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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
BENTLEY PRICE, CIRCUIT COURT JUDGE

Appellate Case No.
2021-000837

Circuit Court Case Nos.:
2016-CP-07-01919
2019-CP-07-01253
2019-CP-07-01294

In re: IN THE MATTER OF: Estate of Paul Brandon Barringer II

Hampton B. Luzak, ... Appellant

v.

Merrill B. Light, Merrill U. Barringer as Personal Representative of the Estate of Paul Brandon Barringer II, J. Randolph Light, Jr., Merrill B. Light as putative trustee of the Paul B. Barringer II Revocable Trust dated December 4, 1998, and Merrill B. Light as Trustee of the Merrill Barringer Light Revocable Trust, ... Respondents

--and--

Coastal Forest Resources Company ("CFRC") ..... Intervenor/Respondent.

--and--

Hampton B. Luzak, ... Appellant,

v.

Merrill U. Barringer, ... Respondent.

FINAL BRIEF OF INTERVENOR/RESPONDENT COASTAL FOREST RESOURCES COMPANY

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STATEMENT OF THE ISSUES ON APPEAL

Issue I: Was the Circuit Court correct in holding that Plaintiff-Appellant Hampton Luzak is asserting shareholder derivative claims and attempting to recover derivative damages that can only be pursued on behalf of Intervenor-Respondent Coastal Forest Resources Company ("CFRC")?

Issue II: Was the Circuit Court correct in holding that Ms. Luzak cannot pursue derivative claims or recover derivative damages belonging to CFRC in this action?

Issue III: Did the Circuit Court abuse its discretion in allowing CFRC to intervene for the limited purpose of preventing Ms. Luzak from litigating derivative claims or recovering derivative damages belonging to CFRC in this action?

PRELIMINARY STATEMENT

The Circuit Court correctly granted CFRC's motion for intervention and protective relief to prevent one of its shareholders, Hampton Luzak, from bootstrapping Virginia shareholder derivative claims and damages onto this South Carolina probate lawsuit. Ms. Luzak is pursuing derivative claims and damages in South Carolina after unsuccessfully litigating derivative claims in Virginia, CFRC's state of incorporation. *See Luzak v. Light*, No. 115CV501AJTIDD, 2016 WL 3854118 (E.D. Va. July 8, 2016), *aff'd*, 678 F. App'x 180 (4th Cir. 2017). But no court in South Carolina has subject matter jurisdiction to decide issues pertaining to CFRC's internal affairs—such as whether its directors are liable for the alleged loss of value of CFRC stock. And no shareholder of CFRC has standing to sue CFRC's directors individually under such a theory. The Circuit Court was right to allow CFRC to intervene. And it correctly dismissed Ms. Luzak's civil conspiracy claim and struck her associated requests for damages, all of which it could have done *sua sponte*. This Court should affirm the Circuit Court's orders granting CFRC's motion.[1]

[1] All internal citations, quotations, and alterations are omitted unless otherwise noted. In keeping with its limited role in this case, CFRC's brief addresses only Ms. Luzak's appeal of the June 7, 2021 order granting CFRC's motion for intervention and protective relief and the July 13, 2021 order denying Ms. Luzak's subsequent motion for reconsideration.

STATEMENT OF FACTS

A. CFRC and its shareholders.

CFRC, "one of the country's largest privately held forest products companies," is a closely held Virginia corporation with its principal place of business in Havana, Florida. Luzak Br. p. 4; Am. Compl. ¶ 10 (R. p. 464). The decedent, Paul B. Barringer II, served as CFRC's Chairman and CEO and was the driving force behind the company. Luzak Br. at 4; Am. Compl. ¶¶ 10, 14, 20 (R. pp. 464, 465, 468).

CFRC's ownership has been divided between the Barringer and Conger families. *Id.* The nonvoting shares, which comprise the vast majority of CFRC's stock, are held or controlled by Mr. Barringer's eldest daughter, Defendant Merrill Light, and her sons, Thomas and Paul; Ms. Luzak, Mr. Barringer's younger daughter, and her son Wade; Mr. Barringer's son, Victor Barringer, and his two children, Paul and Sarah; Robert Conger and his children, Robert, Lewis, and Mary Sue; and Travis Bryant, CFRC's CEO, who is not a member of either family. *See* Luzak Br. p. 4; Luzak Opp. to Light MSJ Ex. A Attch. 22 (CFRC Stock Register May 7, 2012). (R. p. 2238). The voting shares are held or controlled by Mrs. Light, Ms. Luzak, and Mr. Conger, with Mr. Bryant holding one share. Luzak Opp. to Light MSJ Ex. Z (CFRC Stock Register Feb. 13, 2019) (R. p. 3087).

Although CFRC is family-owned, it is no longer family-managed. Mrs. Light and her son Thomas currently serve on CFRC's Board of Directors, but the Board also includes Mr. Bryant; Mr. Conger; and Stephen Wannall, a CPA who is not related to the Barringer or Conger families. *See Luzak*, 2016 WL 3854118, at *2. Day-to-day management of CFRC falls to its officers and approximately 800 employees.

B. CFRC's Board of Directors removes Kevin Luzak from his position as CEO.

Ms. Luzak's derivative claims and damages stem from her husband Kevin Luzak's removal as CFRC's CEO. In early 2012, Mr. Barringer and Mr. Luzak came to a disagreement about the future direction of CFRC and Mr. Luzak's disclosure of his business decisions. Mr. Barringer had spent decades building CFRC into one of the most successful players in the timber and forest products industry. Am. Compl. ¶ 14. (R. p. 465). Mr. Luzak joined CFRC's Board of Directors in 1993 shortly after marrying Ms. Luzak. Luzak Opp. to Light MSJ Ex. B (K. Luzak Aff.) ¶ 2 (R. p. 2859). As Mr. Barringer began to wind down his day-to-day management of CFRC, the Board elected Mr. Luzak to serve as CFRC's President and eventually CEO. *Id.* Mr. Barringer, however, remained involved in the company and continued to serve as a director. *See* Luzak Opp. to Light MSJ Ex. WW (June 28, 2012 Board Minutes) p. 1. (R. p. 3185). By early 2012, the Board was comprised of Mr. Barringer, Mr. Luzak, Mrs. Light, and Michael Hagler, an attorney who represented the Congers' interests. *Id.*; *Luzak*, 2016 WL 3854118, at *1. Throughout this time, the Luzaks continued to live and work in New York City, the Barringers and the Lights lived in Hilton Head, and CFRC was based in Florida. Luzak Br. p. 6; Am. Compl. ¶ 134 (R. p. 514).

As CEO, Mr. Luzak sought to divert CFRC away from its core timber and forest products business toward what he called a "new long-term strategic plan." *See* Luzak Opp. to Light MSJ Ex. B (K. Luzak Aff.) ¶ 17 (R. p. 2865); Mot. for Int. Ex. A (July 6, 2012 H. Luzak Ltr.) p. 3 (R. p. 3634). According to Mr. Luzak, as CEO he wanted "to complete an orderly liquidation of approximately $100 million of the $460 million of timberland which it held" over a four-year period. *See* Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0009 (R. p. 3685). Mr. Luzak allegedly planned to invest those proceeds in a combination of commercial real estate and public securities, *id.*, transforming CFRC into an investment holding company.

Mr. Luzak's vision was antithetical to his father-in-law's, and Mr. Barringer decided that he no longer wanted Mr. Luzak to be CEO. *See* Luzak Opp. to Light MSJ Ex. WW (June 28, 2012 Board Minutes) pp. 1–2 (R. pp. 3185-3186). At a meeting on June 28, 2012, the Board removed Mr. Luzak as CEO on a 2-1 vote, with Mr. Barringer and Mrs. Light voting in favor. *Id.* p. 2. (R. p. 3186). Mr. Luzak, with support from Mr. Hagler, contested the vote, but CFRC's outside counsel and assistant secretary at the time, Bradley Herring of Poyner Spruill LLP, opined that Mr. Luzak was interested and therefore disqualified from voting on the matter. *Id.*

Shortly after that meeting, Mr. and Ms. Luzak sent vitriolic letters contesting the Board's decision. In a July 6, 2012 letter, Ms. Luzak demanded that the Board "remedy the breaches of fiduciary duty which occurred at the June 28, 2012 board meeting" by "affirming that Kevin Luzak continues to serve as President and CEO." Am. Compl. ¶ 72 (R. p. 487); Mot. for Int. Ex. A (July 6, 2012 H. Luzak Ltr.) p. 1 (R. p. 3633). Ms. Luzak also openly claimed that her father was "suffering from a form of Alzheimer's Disease." Mot. for Int. Ex. A (July 6, 2012 H. Luzak Ltr.) p. 2 (R. p. 3632). That same day, Mr. Luzak sent a letter to Mr. Herring asserting that Mr. Barringer was suffering from Alzheimer's and threatening Mr. Herring with liability "[s]hould CFRC and its shareholders suffer damages from CFRC board actions which interfere with the performance of my duties as an officer of CFRC." Am. Compl. ¶ 73 (R. p. 488); Mot. for Int. Ex. B (July 6, 2012 K. Luzak Ltr.) pp. 2–3 (R. pp. 3639–3640). Shortly thereafter, Mr. Herring withdrew as CFRC's counsel and resigned as corporate secretary. Am. Compl. Ex. 10 (July 9, 2012 Herring Ltr.) (R. p. 815). Mr. Luzak was subsequently removed as a director, while Mr. Hagler resigned. Messrs. Bryant and Light then became directors and Mr. Bryant was named CEO. Am. Compl. ¶¶ 81, 83 (R. pp. 492, 493); Luzak Opp. to Light MSJ Ex. EE (Aug. 3, 2012 Shareholder Minutes) (R. p. 3109).

Mr. Barringer also took action with his CFRC voting stock. On July 20, 2012, he amended his revocable trust to leave his CFRC voting stock to Mrs. Light upon his death. Am. Compl. ¶ 75 (R. p. 489); Luzak Br. p. 8. Then, on September 11, 2012, Mr. Barringer transferred all but one share of his CFRC voting stock to Mrs. Light, the transaction that is ostensibly a subject of this action. Am. Compl. ¶ 84 (R. p. 493), Exs. 15 and 16 (Stock Power and Assignment of Shares) (R. pp. 827, 829); Luzak Br. p. 9. Following the transfer, Mrs. Light held or controlled a majority of CFRC's voting stock. Luzak Opp. to Light MSJ Ex. Z (CFRC Stock Register Feb. 13, 2019) (R. p. 3087).

By September 2012, Ms. Luzak continued to hold CFRC stock and receive monthly financial information about the company's strong performance, but she and her husband had no further involvement in the management of CFRC. Indeed, Ms. Luzak declined the Board's invitation to serve as a director. Mot. for Int. Ex. C (H. Luzak Dep. Tr.) pp. 66:22–67:1 (R. pp. 3648–3649). And despite sending multiple letters challenging Mr. Luzak's ouster and the Board's subsequent decisions, the Luzaks did not litigate any of these events at the time.

C. Ms. Luzak brings derivative claims in Virginia challenging a stock sale to her husband's successor as CFRC's CEO.

That changed in January 2015, shortly before Mr. Barringer stepped down as a CFRC director, when Ms. Luzak began sending new demand letters to CFRC seeking to inspect corporate records pursuant to Virginia's Stock Corporation Act. *See* Am. Compl. ¶¶ 95, 98, 101, 104(b) (R. pp. 500, 501, 502, 504); Luzak Br. p. 10; Va. Code § 13.1-771. These letters related not to her husband's removal as CEO, but instead to the Board's decision to sell stock to Mr. Bryant in October 2013. *See* Am. Compl. ¶¶ 95, 99 (R. pp. 500, 502); *Luzak*, 2016 WL 3854118, at *2. CFRC provided records and a lengthy letter explaining the Board's decision, but Ms. Luzak continued to send letters challenging the stock sale. *See* Am. Compl. ¶¶ 99, 101, 104(a) (R. pp.

502, 503); *Luzak*, 2016 WL 3854118, at *2. In all, Ms. Luzak served nearly 100 shareholder inspection demands on CFRC between January 2015 and March 2017.

To address Ms. Luzak's repeated demands and threats, CFRC instituted a declaratory judgment action in the United States District Court for the Eastern District of Virginia on April 15, 2015 seeking to confirm that the stock sale to Mr. Bryant "was valid and binding." *See* Luzak Br. p. 11; *Luzak*, 2016 WL 3854118, at *2. In response, Ms. Luzak asserted two counterclaims. *First*, Ms. Luzak challenged Mr. Barringer's mental competency at the time of the stock sale and alleged that Mr. Light, Mrs. Light, and Mr. Bryant breached their fiduciary duties as CFRC directors by negotiating the sale. Ms. Luzak initially pursued this cause of action as a shareholder derivative claim on behalf of CFRC, sending a derivative demand letter to CFRC two days after the declaratory judgment action was filed. Mot. for Int. Ex. D (June 19, 2015 Hearing Tr.) pp. 44:25–45:15 (R. pp. 3654–3655), Ex. Q (Apr. 17, 2015 M. Smith Ltr.) p. 20 (R. p. 3822); *Luzak*, 2016 WL 3854118, at *6–7. *Second*, Ms. Luzak asserted an individual claim against CFRC and Mrs. Light related to Mr. Barringer's transfer of CFRC voting stock to Mrs. Light in September 2012, alleging that the transfer breached a 2010 shareholder agreement among the Barringer children and CFRC. Am. Compl. ¶ 104(c) (R. p. 504); *Luzak*, 2016 WL 3854118 at *2 n.4. The court subsequently realigned the parties and bifurcated the case between the derivative and individual claims. *Id.*

Soon, however, Ms. Luzak disavowed her derivative demand letter. On three occasions, Ms. Luzak sought to pursue her challenge to the stock sale individually to avoid the statutory requirements for derivative claims imposed under Virginia law. The court rejected each attempt, holding that the challenge to the stock sale was a derivative claim that belonged to CFRC:

- Ms. Luzak first attempted to reframe her claim as an individual (or "direct") claim seeking "to vindicate her own rights and injuries specific to her" based on the alleged "dilution" of

her stock. The court ruled that Ms. Luzak's claim "constitute[s] a derivative action, not a direct action." Mot. for Int. Ex. D (June 19, 2015 Hearing Tr.) pp. 44:10–51:14 (R. pp. 3654–3661).

- Ms. Luzak next argued that "she ha[d] the legal right as a minority shareholder in a closed corporation to file a direct action." The court denied Ms. Luzak's motion because there was "no legal right on the part of Ms. Luzak to bring a direct action against Mr. Bryant or anyone else based on the stock sale and option grant transaction." Mot. for Int. Ex. E (Nov. 18, 2015 Hearing Tr.) pp. 47:14–52:2 (R. pp. 3665–3670).

- Opposing summary judgment, Ms. Luzak argued that her declaratory judgment claim was an individual claim. The Court rejected this argument because it had "already determined" that this claim "is derivative in nature." *Luzak*, 2016 WL 3854118 at *2, 8–9 n.12.

Having confirmed that Ms. Luzak's claims were derivative, the Board formed a special committee of disinterested directors in accordance with Virginia's Stock Corporation Act to evaluate the claims and determine whether it was in CFRC's best interest to pursue them. *See* Va. Code § 13.1-672.4; *Luzak*, 2016 WL 3854118 at *2. The special committee was comprised of Mr. Conger, whose representative on the Board (Mr. Hagler) had objected to Mr. Luzak's removal as CEO, and Mr. Wannall, who had recently joined the Board and had no prior affiliation with the company or the Barringer family. *Luzak*, 2016 WL 3854118 at *2. The special committee also retained independent counsel and an independent financial advisor to assist with its investigation. *Id.* at *2, 7. As the court concluded, the committee "engaged in an objectively reasonable investigation for the purposes of determining whether to pursue breach of fiduciary duty claims raised by Ms. Luzak, and within that context, adequately understood, investigated, and considered [Mr.] Barringer's mental capacity, the fair market value of the Company's stock, . . . and the legal adequacy of the written consents to the Transaction upon which the Company relied for its approval." *Id.* at *6. Based on that inquiry, the committee determined unanimously that it was not in CFRC's best interests to pursue the derivative claims. *Id.* at *2. Over Ms. Luzak's opposition, the court granted CFRC's motion for summary judgment pursuant to the Virginia statute. *Luzak*,

2016 WL 3854118 at *9. The Fourth Circuit summarily affirmed the judgment, including the ruling that Ms. Luzak's claims were derivative. *Luzak*, 678 F. App'x at 180.

Ms. Luzak's breach of contract claim proceeded on a parallel track with the derivative claims until Ms. Luzak filed her conservatorship and guardianship petition in the Beaufort County Probate Court, at which point she sought a stay. *See* Mot. for Int. Ex. F (Order Denying Motion to Stay) (R. p. 3673). The Virginia court denied her motion. *Id.* Ms. Luzak then sought to dismiss her contract claim without prejudice, but the Virginia court instead gave her the option to have her claim tried in May 2016 or dismissed with prejudice. Mot. for Int. Ex. G (Dismissal Order) (R. p. 3675). Ms. Luzak chose dismissal with prejudice. Am. Compl. ¶ 113(b) (R. p. 509); *Luzak*, 2016 WL 3854118, at *2 n.4.

D. Ms. Luzak files this lawsuit while the Virginia derivative proceeding is still on appeal.

Ms. Luzak commenced this action on August 26, 2016, roughly six weeks after the Virginia court granted summary judgment and three months after Mr. Barringer died. The Amended Complaint, which is the operative complaint, asserts a host of claims regarding Mr. Barringer's capacity and estate planning, and specifically challenges his transfer of CFRC voting stock to Mrs. Light in September 2012. The Amended Complaint also asserts a cause of action for civil conspiracy (Count 19) alleging, based on "information and belief," that Mrs. Light conspired with "various agents or representatives of CFRC, including but not limited to Travis Bryant . . . for the purpose of injuring" Ms. Luzak through "the potential loss of CFRC or parts thereof as a family business." Am. Compl. ¶¶ 190–93 (R. pp. 529–530). Because of the vague nature of her allegations, it was not immediately clear that Ms. Luzak sought to recover damages based on the Lights' supposed conspiracy to diminish the value of CFRC itself.

Ms. Luzak's report on damages, prepared by Dr. Charles Alford in December 2019, made her efforts more explicit. Ms. Luzak's damages report did *not* demand the return of the stock that

Mr. Barringer transferred to Mrs. Light when he was allegedly impaired, or value those transferred shares as a measure of damages, or seek other relief based on the alleged interference with her inheritance. Instead, Ms. Luzak seeks to recover **$104 million** in damages for *the alleged loss in value of her CFRC stock* after the September 2012 stock transfer. Luzak Opp. to Light MSJ Ex. DDD (Alford Exhibits) (R. p. 3212); Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0007 (R. p. 3218), Ex. I (Alford Am. Supp. Disclosure) p. Luzak-Alford 0011 (R. p. 3693). To that end, Dr. Alford propounded the following categories of damages in his report:

- *Damage Element #1: Gain of Control.* **$61.7 million** in **lost value** to the CFRC stock already held by Ms. Luzak and her son as a result of her father's stock transfer.
- *Damage Element #2: Ownership Dilution.* **$1.6 million** in **lost value** from the stock sale to Mr. Bryant.
- *Damage Element #4: Compensation to Randy Light.* **$740,000** in **lost value** based on compensation CFRC paid to Mr. Light between 2013 and 2018.
- *Damage Element #6: Forgone Returns on Sales of Timberland.* **$40.7 million** in **lost value** based on the "forgone yields" resulting from CFRC's decision not to pursue Mr. Luzak's business strategy after he was fired.

Mot. for Int. Ex. H (Alford Report) pp. Luzak-Alford 0007–9 (R. pp. 3683–3685). These four damages categories are based on an alleged reduction in value of CFRC stock that all CFRC shareholders would have suffered. None of these categories are for damages that Ms. Luzak would have suffered individually any differently from any other shareholder. And by his own admission, Dr. Alford did not *and could not* distinguish between individual damages (that one shareholder suffers separately from the others) and derivative damages (that all shareholders suffer because of corporate mismanagement). Mot. for Int. Ex. J (Alford Dep. Tr.) pp. 73:19–22, 96:6–24 (R. pp.

3700, 3702). Yet these four categories comprise **93%** of Ms. Luzak's purported damages. Luzak Br. p. 13.[2]

E. Ms. Luzak seeks third-party discovery from CFRC to pursue additional derivative claims in this lawsuit.

Ms. Luzak's demands for third-party discovery from CFRC further demonstrate how she shifted her case increasingly toward CFRC's alleged mismanagement after September 2012.

Ms. Luzak served CFRC with a subpoena pursuant to Florida's Uniform Foreign Depositions Act in September 2017. *See* Luzak Mar. 9, 2018 Mot. to Compel Mem. Ex. 8 (CFRC Objections) (R. p. 7212). That subpoena contained 44 requests, the majority of which did not pertain to Mr. Barringer's capacity: six concerned sales of CFRC stock or assets, seven concerned the stock sale to Mr. Bryant, and two sought all accounting records of CFRC and its subsidiaries. *Id.* CFRC objected to the subpoena. *Id.* In 2019 and 2020, Ms. Luzak and CFRC litigated three discovery motions in the Circuit Court for Gadsden County, Florida, s*ee* Luzak Br. p. 15 n.12, during which Ms. Luzak stated her intent to pursue claims and damages that are in fact derivative.

First, Ms. Luzak moved to compel the production of all CFRC accounting records. Mot. for Int. Ex. K (Luzak Fla. Br.) pp. 18–24 (R. pp. 3741–3747). Ms. Luzak claimed there had been "major misappropriations in company assets" during CFRC's 2013 and 2014 fiscal years, and stated that these "misappropriated gains" "would be a significant element of recovery for Plaintiff in this case." *Id.* (R. pp. 3746–3747). *Second*, Ms. Luzak demanded that CFRC produce Mrs. Light's legal bills from the Virginia litigation. *Id.* (R. pp. 3736–3741). According to Ms. Luzak, these documents would show that CFRC improperly advanced Mrs. Light's expenses for the

[2] Dr. Alford propounded two other categories of damages in his report: $7.5 million in damages for lost compensation to Mr. Luzak (Category No. 3) and $582,000 in out-of-pocket health insurance and health care costs to Mr. Luzak (Category No. 5). CFRC Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0008 (R. p. 3684). These alleged damages were not the subject of CFRC's motion.

contract claim, calling this "an element of Plaintiff's damages against Merrill Light." *Id. (*R. p. 3741).

The Florida court rejected these requests. The Court only required CFRC to provide a supplemental affidavit confirming whether and when Mrs. Light paid her legal expenses in defending the contract claim. Mot. for Int. Ex. M (Oct. 16, 2020 Order) pp. 1–2 (R. pp. 3769–3770). CFRC produced an affidavit from Stephanie Chapman, CFRC's Controller, on November 5, 2020 confirming that Mrs. Light had paid those fees in full. The court sustained CFRC's objections to the requests for accounting records in their entirety. Mot. for Int. Ex. N (Aug. 4, 2020 Order) pp. 4–5 (R. pp. 3776–3777).

CFRC trusted that Ms. Luzak would abide by the letter and spirit of the Florida court's orders, but that did not happen. Instead, Ms. Luzak continued to pursue improper discovery through depositions of CFRC's employees and CFRC itself. For example, when Ms. Luzak deposed Ms. Chapman in March 2021, Ms. Luzak's counsel repeatedly asked about the stock sale to Mr. Bryant, the company's capital expenditures in 2013 and 2014, and the legal fees Mrs. Light and Mr. Barringer incurred in the Virginia litigation. Mot. for Int. Ex. O (Chapman Dep. Tr.) pp. 15:4–18:2, 46:25–47:14, 51:4–74:7, 77:9–89:23. (R. pp. 3782–3783; 3784; 3785–3791; 3791–3795). Similarly, counsel asked John Jolley, CFRC's former corporate counsel and assistant secretary, about the circumstances of his engagement with CFRC in 2012, which Ms. Luzak had previously challenged in two shareholder demand letters. *See* CFRC Mot. for Protective Order (May 3, 2021) (R. p. 3617); Mot. for Int. Ex. P (Nov. 8, 2012 H. Luzak Ltr.) pp. 1–2 (R. pp. 3800–3801), Ex. Q (Apr. 17, 2015 M. Smith Ltr.) p. 20 (R. p. 3822).

These improper requests reached a breaking point when Ms. Luzak served her proposed list of topics for CFRC's corporate deposition on May 4, 2021. Mot. for Int. Ex. R (Proposed

CFRC Rule 30(b)(6) Notice) pp. 2–5. (R. pp. 3826–3829) The notice made clear that Ms. Luzak intended to continue her fishing expedition into CFRC's management and accounting practices. The notice sought, among other information:

- "All notes of all Board meetings 2011–present";
- "All discussions, offers, and proposals to sell CFRC after 2010 or any portion of CFRC other than in the ordinary course of the business operations of CFRC";
- "Total compensation paid each year from 2012 to the present for each of the following: (a) Merrill Light, (b) James Randolph Light, Jr., [and] (c) Travis Bryant";
- "All of the facts, events, and circumstances pertaining to any loans by CFRC to or from any shareholders of CFRC . . . from January 1, 2010 to the present time";
- "All communications between Merrill Light or James Randolph Light, Jr., on the one hand, and CFRC on the other hand, in 2012";
- "All fees paid to [Mr. Jolley's law firm] from January 1, 2011 to present."

Id. Most remarkably, the notice included "[a]ll facts, events and circumstance pertaining to [i]ssuance of stock or stock options to Travis Bryant," the very derivative claim that was dismissed in the Virginia litigation five years prior.

STATEMENT OF THE CASE

CFRC filed its motion for intervention and protective relief on May 14, 2021, 10 days after Ms. Luzak served her Rule 30(b)(6) notice. CFRC's purpose was and remains limited. The company only seeks to preclude Ms. Luzak from pursuing derivative claims and derivative damages in this South Carolina proceeding in an individual capacity. CFRC therefore asked the Circuit Court to:

> (1) grant its request to intervene in this matter for the limited purpose of precluding the litigation of derivative claims in this action,
>
> (2) enter a judgment dismissing Ms. Luzak's cause of action for civil conspiracy for lack of standing and subject matter jurisdiction,

(3) strike the first, second, fourth, and sixth categories of damages identified in Dr. Charles Alford's expert report, and

(4) enter a judgment declaring that Ms. Luzak may not litigate any other derivative claims in this action.

Mot. for Int. at 6 (R. p. 3629). As CFRC explained at the May 27, 2021 motions hearing, the company did not seek to otherwise participate in this case. Instead, the company would be "in" and then immediately "out." May 27, 2021 Hearing Tr. pp. 36:1–12, 37:18–38:4 (R. pp. 6647–6649).

When opposing CFRC's motion, Ms. Luzak fundamentally misstated what derivative claims are, arguing that her claims were individual because she "is not seeking damages *against* the corporation, but rather against only the individual defendants." *See* Luzak Opp. to Mot. for Int. p. 8 (R. p. 4100); *see also* May 27, 2021 Hearing Tr. pp. 35:2–12 (R. pp. 6646). The Circuit Court granted CFRC's motion, agreeing that "they're derivative claims." *Id.* pp. 37:24–38:4 (R. pp. 6648–6649). The Court then moved on to other motions and excused CFRC's counsel. *Id.* pp. 38:5–10 (R. p. 6649). After CFRC's counsel departed the courtroom, Ms. Luzak's counsel engaged in misleading, *ex parte* arguments to the Court about the nature of her claims and CFRC's motion. *Id.* pp. 39:23–41:3, 76:15–20, 101:13–17, 102:1–14; (R. pp. 6650–6652; 6687; 6712; 6713); CFRC Opp. to Mot. for Recons. of Int. Order Ex. U (J. Schronce Aff.) (R. pp. 7637–7370). The Circuit Court adhered to its ruling despite these improper arguments, May 27, 2021 Hearing Tr. pp. 105:18–106:7 (R. pp. 6716–6717), and entered an order granting the motion. June 7, 2021 Int. Order (R. pp. 45–46). The order dismissed Ms. Luzak's civil conspiracy claim, struck four categories of damages in Dr. Alford's report totaling $104 million, and entered a declaratory judgment that Ms. Luzak cannot pursue other derivative claims in this case. *Id.*

Ms. Luzak filed a motion for reconsideration of the Circuit Court's order on June 17, 2021. Her motion offered no new facts for the Circuit Court's consideration, no new law that the court

overlooked, or any other issues on which the court failed to rule. Ms. Luzak even declined to argue her motion at the July 2, 2021 motions hearing. July 2, 2021 Hearing Tr. pp. 16:2–17:20 (R. pp. 6812–6813). The Circuit Court denied her motion. *Id.* pp. 18:17–23 (R. p. 6814); July 13, 2021 Order (R. p. 79). This appeal followed.

ARGUMENT

Issue I: The Circuit Court was correct in holding that Ms. Luzak is asserting shareholder derivative claims and attempting to recover derivative damages that can only be pursued on behalf of CFRC.

The Circuit Court's judgment, and thus this appeal, turn on a threshold question: whether Ms. Luzak has impermissibly bootstrapped shareholder derivative claims onto this probate case through her civil conspiracy claim and related damages demands. *See* June 7, 2021 Int. Order (R. p. 48). If so, Ms. Luzak cannot pursue that claim and those damages because South Carolina courts lack subject matter jurisdiction over the internal affairs of foreign corporations like CFRC. Ms. Luzak must instead pursue derivative claims before a Virginia court and in accordance with Virginia's Stock Corporation Act. *See* Issue II, *infra*. Likewise, if Ms. Luzak is pursuing derivative claims and damages in this case, then CFRC was entitled to intervene because CFRC is the "real party in interest." *See* Issue III, *infra*.

A. Standards of Review.

Ms. Luzak's attempts to pursue derivative claims and damages present common questions but took multiple forms, which in turn affects the applicable standards of review.

In reviewing the Circuit Court's decision dismissing the cause of action for civil conspiracy, the Court must apply the same standard of review as the trial court, with questions of law decided *de novo*. *See S.C. Pub. Int. Found. v. Calhoun Cty. Council*, 432 S.C. 492, 495, 854 S.E.2d 836, 837 (2021) (addressing dismissal under Rule 56, SCRCP).

The Circuit Court's decision to strike four categories of damages from Dr. Alford's report concerns the admissibility of expert testimony. A trial court's decision to strike a portion of the testimony of an expert witness as irrelevant or otherwise inadmissible is reviewed for abuse of discretion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010).

Ms. Luzak's additional derivative claims, threatened in Florida but not yet asserted in the operative complaint or Dr. Alford's report, were the subject of the Circuit Court's declaratory judgment. The standard of review for a declaratory judgment action is "determined by the nature of the underlying issue." *West Anderson Water Dist. v. City of Anderson*, 417 S.C. 496, 502, 790 S.E.2d 204, 207 (Ct. App. 2016). The declaratory judgment entered here concerned damages claims in an action at law, which is "reviewable under an 'any evidence' standard." *See id.* Thus "the appellate court's standard of review extends only to the correction of errors of law." *Id.*

B. Ms. Luzak incorrectly asserts that claims must be asserted "against" CFRC to be deemed derivative.

Ms. Luzak has repeatedly and fundamentally misrepresented what a derivative claim is—a cynical tactic given Ms. Luzak's exhaustive litigation of that same issue in Virginia. Before the Circuit Court, Ms. Luzak declared that her claims are individual because she "is not seeking damages *against* the corporation, but rather against only the individual defendants," and that "there is no pot of money that the corporation is going to have to pay that is going to be split up among the shareholders." May 27, 2021 Hearing Tr. pp. 101:13–17 (R. p. 6712) (emphasis added); *see also id.* pp. 35:2–12, 102:1–8 (R. pp. 6646, 6713); Luzak Opp. to Mot. for Int. pp. 6, 8; (R. pp. 4098, 4100) Luzak Mot. for Recons. of Int. Order p. 7 (R. p. 4262). Ms. Luzak renews this argument on appeal, asserting that no damages were "sought against the company" and that CFRC is not "exposed to Ms. Luzak." Luzak Br. pp. 13, 17, 23.

These arguments contravene black-letter law. There is no such thing as a derivative claim *against* a corporation, and CFRC did not intervene on the basis that Ms. Luzak is pursuing claims *against* CFRC. A derivative claim is brought "in the right of" a corporation. Va. Code § 13.1-603 (defining a "derivative proceeding"); *accord* Rule 23(b), SCRCP ("a derivative action" is "brought by one or more shareholders or members to enforce a right of a corporation"). When a corporation suffers an injury, the resulting claim is a *corporate* asset and "the final relief, when obtained, belongs *to the corporation*." *Michael E. Siska Revocable Tr. v. Milestone Dev., LLC*, 282 Va. 169, 181, 715 S.E.2d 21, 27–28 (2011) (emphasis added); *accord Todd v. Zaldo*, 304 S.C. 275, 278, 403 S.E.2d 666, 668 (Ct. App. 1991) ("The courts of this state recognize that a cause of action for recovery of an asset of a corporation belongs to the corporation as opposed to the individual shareholders."); *Ross v. Bernhard*, 396 U.S. 531, 538 (1970) (the "proceeds" of a derivative claim "belong to the corporation"). Thus the "overwhelming majority rule is that an action for injuries to a corporation cannot be maintained by a shareholder on an individual basis." *Simmons v. Miller*, 261 Va. 561, 573, 544 S.E.2d 666, 674 (2001); *accord Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) ("It is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.").

Shareholder claims for corporate injuries "must be brought derivatively." *Simmons*, 261 Va. at 573, 544 S.E.2d at 674; *accord Babb*, 303 S.C. at 464, 401 S.E.2d at 419. Derivative claims are "an exception to the normal rule that the proper party to bring a suit on behalf of a corporation is the corporation itself, acting through its directors or a majority of its shareholders." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 542 (1984); *accord Carolina First Corp. v. Whittle*, 343 S.C. 176, 186–87, 539 S.E.2d 402, 407–08 (Ct. App. 2000). In other words, a derivative claim allows a shareholder to "step into the corporation's shoes" and "bring[] suit on a cause of action *derived*

from the corporation" if the shareholder satisfies the requirements for doing so. *Id.* at 528 (emphasis added). The shareholder is merely a "nominal plaintiff" because the corporation is "the real party in interest." *Michael E. Siska Revocable Tr.*, 282 Va. at 181–82, 715 S.E.2d at 27–28 (2011); *accord Johnson v. Baldwin*, 221 S.C. 141, 149, 69 S.E.2d 585, 588 (1952); *Ross*, 396 U.S. at 538. Shareholders benefit from the recovery only indirectly in proportion to their ownership interest through an increase in the value of their stock. *Simmons*, 261 Va. at 574, 544 S.E.2d at 674; *accord Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 685 (Ct. App. 2001).

Ms. Luzak suggests that the trial judge agreed with her argument and that the Circuit Court's subsequent order "contradicted" his statements during the May 27, 2021 motions hearing. Luzak Br. pp. 12, 28. It is hard to understand what kind of "agreement" Ms. Luzak believes was made considering the legal misrepresentations her counsel made to the Circuit Court. Regardless, any allegedly inconsistent statements occurred during Ms. Luzak's counsel's misleading *ex parte* argument after CFRC's counsel had left the hearing. *See* May 27, 2021 Hearing Tr. pp. 77:16–18, 103:3–23 (R. pp. 6688, 6714). The trial court expressly reaffirmed its ruling after bringing the arguments to a close. *Id.* pp. 100:23–101:8, 105:18–106:6. (R. pp. 6711–66712, 6716–6717), And regardless of this "contemporaneous colloquy," the "judge's final written order represents the decision of the court." *Corbin v. Kohler Co.*, 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct. App. 2002). That order unequivocally and correctly concluded that the claims and damages at issue are derivative. June 7, 2021 Int. Order ¶¶ 1–3 (R. pp. 45–46).

C. Ms. Luzak cannot transform derivative claims into individual claims by bootstrapping them onto a probate case.

Ms. Luzak wrongly characterizes her claims and damages as individual by insisting that this is merely a probate case. In Ms. Luzak's initial brief, she avows that the "gravamen of [her] claims is that the individual defendants *stole* her inheritance" and that "Merrill Light

misappropriate[d] her father's property, including stock, to the detriment of Ms. Luzak." Luzak Br. pp. 21, 24 (emphasis added); *see also id.* pp. 2, 28–29, 36.

Not so. As Dr. Alford's damages report demonstrates, Ms. Luzak does not seek to recover the value of CFRC stock (or any other property) that belonged to her father and for which she alleges she had a reasonable expectation of inheriting. Instead, she seeks to recover damages for the alleged reduction in value of *her* stock after CFRC's Board of Directors terminated her husband, Kevin Luzak. Mrs. Luzak owned these shares long before Mr. Barringer's September 2012 stock transfer to Mrs. Light. Thus Ms. Luzak has used this probate lawsuit as a Trojan horse to challenge what she alleges to be CFRC's mismanagement over the course of a decade based on the bald assertion that those corporate injuries would not have occurred "but for" Mrs. Light's control of the company. *See* Luzak Br. p. 33. Ms. Luzak's damages are "personal" only in the sense that she seeks recovery of her pro rata share of those corporate damages.

Simply put, Ms. Luzak may not transform derivative claims into individual claims by calling this a probate case. *See* 12B Fletcher Cyc. Corp. § 5912 ("a complaint does not make an action individual or derivative by calling it one or the other"). Likewise, Ms. Luzak cannot litigate derivative claims by grafting them onto whatever individual claims she may have regarding her father's capacity or estate planning. *See, e.g.*, *Simmons*, 261 Va. at 570–82, 544 S.E.2d at 672–79 (distinguishing individual and derivative causes of action within the same case); *accord Patterson v. Witter*, 425 S.C. 213, 232–33, 821 S.E.2d 677, 688 (2018) (courts must look to each of the "causes of action and forms of relief" to determine whether they are individual or derivative). As Ms. Luzak concedes, whether or not a claim is derivative turns on the gravamen of the injury alleged, *see* Luzak Br. p. 31, not by other claims with which they are purportedly connected.

Ms. Luzak's own arguments further undercut her pronouncements that her claims and damages are limited to Mr. Barringer's capacity and estate planning. For instance, Ms. Luzak argues that she "did not sue Merrill Light and Randy Light in their capacities as officers and directors of CFRC" because her alleged damages were the "result of the actions of Merrill Light in her individual capacity." Luzak Br. pp. 17, 24. But later in this same brief, Ms. Luzak invokes Mrs. Light's fiduciary duties *as a CFRC director* in an attempt to reverse the Circuit Court's order granting summary judgment as to Mr. Barringer's February 2012 estate planning documents:

> Despite defendant Light's assertion to the contrary, defendant Light was in a confidential/fiduciary relationship with Mr. Barringer as of February 28, 2012 because, *inter alia, she was the director in a company in which he was a shareholder* and was his partner in a family partnership.[3]

Luzak Br. p. 45 (emphasis added); *see also* May 27, 2021 Hearing Tr. p. 156:12–18 (R. p. 6767). ("They argue that Mrs. Light did not have a fiduciary duty to Mr. Barringer. She most certainly did. *She was a director of a company for which he was a shareholder.*") (emphasis added). Similarly, before the Florida court, Ms. Luzak's counsel expressly stated that she sought discovery from CFRC to prove that the Lights breached their fiduciary duties *as directors of CFRC*:

> We have got a breach of fiduciary duty claim that we are looking for. Let me find that. That is on page 64, 16th cause of action, breach of fiduciary duty, self-dealing, conflict of interest as Defendant, Merrill Light, and aiding and abetting the same by Randy Light. And we think it would also go to proving that because she -- well, *she was a director of the corporation, so she had a fiduciary duty to our client, and -- she has got a fiduciary duty to our clients. She ought not to be a party to -- I guess some of the stuff we are looking for would definitely help us in proving a breach of fiduciary duty.*

Mot. for Int. Ex. L (July 23, 2020 Hearing Tr.) pp. 61:20–62:10 (R. pp. 3764) (emphasis added).

Ms. Luzak also disavows any allegation that anything "was taken from CFRC" or that there was a "misappropriation of corporate funds from CFRC." Luzak Br. pp. 21, 27. But again, in her

[3] For the sake of clarity, CFRC is a corporation, not a partnership, and shareholders outside of the Barringer family own a significant portion of CFRC's stock. *See* Luzak Br. pp. 4, 31 n.24.

appellate brief, Ms. Luzak accuses the Lights of using "the company as their personal purse," specifically noting the supposed "payment of defendant's personal legal fees against Ms. Luzak in the Virginia litigation with company funds." *Id.* p. 54 n.80. This is the same claim Ms. Luzak raised before the Florida court, accusing Mr. and Mrs. Light of "misappropriat[ing] company assets" and "steal[ing] from the corporation." Mot. for Int. Ex. K (Luzak Fla. Br.) pp. 23–24, (R. pp. 3746–3747) Ex. L (July 23, 2020 Hearing Tr.) p. 51:21–23 (R. p. 3761). Indeed, Ms. Luzak has refused to admit that she "does not seek to recover damages from Defendants in this action for assets Defendants allegedly misappropriated from" CFRC. Mot. for Int. Ex. V (Luzak RFA Responses) pp. 1–2 (R. pp. 4285–4286). In short, Ms. Luzak cannot keep her own story straight about the nature of her claims.

D. Virginia law governs whether Ms. Luzak's claims are derivative.

Ms. Luzak asserts for the first time on appeal that "South Carolina, not Virginia, law governs the issues in this case" because "these cases do not involve any rights that CFRC has." Luzak Br. pp. 20 n.14, 22, 25 n.18. CFRC explained to the Circuit Court why Virginia law governs the distinction between individual and derivative claims, and the court applied Virginia law *without objection* from Ms. Luzak. June 7, 2021 Int. Order ¶¶ 2–3 (R. pp. 45–46) ; May 27, 2021 Hearing Tr. p. 101:13–17 (R. p. 6712). "Having failed to properly raise the issue below, [Ms. Luzak] may not do so now." *Tupper v. Dorchester Cty.*, 326 S.C. 318, 324, 487 S.E.2d 187, 191 (1997).

Ms. Luzak is also wrong. As she concedes, South Carolina has adopted the internal affairs doctrine. Luzak Br. p. 34; *see also* S.C. Code § 33-15-105(c); *Pertuis v. Front Roe Restaurants, Inc.*, 423 S.C. 640, 649–50, 817 S.E.2d 273, 277–78 (2018). The "internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the

corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982)). Courts therefore recognize that the law of the state of incorporation determines whether a claim is individual or derivative. *See, e.g.*, *Weinstein v. Schwartz*, 422 F.3d 476, 478 (7th Cir. 2005) (cited in Luzak Br. p. 22); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991).

Ms. Luzak acknowledges that CFRC is a Virginia corporation. Luzak Br. p. 10 n.8; Am. Compl. ¶ 10 (R. p. 464). "Virginia strictly adheres to the derivative-claim rule." *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 119 (4th Cir. 2004). As noted above, Virginia follows the "overwhelming majority rule" that "an action for injuries to a corporation cannot be maintained by a shareholder on an individual basis and must be brought derivatively." *Simmons*, 261 Va. at 573, 544 S.E.2d at 674.[4] The Supreme Court of Virginia has also described the types of claims that must be brought derivatively:

Diminution in the value of stock. A "stockholder has no standing to sue in his own right for an injury to the corporation on the ground the injury caused a depreciation in the value of his stock." *Keepe v. Shell Oil Co.*, 220 Va. 587, 591, 260 S.E.2d 722, 724 (1979). Such claims must be brought derivatively, which "protects the interests of all shareholders by increasing the value of their shares, instead of allowing a recovery by one shareholder to prejudice the rights of others not a party to the suit." *Simmons*, 261 Va. at 574, 544 S.E.2d at 674.

[4] Ms. Luzak suggests that South Carolina may recognize an exception to the derivative-claim rule for closely held corporations, *see* Luzak Br. p. 27 n.20, but South Carolina courts have not adopted this exception. *See Babb*, 303 S.C. at 464–65, 401 S.E.2d at 419–20; *Brown*, 348 S.C. at 50–51, 557 S.E.2d at 685. More importantly, Virginia law governs here, and both the Supreme Court of Virginia and the Virginia court that decided Ms. Luzak's prior derivative claims have rejected such an exception. *Simmons*, 261 Va. at 574–76, 544 S.E.2d at 673–75; Mot. for Int. Ex. E (Nov. 18, 2015 Hearing Tr.) pp. 48:24–49:6 (R. pp. 3666–3667).

Claims for breach of fiduciary duty. Virginia "require[s] that suits for breach of fiduciary duty against officers and directors must be brought derivatively on behalf of the corporation and not as individual shareholder claims." *Simmons,* 261 Va. at 576, 544 S.E.2d at 675.

Injuries purportedly falling on all shareholders. Claims are derivative when they are "not unique" to the individual shareholder and are "also sustained by" the other shareholders. *Remora Invs., LLC v. Orr,* 277 Va. 316, 324, 673 S.E.2d 845, 848 (2009).

Applying this Virginia law, it is clear that the cause of action and categories of damages at issue in this appeal are derivative.[5]

E. Ms. Luzak's cause of action for civil conspiracy is a derivative claim.

As the Circuit Court recognized, Ms. Luzak's cause of action for civil conspiracy is a derivative claim under Virginia law. *See* June 7, 2021 Int. Order ¶ 2. (R. p. 45) Ms. Luzak asserts that this claim is "based upon Merrill Light's undue influence and tortious interference against Paul Barringer," Luzak Br. p. 22, but the cause of action as pleaded in the Amended Complaint demonstrates otherwise. *See* Am. Compl. ¶¶ 190–93 (R. pp. 529–530). The Amended Complaint alleges that the Lights and "various agents and representatives of CFRC" conspired to sell "integral portions of the business," including "three of [CFRC's] manufacturing facilities in a transaction that closed on June 24, 2016"—*four years* after Mr. Barringer transferred his CFRC voting stock

[5] Virginia law governs, but South Carolina law incorporates many of these principles. *See, e.g., Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006) ("Appellants allege corporate malfeasance that resulted in identical harm to all shareholders: such a breach of fiduciary duty gives rise to a classic shareholders' derivative suit."); *Brown,* 348 S.C. at 51, 557 S.E.2d at 685 (a shareholder could not "maintain his action as an individual action . . . because the diminution in the value of the stock was suffered by all of the stockholders"); *Ward v. Griffin,* 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) ("A stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally."). The Supreme Court of Virginia has, however, declined to adopt the two-factor test articulated in *Patterson,* 425 S.C. at 232, 821 S.E.2d at 687, which is drawn from Delaware law. *See* Luzak Br. p. 22; *Remora Inv.*, 277 Va. at 323–24, 673 S.E.2d at 848.

to Mrs. Light and nearly one month after Mr. Barringer died. *See id.* ¶¶ (R. pp. 529–530). In her deposition, Ms. Luzak confirmed that these assets were "owned by the company" and that CFRC's Board of Directors made the decision to sell them. Mot. for Int. Ex. C (H. Luzak Dep. Tr.) pp. 63:16–67:1 (R. pp. 3645–3649).

This is a classic derivative claim because it contests the sale of assets *belonging to CFRC*. Going further, this cause of action is in fact a claim for breach of the Lights' fiduciary duties as directors because it directly challenges decisions they made in managing CFRC. But, as Ms. Luzak well knows from the Virginia litigation, "suits for breach of fiduciary duty, *however framed*, against officers and directors" must be brought derivatively. Mot. for Int. Ex. E (Nov. 18, 2015 Hearing Tr.) pp. 49:25–50:15 (R. pp. 3667–3668) (emphasis added). She cannot sidestep this bright-line rule by labeling her cause of action as a civil conspiracy claim. Indeed, the derivative-claim rule applies equally to civil conspiracy claims alleging mismanagement of a company. *See, e.g., Trivedi v. Pathak*, No. CIV.A.3:08CV3HEH, 2008 WL 1758913, at *1–3 (E.D. Va. Apr. 16, 2008).

Ms. Luzak claims that the Supreme Court of Virginia's decision in *Simmons* is "not applicable here," Luzak Br. p. 24, but that case is directly on point. *Simmons* involved claims that a majority shareholder caused a closely held corporation to transfer its assets for *no* consideration, but the court held that those claims could only be brought derivatively. *Simmons*, 261 Va. at 567–71, 544 S.E.2d at 670–72. The same is true here. If the Board sold CFRC's assets improperly or for inadequate consideration, then CFRC—including all of its shareholders collectively, not just Ms. Luzak—suffered the alleged injury in proportion to the number of shares owned. Any recovery must be sought derivatively before a Virginia court.

Ms. Luzak also attempts to disavow her allegations entirely, claiming they "were merely evidentiary allegations that showed evidence of special damages required for a civil conspiracy claim at the time the Complaint was filed." Luzak Br. pp. 22–23. The allegations in paragraphs 191 and 192 regarding the sale of CFRC assets, however, are the *sole* factual basis offered for her conspiracy claim. *See* Am. Compl. ¶¶ 190–93 (R. pp. 529–530). What is more, Ms. Luzak's civil conspiracy claim is the apparent driving vehicle for recovering the damages proffered in Dr. Alford's report. *See* Luzak Br. p. 23. As discussed below, the bulk of those alleged damages turn on alleged injuries to CFRC, with Ms. Luzak injured only indirectly based on her ownership of CFRC stock.

F. Four of the six categories of damages in Dr. Alford's report are derivative damages.

The report of Dr. Alford, Ms. Luzak's damages expert, proffered four categories of alleged damages totaling $104 million that are derivative. On appeal, Ms. Luzak accuses CFRC of "misdirecting the focus of its argument on the calculation of damages rather than the nature of the claims," citing her individual "claims for fraud, breach of fiduciary duty as trustee, intentional interference with inheritance, and conversion." Luzak Br. p. 29. This argument is another example of Ms. Luzak's Trojan-horse approach to this case. Damages are supposed to compensate for injuries *the plaintiff* suffers as "the proximate and necessary result of the wrong." *Norwest Properties, LLC v. Strebler*, 424 S.C. 617, 623, 819 S.E.2d 154, 158 (Ct. App. 2018). A plaintiff cannot recover damages for injuries that *someone else* purportedly suffered from that wrong, much less separate wrongs occurring years after the fact. But Ms. Luzak seeks to do just that. Rather than base an estimate of Ms. Luzak's personal damages on the alleged loss of her inheritance, Dr. Alford concocted four categories of damages based solely on the purported decline in value of her CFRC stock. The Circuit Court properly struck those damages. *See* June 7, 2021 Int. Order ¶ 3 (R. p. 46).

1. Ms. Luzak's claim for damages based on Mrs. Light's "gain of control" (Category No. 1) is derivative.

At the outset, it is necessary to establish what the first category of damages in Dr. Alford's report—for Mrs. Light's "gain of control" of CFRC—is not. Ms. Luzak does *not* seek to recover any of the **38,271** shares of CFRC voting stock that Mr. Barringer transferred to Mrs. Light in September 2012, the monetary value of that stock, or any other property belonging to her late father. That sort of claim would be a "direct shareholder-to-shareholder, family member-to-family member" claim. *See id.* p. 32. Instead, Dr. Alford based his damages estimate on the **7,266,641** shares of CFRC stock that Ms. Luzak and her son held before Mr. Barringer had even made that September 2012 transfer. Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0007 (R. p. 3683), Ex. I (Alford Am. Supp. Disclosure) p. Luzak-Alford 0011 (R. p. 3693); Luzak Opp. to Light MSJ Ex. DDD (Alford Exhibits) p. Luzak-Alford 0002 (R. p. 3213); Luzak Opp. to Light MSJ Ex. Z (CFRC Stock Register Feb. 13, 2019) (R. p. 3087). According to Dr. Alford, Ms. Luzak suffered damages because these shares *lost value* as a result of Mr. Barringer's stock transfer. Mot. for Int. Ex. H (Alford Report) at Luzak-Alford 0007 (R. p. 3683). Dr. Alford based his calculations solely on a November 30, 2018 outside appraisal of *all* CFRC nonvoting stock that the company commissioned. *Id.* Dr. Alford attributed two discounts in that appraisal to Mrs. Light's gain of control as a result of the stock transfer six years prior, an assumption made without any support in his report or the record. *Id.* He then subtracted the discounted value of Ms. Luzak's stock from the undiscounted value. *Id.* The "difference, or **$61,728,933**, is the measure of damage from the gain of control (by Defendant Light) related to the transfer of voting stock." *Id.*

This is simply a claim for the "diminution in value of Ms. Luzak's stock." Luzak Br. p. 29; *see also id.* (the transfer "caus[ed] the value of Ms. Luzak's holdings in CFRC to decline"); *id.* p. 30 ("this gain in control by Ms. Light reduced the value of Ms. Luzak's stock"), p. 32 ("It is the

value of Ms. Luzak's stock that has been significantly diminished"). Virginia law is clear that "a stockholder has no standing to sue in his own right for an injury to the corporation on the ground the injury caused a depreciation in the value of his stock." *Keepe,* 220 Va. at 591, 260 S.E.2d at 724. Although Ms. Luzak asserts that this loss was "particular" to her, she fails to point to any facts that would support that contention. Instead, she argues that "no other shareholder of CFRC can make this claim because no other shareholder was a beneficiary of Paul Barringer's Will," Luzak Br. at 30, but that argument is another red herring. The purported loss in value to her stock is not at all "unique" to Ms. Luzak. *See Remora,* 277 Va. at 324, 673 S.E.2d at 848. As Dr. Alford conceded at his deposition, any loss of value "would have been the detriment of all of the shareholders, not just Hampton Luzak." Mot. for Int. Ex. J (Alford Dep. Tr.) pp. 144:20–145:15 (R. pp. 3709–3710).

Ms. Luzak also suggests that her damages are individual because they are based on "the reduction of [her] individual percentage of corporate control." Luzak Br. p. 31 (discussing *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991)). *Hite* does not control because Virginia law governs this issue, not South Carolina law. What is more, Ms. Luzak's premise is wrong because she owned the exact same percentage of CFRC voting stock both before and after the transfer. *Compare* Luzak Opp. to Light MSJ Ex. A Attch. 22 (CFRC Stock Register May 7, 2012) (R. p. 2238) *with* Luzak Opp. to Light MSJ Ex. Z (CFRC Stock Register Feb. 13, 2019) (R. p. 3087). Ms. Luzak's position as a minority shareholder did not change one bit.

2. Ms. Luzak's claim for damages based on CFRC's stock sale to Mr. Bryant (Category No. 2) is derivative.

Dr. Alford's second category of damages arose from CFRC's stock sale to Mr. Bryant, *the same claim the Virginia court repeatedly found to be derivative and ultimately dismissed.* In Dr.

Alford's words: "Under Defendant Light's control of [t]he Company, 503,211 shares of stock were issued to Travis Bryant, resulting in a reduction of Plaintiff Luzak's holdings of outstanding shares from 37.03% to 36.10%. The undiscounted value of Plaintiff Luzak's holdings was reduced by **$1,582,797** as a result of the issue to Travis Bryant." Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0008 (emphasis added) (R. p. 3684), Ex. I (Alford Am. Supp. Disclosure) p. Luzak-Alford 0011 (R. p. 3693). That explanation tracks Ms. Luzak's prior claim nearly verbatim: Ms. Luzak alleged in the Virginia litigation that the stock sale "was financially inadequate" and "had the effect of diluting her shareholder equity." Mot. for Int. Ex. D (June 19, 2015 Hearing Tr.) pp. 44:11–48:3 (R. pp. 3654–3658); *see also* Luzak Br. p. 32 (the stock sale "dilute[ed] the interest and value of Ms. Luzak's stock").

Ms. Luzak completely ignores the Virginia court's judgment, affirmed on appeal, that this is a derivative claim. As Dr. Alford testified, the stock sale supposedly "dilute[d] the value of every shareholder's stock." Mot. for Int. Ex. J (Alford Dep. Tr.) pp. 72:18–73:5 (R. pp. 3699–3700); *see also id.* pp. 134:5–135:11 (R. pp. 3706–3707). The Virginia court held that this claim "constitute[d] a derivative action, not a direct action," precisely because the "alleged dilutive effect involves an alleged injury common to all shareholders," which "constitute[d] a claim of an injury that is deemed to be a corporate injury and one that is controlled by the corporation in the first instance as far as how to address that injury." *Id.* pp. 47:9–48:3. The Virginia court reaffirmed this ruling twice. *Luzak,* 2016 WL 3854118 at *2, 8–9; Mot. for Int. Ex. E (Nov. 18, 2015 Hearing Tr.) pp. 47:14–52:2 (R. pp. 3665–3670). To reassert that claim now under the guise of an expert report

amounts to nothing more than an end-run around the res judicata effect of the Virginia court's repeated rulings discussed above.[6]

3. Ms. Luzak's claim for damages based on compensation CFRC paid to Mr. Light (Category No. 4) is derivative.

In her fourth category of damages, Ms. Luzak seeks to recover damages for compensation that CFRC paid to the late Randy Light. Dr. Alford calculated Mr. Light's total compensation between 2013 and 2018 as $1,998,577. Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0008 (R. p. 3684), Ex. I (Alford Am. Supp. Disclosure) p. Luzak-Alford 0011 (R. p. 3693). Dr. Alford then calculated Ms. Luzak's damages as **$740,016**, or "37% of the payments to Mr. Light," a figure that he reached because her "undiluted ownership share of the company would be 37%." Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0008 (R. p. 3684).

Ms. Luzak may not recover personally for compensation paid by CFRC. As Dr. Alford acknowledged, these were "funds that *exited the company* that would have remained in the company and would have increased income to Ms. Luzak[] as a shareholder of the company." Mot. for Int. Ex. J (Alford Dep. Tr.) p. 94:17–21 (emphasis added) (R. p. 3701); *see also id.* p. 135:12–16 (R. p. 3707). The purportedly wrongful payments thus "damaged all the shareholders in the same manner." *Id.* p. 135:17–25 (R. p. 3707). Ms. Luzak's damages are personal to her only in the sense that they "represent *Ms. Luzak's share of company profits as a shareholder,* thereby isolating

[6] Ms. Luzak asserts that, under South Carolina law, "a plaintiff can choose to sue individually" for certain "dual" claims that "affect both the corporation and the stockholders." Luzak Br. p. 22 n.18 (citing *Patterson*, 425 S.C. at 232, 821 S.E.2d at 687); *see also id.* p. 31 (discussing *Hite*, 305 S.C. at 361, 409 S.E.2d at 342). That argument contravenes governing Virginia law as reflected in the repeated rulings in the Virginia litigation. What is more, the dicta in *Patterson* rests on abrogated Delaware law. *Patterson* cited 19 Am. Jur. 2d *Corporations* § 1922 (2015), which in turn cited *Carsanaro v. Bloodhound Techs., Inc*., 65 A.3d 618 (Del. Ch. 2013). Last year, the Supreme Court of Delaware overturned *Carsanaro* and similar cases because "equity dilution claims are solely derivative." *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1255, 1275 n.126 (Del. 2021).

the effect of the losses solely on Ms. Luzak." Luzak Br. p. 33 (emphasis added). Her claim thus boils down to an assertion that Mr. Light's compensation "caused a depreciation in the value of h[er] stock," *Keepe*, 220 Va. at 591, 260 S.E.2d at 724, which other CFRC shareholders purportedly suffered as well. *Remora*, 277 Va. at 323, 673 S.E.2d at 848.

4. Ms. Luzak's claim for damages based on the allegedly forgone returns on sales of timberlands (Category No. 6) is derivative.

Ms. Luzak's sixth category of damages is relief sought for CFRC's directors' alleged mismanagement over a decade in which it did not adopt the business strategy that her husband Kevin Luzak had championed before his removal as CFRC's CEO. *See* Luzak Br. p. 33. Employing assumptions that Mr. Luzak provided, Dr. Alford calculated "the forgone yields resulting from [t]he Company's failure to sell the targeted timberland." Mot. for Int. Ex. H (Alford Report) p. Luzak-Alford 0009 (R. p. 3685). Assuming "the $100 million in targeted timberland had been sold over a four-year period," with the proceeds invested in commercial real estate and public securities, Dr. Alford calculated that "the ending combined balance . . . would have been $241.6 million, or [$]109.8 million higher than the ending value of the targeted timberland without sale." *Id.* Again, because "Plaintiff Luzak's undiluted ownership share of the company would be 37%," Dr. Alford opined that "the damage to Plaintiff Luzak is 37% of the forgone income from failing to liquidate the targeted timberland," or **$40,661,578**. *Id.*; *see also* Mot. for Int. Ex. I (Alford Am. Supp. Disclosure) p. Luzak-Alford 0011 (R. p. 3693). Dr. Alford described this calculation as "the resulting value of a business decision." Mot. for Int. Ex. J (Alford Dep. Tr.) p. 98:11–22 (R. p. 3703).

A shareholder cannot sue individually for "mismanagement, negligence, or the like." *Simmons*, 261 Va. 573, 544 S.E.2d at 674. That is a claim for breach of fiduciary duty. And as with Ms. Luzak's other claims, the resulting injury would be to CFRC, with all shareholders

affected "in the same way." *See* Mot. for Int. Ex. J (Alford Dep. Tr.) pp. 133:10–134:2, 136:1–5 (R. pp. 3705–3706; 3708) In other words, Ms. Luzak merely seeks to recover her "share of company profits as a shareholder." Luzak Br. p. 33. These damages too are derivative. *See Remora*, 277 Va. at 323, 673 S.E.2d at 848; *Simmons*, 261 Va. 573, 544 S.E.2d at 674; *Keepe*, 220 Va. at 591, 260 S.E.2d at 724.

G. The Circuit Court correctly entered a declaratory judgment precluding Ms. Luzak from asserting additional derivative claims raised in Florida.

The Circuit Court was also correct when it granted CFRC's request for declaratory relief. *See* June 7, 2021 Int. Order ¶ 5 (R. p. 46). On appeal, Ms. Luzak asserts that the Circuit Court erred because she "has not pursued any derivative claims," Luzak Br. p. 20, but she continues to miss the point of this relief. CFRC sought to preclude Ms. Luzak from asserting additional derivative claims in a South Carolina court that she threatened in the Florida discovery proceedings but had not yet brought in her Amended Complaint or Dr. Alford's report. Ms. Luzak did not contest this portion of CFRC's motion or the Circuit Court's order, so she may not do so now. *See Tupper*, 326 S.C. at 324, 487 S.E.2d at 191.

The declaration was also wholly justified under the circumstances. It is "proper" to invoke the Declaratory Judgments Act when there are "the ripening seeds of a controversy" because the "basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423–24, 593 S.E.2d 462, 466 (2004). Before the Florida court, Ms. Luzak stated her intent to raise at least two additional derivative claims based on CFRC's budget and Mrs. Light's legal fees in the Virginia litigation. In her Florida brief, Ms. Luzak alleged that there had been "major misappropriations in company assets" in 2013 and 2014, which "would be a significant element of recovery for Plaintiff in this case." Mot. for Int. Ex. K (Luzak Fla. Br.) pp. 23–24 (R. pp. 3746–3747). Ms. Luzak also

represented to the Florida court that CFRC's alleged payment of Mrs. Light's legal fees in the Virginia litigation "is an element of Plaintiff's damages." *Id.* p. 18 (R. p. 3741). Ms. Luzak's counsel doubled down on these claims at oral argument, stating explicitly that she sought to prove Mrs. Light's plans "to steal from the corporation," "fund[] her lawsuit with the company['s] money," and engage in "corporate hanky panky." Mot. for Int. Ex. L (July 23, 2020 Hearing Tr.) pp. 21:3–22:8, 45:19–46:17, 51:20–24 (R. pp. 3757–3758, 3759–3760, 3761).

These claims are plainly derivative under *Remora*, *Simmons*, and *Keepe*. Indeed, the Supreme Court of Virginia has specifically described "the return of funds[] misappropriated by an officer" as a remedy "highly appropriate for a derivative claim." *Cattano v. Bragg*, 283 Va. 638, 648, 727 S.E.2d 625, 629 (2012). The Circuit Court's declaration, which precluded these claims from proceeding without requiring CFRC to intervene again, was entirely proper.

Issue II: The Circuit Court was correct in holding that Ms. Luzak cannot pursue derivative claims or recover derivative damages belonging to CFRC in this action.

As the Circuit Court concluded, Ms. Luzak cannot pursue derivative claims and damages belonging to CFRC in this case. Ms. Luzak largely conceded this point below. As Ms. Luzak's counsel stated, the "clear sense of [CFRC's motion] was that we don't have the power to bring a derivative action against CFRC. *We agree with that*." May 27, 2021 Hearing Tr. p. 77:5–7 (emphasis added) (R. p. 6688). There are at least four reasons why this is so: (i) South Carolina courts lack subject matter jurisdiction to consider claims involving the internal affairs of CFRC, a foreign corporation; (ii) under CFRC's bylaws, Ms. Luzak must bring derivative claims in Virginia; (iii) Ms. Luzak lacks standing because she has failed to comply with Virginia's statutory requirements for bringing derivative claims; and (iv) Ms. Luzak's attempts to recover damages for CFRC's stock sale to Mr. Bryant are barred by res judicata as a result of the Virginia litigation.

A. Standard of Review.

Ms. Luzak's ability to bring derivative claims raise questions of law that are reviewed *de novo*. *See S.C. Pub. Int. Found.*, 432 S.C. at 495, 854 S.E.2d at 837.

B. The Circuit Court lacks subject matter jurisdiction over claims involving CFRC's internal affairs.

As the Circuit Court recognized, South Carolina courts lack subject matter jurisdiction over claims involving the internal affairs of a foreign corporation, which by definition include derivative claims. *See* June 7, 2021 Int. Order ¶ 2 (R. p. 45–46) (citing S.C. Code § 33-15-105(c) and *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278). Ms. Luzak contends on appeal that the "internal affairs doctrine is not a rule of subject matter jurisdiction," Luzak Br. p. 34, but her counsel admitted that she lacked the "power" to bring derivative claims. May 27, 2021 Hearing Tr. p. 77:5–7 (R. p. 6688). Ms. Luzak's only subsequent reference to subject matter jurisdiction was a footnote in her motion for reconsideration, which merely stated that she "did not concede" the issue. Luzak Mot. for Recons. of Int. Order p. 2 n.1 (R. p. 4257). An argument in a "footnote" that is "conclusory and cited no supporting authority" is "insufficient to preserve the argument for review." *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691–92 (Ct. App. 2001).

Ms. Luzak's argument also fails on the merits. The relevant statute, S.C. Code § 33-15-105(c), goes well beyond choice of law. S.C. Code § 33-15-105(c) states that "[t]his title *does not authorize* this State to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this State." S.C. Code § 33-15-105(c) (emphasis added). Applying the statute, the Supreme Court of South Carolina explained that "our Legislature has made clear that this state is '*not authorized*' to 'regulate the organization or internal affairs of a foreign corporation' even if the corporation is registered to conduct business in South Carolina." *Pertuis*, 423 S.C. at 650, 817 S.E.2d at 278 (emphasis added). As a result, the court refused to

weigh claims involving the internal affairs of two North Carolina corporations because "the internal affairs doctrine *precludes consideration* of any remaining issues" as to those foreign corporations. *Id.* at 657, 282 (emphasis added). The statute thus directly limits the power of South Carolina courts to consider claims involving the internal affairs of foreign corporations, including the derivative claims and damages Ms. Luzak seeks to pursue here.

C. Under CFRC's bylaws, Ms. Luzak must bring derivative claims in a Virginia court.

The Circuit Court was also correct when it ruled that CFRC's bylaws require Ms. Luzak to bring derivative claims in a Virginia court. *See* June 7, 2021 Int. Order ¶ 2 (R. p. 45–46). Ms. Luzak attempts to argue this issue on appeal, *see* Luzak Br. pp. 25–26, but she only mentioned the bylaw below in the aforementioned footnote. *See* Luzak Mot. for Recons. of Int. Order p. 2 n.1 (R. p. 4257). Consequently, this argument is not properly before the Court. *Glasscock,* 348 S.C. at 81, 557 S.E.2d at 691–92.

Ms. Luzak's argument also fails on the merits. Virginia's Stock Corporation Act expressly authorizes Virginia corporations to adopt bylaws requiring "that any or all internal corporate claims shall be brought exclusively in a circuit court or a federal district court in the Commonwealth." Va. Code § 13.1-624(C). Consistent with the South Carolina code, such bylaws eliminate "uncertainty as to the manner in which the governing law or the governing documents will be construed" outside the state of incorporation. Allen C. Goolsby & Steven M. Haas, Goolsby & Haas on Virginia Corporations § 2.6 (6th ed. 2017). In accordance with the Virginia statute, CFRC has adopted a bylaw requiring that "the United States District Court for the Eastern District of Virginia, Richmond Division, or in the event that court lacks jurisdiction to hear such action, the Circuit Court of the County of Henrico, Virginia . . . be the sole and exclusive forum" for "any derivative action or proceeding brought on behalf of the Corporation," "any action for breach of duty to the Corporation or the Corporation's shareholders by any current or former . . . director of

the Corporation," and "any action against . . . any current or former . . . director of the Corporation governed by the internal affairs doctrine." Mot. for Int. Ex. S (CFRC bylaws) art. VIII, § 7 (R. pp. 3845–3846). The claims and damages that CFRC identified fit squarely within this provision. If Ms. Luzak wants to litigate those claims, she must do so in Virginia, not South Carolina.

D. Ms. Luzak lacks standing because she has not satisfied Virginia's statutory requirements for bringing derivative claims.

The Circuit Court also recognized that Ms. Luzak "lacks standing to pursue those claims because she has not fulfilled the requirements for commencing a derivative action set forth in the Virginia Stock Corporation Act." *See* June 7, 2021 Int. Order ¶ 2 (R. pp. 45-46). Once again, Ms. Luzak did not contest this point below beyond her footnote, conceding instead that she did not "have the power" to bring derivative claims. May 27, 2021 Hearing Tr. p. 77:5–7 (R. p. 6688). Any argument that she has standing is not properly preserved. *See Glasscock*, 348 S.C. at 81, 557 S.E.2d at 691–92.

The Circuit Court's decision was also correct. To obtain standing to sue derivatively, Ms. Luzak must comply with the Virginia Stock Corporation Act. *See* Va. Code §§ 13.1-672.1 et seq. Ms. Luzak, however, has failed to meet the first and most basic requirement, which she well knows from the Virginia litigation: she must make a written demand on the Board of Directors before filing suit. Va. Code § 13.1-672.1(B). That obligation applies "without exception." *Firestone v. Wiley*, 485 F. Supp. 2d 694, 701 (E.D. Va. 2007).

The demand requirement also makes good sense because it affords the disinterested directors the opportunity to evaluate whether derivative litigation is in the corporation's best interests using their good faith business judgment. *See* Va. Code § 13.1-672.4; *see also Daily Income Fund*, 464 U.S. at 532 (the decision to sue for damages on the corporation's behalf is a "business question[]"). If the disinterested directors fail to satisfy the statutory requirements for

evaluating the demand, the shareholder then obtains standing to sue on the corporation's behalf. *See id.* This is the exact approach CFRC followed in response to Ms. Luzak's derivative claims challenging the stock sale to Mr. Bryant. *See Luzak*, 2016 WL 3854118 at *3–8. Both the Virginia court and the Fourth Circuit upheld that decision-making process. Ms. Luzak cannot avoid that process now by litigating derivative claims in this South Carolina probate lawsuit. If that were possible, then any shareholder in a foreign corporation could completely avoid that state's corporation law by filing the claim in South Carolina under the label of a conspiracy claim.

E. Res judicata bars Ms. Luzak's damages claim based on the stock sale to Mr. Bryant.

The Virginia judgment also precludes Ms. Luzak's request for damages arising from CFRC's stock sale to Mr. Bryant. *See* June 7, 2021 Int. Order ¶ 4 (R. p. 46). Claim preclusion applies under Virginia law when there is (1) a final judgment on the merits, (2) identity of the parties, and (3) both causes of action arise out of the same conduct, transaction, or occurrence. Va. Sup. Ct. R. 1:6; *Lee v. Spoden*, 290 Va. 235, 246–50, 776 S.E.2d 798, 804–06 (2015).[7] Here, the Virginia court granted CFRC's motion for summary judgment as to this exact claim, which the Fourth Circuit affirmed on appeal. *See Luzak*, 2016 WL 3854118 at *3–8. There, as here, Ms. Luzak was the plaintiff, the Lights were among the defendants, and CFRC was the nominal defendant. *See id.* Finally, the claims clearly arise out of the same transaction or occurrence because Ms. Luzak's claims directly challenged CFRC's sale of stock to Mr. Bryant as dilutive to

[7] Virginia law governs the preclusive effect of the judgment because the federal court sat in diversity. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001); *accord Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 653, 591 S.E.2d 611, 616 (2004) ("Full faith and credit generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded *in the State which rendered it.*") (emphasis in original). Nevertheless, South Carolina law would compel the same result. *See Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.").

her ownership stake. *See id.*; Mot. for Int. Ex. D (June 19, 2015 Hearing Tr.) pp. 44:10–51:14 (R. pp. 3654–3661).

On appeal, Ms. Luzak again resorts to misdirection about the nature of her claims and alleged damages. Ms. Luzak asserts that in this case she is pursuing "different causes of action derived from a different set of operative facts," and that she "did not have standing" to bring her current claims until "the death of Paul Barringer." Luzak Br. pp. 37–38. But Mr. Barringer's death had no impact on Ms. Luzak's ability to contest the stock sale to Mr. Bryant because she did so well over a year before Mr. Barringer passed away. Ms. Luzak simply seeks to circumvent that judgment by bringing the same cause of action previously dismissed and calling it a category of damages. The Circuit Court was correct to prevent her from doing so.

Issue III: The Circuit Court did not abuse its discretion in allowing CFRC to intervene for the limited purpose of preventing Ms. Luzak from litigating derivative claims or recovering derivative damages belonging to CFRC in this action.

In light of the foregoing, CFRC was entitled to intervene in this case to protect its interests. Rule 24(a)(2), SCRCP "permit[s] liberal intervention" when "judicial economy will be promoted by the declaration of the rights of all parties who may be affected." *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990). A party seeking intervention as of right need only "(1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties." *Id.* CFRC satisfied these requirements. *See* June 7, 2021 Int. Order ¶ 1 (R. p. 45).

A. Standard of Review.

This Court reviews orders granting intervention for abuse of discretion. *See* Luzak Br. p. 14; *Berkeley Elec. Co-op.*, 302 S.C. at 189, 394 S.E.2d at 714. "On appeal, this Court will not

disturb the trial court's decision absent a manifest abuse of discretion that results in an error of law. Moreover, the error of law must be so opposed to the trial court's sound discretion as to amount to a deprivation of the legal rights of the party." *Ex parte Builders Mut. Ins. Co.*, 431 S.C. 93, 98–99, 847 S.E.2d 87, 90 (2020).

B. CFRC's intervention was timely.

CFRC's intervention in this case was timely. South Carolina courts determine timeliness using the same factors articulated by federal courts, balancing "(1) the time that has passed since the applicant knew or should have known of his or her interest in the suit; (2) the reason for the delay; (3) the stage to which the litigation has progressed; and (4) the prejudice the original parties would suffer from granting intervention and the applicant would suffer from denial." *Davis v. Jennings*, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991). "[T]imeliness determinations under Rule 24 are vested in the sound discretion of the [trial] court." *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 784 (1st Cir. 1988) (cited in *Davis*, 304 S.C. at 504, 405 S.E.2d at 603). When, as here, the movant seeks to intervene as of right, "courts should be reluctant to dismiss such a request for intervention as untimely" because "the would-be intervenor may be seriously harmed if intervention is denied." Wright & Miller, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.).

Ms. Luzak claims that intervention was untimely because CFRC did not file its motion until "four and a half years after the assertion of the conspiracy claim," Luzak Br. pp. 15–16, but "[m]ere passage of time is but one factor to be considered in light of all the circumstances." *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980) (allowing intervention four years after the action was filed). In this case, CFRC's motion challenged the Circuit Court's subject matter jurisdiction, which "can be raised at any time." *Jackson v. Jackson*, 432 S.C. 415, 436, 853 S.E.2d 344, 355 (Ct. App. 2020). CFRC did not request any relief that the Circuit Court could not have

granted *sua sponte* on the basis that South Carolina courts lack subject matter jurisdiction over CFRC affairs and Ms. Luzak lacks standing to pursue them. *See id.*

What is more, Ms. Luzak's cause of action for civil conspiracy was the tip of the iceberg. Dr. Alford produced his report in December 2019, but Ms. Luzak did not provide CFRC with any of his analysis until the Florida discovery proceedings in 2020. *See* Mot. for Int. Ex. K (Luzak Fla. Br.) p. 23 (R. p. 3746). CFRC litigated the discovery requests that were targeted toward purely corporate matters and, having prevailed in November 2020, trusted that Ms. Luzak would abide by the Florida court's rulings. She did not. Her depositions of CFRC employees and counsel in March and April 2021, and her list of topics for CFRC's proposed Rule 30(b)(6) deposition on May 4, 2021, flouted the Florida court's rulings and demonstrated Ms. Luzak's intent to pursue derivative claims and damages. CFRC moved to intervene 10 days after receiving the Rule 30(b)(6) notice.

The timing of CFRC's intervention also did not prejudice Ms. Luzak, which is the "most important consideration" in the analysis. *Spring Const. Co.*, 614 F.2d at 377. CFRC intervened before there was even a discovery cutoff. Although the case was proceeding toward a bifurcated trial, that trial was limited to the second and third causes of action against Merrill Barringer relating to her power of appointment, not the civil conspiracy claim or the damages included in Dr. Alford's report. *See* Dec. 30, 2020 Bifurcation Order (R. pp. 33–34). Indeed, the only prejudice that Ms. Luzak identifies is having to relitigate res judicata, Luzak Br. at 16, but the Defendants' 2016 motion to dismiss turned on Ms. Luzak's contract claim in the Virginia litigation. *See* Def. Mot. to Dismiss pp. 4, 18–24 (R. pp. 428–434). Dr. Alford's report, which was issued three years after Defendants filed their motion to dismiss, raised the stock sale to Mr. Bryant that was the subject of the derivative claim and the Virginia court's summary judgment order.

As the Circuit Court observed, it made sense for CFRC to "clean this up" before the end of discovery and in advance of the first phase of the bifurcated trial. May 27, 2021 Hearing Tr. pp. 37:15–38:1 (R. pp. 6648–6649). This Court should not disturb that judgment.

C. CFRC is the real party in interest for derivative claims.

CFRC had the requisite "direct, substantial, and legally protectable interest affected by the litigation to support intervention." *See* Luzak Br. p. 17 (quoting *Ex Parte Reichlyn*, 310 S.C. 495, 499, 427 S.E.2d 661, 664 (1993)). This second requirement turns on whether the intervener is a "real party in interest." *Ex parte Builders Mut. Ins. Co.*, 431 S.C. at 99, 847 S.E.2d at 90. When, as here, a shareholder seeks to bring a derivative claim, "the corporation is a necessary party" and "the real party in interest" because the "proceeds of the action belong to the corporation and it is bound by the result of the suit." *Michael E. Siska Revocable Tr.*, 282 Va. at 181, 715 S.E.2d at 27–28 (quoting *Ross*, 396 U.S. at 538); *accord Johnson*, 221 S.C. at 149, 69 S.E.2d at 588. Ms. Luzak's sole argument to the contrary is that she is not asserting "corporate derivative claims," *see* Luzak Br. p. 17, but that argument fails for the reasons already discussed.

D. The disposition of derivative claims and damages would impair CFRC's interests.

Resolution of derivative claims in this case would impair CFRC's interests. CFRC need only show "that it would have difficulty adequately protecting its interests if not allowed to intervene," *Berkeley Elec. Co-op.*, 302 S.C. at 190, 394 S.E.2d at 715, and it has done so.

CFRC could not have protected its interests without intervention. The Supreme Court of Virginia has explained that the derivative-claim rule is vital to the corporation and its stakeholders because it "prevents multiplicity of lawsuits by shareholders," "protects all shareholders as well as creditors," and "promotes predictability" through the "consistent application of commercial rules." *Simmons*, 261 Va. at 576, 544 S.E.2d at 675; *see also* Luzak Br. p. 27 (quoting *Brown*, 348 S.C. at 50, 557 S.E.2d at 685). In contrast, "allowing a recovery by one shareholder," which is what

Ms. Luzak seeks to do here, would "prejudice the rights of others not a party to the suit." *Id.* at 574, 674. Allowing Ms. Luzak to litigate derivative claims in this action would compromise not only CFRC's interests, but also those of its shareholders, directors, officers, employees, and creditors who are not related to the Barringer family.

Ms. Luzak's improper attempts to litigate derivative claims would impair other interests of CFRC. Her claims contravene CFRC's exclusive forum bylaw and Virginia's specific statutory requirements for derivative claims. What is more, if Ms. Luzak is allowed to litigate derivative claims, it would expose CFRC to claims by Mrs. Light for indemnification and advancement of her legal fees because those claims implicate her service as a CFRC director. *See* Va. Code §§ 13.1-698, 13.1-699; Mot. for Int. Ex. S (CFRC bylaws) art. VII §§ 1–5 (R. pp. 3840–3842). intervention was necessary to protect these interests as well.

E. The individual defendants cannot adequately represent CFRC's interests.

CFRC had to intervene because the individual Defendants cannot safeguard its unique interests. CFRC's burden to satisfy this requirement is "minimal." *Berkeley Elec. Co-op.*, 302 S.C. at 191–92, 394 S.E.2d at 715. CFRC need only "show that the representation of [its] interests may be inadequate" by "rais[ing] certain issues outside the existing pleadings," "assert[ing] certain defenses" that the existing parties "may or may not be able to raise," or "bring[ing] a different perspective or experience to the proceeding that would otherwise be absent." *Id.* CFRC challenged Ms. Luzak's improper assertion of derivative claims in this action, a new issue in this case. CFRC has its own interests in enforcing Virginia law and its bylaws and in protecting the interests of its other shareholders and stakeholders. And CFRC has the perspective and experience to raise this issue because it has already litigated these issues with Ms. Luzak in Virginia.

Ms. Luzak claims that "[t]here is little, if any, daylight" between Mrs. Light's positions and CFRC's because Mrs. Light "is acting as the controlling shareholder . . . and serves on its

board of directors." Luzak Br. p. 18. But it "is elementary that a corporation is a legal entity entirely separate and distinct from the shareholders or members who compose it," even if "the corporation is owned totally by a single person." *Barnett v. Kite*, 271 Va. 65, 70, 624 S.E.2d 52, 55 (2006); *accord Costas v. First Fed. Sav. & Loan Ass'n*, 283 S.C. 94, 102, 321 S.E.2d 51, 56 (1984) ("a corporation is an entity separate and distinct from its officers and stockholders . . . whether the corporation has many or only one stockholder"). Ms. Luzak essentially asks the Court to pierce the corporate veil without any record support for doing so.

As for Ms. Luzak's insistence that Mrs. Light and CFRC are in "extremely close coordination," Luzak Br. pp. 18–20, the fact is that Mrs. Light had not moved to dismiss or strike derivative claims or damages when CFRC sought to intervene. Mrs. Light did not amend her answer to assert an affirmative defense until June 7, 2021, the same time the Circuit Court allowed CFRC to intervene, and her counsel's August 7, 2020 letter merely reported the outcome of the Florida discovery proceedings to the presiding judge. *See* June 7, 2021 Order on Motions ¶ 4 (R. p. 49); Aug. 7, 2020 Paylor Ltr. (R. p. 7254). CFRC's intervention was therefore essential to present this issue.

F. In the alternative, CFRC was entitled to permissive intervention.

In the alternative, CFRC was entitled to permissive intervention. *See* Rule 24(b), SCRCP; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Under Rule 24(b)'s less restrictive standard, CFRC need only "(1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove [its] participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties." *Ex parte Builders Mut. Ins. Co.*, 431 S.C. at 102, 847 S.E.2d at 91. As explained above, CFRC filed this motion promptly after the Florida discovery rulings and the

depositions of its employees and counsel. CFRC's intervention also addressed the scope of claims and asserted damages that were already before the Circuit Court. Finally, intervention did not prejudice the existing parties because the scope of CFRC's involvement was limited to the resolution of its motion, which narrowed the scope of claims and damages in advance of trial.

CONCLUSION

This Court should affirm the Circuit Court's June 7, 2021 order granting CFRC's motion for intervention and protective relief and its July 13, 2021 order denying Ms. Luzak's motion for reconsideration of the June 7, 2021 order.

Dated: November 2, 2022

Respectfully submitted,

/s/ Erin Dean

TUPPER, GRIMSLEY, DEAN & CANADAY, PA
ERIN DEAN
(S.C. Bar No. 65320)
611 Bay Street
Beaufort, South Carolina 29901
Telephone: (843) 524-1116
Facsimile: (843) 524-1463
erindean@tgdcpa.com

HUNTON ANDREWS KURTH LLP
EDWARD J. FUHR
(admitted *pro hac vice*)
JOHNATHON E. SCHRONCE
(admitted *pro hac vice*)
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: 804-788-8201
Facsimile: 804-788-8218
efuhr@huntonAK.com
jschronce@huntonAK.com

Counsel for Intervenor/Respondent
Coastal Forest Resources Company