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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	CIVIL ACTION #: 2017-CP-10-00838
Jacque Lucas, Shirley Ann Lucas, and Daniel Simerly,	)	
Plaintiffs,	)	
vs.	)	**ORDER GRANTING DEFENDANTS KAPSTONE PAPER AND PACKAGING CORPORATION AND KAPSTONE KRAFT PAPER CORPORATION'S RULE 12(b)(1) MOTION TO DISMISS**
KapStone Paper and Packaging Corporation, KapStone Kraft Paper Corporation, Safway Group Holdings, LLC, Easy Way Insulation Co., Inc., Sypris Technologies, Inc. f/k/a Tube-Turns Technologies, Inc., Thompson Construction Group, Inc. and Thompson Industrial Services, LLC,	)	
Defendants.	)	

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This matter is before the Court pursuant to Defendants KapStone Paper and Packaging Corporation ("KapStone Paper") and KapStone Kraft Paper Corporation's ("KapStone Kraft") (collectively, "the KapStone Defendants") Second Amended Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction. A hearing was held before the Court of Common Pleas for Charleston County on September 27, 2019.

After considering the briefs, the record, the controlling law, and arguments of counsel, the Court finds as follows:

I. FACTUAL AND PROCEDURAL HISTORY

On May 24, 2016, Plaintiffs suffered serious injuries while performing duties as employees of KapStone Charleston Kraft, LLC ("KapStone Charleston"). After Plaintiffs were injured, they filed workers compensation claims to recover under a workers' compensation policy held by

KapStone Paper for the benefit of its subsidiaries' employees.[1] Plaintiffs have already recovered nearly $4,000,000 under this policy to cover their medical bills and lost wages. *See* Memo. of Law in Support of Petitioner Sentry Cas. Company's Motion to Intervene, at 2-3 (December 21, 2017).

There are three KapStone entities at issue in this case: KapStone Paper, KapStone Kraft, and KapStone Charleston. These entities form a parent-subsidiary relationship: KapStone Paper (a publicly traded corporation) is the sole shareholder of KapStone Kraft (a privately held corporation), which is the sole "member" of KapStone Charleston, LLC (a limited liability company). *See* KAPSTONE-000122; KAPSTONE-000273-287, at 275.

The South Carolina Workers' Compensation Act's "Exclusivity Rule" provides that when a claimant can recover for work-related injuries under a workers'-compensation policy, the claimant's employer is immune to civil liability in tort for those injuries. *See* S.C. Code Ann. § 42-1-540. South Carolina law permits the employee to pursue an action against a parent company of his employer under certain circumstances. *See Poch v. BayShore Concrete Products/South Carolina, Inc.*, 405 S.C. 359, 370-71, 747 S.E.2d 757, 764 (2013) (quoting 82 Am. Jur.2d *Workers' Compensation* § 90 (2003) (footnotes omitted)). On February 17, 2017, Plaintiffs filed a civil action against both KapStone Kraft and KapStone Paper, along with several other third-party defendants unrelated to the KapStone entities.

In response, the KapStone Defendants filed a Rule 12(b)(6) motion to dismiss, asserting that they, like KapStone Charleston, should be accorded tort immunity, pursuant to the analysis in *Poch v. Bayshore Concrete Products/South Carolina, Inc.* ("*Poch*"). On July 31, 2017, the KapStone Defendants filed an Amended Rule 12(b)(6) motion, clarifying their position. On

[1] Initially in these claims, Plaintiffs identified their employer as KapStone Paper, then later amended their claims to identify their employer as KapStone Kraft before finally identifying their employer as KapStone Charleston. *See, e.g.*, Plaintiffs' Workers'-Compensation Pre-Hearing Briefs, KAPSTONE-000435-36; KAPSTONE-000706.

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September 22, 2017, the KapStone Defendants submitted a Second Amended Motion to Dismiss, specifying that they were challenging subject matter jurisdiction under Rule 12(b)(1). *See Poch*, 405 S.C. at 367, 747 S.E.2d at 761 (quoting *Glass v Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997) (noting that issue of employer-employee relationship for purposes of workers' compensation is jurisdictional)); *see also Johnson v. Jackson*, 401 S.C. 152, 735 S.E.2d 664 (Ct. App. 2012) (performing *Poch* analysis under a Rule 12(b)(1) motion to dismiss); *see also Keene v. CNA Holdings, LLC*, 426 S.C. 357, 827 S.E. 183 (Ct. App. 2019) (applying the *Poch* analysis under a Rule 12(b)(6) motion to dismiss).

On November 28, 2017, the Honorable Judge John Hayes entered an Order staying merits discovery until the jurisdictional issue was resolved. Pursuant to this Order, Plaintiffs and the KapStone Defendants engaged in substantial jurisdictional discovery on the various *Poch* factors. Over the next eighteen months, the KapStone Defendants produced approximately 3,800 pages of business records in response to Plaintiffs' jurisdictional discovery requests. In addition, the KapStone Defendants submitted three affidavits by corporate officers, one by Ms. Kelly Hulseman, the Vice President of Shared Services at KapStone Paper, and two by Mr. Mark Niehus, the Vice President and Controller for KapStone Paper. Plaintiffs deposed these affiants. The KapStone Defendants also submitted the affidavit of Mr. Todd Lester, a financial analyst and forensic accounting consultant, on the nature of the KapStone companies' corporate relationship from the perspective of a financial analyst. Mr. Lester was deposed on September 5, 2019.

Plaintiffs sought to exclude Mr. Lester's affidavit, asserting that Mr. Lester's opinion "constituted improper conclusions of law." After considering the parties' arguments and briefs on this issue, the Court ruled in favor of admitting Mr. Lester's affidavit. *See* July 29, 2019 Order.

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Plaintiffs subsequently submitted an affidavit by David Fuller, a financial analyst, to respond to Mr. Lester's affidavit.

On September 27, 2019, this Court heard the parties' arguments on the KapStone Defendants' Second Amended Rule 12(b)(1) Motion to Dismiss. In their briefs and at the hearing, Plaintiffs asserted the following arguments: (1) *Poch* is not controlling in this case; (2) even if *Poch* is controlling, the record does not support a conclusion that the KapStone Defendants were sufficiently economically integrated with KapStone Charleston to justify the extension of workers' compensation immunity; (3) the post-incident "One KapStone" project demonstrates the KapStone entities were not integrated under *Poch*; (4) the Court should strike the affidavit of Ms. Hulseman; (5) Mr. Lester's Affidavit is inadmissible legal opinion; and (6) Mr. Lester's Affidavit was untimely. Upon hearing the parties' arguments, considering the law and reviewing the extensive record, the Court finds that the KapStone Defendants' motion to dismiss should be granted.

II. APPLICABLE LAW

a. *Poch v. Bayshore Concrete Products/South Carolina, Inc.*

"The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury." *Poch*, 405 S.C. at 366, 747 S.E.2d at 761 (quoting *Edens v. Bellini,* 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004)). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Id.* (quoting *Edens* at 441–42, 597 S.E.2d 863) (interpreting S.C. Code Ann. § 42–1–540 (1985)).

Concerning whether the Exclusivity Rule extends to an employer's corporate parent, the South Carolina Supreme Court has explained:

> A parent corporation is generally not immune from an action in tort by an injured employee of its subsidiary by virtue of the employee's

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entitlement to workers' compensation. Where an employee of a subsidiary is injured while working on property owned by the parent corporation and receives workers' compensation benefits from the subsidiary, the employee may maintain an action in tort against the parent corporation even though parent and subsidiary are covered by same policy of workers' compensation insurance.

However, a parent corporation's immunity has been recognized in some instances on the theory that the parent is or may be found to be the alter ego of the employer-subsidiary corporation.

Poch, 405 S.C. at 370-71, 747 S.E.2d at 763 (quoting 82 Am.Jur.2d *Workers' Compensation* § 90 (2003) (footnotes omitted) (emphasis added) (also citing Annotation, *Workers' Compensation Immunity as Extending to One Owning Controlling Interest in Employer Corporation,* 30 A.L.R.4th 948, § 2 (1984 & Supp. 2013) (discussing alter ego theory by which a parent corporation may seek tort immunity via its interest in the employer-corporation; noting that immunity does not extend where: (1) parent and subsidiary are separate and distinct entities; or (2) there is evidence of fraud, abuse of corporate privilege, or an attempt to circumvent the law to avoid liability)).

The Supreme Court of South Carolina has adopted an eight-factor test (the "*Poch* test") used to determine whether a parent company and its subsidiary are so integrated that the subsidiary's workers' compensation tort immunity should be extended to the parent. 405 S.C. at 371-72, 747 S.E.2d at 764 (citing *Monroe v. Monsanto Co.*, 531 F. Supp. 426 (1982)). This test, the court explained, is "the correct approach" under South Carolina law to "determin[e] whether two related businesses are separate and distinct corporations for workers' compensation purposes." *Id.*

The *Poch* test considers the following factors:

(1) Did the two businesses maintain separate corporate identities?

(2) Did the two businesses maintain separate Boards of Directors?

(3) Did the two businesses transact business from different locations under different managers?

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> (4) Did the two businesses hire and pay their own employees?
>
> (5) Did the two corporations hold themselves out to their employees as two separate identities?
>
> (6) Did the two corporations engage in different business activities?
>
> (7) Did the two corporations maintain separate books, bank accounts, and payroll records?
>
> (8) Did the two corporations file separate tax returns?

Poch, 405 S.C. at 372, 747 S.E.2d at 764 (quoting *Monroe* at 434). The court noted that "these factors [a]re not the only relevant factors and that none of the factors alone provide[] immunity." *Id.*

b. Standard of review under the *Poch* test

"[T]he determination of the employer-employee relationship for workers' compensation purposes is jurisdictional." *Poch*, 405 S.C. at 367, 747 S.E.2d at 761 (quoting *Glass v Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)). Thus, when a court is faced with a motion to dismiss based on *Poch*, the court "has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Id.* "Any doubts as to a worker's status should be resolved in favor of including him or her under the Workers' Compensation Act." *Poch*, 405 S.C. at 367, 747 S.E.2d at 761 (quoting *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218-19, 661 S.E.2d 395, 400 (Ct. App. 2008)). This preference applies with equal force to cases in which the employer-employee relationship is being asserted as a sword (to obtain coverage) or a shield (to assert immunity). *See Olmstead v. Shakespeare*, 354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003). ("[B]road construction in favor of coverage . . . . is the standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory[.]").

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III. ANALYSES

Having reviewed the record and considered the parties' arguments, the Court finds as follows:

a. The eight-factor test adopted in *Poch v. Bayshore* is controlling.

As a preliminary matter, this dispute is governed by the South Carolina's Workers' Compensation Act, S.C. Code Ann. § 42-1-10, *et seq.*, and *Poch v. Bayshore*. Plaintiffs sustained injuries in the scope of their employment with KapStone Charleston and recovered approximately $4,000,000 in benefits through workers' compensation claims. Plaintiffs seek to recover against KapStone Kraft and KapStone Paper, respectively the corporate parent and grandparent of KapStone Charleston, for the same injuries. The KapStone Defendants have asserted that Kapstone Charleston's workers' compensation tort immunity extends to them because of the extensive economic interrelation between the three companies. Therefore, the eight-factor test adopted by the Supreme Court of South Carolina in *Poch* is "the correct approach" to determine whether these KapStone entities "are separate and distinct corporations for workers' compensation purposes." 405 S.C. at 371-72, 747 S.E.2d at 764 (citing *Monroe v. Monsanto Co.*, 531 F. Supp. 426 (1982)).

b. The KapStone Defendants and KapStone Charleston were economically integrated under *Poch*

Having determined that the *Poch* analysis controls in this dispute, the Court has reviewed the materials submitted by the parties and finds as follows:

1. Did the two businesses maintain separate corporate identities?

In *Poch*, the Supreme Court of South Carolina held that the relationship between Bayshore Corp. and its subsidiary Bayshore SC satisfied this factor because the companies used the named

“Bayshore” “interchangeably” in signing documents. *See* 405 S.C. at 373, 747 S.E.2d at 764. In addition, Bayshore SC used several documents, including letterhead, employment applications, benefits packages, and safety manuals that “displayed the standard Bayshore Corp. designation.” *See id.* Further, the court noted that one workers’ compensation policy covered all of the Bayshore subsidiaries. *See id.*

Review of the documents produced by the KapStone Defendants in this matter shows that the KapStone companies maintained a shared corporate identity at least to the same degree of the companies in *Poch*, if not more so.[2] Internal documents, external communications, and public filings, such as KapStone Paper’s 10-K, all show that KapStone Paper, KapStone Kraft, and KapStone Charleston often referred to themselves collectively as “KapStone” or the “Company.” *See, e.g.*, KAPSTONE-000002-134, at 3-40, *et seq.* (referring to the KapStone companies collectively as “KapStone” or “we”). The KapStone entities shared the “KapStone” name, logo, trademark, and color scheme. *See, e.g.*, KAPSTONE-000344-45, 376, 465, 684, 758-59, 3438 (demonstrating use of shared name, logo, trademark, and color scheme). Part of this shared corporate identity included a shared “KapStone” website, *see* KAPSTONE-000758-59, letterhead with the “KapStone” logo and trademark, *see* KAPSTONE-000344-45, common employment forms, *see* KAPSTONE-000376, and shared corporate policies and procedures. *See* KAPSTONE-000465, 1897-98, 1899, 1901, 1902-09, 1910-13.

[2] It is important to note that the concept of a “shared corporate identity” is separate from the concept of “separate entities.” Corporate identity is the “[c]ombination of color schemes, designs, words, etc., that a firm employs to make a visual statement about itself and to communicate its business philosophy. It is an enduring symbol of how a firm views itself, how it wishes to be viewed by others, and how others recognize and remember it. . . . [C]orporate identity is . . . conveyed by things such as buildings, décor, logo, name, slogan, stationery, uniforms. . . .” *See* Business Dictionary, Definition of “Corporate Identity,” http://www.businessdictionary.com/definition/corporate-identity.html.

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Plaintiffs' employment applications, hiring letters, and signed company policies all exhibited the shared "KapStone Paper" name, logo, and trademark. Plaintiffs' employment applications were on KapStone Paper documents. *See* KAPSTONE-000702-05, 741-44. Plaintiff Simerly's hiring letter exhibited the KapStone Paper logo and included the following: "On behalf of KapStone Paper and Packaging Corporation, I am delighted to extend an offer of employment to you for the position of Lubricator in the Maintenance Department." *See* KAPSTONE-000345. As to Plaintiff Lucas, the hiring letter also had the KapStone Paper logo and offered a position "at the KapStone Kraft Division, North Charleston Mill." *See* KAPSTONE-000344. Finally, as also noted in *Poch*, the workers' compensation policy at issue was procured and funded by the corporate grandparent KapStone Paper and covered all of the KapStone subsidiaries' employees, including Plaintiffs. *See* KAPSTONE-000301-306, at 303 (declaration page of the applicable policy). Accordingly, a preponderance of the evidence supports a finding that the KapStone Defendants maintained a shared corporate identity with KapStone Charleston.

2. <u>Did the two businesses maintain separate Boards of Directors?</u>

In *Poch*, the Supreme Court found this factor was satisfied when "with the exception of two people, the corporations shared the same officers and directors." *See* 405 S.C. at 373, 747 S.E.2d at 764. The court noted that Bayshore SC's Board of Directors was comprised entirely of members of Bayshore Corp.'s Board of Directors, and that all officers received their salaries from Bayshore Corp. *Id.*

Under the analysis in *Poch*, the KapStone Defendants satisfy this element. The documents produced by the KapStone Defendants, as well as the deposition testimony of Ms. Hulseman and Mr. Niehus, show that the KapStone Defendants maintained overlapping Officers and Boards of Directors. Each of the KapStone companies had the same persons as officers in essentially the

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same positions. *See* KAPSTONE-001184-85. KapStone Charleston, as an LLC, had no Board of Directors, but had the same officers as KapStone Kraft and KapStone Paper. *See id.* The LLC's sole managing member was KapStone Kraft, who appointed KapStone Charleston's officers. *See* KAPSTONE-000273-287, at 276 and 277. Thus, KapStone Charleston was governed directly by KapStone Kraft's Board of Directors, all of whom were also on KapStone Paper's Board of Directors. *See* KAPSTONE-001184-85. The record also shows that the salaries of these Directors and Officers, like all KapStone employees, were funded by KapStone Paper. Accordingly, a preponderance of the evidence supports a finding that the KapStone Defendants and KapStone had overlapping Officers, and that KapStone Kraft's and KapStone Paper's Board of Directors had direct influence over KapStone Charleston.

3. Did the two businesses transact business from different locations under different managers?

In *Poch*, the Supreme Court found that Bayshore SC and Bayshore Corp. satisfied this factor, even though they were headquartered in different states. *See* 405 S.C. at 373, S.E.2d at 764. There, the court noted that the parent entered into leases for and purchased equipment on behalf of its subsidiary, and periodically sent its own employees to oversee its subsidiaries' operations. *See id.* Further, the parent provided services for its subsidiary, including the processing and paying of invoices, and human resources services. *See id.*

Here, the KapStone Defendants were headquartered in the same location as their subsidiaries, at KapStone's "corporate office," located at 1101 Skokie Blvd, Suite 300, in Northbrook, Illinois. *See* KAPSTONE-00002; KAPSTONE-000275-276. KapStone Kraft's primary physical operations are performed at its mill in Roanoke Rapids, North Carolina. *See* Niehus Dep. 45:8-21. KapStone Charleston's paper mill is located in North Charleston, South Carolina, and four chip mills located throughout South Carolina. *See* Niehus Dep. 59:14-21. Each

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location employs managers who reside near and work at the various plants. *See* KAPSTONE-002596-2650 (records maintained by KapStone Paper on every KapStone employee's location, payroll listing, and role).

Although each KapStone entity was engaged in its own day-to-day operations, like the Bayshore entities in *Poch*, several KapStone Paper and KapStone Kraft employees worked at KapStone Charleston's facilities (approximately 8% of the total work force at the Charleston mill), and several KapStone Kraft employees worked at the corporate office in Northbrook, Illinois (approximately 15% of the work force). *See* KAPSTONE-002596-2650. The various operational policies for KapStone Charleston show that these subsidiaries were subject to oversight and policies implemented by KapStone Paper at the corporate office. *See* KAPSTONE-000420; 1902-1909; 1914-1917; 1947; 1964-1968.

As the headquarters for the KapStone entities, the corporate office served as KapStone's "nerve center." It was the location for all board meetings. *See* Niehus Dep. 132:6-132:12. It was also the location from which KapStone Paper provided shared accounting services, shared payroll services, and several other shared administrative services for KapStone Kraft and KapStone Charleston. *See* Hulseman Dep. 270:7-272:14.

KapStone Paper and KapStone Kraft also entered into leases on KapStone Charleston's behalf for machinery used at KapStone Charleston's North Charleston mill. *See* KAPSTONE-003286-3300; 3301-3314; 3315-3324; 3325-3340; 3341-3356; 3387-3396; 3397-3435; 3436-3437. These leases were entered into at the corporate office. *See id.* The corporate office was also the location of KapStone's "centralized purchasing system," which directed purchase orders for paper to the KapStone entity best suited to fulfil the request. *See* Niehus Dep. 85:9-86:10. KapStone Paper processed invoices and made payments from the corporate office for services and

deliveries to KapStone Charleston's facilities. *See* KAPSTONE-002125-29. KapStone Paper procured and funded employee payroll and benefits for KapStone Kraft and KapStone Charleston employees at the corporate office, *see* KAPSTONE-000439, 335-337, 2510, 718, including the applicable workers' compensation insurance policy. *See* KAPSTONE-000301-306, at 303. Accordingly, a preponderance of the evidence supports a finding that the KapStone companies conducted business from shared locations, to at least the same degree as the entities in *Poch*.

4. Did the two businesses hire and pay their own employees?

In *Poch*, the Supreme Court found this factor was satisfied because Bayshore Corp. hired, fired, and provided compensation and benefits to Bayshore SC's salaried employees. *See* 405 S.C. at 373-74, 747 S.E.2d at 764-65. However, the court noted that Bayshore SC was in charge of hiring and paying its hourly workers, in addition to hiring temporary workers, although temporary workers' compensation was indirectly provided by Bayshore Corp. *See id.*

Each KapStone entity generally hired its own local employees, both hourly and salaried, although as noted above, there was some employee overlap between locations. Payroll records show that all employee compensation was processed and funded by KapStone Paper through shared payroll services and a third-party payment processor, ADP. *See* KAPSTONE-000439, 335-337, 2510, 718 (in that order). Benefits packages presentations for hourly employees of KapStone Kraft and KapStone Charleston show that hourly employees' benefits, including life insurance, health insurance, short and long-term disability insurance, employee assistance programs, tuition reimbursement, scholarships for employee dependents, workers' compensation policies, and 401(k)s were procured and funded by KapStone Paper. *See* KAPSTONE-000149-192, 403-05. As discussed further below under factor 7, all of the funds generated by the KapStone subsidiaries were transferred overnight to KapStone Paper, who controlled the finances of its subsidiaries with

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minor exception.[3] *See* KAPSTONE-000339 (identifying zero-balance accounts as "ZBA"). Accordingly, while KapStone Paper was not directly in charge of hiring or firing employees at KapStone Charleston, it was in charge of handling payroll and other forms of compensation.

5. <u>Did the two corporations hold themselves out to their employees as two separate identities?</u>

In *Poch*, the Supreme Court found that Bayshore SC and Bayshore Corp held themselves out as related entities because Bayshore SC employees "were provided with employment documents that were standard for Bayshore Corp." *See* 405 S.C. at 374, 747 S.E.2d at 765. That is also the case here.

The KapStone entities held themselves out to their employees and the public as related companies with a shared corporate identity. In addition to general shared use of the "KapStone" name, logo, trademark, internal letterhead, website, and business forms, Plaintiffs' personnel files show that the KapStone entities held themselves out to employees as interrelated. Plaintiffs' employment applications to work at KapStone Charleston's mill used the KapStone Paper logo and referred specifically and repeatedly to "KapStone Paper and Packaging Corporation" as the entity to whom the application was being submitted. *See* KAPSTONE-000702-705, 741-744. As part of their application for employment, Plaintiffs signed a "KapStone Paper and Packaging Corporation" background check authorization form. *See* KAPSTONE-000698, 745. Plaintiffs received hiring letters that referenced KapStone Paper and KapStone Kraft. *See* KAPSTONE-000344, 345. Once hired, Plaintiffs signed off on several KapStone Paper and Packaging Corporation policies, including the "KapStone Paper and Packaging Corporation Code of Conduct and Ethics," *see* KAPSTONE-000694, 736, 2082, *et seq.*, and the "KapStone Paper and Packaging

[3] KapStone Paper and KapStone Charleston also appear to have jointly held bank accounts with Bank of America/Merrill Lynch. *See* KAPSTONE-001620-1641. This suggests that KapStone Charleston had some financial independence, although still tethered to KapStone Paper. *See* KAPSTONE-001969-1970.

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Corporation Computer Use Policy User Agreement." *See* KAPSTONE-000464. When Plaintiffs sought to update their personal data with the company, they filled out a "KapStone Paper and Packaging Corporation Personal Data Change Form." *See* KAPSTONE-000684. This is all evidence of a shared corporate identity. As such, a preponderance of the evidence supports a finding that the KapStone entities held themselves out to their employees and the public as having a common identity.

6. Did the two corporations engage in different business activities?

In *Poch*, the Supreme Court held that Bayshore Corp. and Bayshore SC "engaged in the same business activity of providing concrete forms for construction sites." *See* 405 S.C. at 375, 747 S.E.2d at 765. Here, while KapStone Kraft and KapStone Charleston were engaged in the same general business of manufacturing kraft paper products, KapStone Paper did not literally manufacture paper. Instead, KapStone Paper managed the financial aspects of its subsidiaries that were engaged in the paper-manufacturing industry.

The record shows that the KapStone companies collectively engaged in the business of manufacturing, selling, and distributing paper products. The various KapStone companies were segmented into separate "divisions," each of which performed a different step in the paper-making and paper-selling process. These included the Mill Division (making kraft paper), the Container Division (turning kraft paper into boxes or other packaging) (occasionally collectively referred to as the "Paper and Packaging Segment"), and Distribution (shipping the paper and boxes to customers). *See* KAPSTONE-00002-134.

As part of the Mill Division, KapStone Charleston and KapStone Kraft operated paper mills that manufactured kraft paper products. *See id.* at 2, 4, 6. KapStone Paper provided managerial and financial oversight to these operations, and supplied shared accounting, payroll,

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and other administrative services for its subsidiaries. *See id.* at 2-9. The array of KapStone entities were engaged in the various functions necessary to the manufacture, sale and distribution of kraft paper products. *See id.* In essence, the various KapStone companies operated as a single-purpose entity with specialized divisions, all funded by KapStone Paper. In addition to functioning as a single-purpose entity, KapStone Paper also marketed its corporate family to the public as a single paper company, and marketed and sold its products as coming from "KapStone." *See* KAPSTONE-000758-759.

In addition to functioning like a single paper company, several governmental agencies, including the EPA and OSHA, officially categorized KapStone Paper and its subsidiaries under NAICS and SIC codes designated for paper manufacturing, paper mills, and pulp mills. *See, e.g.*, EPA, *Economic Impact Analysis: Proposed Revisions to the National Emission Standards for Hazardous Air Pollutants*, Table 2-7 (October 2016), available at https://www. epa.gov/sites /production/files/2016-12/documents/subpart_mm_eia_10_31_2016_ final.pdf (identifying KapStone Paper as one of the largest "U.S. Pulp and Paper Companies in 2015").

The KapStone entities' overall function as a paper manufacturing business is more akin to the entities in *Poch* than those discussed in *Monroe v. Monsanto*, where the court found insufficient integration. *See* 531 F. Supp. 426, 434 (1982). In *Poch*, the court found the parent and subsidiary entities were both engaged in manufacturing concrete forms for construction projects. *See* 405 S.C. at 374, 747 S.E.2d at 765. Conversely, in *Monroe v. Monsanto*, the court found that the sibling entities operated independently of one another, one company "processing . . . continuous fiber into carpet staple" and the other "processing . . . fibers and manufactur[ing] and marketing fabrics." *See id.* Here, as noted above, to the extent they were in different KapStone divisions, the KapStone entities did not engage in exactly the same day-to-day activities. Despite this, the

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several entities were collectively engaged in the business of paper manufacturing. As such, a preponderance of the evidence supports a conclusion that the KapStone entities satisfied this element.

7. <u>Did the two corporations maintain separate books, bank accounts, and payroll records?</u>

In *Poch*, the Supreme Court found that Bayshore Corp. and Bayshore SC maintained separate books, accounting records, and bank accounts for purposes of financial accountability. *See* 405 S.C. at 374, 747 S.E.2d at 765. However, the court found that this factor was satisfied because "Bayshore SC contributed to Bayshore Corp.'s gross revenues" and "[m]ore importantly, Bayshore Corp. was entirely responsible for the financial operation of Bayshore SC." *See id.*

Here, the KapStone entities maintained consolidated books and payroll records. The KapStone subsidiaries had individual bank accounts, but these were "zero balance accounts" that did not serve as operating accounts. *See* KAPSTONE-000339. Any funds in these accounts were swept nightly into a KapStone Paper "master account." *See id.* KapStone Paper maintained consolidated electronic records for the operations of its subsidiaries, in which it recorded its subsidiaries' profits and losses, amalgamated into a single profit and loss chart, as well as overall product manufacture and sale, costs of goods sold, unit average selling price, and employee headcount for its subsidiaries' locations, among other details. *See* KAPSTONE-003462-3480.

The KapStone entities also collectively entered into a "Receivables Purchase Agreement" and "Receivables Sales Agreement" whereby ownership of "accounts receivable" generated by KapStone subsidiaries were transferred to KapStone Receivables, LLC, which would sell the accounts receivables to a "purchaser" (in this case, Wells Fargo Bank), for ninety-nine cents on the dollar. *See* KAPSTONE-002243-2488. KapStone Receivables, LLC, would then transfer the funds obtained from the sale of its accounts receivable to KapStone Paper's "master account,"

from which KapStone Paper would then fund the operations, payroll, benefits, and other costs of its subsidiaries, including KapStone Charleston. *See id.*

In addition to the above, KapStone Paper maintained consolidated payroll records for its subsidiaries' employees. Payroll was processed by KapStone Paper at the "corporate office," after which KapStone Paper would request ADP, a third-party vendor, to process payments; ADP would then draft payroll checks with funds provided by KapStone Paper, for direct deposit or distribution to its subsidiaries' employees. *See* KAPSTONE-000439, 335-337, 2510, 718. As such, there is sufficient evidence to find that the KapStone Defendants satisfied this factor.

8. <u>Did the two corporations file separate tax returns?</u>

In *Poch*, the Supreme Court noted that this is a "weighty" factor, yet still found sufficient integration despite finding that the Bayshore entities maintained separate tax identification numbers and filed separate tax returns. *See* 405 S.C. 374, 747 S.E.2d at 765. Comparatively, the *Monsanto* court found that this factor was satisfied simply by the entities at issue filing a consolidated tax return. *See* 531 F. Supp. 426, 434. Based on this, the Court finds the KapStone entities satisfied this factor, as they filed a single consolidated federal tax return.

Pursuant to the above analysis, the Court finds the documents in the record, by a preponderance of the evidence, supports a conclusion that the KapStone Defendants were so economically integrated and commingled that they "could be viewed only as one economic entity." *See Poch*, 405 S.C. at 374, 747 S.E.2d at 765.

c. <u>The post-accident "One KapStone" documents show that the KapStone Defendants were financially integrated</u>

Plaintiffs argued that the "One KapStone" documents, mostly generated after Plaintiffs' accident, and which related to efforts to improve "integration" of operations between KapStone's Mill and Container Divisions, show that the KapStone entities were not financially integrated

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under *Poch* at the time of Plaintiffs' injuries. After reviewing these documents, the Court disagrees.

As an initial matter, the question of *Poch*-based immunity is based on the degree of economic integration between entities as of the date of the employee's injuries. *See Poch v. BayShore Concrete Products/South Carolina, Inc.*, 405 S.C. 359, 747 S.E.2d 757. To this extent, the post-incident nature of the "One KapStone" documents arguably renders these documents less relevant to the issue before the Court. However, Plaintiffs argue that post-incident efforts to become more integrated imply a lack of previous integration. Thus, the Court has reviewed these documents as part of the *Poch* inquiry.

The "One KapStone" documents are relevant and probative of the *Poch* issues, although not necessarily in the manner Plaintiffs assert. On their face, the "One KapStone" documents appear to have been developed in furtherance of a goal to better "integrate" the *operations* of the KapStone Mill and Container Divisions: to make them more uniform. *See* KAPSTONE-0003543; KAPSTONE-003483-3796. As explained above, KapStone's Mill Division companies, which included KapStone Kraft and KapStone Charleston, manufactured kraft paper. KapStone's Container Division companies, which included KapStone Container Corporation, used the kraft paper made by the Mill Division to manufacture cardboard boxes and other forms of packaging. These are the segments of the KapStone family of companies that were subject to the "One KapStone" plan. *See, e.g.*, KAPSTONE-003543 (discussing the urgent need to "[i]ntegrate the operations and supporting functions of our Mill and Container systems" and "[i]dentify and execute major performance improvements across both"); KAPSTONE-003547 (planning by 2019 to "[d]evelop standardized scales, supply chain, production, and distribution processes across Container and Mill Systems").

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Plaintiffs assert that the use of the words "integrate" and "integration" in the "One KapStone" documents shows that the KapStone companies were not integrated under *Poch*. This argument conflates the meaning of "economic integration," as it is used in *Poch*, with the meaning of "integrate" in the context of the "One KapStone" documents. Under *Poch*, "integration" includes factors such as shared corporate identity, economic (financial) interrelation, and shared corporate governance. *See* 405 S.C. at 372, 747 S.E.2d at 764 (quoting *Monroe* at 434). In the "One KapStone" documents, "integration" appears to refer to operational uniformity between the KapStone Mill and Container Division entities.

The "One KapStone" documents demonstrate economic integration, shared books and accounting, overlapping management and corporate control over subsidiary operations and finances, as well as a shared corporate identity. *See* KAPSTONE-003536-3572. The "One KapStone" documents note that the purpose of the program was to capture a "$150M EBITDA gap" by making the operations of the Mill and Container Divisions more consistent and efficient. *See, e.g.*, KAPSTONE-0003543, 3546, 3549, 3573, 3672, 3678 (referencing KapStone EBITDA). This is telling. EBITDA stands for "earnings before interest, tax, depreciation, and amortization." The fact that KapStone Paper identified an "EBITDA gap" on a KapStone-wide scale, caused by inconsistencies between its subsidiaries, shows that KapStone Paper maintained consolidated books and accounts from which to reach this conclusion. Further, the fact that KapStone Paper could implement a "One KapStone" program to make its subsidiaries' operations more consistent demonstrates KapStone Paper's overarching control over its subsidiaries' business operations. Finally, as to corporate identity, the "One KapStone" documents repeatedly refer to all of the KapStone entities collectively as "KapStone," "we," or "the Company." *See, e.g.*, KAPSTONE-

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003536-3572, 3579, 3580, 3591, 3599, 3606, 3702, 3734. The KapStone name, logo, and trademark is used throughout the documents. *See id.*

Based on the foregoing, the Court finds that the "One KapStone" documents support a finding that the KapStone Defendants were economically integrated with KapStone Charleston under the *Poch* test.

d. The KapStone Defendants properly authenticated and entered supporting business records and related testimony into the record before this Court

The KapStone Defendants' have supported their motion to dismiss with approximately 3,800 pages of documents produced in response to Plaintiffs' discovery requests. Plaintiffs objected to the KapStone Defendants' referencing these documents, asserting that the documents were not "in the record." Plaintiffs raise a similar objection in footnote 1 of their July 25, 2019 Response in Opposition to Defendants KapStone's Memorandum of Law in Support of the Admissibility of the Affidavit of Todd K. Lester, arguing: "Defendants' attempt to put every document produced into the record in support of their motion to dismiss fails, as the business records affiant could not properly authenticate those records in his deposition."

The requirement of authentication is satisfied by evidence sufficient to support a finding that the document in question is what the proponent claims it to be. Rule 901(a), SCRE. Under this rule, the testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to establish its authenticity. *See* Rule 901(b)(1), SCRE. "'The burden to authenticate . . . is not high' and requires only that the proponent 'offer[] a satisfactory foundation from which the [fact finder] could reasonably find that the evidence is authentic.'" *Deep Keel, LLC v. Atl. Private Equity Grp.*, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

The KapStone Defendants authenticated the documents on which they rely through two affidavits of Mark Niehus, the Vice President and Controller for KapStone Paper, executed on July 13, 2018 and June 14, 2019. In these affidavits, Mr. Niehus affirms that he reviewed the documents and affirmed that they were authentic records of the KapStone Defendants' business activities, created and maintained in the regular course of business. In the deposition of Mr. Niehus on January 8, 2019, Plaintiff acknowledged that Mr. Neihus had authenticated the documents listed in the appendix to the June 13, 2018 affidavit. *See* Niehus Dep. 23:16-21. As such, the Court finds that the KapStone Defendants have authenticated the documents in the record.

Plaintiffs' second argument, that the KapStone Defendants did not enter these documents into the record, is incorrect. Pursuant to the Court's directive on submitting large files of documents, on June 4, 2019, the KapStone Defendants sent the Court two CDs, one of which contained the July 13, 2018 Affidavit of Mark Neihus and the documents Mr. Niehus had authenticated via the affidavit, referenced in the appendix to the same (documents bates labeled KAPSTONE-000001 through KAPSTONE-002522). On June 17, 2019, the KapStone Defendants sent the Court a second CD with the June 14, 2019 Affidavit of Mark Niehus and the documents Mr. Niehus had authenticated via that affidavit (documents bates labeled KAPSTONE-002596 through KAPSTONE-003828). In doing so, the KapStone Defendants have entered these documents into the record in support of their motion to dismiss.

e. <u>The Affidavit of Kelly Hulseman</u>

Plaintiffs argued in their May 24, 2019 Response in Opposition to the KapStone Defendants' Motion to Dismiss and at the September 27, 2019 hearing, that the affidavit of Ms. Hulseman must be stricken, because in her affidavit Ms. Hulseman denied having "personal knowledge" of the information included in it, therefore rendering it a "sham."

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The South Carolina Rules of Evidence require evidence showing a witness has "personal knowledge" of a matter in order to testify about it. *See* Rule 602, SCRE. "Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." *Id.* "Personal knowledge" may be based on personal observations, experience, or first-hand knowledge of information. *See, e.g.*, *Divine v. Robbins*, 385 S.C. 23, 40-41, 683 S.E.2d 286, 295 (Ct. App. 2009) (permitting witness testimony based on personal observations, experiences, and first-hand knowledge).

There is sufficient evidence for the Court to find that Ms. Hulseman had personal knowledge of certain facts, as testified to in her deposition. Ms. Hulseman testified in her deposition that she had worked in the KapStone "corporate office" for over ten years, having started in 2007. *See, e.g.*, Hulseman Dep. 56:13-14. Ms. Hulseman testified repeatedly that she had personal knowledge of many of the facts in her affidavit. *See* Hulseman Dep. 30:22-31:2; 33:12-16; 221:4-12; 222:9-13; 233:18-22; 241:4-11; 242:7-12; 251:7-16; 255:1-7; 256:6-18.

Plaintiffs' assertion that the affidavit was a "sham" is a misunderstanding of the definition of a "sham" affidavit under South Carolina law. In this jurisdiction, a "sham" affidavit is one created to contradict prior harmful testimony. *See Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004) (holding same). Here, Ms. Hulseman's affidavit was generated prior to her deposition, and was substantively consistent with her deposition testimony. As such, the affidavit is not a "sham."

The Court finds sufficient evidence exists that Ms. Hulseman had personal knowledge upon which to base certain facts in her affidavit. The affidavit is not a "sham" affidavit. Accordingly, the Court declines to strike the affidavit. Given the extensive documentary evidence in the record, the Court does not need to rely on Ms. Hulseman's affidavit to reach its conclusion in this matter.

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The Court has instead focused its attention on the relevant documentary evidence included in the record by the KapStone Defendants, cited herein.

f. Todd Lester's expert affidavit

Todd Lester's expert affidavit is admissible to assist the Court in its role as fact finder, although, as is the case with Ms. Hulseman's affidavit, based on the substantial documentary support in the record, the Court has not relied on the substance of the affidavit to reach its factual findings in this matter. The "question of law" in this case is whether the Court has jurisdiction over the KapStone Defendants in light of the degree of economic integration between the KapStone Defendants and KapStone Charleston. Mr. Lester did not offer a legal opinion as to this issue. His affidavit focuses on the nature of documents and the corporate relationships from the perspective of a financial analyst. These are factual matters generally beyond the knowledge of a lay person. As such, the affidavit is both appropriate expert opinion under Rule 702, SCRE, and does not violate the rule against expert opinions on issues of law. *See Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433, 437 (2003) (citing *O'Quinn v. Beach Assocs*, 272 S.C. 95, 106-07, 249 S.E.2d 734, 739-40 (1978) (holding an expert opinion may not contain "legal arguments and conclusions" in an attempt to "inappropriately . . . usurp the trial court's role" to determine legal issues)). In any event, the Court does not rely on the Lester or Hulseman affidavits in reaching its conclusion as to the KapStone Defendants' motion to dismiss.

g. The KapStone Defendants' expert disclosure and submission of Mr. Lester's affidavit were timely

Plaintiffs further objected to Mr. Lester's affidavit on the grounds that: (1) the KapStone Defendants did not timely identify Mr. Lester as an expert; and (2) The KapStone Defendants did not timely serve his affidavit. Plaintiffs are incorrect on both points.

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The KapStone Defendants disclosed Mr. Lester as an expert on April 30, 2019, pursuant to the Court's November 9, 2018 scheduling order, which was in effect at that time. This disclosure was timely. No rule under the South Carolina Rules of Civil Procedure requires production of an expert report or affidavit, nor did the Court's scheduling order impose this requirement. The only obligation the KapStone Defendants had to serve Mr. Lester's affidavit on opposing counsel arose from this Court's instruction at a May 24, 2019 status conference that the parties submit any evidence they planned to rely on at least ten days before the then-scheduled June 21, 2019 hearing on this matter. On May 31, 2019, the KapStone Defendants submitted Mr. Lester's affidavit pursuant to this order, twenty-one days prior to the proposed hearing date.[4] Furthermore, the court provided additional time for the Plaintiffs to depose Mr. Lester, which they did, as well as determine whether they would hire their own expert, which they also did, thus alleviating any potential prejudice to the Plaintiffs as a result of receiving a late report. Accordingly, the KapStone Defendants' disclosure of Mr. Lester and his affidavit was timely.

ORDER

Based on the foregoing, this Court rules as follows:

1. The South Carolina's Workers' Compensation Act, S.C. Code Ann. § 42-1-10, *et seq*., and *Poch v. Bayshore Concrete Products/South Carolina, Inc.* is controlling in this matter;
2. The KapStone Defendants are immune from Plaintiffs' tort actions under *Poch*, as the KapStone Defendants and KapStone Charleston could be viewed as only one economic entity;

[4] This hearing was subsequently rescheduled to July 26, 2019. During this period, Plaintiffs deposed Mr. Lester and submitted a counter affidavit.

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3. The KapStone Defendants properly authenticated and entered into the record the business records and testimony upon which they relied;
4. The Affidavit of Kelly Hulseman need not be struck;
5. The Affidavit of Todd Lester is admissible, albeit not relied upon by this court; and
6. The KapStone Defendants timely disclosed Todd Lester as an expert.

Based on the foregoing, this Court grants the KapStone Defendants' Second Amended Rule 12(b)(1) Motion to Dismiss. With entry of this Order, the Court lifts the stay on merits discovery entered by Judge Hayes on November 28, 2017.

AND SO IT IS ORDERED,

____
The Honorable Jennifer B. McCoy

____
Date

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Charleston Common Pleas

Case Caption:	Jacque Lucas , plaintiff, et al VS KapStone Paper and Packaging Corporation , defendant, et al
Case Number:	2017CP1000838
Type:	Order/Dismissal

So Ordered

s/Jennifer B. McCoy #2764

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