapStone ownership CFO Mancuso had made) and was orally made aware of the fact that there was a serious issue with the RentPayment cap table that YapStone was using. (Ex. 80 at DEF0002086; Ex. 81; Ex. 74, Price Dep. at 105:9-106:23;120:8-21; 128:11-14; 135:5-136:24). Accepting his position that Plaintiffs are RentPayment shareholders, they are therefore indirect shareholders of YapStone, to whom he had independent fiduciary duty – one he repeatedly and intentionally ignored. (Ex. 8, Villante Dep at 184:21-24); Ex. 54; Ex. 55)(). Allowing inquiries about the Cap Table discrepancy to go unanswered by YapStone constitutes aiding and abetting and conspiracy in the face of his own duty to Plaintiffs. *American Master Lease*, 225 Cal. App. 4th at 1475.

8; Ex. 78, Mancuso Dep. at 58:14-23; CACI 1906). Likewise, neither Mancuso, Villante nor anyone else at YapStone responded to Rudometkin's questions about the discrepancy in the Revised Cap Table being used by YapStone:

> Q. Mr. Mancuso, right before we took the break we were looking at Plaintiffs' Exhibit 52 [email from Mancuso to Villante and Golis describing the discrepancy in the cap tables at issue and asking for direction to respond to Rudometkin]. And I had asked you if you recalled getting a response from Mr. Golis or Mr. Villante, and I believe that you testified that you didn't believe that you did; is that correct?
>
> A. Yes.
>
> Q. Did it trouble you, as the CFO, that there was this discrepancy relating to one of the acquisitions in the company's history and you were not getting information from the CEO of YapStone [Golis] or the chairman [Villante]?
>
> A. Yes.

(Ex. 78, Mancuso Dep. at 47:6-17). Ultimately, Mancuso did not respond to Rudometkin's requests for information because he did not receive any direction from Golis or Villante regarding how to address the issue. (*Id.* at 46:19-22). Villante and YapStone continued to provide "substantial assistance" to Golis when YapStone sent the email under Villante's watch announcing the $40 million dividend to Plaintiffs and RentPayment shareholders. (Ex. 59). In the ensuing days, YapStone's corporate controller and outside counsel (who is the "corporate representative" of YapStone in this matter) continued to reiterate that Plaintiffs and RentPayment shareholders were YapStone shareholders, even providing their share amounts using the Revised Cap Table. (Ex. 61; Ex. 62).

Finally, Villante aided and abetted and conspired with Golis in the self-dealing transactions that caused RentPayment's ownership share to dwindle to just above 5% ownership today from 25% at the close of the transaction. (Ex. F to Bohrer Decl., Gerber Dep. (Vol. II) at 167:23-168:04, 257:01-258:15; Ex. 71). These transactions were orchestrated and carried out among the three Defendants, benefitted Villante directly and required his knowledge and participation to pull them off. The resulting unlawful diminishment to RentPayment constitutes the violation of a direct duty owed by Villante and YapStone to YapStone's minority shareholders.

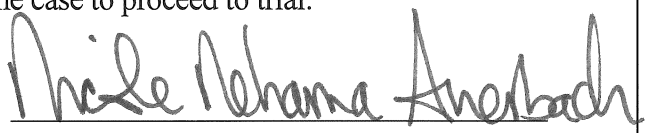
Not only is there ample evidence that Villante and YapStone substantially assisted and encouraged the breaches of fiduciary duty by Golis, there is similarly ample evidence to establish that

Villante, as an officer, director and controlling shareholder of YapStone had his own duties to minority shareholders of YapStone, including RentPayment and Plaintiffs, that he violated and ignored. Because Defendants cannot establish the absence of any issue of material fact as to these claims, summary judgment should be denied.

IX. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions for summary judgment or summary adjudication against Plaintiffs Richard Rudometkin, John Warner and Peter Witmer in their entirety and allow the case to proceed to trial.

Dated: September 16, 2014



David C. Bohrer
Nicole Nehama Auerbach (admitted *pro hac vice*)
Margot Klein (admitted *pro hac vice*)

VALOREM LAW GROUP, LLP

Attorney for Plaintiffs,
DONALD A. NEWELL, PETER C. WITMER, RICHARD RUDOMETKIN, GIRISH MIRCHANDANI, DANIEL CHESTER, MICHELLE CHESTER, and JONATHAN WARNER